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The Right to Be a Part of Nature:

Indigenous Peoples and the Environment

Academic Dissertation to be presented,
with the permission of the Faculty of Law of the University of Lapland,
for public discussion in Auditorium 2, Yliopistonkatu 8, Rovaniemi,
on May 7th, 2010, at 12 o´clock.

University of Lapland
Faculty of Law

Distributor: Lapland University Press
P.O. Box 8123
FI-96101 Rovaniemi

tel. + 358 (0)40-821 4242 , fax + 358 16 362 932
publication@ulapland.fi
www.ulapland.fi/lup

Paperback
ISBN 978-952-484-367-6
ISSN 0788-7604

pdf
ISBN 978-952-484-429-1
ISSN 1796-6310
www.ulapland.fi/unipub/actanet

This book is dedicated to the Earth and all the Life it embraces…
… and to my son Lauri, for teaching me how it is to feel truly responsible.

Contents

Acknowledgements

To become a doctor of laws has never been my dream. Instead, my dream, for as long as I can remember, has been to contribute something valuable to this world – to take part in the transformation of human consciousness, which is a prerequisite for the values of global responsibility, equality and justice. As highlighted by the case of indigenous peoples, we are all part of Nature, we are all part of this world, and thus every action, even the smallest one, has an effect on the whole. Every piece of work that deals with justice creates justice in its microcosm, which is, nevertheless, always connected to and a part of the greater macrocosm. We all are parts of the One Life and its creation. That is what makes this piece of work meaningful, too.

I have been privileged to be able to freely choose and create the topic of my dissertation and get funding for it during the whole time I was writing it. In the beginning of my work, I was supported by the Academy of Finland for a couple of years. Then, during the following years, I have been extremely fortunate to have a research post in the Northern Institute for Environmental and Minority Law (NIEM). As a workplace, NIEM is a dream for a scholar working on a topic such as mine. I have received enormous academic and psychological support from all of my dear colleagues, whom I would like to thank from the bottom of my heart. We have a wonderful spirit in NIEM, and we call our research team the NIEM "family". My deepest and most humble thanks for creating this uncompetitive and caring environment goes to the director of our institute, Research Professor Timo Koivurova. Not only is Timo the best boss in the world, but he has also been a wonderful supervisor for my dissertation. I am deeply grateful to Timo for giving me complete freedom to do my work in my own way, yet supporting me with astute and useful comments that have helped keep me on the right track. Not all of our lengthy discussions have been directly related to my research topic, but we have also shared deeply spiritual thoughts about human existence and the purpose of life. Timo's ability to accept all his employees as they are, representing different cultures, religions and views of life, makes this institute a microcosm representing those values we work for: equality and justice, sharing and caring.

NIEM is part of the Arctic Centre, which is a very inspiring working environment. I would like to thank all my colleagues in the Arctic Centre and especially the director of the Arctic Centre, Paula Kankaanpää, for her constant work on behalf of the Arctic Centre and all of us. The reason why I have been able to have and keep my research position is that Paula has constantly believed in the value of NIEM's work. I would also like to thank the Arctic Graduate School ARKTIS for providing scientific inspirations and ideas, and above all Päivi Soppela, who is in charge of ARKTIS. Furthermore, I would like to thank Arto Vitikka and Kari Jantunen of the Arctic Centre for their invaluable technical assistance.

I also extend my deepest gratitude to my other supervisor, Professor Kari Hakapää. Kari has the amazing gift of being able to encourage his students. His humble way of making us believe that we are the best experts in the field of our own work, while giving valuable advice and guidance, shows what a great man he is. Every time I talked with Kari about the content of my dissertation, I felt sure that this was precisely the work to which I wanted to commit myself. I was indeed lucky to have Kari as my supervisor just before he retired from his position at the University of Lapland. Kari's work has now been taken over by Professor Lotta Viikari, whom I would like to thank for supporting me and helping me keep to the

schedule in finalizing my dissertation. I am grateful to the Faculty of Law for giving me financial and practical support, and I would like to extend my special thanks to the person behind this support: the administrative director of the Faculty of Law, Markku Vartiainen. Heartfelt thanks are due also to the Lapland University Press, especially Tuula Tervashonka and Niina Huuskonen, and to Michael Hurd and Richard Foley of the university's Language Centre for their excellent proofreading of the text of my dissertation.

My examiner, Professor Malgosia Fizmaurice has been an inspiration to my work. Her vast expertise has made a significant contribution to the field of international environmental law as well as to the rights of indigenous peoples. I would like to express my gratitude for her comments and encouragement concerning my work, and I am honoured to have her as my opponent during the defence of my dissertation. I owe thanks also to the other examiner of my work, Professor Tuomas Kuokkanen. In addition to acknowledging my gratitude for the valuable comments he made on my dissertation, I would also like to thank him for making it possible for me to do my internship in the Ministry of the Environment ten years ago. Tuomas got me interested in the regulation of global climate change, which led me to my research topic: to study the impact of climate change and other environmental changes on indigenous peoples' traditional ways of life and their human rights. It is wonderful to have Tuomas as an examiner of my work, thereby closing one important circle of my working life.

One of the most interesting periods in the process of researching and writing my dissertation was the six months I spent in the Canadian north, in Whitehorse, Yukon, in 2002. I was doing an internship in the Arctic Athabaskan Council, where I also engaged myself in writing about the rights of Canadian Aboriginal peoples. My very warm thanks go to everybody in the Council of Yukon First Nations, and particularly to Cindy Dickson and Dave Roddick. Participating in workshops with Yukon indigenous elders was a beautiful experience involving a great deal of mutual sharing. In relation to my writing about the legal status of Canadian Aboriginal peoples, I would also like to thank Professor John Borrows for his invaluable help and advice.

I would also like to express my deepest gratitude to my family. To my father I give thanks for always believing in my ability to do this work. To my mother I am grateful for her loving support. I would like to thank Markus for giving me the grounding and deepening my connection with the Earth. I would also like to thank two wonderful women in my life, Marjatta and Virpi, who have always been there for me. In addition, I want to thank two wonderful people who have the same name – Lauri – and who share the same task on this Earth: to bring joy to people's hearts. Professor Lauri Hannikainen, my former boss in NIEM, has been a role model for me for always keeping a playful attitude in his working life. Lauri makes everyone feel relaxed by not taking himself or other people too seriously. Looking at Lauri, one can understand why a well known master has said that the kingdom of God belongs to the childlike. My precious son Lauri deserves my deepest gratitude just for being who he is. He has also helped with my work by keeping me so occupied in the evenings that I didn't have to think about work in my spare time.

My final words of thanks go to my soul mate Hans Christian, who came into my life during the final stages of this work to make space for something new and taught me that the most difficult thing about love is not to give but to receive.

Rovaniemi, March 2010 Leena Heinämäki

Abbreviations

AC	Arctic Council
ACAP	Arctic Contaminants Action Plan
ACIA	Arctic Climate Impact Assessment
AEPS	Arctic Environmental Protection Strategy
AHDR	Arctic Human Development Report
AMAP	Arctic Monitoring and Assessment Programme
ASW	Aboriginal Subsistence Whaling
AWMS	Aboriginal Whaling Management Scheme
BNA ACT	British North America Act
CAFF	The Conservation of Arctic Flora and Fauna
CBD	Convention on Biological Diversity
CCPR	International Covenant on Civil and Political Rights
CEC	Commission for Environmental Cooperation of North America
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CITES	Convention on International Trade in Endangered Species
COP	Conference of Parties
DIAND	Department of Indian Affairs and Northern Development
ECHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EPPR	The Emergency Prevention, Preparedness and Response
HRC	United Nations Human Rights Committee
IASC	International Arctic Science Committee
ICC	Inuit Circumpolar Council
ICRW	International Convention for the Regulation of Whaling
IDA	International Development Association
IIED	International Institute for Environment and Development
ILA	International Law Association
ILM	International Legal Materials
ILO	International Labour Organisation
INTER-AM. C.H.R.	Inter-American Commission on Human Rights
INTER-AM. Ct. H.R.	Inter-American Court of Human Rights
IUCN	The International Union for Conservation of Nature
IUCN PBSG	The World Conservation Union's Polar Bear Specialist Group
IWC	International Whaling Commission
JCAP	The Joint Public Advisory Committee of North America
LNTS	League of Nations Treaty Series
MSY	Maximum Sustainable Yield
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	The North American Free Trade Agreement
NCP	The Canadian Northern Contaminants Program

NGO	Non-governmental organisation
OAS	Organization of American States
OD	World Bank Operational Directive
OEA	Organización de los Estados Americanos
PAME	The Protection of the Arctic Marine Environment
PB	World Bank's Bank Policy
POP	Persistent Organic Pollutant
RCAP	Royal Commission on Aboriginal Peoples
SDWG	The Sustainable Development Working Group
SCC	Supreme Court of Canada
TEK	Traditional Ecological Knowledge
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCERD	Committee on the Elimination of Racial Discrimination
UNECE	United Nations Economic Commission for Europe
UNFCCC	United Nations Framework Convention on Climate Change
UNCED	United Nations Conference on Environment and Development
UN ESCOR	United Nations Economic and Social Council Resolution
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNOHCHR	United Nations Office of the High Commissioner on Human Rights
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNTS	United Nations Treaty Series
US NOAA	National Oceanic and Atmospheric Administration of the United States
WCED	The World Commission on Environment and Development
WDCS	Whale and Dolphin Conservation Society
WGIP	The United Nations Working Group on Indigenous Populations
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WSSD	The World Summit on Sustainable Development
WTO	World Trade Organization
WWF	World Wide Fund for Nature

I Introduction

UN Special Rapporteur Ksentini's 1990 characterization of indigenous peoples as 'victims of environmental degradation and protectors of vulnerable ecosystems'[1] describes a prevailing view in international discussions concerning indigenous peoples' relationship with the environment. Victoria Tauli-Corpuz, Chairperson of the Permanent Forum on Indigenous Issues, emphasizes the fundamental importance of lands and territories to indigenous peoples as the crux of their livelihood and their spiritual, cultural and social identity. In many declarations and statements, indigenous peoples stress how people and the Earth are one: human beings are an integral part of nature. All living creatures in nature are sacred, and it is not merely the right but also the responsibility of indigenous peoples to preserve the environment for future generations.[2]

Traditional, nature-based livelihoods and the way of life of indigenous peoples are considered to be an inherent part of their right to culture.[3] Thus the cultural and environmental integrity[4] of indigenous peoples go hand in hand. 'The Right to Be a Part of Nature' in this context means the protection of the cultural integrity of indigenous peoples[5] against any kind of environmental interference that negatively affects the ability of these peoples to practise their traditional, nature-based livelihoods and way of life, which, despite many changes in the modern world, still form the basis of the culture of many indigenous peoples.

This dissertation, although acknowledging that culture is an evolving concept, focuses solely on the so-called traditional way of life of indigenous peoples. It is, in the end, the traditional, nature-based culture that makes indigenous peoples a special group benefiting from environmental rights intended to protect their traditional cultural practices. The special importance of lands and resources is also the basis of claims concerning self-determination, as will be discussed in this dissertation.

The UN Office of the High Commissioner for Human Rights has estimated that there are over 300 million people regarded as indigenous in over 70 different countries.[6]

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[1] Special Rapporteur Ksentini, Preliminary Report, Human Rights and the Environment, E/CN.4/Sub.2/1991/8 (1991), 23.

[2] See the article in this dissertation: Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?, particularly Chapters 2 and 3.

[3] See, for instance, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, CCPR/C/38/D167/1984; *Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/167/1985 (1988); Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), UN Doc. CCPR/C/21/Rev.1/Add. 5, 8 April 1994.

[4] There is no generally accepted definition of this widely used concept. However, generally, and also in the context of this dissertation, 'environmental integrity' refers to the sustenance of important biophysical processes which support life and which must be allowed to continue without significant change in order to maintain the balance and health of nature's life support systems. See generally, for instance, Westra, L., Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives, Earthscan, London, Sterling, VA, 2008, pp. 3-22.

[5] 'Cultural integrity of indigenous peoples', in the context of this dissertation, means the possibility of indigenous communities to enjoy and practice the elements of their culture, such as traditional livelihoods, without any external threat.

[6] UN Office of High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1): The Rights of Indigenous Peoples (1997), available at: <http:///www.ohchr.org.> (visited 22 June 2009). See also Table 1 in

According to the chairperson of the Working Group on Indigenous Populations, Erica-Irene Daes, 'the concept of "indigenous" is not capable of a precise, inclusive definition that can be applied in the same manner to all regions of the world'.[7] Also the UN Permanent Forum on Indigenous Issues states that no formal universal definition of the term is necessary.[8] A so-called 'working definition' of indigenous peoples at the international level was made two decades ago by United Nations Special Rapporteur Martinez Cobo. In his study on discrimination against indigenous peoples, he adopted the following definition, which is still widely used at present:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of the societies and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their cultural patterns, social institutions and legal systems.
>
> This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:
>
> a. occupation of ancestral lands, or at least of part of them;
> b. common ancestry with the original occupants of these lands;
> c. culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
> d. language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred habitual, general or normal language);
> e. residence in certain parts of the country, or in certain regions of the world;
> f. other relevant factors.[9]

Requiring some sort of historical continuity limits this definition essentially to indigenous peoples in countries in which European colonization has occurred, thus excluding many indigenous peoples of Asia and Africa.[10] Accordingly, ILO Convention

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Hitchcock, R.K., 'International Human Rights, the Environment and Indigenous Peoples', 5 *Colorado Journal of International Environmental Law and Policy* (1994): 1-21, at 3.

[7] Working Group on Indigenous Populations, Working Paper by the Chairperson-Rapporteur on the concept of 'indigenous peoples', U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996). However, Daes lists several factors which are relevant to an understanding of the term 'indigenous peoples': 'a. priority in time, with respect to the occupation and use of a specific territory; b. the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; c. self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and d. an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.' Ibid.

[8] UN Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Indigenous Peoples', Background Paper to Workshop on Data Collection and Disaggregation for Indigenous Peoples, New York, 19-21 January 2004, UN Doc PFII/2004/WS.1/3, available at: <http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc> (visited 21 June 2009).

[9] U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, paras. 379-380.

[10] See Stoll, P. and von Hahn, A., 'Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law', in S. v. Lewinski (ed.), Indigenous Heritage and Intellectual Property: Genetic

No. 169 concerning Indigenous and Tribal Peoples in Independent Countries[11] goes further in its definition by including all tribal and indigenous peoples who lived on a specific territory at the time of the establishment of the present state boundaries. ILO Convention No. 169 is applicable to all

> tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; [and all] peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[12]

In contrast with Cobo's definition, the ILO Convention No. 169 does not explicitly emphasize the relevance of lands and traditional livelihoods as factors defining indigenous peoples. The key role of the rights to lands and traditional territories has, however, been recognized in other paragraphs of the ILO Convention No. 169. The World Bank, on the other hand, recognizes 'a close attachment to ancestral territories and to the natural resources in these areas' as one of the key elements of the definition of indigenous peoples.[13]

Despite all the differences among indigenous peoples around the world, common themes prevail in the various attempts at definition listed above. First and foremost is the distinct culture of indigenous peoples in relation to the majority population. Such a culture can comprise different elements: for example, a distinct language, religion, specific customs and traditions, as well as specific uses of territory and resources. Furthermore, self-identification as a subjective criterion is fundamental. Self-identification consists of two elements: the group-consciousness of persons who believe they belong to a certain indigenous group, and the group's acceptance that the individuals in question are a part of their community.[14]

Resources, Traditional Knowledge, and Folklore, 2nd Edition, Kluwer Law International, The Hague (2008), at 12.

[11] International Labour Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, adopted 27 June 1989, entered into force 5 September 1991, 28 ILM (1989) 1382.

[12] ILO Convention No. 169, Article 1, para. 1.

[13] See the World Bank Operational Directive 4.20. The World Bank does not limit itself purely to indigenous peoples but uses the terms 'indigenous peoples', 'indigenous ethnic minorities', 'tribal groups', and 'scheduled tribes' to describe social groups with a social and cultural identity distinct from the dominant society, which makes them vulnerable to being disadvantaged in the development process. Ibid.

[14] See Stoll, P. and von Hahn, A. (2008), at 14. See also E/CN.4/Sub.2/1986/7/Add.4, para. 381, and Art. 1(2) of ILO Convention No. 169, which says: 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'. According to Donders, 'Self-identification is a key aspect of lives of indigenous peoples, which implies that an individual is indigenous on the basis of self-identification and acceptance by community.' See Donders, Y.M., Towards a Right to Cultural Identity, School of Human Rights Research Series No. 15, Intersentia/Hart, Antwerpen/Oxford/New York (2002), at 205.

Brölmann and Zieck, for instance, emphasize the above-mentioned elements relating to the definition of indigenous peoples, dividing these elements into four categories: pre-existence or 'historical continuity', distinct cultural forms, non-dominance and self-identification.[15] In a similar way, Thornberry regards the following elements as definitive with regard to indigenous peoples: present habitation and historical continuity in relation to the colonial context, attachment to land, a communal sense and communal rights, and a cultural gap between the dominant population and the indigenous communities.[16]

What distinguishes indigenous peoples from minorities is that indigenous peoples, unlike minorities, lived as the original inhabitants, prior to the arrival of later settlers, of a given territory. Additionally, their distinct livelihood related to the use of the land distinguishes indigenous peoples from minorities.[17] Capotorti describes minorities as follows:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion and language.[18]

According to Alfredsson, the rights of both minorities and indigenous peoples concern protection within the state without interruption of sovereignty and territorial integrity.[19] There are, however, differences in the protection of the rights of minorities, on one hand, and indigenous peoples, on the other, when it comes to the adoption of different standards and the creation of forums and monitoring systems. According to Alfredsson, indigenous rights involve not only equal rights and non-discrimination but also include special elements, such as the possession of land and benefits from natural resources. Additionally, as discussed in this dissertation, there is an opening for the recognition of internal self-determination in relation to indigenous peoples.

Indigenous peoples have often been seen as fulfilling the criteria for both categories – minorities and peoples – at least, peoples in the social, cultural, and ethnological meaning of the term.[20] The UN Human Rights Committee, for instance, as discussed in this dissertation, applies nowadays both Articles 27 (on the protection of minorities) and Article 1 (on the right of peoples to self-determination) of the International Covenant on

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[15] Brölmann, C.M. and Zieck, M.Y.A., 'Indigenous Peoples', in C.M. Brölmann et al (eds.), Peoples and Minorities in International Law, Kluwer: Dordrecht (1993), pp. 187-220, at 191.

[16] Thornberry, P., Indigenous Peoples and Human Rights, Manchester, Manchester University Press (2002), at 55.

[17] See Alfredsson, G., 'Minorities, Indigenous and Tribal Peoples and Peoples: Definitions of Terms as a Matter of International Law' in N. Ghanea and A. Xanthaki (eds.), Minorities, Peoples and Self-Determination, Dordrecht: Martinus Nijhoff Publishers (2005), pp.163-172, at 169.

[18] The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), United Nations, 'Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN. 4/Sub.2/384/Rev.1, at 568 (1979).

[19] Alfredsson, G. (2005), at 168.

[20] See, for instance, Daes, E.-I.A., 'The Right of Indigenous Peoples to "Self-Determination" in the Contemporary World Order', in D. Clark and R. Williamson (eds.), Self-Determination: International Perspectives, Houndmills: MacMillan Press (1996), pp. 47-57, at 50-51. See also Meijknecht, A., Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law, Antwerpen/Groningen/Oxford: Intersentia/Hart (2001), pp. 74-77.

Civil and Political Rights (CCPR) to indigenous peoples.[21] There are, however, minorities that do not qualify as peoples under Article 1. Additionally, there are peoples that can be regarded as indigenous that are not in a minority position in the state in which they live.[22]

In contrast to classical Western conception of rights, which is built upon the understanding of rights attached to individual human beings, indigenous peoples submit themselves to their community and attach great importance to group rights or collective rights. It has been pointed out that one of the differences between minorities and indigenous peoples is often that whereas minorities aim at efficient political participation in the community of which they form a part, the aim of the collective rights of indigenous peoples instead is to provide for them the opportunity to make their own decisions concerning matters that are crucial for them.[23] Sanders distinguishes group and collective rights by defining group rights as the sum of the rights of individual members, whilst collective rights are intended for the benefit of the group as a whole. Rights are collective insofar as they override individual rights and serve the goals and preservation of collectivity.[24]

An indigenous person is born into a group and becomes inseparable from it. The group thus forms an integral part of the identity of its members. Although indigenous peoples strongly define themselves as parts of a whole, individual rights also exist in indigenous cultures.[25] An important element of indigenous peoples' collective rights is the control and use of land. Land means much more to indigenous peoples than the mere basis of economic existence. Indigenous peoples' profound relationship to land is not only based on the use of its natural resources, but is also a prerequisite for the spiritual well-being of the group, and thus is central not only to their physical but also their cultural survival.[26] This explains the great importance indigenous peoples attach to the issue of land rights. It also explains the call for rights to natural resources and the knowledge connected with these resources.[27]

The expression of indigenous culture is found not only in the land traditionally occupied by indigenous peoples, but also in their specific knowledge of the use of the land and its resources, in their medicinal and spiritual knowledge, and in the traditional art, beliefs and values that have been passed down from generation to generation. Knowledge and traditional resources are central to the maintenance of identity for indigenous peoples and cannot clearly be distinguished from one another.[28] The sustainable way of life and the valuable contribution that indigenous peoples can make due to their traditional knowledge

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[21] There are many international agreements pertaining to the right of minorities which are also relevant to indigenous peoples. See, for instance, Fitzmaurice, M., 'The New Developments Regarding the Saami Peoples of the North', *International Journal on Minority and Group Rights* 16 (2009): 67-156, at 133.
[22] See Scheinin, M., 'What are Indigenous Peoples', in N. Ghanea and A. Xanthaki (eds.) (2005), pp. 3-14, at 10.
[23] Henriksen, J.B., Scheinin, M. and Åhrén, M., 'The Saami Peoples' Right to Self-Determination: Background Material for the Nordic Saami Convention', Gáldu Cála: Journal of Indigenous Peoples Rights, No. 3 (2007), pp. 52-97, at 65.
[24] Sanders, D., 'Collective Rights', 13 *Human Rights Quarterly* (1991): 368-386, pp. 369-370, 374.
[25] Stoll, P. and von Hahn, A. (2008), pp.17-18.
[26] Ibid, at 18.
[27] Davis, M, 'Law, Anthropology, and the Recognition of Indigenous Cultural Systems', *Law and Anthropology*, 11, In R. Kuppe and R. Potz (eds.), Law and Anthropology: *International Yearbook for Legal Anthropology*, 11, The Hague, Martinus Nijhoff (2001): 298-320, at 299.
[28] Ibid.

and environmental practices are defining qualities of indigenous peoples in the Rio Declaration on the Environment and Development[29] and in other outcomes of the Rio Conference on Environment and Development (1992), such as the Convention on Biological Diversity.[30]

II The Structure of the Dissertation: The Articles

'The Right to Be a Part of Nature: *Indigenous Peoples and the Environment*' is composed of five articles that have a synergic relationship with each other. It is a dissertation in public international law. The predominant branch is human rights law, but international environmental law as well as general public international law make a valuable, albeit somewhat limited, contribution to the theme of the dissertation. Although one of the articles takes a national perspective – the position of indigenous rights within the Canadian legal system – this national perspective has been linked to the question of the legal status of indigenous peoples in international law, which is one of the key questions of this dissertation as it relates to the possibilities of indigenous peoples to influence international environmental decision-making.

The research method is to re-evaluate the strategic capacities of law from substantive and participatory points of view, thus analyzing the theoretical, doctrinal and practical aspects of human rights law and, to a limited extent, international environmental law, as well as the general structures of international law in light of the emerging and evolving rights of indigenous peoples. The aim is to study the normative potential as well as the deficiencies of present human rights law and international environmental law as they relate to indigenous peoples and the environment. Additionally, the aim is to look at the future with some suggestions for measures that might provide adequate protection of the rights of indigenous peoples, specifically in relation to environmental matters. The legal material consists mainly of international agreements, decisions and statements of human rights monitoring bodies, and legal and other relevant research and expert views.

This dissertation is based on articles that all have already been published. Due to the fact that the structure of scientific publications usually requires coherence with respect to content, the dissertation questions have been reviewed from a specific perspective in each article. However, because the main theme of the dissertation – the rights of indigenous peoples in relation to their environment – forms the very core of all the articles, a certain amount of overlapping between the articles was unavoidable. All of the issues covered are related in such a profound way that one article, for instance, could not avoid touching lightly on some of the aspects that were the main focus of another article. Each article, however, has a specific theme that is dealt with in its entirety in that particular piece, thus bringing a new perspective to the overall topic.

The dissertation, though consisting of five articles, can be divided into three sub-themes under the main theme. The first sub-theme is human rights norms that recognize and protect the right to a traditional way of life against environmental interference. These

[29] Rio Declaration on the Environment and Development, United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/Conf.151/26/Rev.1 (Vol. 1) (1992) , 31 ILM 874 (1992).
[30] The Convention on Biological Diversity, adopted 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79; 31 ILM 818 (1992).

issues are covered mainly by the articles 'The Protection of the Environmental Integrity of Indigenous Peoples in Human Rights Law' and 'Environmental Rights Protecting the Way of Life of Arctic Indigenous Peoples: ILO Convention No. 169 and the UN Draft Declaration on Indigenous Peoples.'

The second sub-theme is the recognition that indigenous peoples have gained in international instruments as 'guardians of nature.' The article 'Protecting the Rights of Indigenous Peoples, Promoting the Sustainability of the Global Environment?' studies how the right of indigenous peoples to traditional livelihoods can support environmental protection, and what the potential controversies in this field are.

The third sub-theme focuses on various aspects of the legal status of indigenous peoples. The article 'Inherent Rights of Aboriginal Peoples in Canada – Reflections of the Debate in National and International Law' studies the Canadian domestic legal system as a special case, since in Canada there is an interesting legal concept, the so-called 'inherent aboriginal rights', which includes recognition that the rights of indigenous peoples to their culture and traditional way of life are inherent and that the original source of these rights is not the Canadian legal system but the original occupation by indigenous peoples of the area before colonization took place. Since the concept of inherent rights touches upon the very core of the legal status of indigenous peoples in international law, the question of self-determination and its relationship to the discussion of inherent rights is analyzed in that article.

Another article dealing with the third sub-theme, **'**Rethinking the Status of Indigenous Peoples in International Environmental Decision-Making; Pondering the Role of Arctic Indigenous Peoples and the Challenge of Climate Change', takes up similar questions, aiming to show that the traditional human rights monitoring system is incapable of establishing an effective protection of the rights of indigenous peoples from global environmental interference such as climate change. Therefore, this article studies the legal possibilities indigenous peoples have to participate in international environmental decision-making, with the aim of pointing out deficiencies in the present structure of international law, as well as pondering some possibilities to improve the legal status of indigenous peoples in that respect.

It must be noted that the articles were not originally published in the order described above. The content of the articles reflects the legal developments at the time of publication. The publications have not been updated, but are reprinted here as they appeared in their original form. A list of references attached to each article complements the bibliography of the original publications.[31]

1. The Synthesis

This synthesis aims to bring together the most essential elements and questions of the dissertation. The synthesis can be divided into three main topics that are all inherently related. The first main topic is environmental rights discourse. Although the actual dissertation deals only with the environmental rights of indigenous peoples, a general legal

[31] It should be noted that the last article of this dissertation, unlike the other articles, originally had its own list of reference, which has not been modified. Therefore the structure of this particular list of references is different from that in the other articles.

discussion of the theme 'a right to the environment' is included in this synthesis in order to give a more comprehensive picture of the area of study.

The second main topic of the synthesis is the developments concerning the legal status of indigenous peoples in international law. This synthesis is not just a summary of the issues addressed in the actual dissertation, but touches upon some relevant areas that could not be dealt with in the article-based dissertation. This is because of the need to limit each article to a specific theme with structural limitations of content and space. Some recent developments that had yet not taken place at the time of the publication of the articles have also been added to this synthesis.

The third main topic of this synthesis is Arctic indigenous peoples and their contribution to the main theme of this doctoral dissertation: indigenous peoples' active involvement in international forums and environmental decision-making. This has been done keeping in mind the possibility of using the Arctic experience as a model for other international environmental regimes dealing with issues that are important to indigenous peoples.

1.1. Linking Environmental Protection and Human Rights

Since the actual doctoral dissertation (the five published articles) focuses solely on the environmental rights of indigenous peoples, a brief discussion of the developments of the linkage between environmental protection and human rights at a more general level is necessary. However, the role of indigenous peoples has not been totally ignored here either; the special recognition of indigenous peoples within the general framework is mentioned when merited.

The idea is first to look at the international dialogue on the concept of the right to the environment, and then briefly discuss general procedural environmental rights that have not been largely covered in the actual dissertation articles because of the somewhat limited intention of these rights to recognize and take into account the specific cultural circumstances of indigenous peoples, such as the special importance that lands and the environment have for them.

1.1.1. A Right to the Environment

International environmental law and the law of human rights represent distinct but related concerns. On one hand, since the future of humanity depends on maintaining satisfactory living conditions on this planet, effective measures to protect the environment are necessarily interrelated with the protection of human rights. It can be convincingly argued that human rights rely ultimately on achieving a secure environment. On the other hand, because human rights law already protects interests such as those concerned with life, home and property, claims at the international level relating to a variety of environmental matters are now possible by those affected. Accordingly, it can be said that established human rights are already contributing something to environmental protection.[32]

[32] Merrills, J. G., 'Environmental Rights,' in D. Bodansky, J. Brunnée and E. Hey, The Oxford Handbook of International Environmental Law, Oxford University Press (2007), pp. 664-680, at 664.

As often defined, the aim of human rights is to secure self-determination and self-actualization through a framework of rights aimed at protecting people from arbitrary government interference in order to secure the protection of basic political needs for survival. In a similar vein, norms of environmental protection ultimately aim at preserving natural resources in order to secure human survival.[33]

One much cited statement of support for an inherent link between environmental protection and international human rights law is found in Vice President Judge Weeramantry's separate opinion on the Gabcikovo-Nagymaros case before the International Court of Justice in 1997.[34] Vice President Weeramantry noted that 'protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights, such as the right to health and the right to life itself.'[35]

When looking at the evolution of the concept of a human right to the environment, it can be seen as dating back to the United Nations Stockholm Declaration on Human Environment 1972[36], which provides that: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'[37] While not explicitly stating a right to the environment[38], this formulation recognizes environmental quality as an essential adjunct to

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[33] Shelton, D., 'The Environmental Jurisprudence of International Human Rights Tribunals', in R. Picolotti and J. D. Taillant (eds.), Linking Human Rights and the Environment, Tucson, Arizona, University of Arizona Press (2003), pp. 1-31, at 1.

[34] *Case concerning Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgement of 25 September 1997, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=hs&case=92&k=8d> (visited 21 June 2009).

[35] Separate opinion of Vice-President Judge Weeramantry at 91, available at: <http://www.icj-cij.org/docket/files/92/7383.pdf> (visited 21 June 2009).

[36] Declaration of the U.N. Conference on the Human Environment (June 16, 1972) U.N. DOC. A./CONF. 48/14/Rev.1 (1973), available at: < http://www.unep.org/Documents/Default.asp?DocumentID=97> (visited 21 June 2009). Before the Stockholm Conference, the relationship between the quality of the human environment and the enjoyment of basic rights was first noted in a United Nations General Assembly Resolution in 1968. See UNGA Res. 2398 'Problems of the human environment' of 3 December 1968. Also in 1968, the Tehran Conference on Human Rights proclaimed that all human rights are interdependent and indivisible, thus opening the door for the consideration of environmental rights (Final Act of the International Conference on Human Rights, UN Doc.A/CONF.32-41; UN Pub. E. 68. XIV.2). Two years after the Stockholm Conference, the Charter of Economic Rights and Duties of States (UNGA Res. 3281 of 12 December 1974) stated that 'the protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility' (Art. 30).

[37] Principle 1. Several proposals were made during the course of the Stockholm Conference to connect environmental protection and human rights even more closely. For instance, the United States supported adoption of the following language: 'Every human being has a right to a healthful and safe environment, including air, water and earth, and to food and other material necessities, all of which should be sufficiently free of contamination and other elements which detract from the health or well-being of man.' Quoted in Shelton, D.: 'Environmental Rights' in P. Alston (ed), Peoples' Rights, Academy of European Law, European University Institute, Oxford University Press (2001), pp. 189-258, at 194. The wording did not, however, receive sufficient support.

[38] See Taylor, P., An Ecological Approach to International Law; Responding to challenges of climate change, Routledge, London and New York (1998 a), pp. 202-203.

fundamental rights.[39] The Stockholm Declaration also states: 'Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself.'[40] Although this statement does not establish a separate human right to the environment either, it does again recognize the inherent linkage between the environment and human rights, explicitly mentioning the right to life.[41]

After the Stockholm Conference, the link between human rights and environmental protection was further developed and given weight in the work of the World Commission on Environment and Development (WCED), which was established by the United Nations in 1983.[42] The Commission issued its Final Report concerning many urgent issues relating to the issue of sustainable development (the so-called Bruntland Report[43]) in 1987.[44] With regard to the environment, the Commission stated that the recognition by states of their responsibility to ensure an adequate environment for present as well as future generations is an important step towards sustainable development.[45] The Commission clearly expressed a human rights approach to the environment in Proposed Legal Principles for Environmental Protection and Sustainable Development, adopted by the Expert Group on Environmental Law, by stating: 'All human beings have the fundamental right to an environment adequate for their health and well-being'.[46]

Whereas the role of indigenous peoples had not yet become active in the Stockholm Conference, the WCED engaged indigenous communities in the environmental rights

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[39] Hill, B. E., Wolfson, S., Targ, N., 'Human Rights and the Environment: A Synopsis and Some Predictions', 16 *Georgetown International Environmental Law Review*, 359 (2004): 358-402, at 375. According to UN Special Rapporteur Fatma Ksentini, the Stockholm Declaration 'constitutes recognition of the right to a healthy and decent environment, which is inextricably linked, both individually and collectively, to universally recognized fundamental human rights standards and principles, and which may be demanded as such by their beneficiaries, i.e., individuals alone or in association with others, communities, associations and other components of civil society, as well as peoples.' Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further developments in fields with which the Sub-Commission has been concerned: Human Rights and the environment. Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9 (1994), para. 31. The Ksentini Report also made references to the environmental rights of indigenous peoples. Her Final Report emphasized: 'Indigenous peoples must genuinely participate in all decision-making regarding their lands and resources' (para. 94).

[40] Stockholm Declaration on the Human Environment, 11 ILM 1416 (1972), para. 1. See also UN General Assembly Res. 2398 (XXIII) 1968 calling for the Stockholm Conference.

[41] Shelton, D., 'Human Rights, Environmental Rights and the Right to Environment', 28 *Stanford Journal of International Law* (1991): 103-138, at 112.

[42] See UNGA Res. 38/161 Process of preparation of the Environmental Perspective to the Year 2000 and beyond of 19 December 1983.

[43] The report is named after the chairperson of the Commission, Norwegian Gro Harlem Bruntland.

[44] Our Common Future, Report of the World Commission on Environment and Development, A/42/427 (1987).

[45] Bruntland, G. (ed.), Our Common Future, World Commission on Environment and Development, Oxford, Oxford University Press (1987), at 330.

[46] Proposed Legal Principles for Environmental Protection and Sustainable Development, adopted by the Expert Groups on Environmental Law of the World Commission on Environment and Development, 18-20 June 1986, WCED/86/23/Add. 1 (1986), Art.1. The international Expert Group drafted a set of universal legal principles on environmental protection and sustainable development which was later adopted as an annex to the Final Report of the WCED. The Commission expressed a view according to which the Principles would eventually be incorporated into a global, legally binding instrument.

dialogue, recognizing the valuable contribution of indigenous peoples to environmental protection, and the importance of the protection of their right to a traditional way of life, stating:

> [Indigenous] communities are the repositories of vast accumulations of traditional knowledge and experience that link humanity with its ancient origins. Their disappearance is a loss for the larger society which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems. [...] The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and other resources that sustain their way of life.[47]

A similar kind of argumentation continued after the statement of the WCED in many forums, such as the Rio Conference on Environment and Development, as maintained in this dissertation. The Rio Conference can be seen as the real starting point for indigenous peoples' active role in the legal and political processes concerning sustainable development. The role and rights of indigenous peoples in this respect are dealt with in the following section of this synthesis, as it focuses on the development of the legal status of indigenous peoples in international law.

Regarding the right to the environment, the Rio Declaration on Environment and Development (1992) does not contain a specific reference similar to that of the Stockholm Convention, in spite of its strong anthropocentric focus.[48] Despite auspicious attempts by the Commission on Environment and Development, the Rio Declaration remains rather modest with respect to a human rights approach to environmental protection[49] by declaring – in the context of sustainable development – that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'[50] The approach of the Rio Declaration has been viewed as reflecting a growing recognition by governments of the complexity of political, social and economic concerns involved in the quest for sustainable development.[51]

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[47] Bruntland, G. (ed.), (1987), pp. 114-115.

[48] Boyle, A. E., 'The Role of International Human Rights Law in the Protection of the Environment', in A. E. Boyle and M. Anderson (eds.), Human Rights Approaches to Environmental Protection, Oxford, Clarendon Press (1996), pp. 43-70, at 43.

[49] The Rio Declaration has been criticized for avoiding the use of rights language. See, for instance, Atapattu, S., 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law', 16 *Tulane Environmental Law Journal* 65 (2002): 65-127, at 78. Principle 1 of the Rio Declaration has also been criticized for taking a sharply anthropocentric approach. In contrast, the nonbinding 1982 World Charter for Nature recognizes the right of nature in its own right, as distinguished from the anthropocentric focus. See Atapattu, S., Ibid.

[50] Principle 1 of the Rio Declaration on the Environment and Development.

[51] Hill, B.E., Wolfson, S., Targ, N. (2004), at 375. One year after the Rio Conference, in the World Conference on Human Rights in Vienna, the Vienna Declaration states in Article 11: 'The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.' (Vienna Declaration and Programme of Action, Vienna, 25 June 1993, A/CONF.157/23). The provision speaks about the right to development, but it also appears to encompass a right to the environment, emphasizing the intergenerational aspect of this right. See, Kolari, T., The Right to a Decent Environment with Special Reference to Indigenous Peoples, Juridica Lapponica 31, The Northern Institute for Environmental and Minority Law, University of Lapland (2004), at 47. Article 11 of the Vienna Declaration also deals with the problems posed by hazardous waste, recognizing that illicit dumping of toxic and dangerous substances and waste 'potentially constitutes a serious threat to the human rights to life and health.' The document can be found at:

In 2002, the World Summit on Sustainable Development (WSSD) marked the 10-year-review of the implementation of the documents adopted at the Rio Conference. In the preparatory phase, the link between a safe and healthy environment and human rights was visible.[52] In the final product of the Summit, the Plan of Implementation[53], this link remains vague. In Paragraph 169, it is recommended that states 'acknowledge the consideration being given to the possible relationship between the environment and human rights, including the right to development, with full and transparent participation of Member States of the United Nations and observer States.'[54]

More generally, the Plan of Implementation states: 'Peace, security, stability and respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all.'[55] Although not establishing a right to the environment, this paragraph clearly recognizes the important link between human rights and sustainable development.[56]

There have been attempts at different forums to create an instrument that would explicitly recognize a human right to the environment. In 1994, Special Rapporteur Fatma Zohra Ksentini delivered her Final Report on Human Rights and the Environment to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[57]

The Report found that 'a right to a healthy and flourishing environment' was 'evolving', while also noting 'universal acceptance of the environmental rights recognized

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<http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument> (visited 21 June 2009).

[52] See Commission on Sustainable Development Acting as the Preparatory Committee for the World Summit on Sustainable Development, Contribution of the Governing Council/Global Ministerial Environmental Forum of the United Nations Environment Programme to the World Summit on Sustainable Development, A/CONF.199/PC/9 (2002), Annex: UNEP Governing Council Decision SS. VII/2, Appendix p. 3, para. 4.

[53] Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/20 (2002), Chapter 1.2.

[54] Ibid., at 72, para. 169. Paragraph 169 was analyzed by the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 'Relevant Outcomes of the World Summit on Sustainable Development' (UNECE MP.PP/2002/17 (2002), at 4, para. 5(g)). The discussion highlighted the central role of procedural human rights of access to information, participation and justice. There was criticism that while referring to the linkages, the Plan of Implementation does not include any specific commitments to further work in this area.

[55] Para. 5.

[56] A report of the Secretary-General to the UN Commission on Human Rights, entitled 'Human Rights and the environment as a part of sustainable development' adopted in 2004 (Commission on Human Rights, Report of the Secretary-General 'Human rights and the environment as part of sustainable development' (E/CN.4/2004/87 (2004)). In the submissions, it was recognized that 'enjoying a high level of environmental quality as part of a broader quality of life and without discrimination against disadvantaged members of the society is an essential human right' (Para. 8). Furthermore, the Report notes that there is a growing connection between human rights and environmental protection (Para. 31). The report refers to many instruments relevant to this respect, for instance the Convention on the Rights of the Child and ILO Convention No. 169 (Para. 32), and relevant case law (Paras. 33-34).

[57] Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, UN ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/9.

at the national, regional and international level.'[58] However, the Report clearly deals more with *lex ferenda* than *lex lata* considerations.

The Report included a Draft Declaration of Principles on Human Rights and the Environment, *inter alia*, stating that 'all persons have the right to a secure, healthy and ecologically sound environment.'[59] The Draft Declaration refers to indigenous peoples, stating: 'Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence.'[60] The Draft Declaration further declares: 'Indigenous peoples must genuinely participate in all decision-making regarding their lands and resources.'[61] It continues: 'Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.'[62] More generally, the Draft Declaration states: 'In implementing the rights and duties in this Declaration, special attention shall be given to vulnerable persons and groups.'[63]

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[58] Ibid., at 5 and 240.

[59] Draft Declaration of Principles on Human Rights and the Environment, Centre for Human Rights, UN. (May 16, 1994), Principle 3, available at: <http://www.worldpolicy.org/projects/globalrights/environment/envright.html> (visited 21 June 2009).

[60] Para. 14.

[61] Ibid.

[62] Ibid.

[63] Principle 15. Importantly, the Ksentini Final Report states, with regard to the International Convention on the Elimination of All Forms of Racial Discrimination: 'The flagrant discrimination to which marginalized persons, vulnerable groups, minorities and indigenous peoples are subjected vis-à-vis ecological risks, raises sharply the issue of the effective implementation of the basic principle of non-discrimination set out in the Convention, and that of the practical implementation of all the provisions of the Convention on behalf of disadvantaged individuals and groups' (Para. 44). In 1995, the UN Commission on Human Rights reaffirmed Principle 1 of the Rio Declaration and stated that 'the promotion of an environmentally healthy world contributes to the protection of human rights, and that environmental damage has potentially negative effects on the enjoyment of life, health and a satisfactory standard of living' (Commission on Human Rights, Res. 1995/14 'Human rights and the environment', 24 February 1995). The human rights approach to environmental protection has been recognized, for instance, also by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, formerly known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities. A Resolution by the Sub-Commission in 1998 referred to the right of all peoples to life and the right of future generations to enjoy their environmental heritage. The Resolution noted that the movement and dumping of toxic and dangerous wastes endangers basic human rights such as the right to life, the right to live in a sound and healthy environment, and consequently the right to health. See Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1988/26, September 1988. A second example is the 1989 International Summit on the Protection of the Global Atmosphere, held at the Hague, during which the Hague Declaration on the Environment (March 11, 1989, ILM 1308 (1989)) was signed by 24 states. Notwithstanding its environmental law orientation, the Declaration recognizes environmental degradation as a human rights issue, beginning with its first paragraph: 'The right to live is the right from which all other rights stem'. It reaffirms the link between environmental protection and human rights, noting that, with respect to environmental degradation, 'remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment' (Sec. 5). The close relationship between human rights and the environment has further been noted in the UN, for instance, by the joint expert seminar between the United Nations Environmental Programme (UNEP) and the UN Office of the High Commissioner on Human Rights (UNOHCHR), which observed that in the last decade, 'a substantial body of case law and decisions have recognized the violation of a fundamental human right as the cause, or result, of environmental degradation' (Para. 8).The meeting concluded that

Even today, fifteen years after the Report, there is no recognition of a distinct universal right to the environment.[64] On the other hand, there are a few regional instruments that explicitly recognize this right. One regional instrument recognizing a human right to the environment is the Additional Protocol to the American Convention on Human Rights[65], which provides: 'Everyone shall have the right to live in a healthy environment and to have access to basic public services.'[66]

Additionally, the African Charter of Human Rights and Peoples' Rights[67], adopted in 1981 under the auspices of the then Organization of African Unity (OAU), recognizes a substantive human right to the environment. Article 24 of the Charter states: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'[68] Importantly, the African Commission on Human and Peoples' Rights has elaborated on the obligations of African states in light of Article 24 of the *SERAC v. Nigeria* communication of 1996.[69] The communication related to alleged human rights violations in the Ogoni region of Nigeria committed by the Nigerian Government, together with a national petroleum company and the Shell Petroleum Development Corporation while engaged in irresponsible oil development practices in the Ogoni region.

The African Commission on Human and Peoples' Rights noted that the survival of the Ogoni depends on their land and farms, which were destroyed by the direct involvement of the Government.[70] Importantly, the African Commission explicitly recognized the right to a healthy environment:

> The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[71]

'environmental protection constitutes a precondition for the effective enjoyment of human rights protection and that human rights and the environment are interdependent and interrelated' (Para. 9). UNEP-OHCHR, Meeting of Experts on Human Rights and the Environment, 14-15 January 2002, Conclusions (2002), pp. 10-11. The document is available at: <http://www.unhchr.ch/html/menu6/2/environment.doc> (visited 2 October 2006).

[64] See, generally, Atapattu, S. (2002).

[65] Additional Protocol to the American Convention on Human Rights, adopted 17 November 1988, entered into force 16 November 1999, 28 ILM 156, 161. American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978, 114 UNTS 123.

[66] Article 11.

[67] The African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM (1982) 58.

[68] Article 24.

[69] African Commission on Human and Peoples' Rights, Ref: ACHPR/COMM/A044/1, 27 May 2002, *The Social and Economic Action Rights Centre and the Center for Economic and Social Rights v. the Federal Republic of Nigeria*, available at:
<http://cesr.org/filestore2/download/579/AfricanCommissionDecision.pdf> (25 August 2008).

[70] Para. 67.

[71] Para. 52. The African Commission was of the opinion that other rights, such as the right to health, are inherently related to the state of the environment by noting: 'These rights [the right to health and the right to a satisfactory environment] recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual' (Para. 51). Besides the rights to the environment and health, the Commission found that by not

In the field of international environmental law, a regional treaty created under the auspices of the UN Economic Commission for Europe in 1998 – the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (s.c. Aarhus Convention)[72] – states as an objective of the treaty in Article 1:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The Convention recognizes in its preamble that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.[73] Furthermore, the Convention also affirms the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development.[74] The Convention does not seem to pay attention to

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preventing the devastating effects on the Ogoni lands and by not taking care to protect the inhabitants against the harmful activities of the oil companies, the State of Nigeria had violated many other human rights of the Ogoni such as the rights to life and property and the right of peoples to freely dispose of their wealth and natural resources. The rights that the Commission found to have been violated are contained in Articles 2 (non-discrimination in the enjoyment of rights), 4 (the right to life), 14 (the right to property), 16 (the right to health), 18 (family rights), and 21 (the right of peoples to freely dispose of their wealth and natural resources). It is important to note that peoples' right to a satisfactory environment and the right to freely dispose of their wealth and natural resources are collective rights and that, in the African human rights system, they can be claimed by a minority group such as the Ogoni people. See Coomans, F., 'The Ogoni Case before the African Commission on Human and Peoples' Rights', *International and Comparative Law Quarterly* (2003), 52: 749-760, at 757, Cambridge University Press. On the other hand, in relation to peoples' right to self-determination, the OAU has, from its inception, taken strong stands against revising borders or dividing states in order to accommodate 'sub-national' claims. See Welch, Jr., Claude, E., 'The Ogoni and Self-Determination: Increasing Violence in Nigeria', *The Journal of Modern African Studies*, Vol. 33, No. 4 (1995): 635-650, at 647. Eritrea's re-establishment was seen as a necessary exception: it had existed prior to 1950 as a political entity distinct from Ethiopia (despite their many cultural and economic links); its people had struggled for independence for decades following the territory's incorporation into Ethiopia; a referendum organised with substantial international involvement showed an overwhelming majority favouring independence; and the regime in Addis Abeba headed by Meles Zenawi conceded in advance that it would accept the outcome (Ibid). This view becomes clear also in the light of the African Charter on Human and Peoples' Rights, which states in Article 29 that individuals have the duty 'to preserve and strengthen the national independence and the territorial integrity of [their] country' (Article 29.5). In *Katangese Peoples' Congress v. Zaire*, the African Commission, although accepting the claim of the Katangese Peoples' Congress to the right of self-determination, held that 'Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire' (now the Democratic Republic of Congo). *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), available at: <http://www1.umn.edu/humanrts/africa/comcases/75-92.html> (visited 29 August 2008), para. 6. See also Mhango, M. O., 'Recognizing a Right to Autonomy for Ethnic Groups under the African Charter on Human and Peoples' Rights: Katangese Peoples' Congress v. Zaire', available at: <http://www.wcl.american.edu/hrbrief/14/2mhango.pdf?rd=1> (visited 29 August 2008).

[72] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 450.

[73] Sixth preambular paragraph.

[74] Fifth preambular paragraph.

the intrinsic value of the environment, but recognizes the duty of human beings to protect and improve the environment for the benefit of present and future generations.[75]The Aarhus Convention, however, contains extensive procedural rights in relation to the environment; it also establishes the Compliance Committee, which receives complaints also from individuals and NGOs.[76]

The International Union for Conservation of Nature (IUCN) has also attempted to establish a human right to the environment. It has prepared a draft covenant with the aim of elaborating binding norms of international environmental law as a follow-up to the World Charter for Nature.[77] The 2004 revision of the IUCN's Draft International Covenant on Environment and Development states: 'The Parties undertake to achieve progressively the full realization of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity.'[78]

Despite the development of these draft principles, however, there has been a slow-down in the movement towards a definitive proclamation of a universal right to the environment.[79] After receiving what seemed like steadily growing international support, progress towards an outright recognition of an individual right to the environment (as opposed to a right embodied in specialized treaty and policy regimes) reached a plateau with the Rio Conference and Declaration.[80] This is reflected in the Special Rapporteur's report, submitted in 2006, where no mention at all was made of a right to the environment.[81] On the other hand, the inherent linkage between environmental issues and human rights is still very much on the agenda of international human rights bodies. Recently, the UN Human Rights Council issued a resolution on climate change and human rights (2008) which highlights the implications of climate change for human rights and

[75] Seventh preambular paragraph. Nevertheless, it can convincingly be argued that public participation, which is one of the primary objects and rights of the Aarhus Convention, also benefits environmental protection. See Ebbesson, J., 'The Notion of Public Participation in International Environmental Law', *Yearbook of International Environmental Law*, Vol. 9, Oxford University Press (1997): 52-97, particularly at 62.

[76] Article 15 of the Aarhus Convention requires a Meeting of the Parties to establish, on a consensual basis, optional arrangements of a non-confrontational, non-juridical and consultative nature for reviewing compliance with the provisions of the Convention. In 2002, the Aarhus Convention Compliance Committee was established for this purpose. Decision 1/7 on Review of Compliance, available at: <http://unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> (visited 8 March 2007).

[77] World Charter for Nature, UN Doc. A/RES/37/7, 28 October 1982. See also IUCN Commission on Environmental Law, Environmental Policy and Law Paper No. 31, Rev. 2 (IUCN, 2004), at xvii.

[78] Article 12 (1). Draft International Covenant on Environment and Development, Environmental Policy and Law Paper No 31, Rev. 2 (2004), available at: <http://www.i-c-e-l.org/english/EPLP31EN_rev2.pdf> (visited 10 September 2008).

[79] Soveroski, M., 'Environment Rights versus Environmental Wrongs: Forum over Substance?', RECIEL 16 (3)(2007): 261-273, at 267.

[80] Ibid.

[81] Report of the Special Rapporteur, Okechukwu Ibeanu, Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights, submitted to the UN Commission on Human Rights, Economic, and Social Council, UN Doc. E/CN.4/2006/42, 20 February 2006.

requests the Office of the United Nations High Commissioner for Human Rights to conduct a study of the relationship between climate change and human rights.[82]

Despite the need for a right to the environment, this concept contains many definitional questions and challenges. Many adjectives have been applied to the term *environment*[83] in describing the particular environmental quality to which humans have a right under international and national laws. The adjectives most frequently used in legal literature for such purposes include: *secure, safe, satisfactory, healthy, healthful, decent, adequate, clean, pure, natural, viable, ecologically-sound,* and *ecologically-balanced*.

Definitional challenges also arise in attempts to postulate environmental rights in qualitative terms. What constitutes a satisfactory, decent, viable, or healthy environment is bound to be open to uncertainty and ambiguity.[84] It has been stated that one important obstacle to the definition of substantive rights is the fact that the quality of the environment is a value judgment, necessitated by formulations of the right to a 'satisfactory', 'healthy' or 'adequate' environment. The judgment of what is adequate or satisfactory varies in time and place.[85]

It has sometimes been held that the advantage of focusing on procedural rights in the environmental context is that they are more concrete in nature than the often rather vague substantive environmental standards, and therefore they may, in many cases, be more easily defined and enforced.[86] However, it has been argued that substantive norms on the contents of the right to a decent environment are needed because mere procedural rights do not have any meaning if there are no substantial norms upon which to base the use of these rights.[87] In short, substantive rights can often be seen as necessary for the use of procedural

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[82] UN General Assembly, Human Rights Council, Seventh session, Agenda item 3, *Human rights and climate change*, A/HRC/7/L.21/Rev.1, 26 March 2008, para. 1, available at: <http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/7/L.21/Rev.1> (visited 24 April 2008).

[83] The term 'environment' has itself been the object of debate, and definitional problems are evident. For instance, Thorme asks many fundamental questions: 'Besides the controversy over the descriptive words, the word ''environment'' itself evokes a secondary debate: What is included within this term? Does this term encompass the entire global biosphere, or simply areas in direct contact with human persons or communities? The entire global ecosystem is so inextricably intertwined that policies which aim to protect inhabited areas alone will prove futile in the end. The right to environment should include not only the enjoyment of clean air, water, and fertile soil, but also protection of the Earth's flora and fauna.' See Thorme, M., 'Establishing Environment as a Human Right', 19 *Denver Journal of International Law and Policy* 301 (1991):301-342, pp.309-310.

[84] Rodriguez-Rivera, L.E., 'Is the Human Right to Environment Recognized under International Law? It depends on the Source', 12 *Colorado Journal of International Environmental Law and Policy* 1 (2001): 1-45, at 11.

[85] See Tomasevski, K., 'Environmental Rights', in A. Eide, C. Krause and A. Rosas (eds.), Economic, Social and Cultural Rights, A Textbook, Martinus Nijhoff Publishers, Dordrecht (1995), pp. 257-269, at 261.

[86] Procedural rights have also been seen as less anthropocentric as they can be exercised on behalf of the environment. The rights may also lead to positive effects beyond environmental protection, for instance, by contributing to the process of democratization. See Coffey, C., 'The EU Charter of Fundamental Rights – The Place of the Environment', in K. Feus (ed.), The EU Charter of Fundamental Rights. Text and Commentaries, London, Federal Trust (2000), pp. 129-145, at 134.

[87] Ebbesson, J., Information, Participation and Access to Justice: The Model of the Aarhus Convention, Background Paper No. 5 of the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002), at 94.

rights and *vice versa*: procedural rights are necessary for the realization of substantive rights.[88]

The primary argument advanced for not recognising a right to the environment is that the proclamations of this right are merely aspirational, being primarily embodied in non-binding declaratory documents. More significantly, since these proclamations are often vague, and since there are varying elaborations in the different instruments where the right to the environment appears, it is argued that the right to the environment lacks the legal certainty, with respect to content, required for an enforceable right.[89]

Some authors, for instance Anderson and Boyle, have argued that environmental rights are inadequate tools because they have not yet been defined and cannot operate in a legal context.[90] However, as noted by Kiss and Shelton, uncertainty and ambiguity are common features in the articulation of most human rights, especially economic, social and cultural rights. Nonetheless, as pointed out by the same authors, ambiguity has not hindered the implementation and enforcement of recognized human rights because 'in the public conscience of a given society, these concepts can have sufficient precision to permit a judge or administration to apply them. For the most part, rights and liberties will be taken from the abstract and given meaning in a concrete social and historical context.'[91]

Moreover, national and international tribunals have historically provided substantive specificity to equally abstract terms found in both local and international legal systems.[92] When determining the minimum qualitative standards contained in the right to the environment, tribunals naturally have to weigh conflicting visions and values of human life. But this is precisely the role of courts in interpreting and enforcing rights.[93] Furthermore, tribunals are today in a position to effectively articulate the content of the

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[88] Kolari, T. (2004), at 4. Rights within one category may also operate synergistically. For instance, in the procedural field, access to information allows for more informed and effective public participation and judicial redress. In the same manner, public participation often improves the information that is available and provides a means for resolving disputes before they escalate. Furthermore, access to justice ensures that government agencies and others respect the procedural rights of access to information and participation. See Bruch, C. (ed.), The New Public. The Globalization of Public Participation, Environmental Law Institute (2002), at 3. The document is available at: <http://www.elistre.org/Data/products/d1205.pdf> (visited 3 October 2006).

[89] Soveroski, M. (2007), at 268. See elaboration of such arguments in P.W. Birnie, A.E. Boyle and Redgwell, C., International Law and the Environment, 3rd edition, Oxford University Press (2009), pp. 277-282.

[90] See Anderson, M. R., Human Rights Approaches to Environmental Protection: An Overview, in A. Boyle and M. Anderson (eds.) (1996), pp. 1-25, at 11. See Boyle, A. E. (1996), at 50-51. According to the same authors, much of their above mentioned concern may be addressed if environmental rights are viewed as procedural in nature, or are viewed as 'moral rights' (Ibid., pp. 12-13). Considering the right to the environment as a procedural right has been suggested by several scholars and may, according to them, serve to provide more immediate enforcement of the right while consensus is being built on the definitional questions relating to the substantive features of the right. See Leighton, M.T., From Concept to Design: Creating an International Environmental Ombudsperson, Legal and Normative References: Environmental Human Rights, A Project of The Earth Council, San José, Costa Rica, Project Director: The Nautilus Institute for Security and Sustainable Development, Berkeley, California, March 1998, at 6.

[91] Kiss, A. and Shelton, D., International Environmental Law (1991), at 23. Transnational Publishers, Ardsley, New York.

[92] Rodriguez-Rivera, L.E. (2001), at 13.

[93] Du Bois, F., 'Social Justice and the Judicial Enforcement of Environmental Rights and Duties', in Boyle, A. and Anderson, M. (eds.) (1996), pp. 153-176, at 153.

right to the environment given 'that there presently exists in the public conscience a clear image of an environment which should be preserved and from which each person should benefit.'[94]

Additionally, it has been pointed out that the sheer number of times an environment-related right has been put forward, even in a non-binding context, gives credence to the claim that there is growing recognition of such a right. Internationally agreed resolutions and declarations create expectations of compliance with their spirit and content.[95]

Emphasizing human interests in environmental protection is an issue for which the 'human rights approach' in relation to the environment has also been criticized. It has been suggested that a human rights approach to environmental protection is, in its most basic form, anthropocentric. The objectives and standards applied are human-centred. Humanity's survival and continued use of the Earth's resources are the objectives, and the state of the environment is determined in relation to the needs of humanity, not the needs of other species or the needs of ecosystems.[96]

This point has been illustrated by comparing the human rights approach to that of the World Charter for Nature.[97] The basic purpose of the Charter is to establish principles 'by which human conduct affecting nature is to be guided and judged.'[98] The Charter begins by declaring that 'Mankind is part of nature'[99] and that 'Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.'[100] The Charter's general principles focus on, and give precedence to, the interests of nature rather than those of humanity.[101] They provide that 'Nature shall be respected and its essential processes shall not be impaired'[102], that 'The genetic viability on the earth shall not be compromised'[103], that 'Nature shall be secured against degradation'[104], and that 'Ecosystems and organisms [...] that are utilised by man shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.'[105]

Many authors supporting 'deep ecology' have seen the human rights approach as being opposed to the idea of the inherent value of nature; it is against the ethical view of 'deep ecology' to protect nature only for the benefit of humankind.[106] Besides the World

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[94] Kiss, A. and Shelton, D. (1991), at 25.
[95] Soveroski, M. (2007), at 268.
[96] Taylor, P. (1998 a), at 233. The statement of the European Court of Human Rights is a revealing example in this respect. In the case of *Kyrtatos v. Greece* (Application No. 41666/98, Decision of 22 May 2003), the Court has stated with regard to Art. 8 of the Convention that the Article does not give protection to the environment as such (Para. 52).
[97] The World Charter for Nature, UNGA Res 37/7 on 28 October 1982, 22 ILM 455 (1983).
[98] Preamble.
[99] Preamble.
[100] Preamble.
[101] Taylor, P. (1998 a), at 233.
[102] Principle 1.
[103] Principle 2.
[104] Principle 5.
[105] Principle 4.
[106] The anthropocentrism of a human right creates philosophical tension between 'deep' and 'shallow' ecology. Many 'deep' ecologists take an ecocentric approach. They advocate that humanity's relationship with the earth and the species which inhabit it should be one of equality. They maintain that the earth's, and

Charter for Nature, there have been some attempts to create instruments which, besides recognizing the intrinsic value of nature, emphasize the human responsibility to protect nature. One example of this is the Earth Charter, which is the outcome of a project that began as a United Nations initiative, but was carried forward and completed by a global civil society initiative.[107] This document reflects an ecocentric ethic, and, rather than guaranteeing environmental rights, it creates a deeper concept of ecological human rights.[108]

On the other hand, as pointed out by Taylor, a degree of anthropocentrism is a necessary part of environmental protection[109] – not in the sense of humanity as the centre of the biosphere, but because humanity is the only species, as far as we know, which has the consciousness to recognise and respect the morality of rights and because human beings are themselves an integral part of nature.[110] Finally, an environmental human right may also raise consciousness of the interdependence of the Earth's biosphere and of the interconnectedness between the state of the biosphere and the activities of all humanity, as pointed out by Taylor. A human right can achieve this most effectively if it is applied to the global environment. As a consequence, humanity may begin to approach environmental protection from a more holistic perspective, one which affirms a new environmental ethic. In short, an environmental human right may encourage the development of a new ethic.[111]

Concepts such as intrinsic values and duties towards nature have only recently emerged in jurisdictions following Western cultural and legal traditions. They have been brought to the fore over the last sixty years by debates within the field of environmental philosophy over new and prevailing environmental ethics, and by the influence of writers such as Aldo Leopold.[112]

The traditional worldview of indigenous peoples comes quite close to the ecological approach, for according to this view, people are not above nature but an inherent part of it. Each part of the natural environment is sacred and therefore has its own value. Taylor's goal is to develop an environmental right which expresses the special spiritual, cultural and social relationships between indigenous peoples and nature. [113] Indigenous peoples have a great role to play since they have the potential to act as leading examples in bringing a

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therefore humanity's, survival depends on recognition that the relationship is one of equality, interdependence and interconnectedness, not one of human superiority. See Taylor, P. (1998 a), at 233. See generally Devall, B. and Sessions, G., Deep Ecology, Peregrine Smith Books, Salt Lake City (1985).

[107] See The Earth Charter Initiative, available at: <http://www.earthcharterinaction.org/content/> (visited 23 June 2009).

[108] See Taylor, P. 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?', 10 *Georgetown International Environmental Law Review* (1998 b): 309-397.

[109] Taylor, P. (1998 a), pp. 234-235.

[110] Ibid. Shelton also points out that humans are not separable members of the universe: 'Rather, humans are interlinked and interdependent participants with duties to protect and conserve all elements of nature, whether or not they have known benefits or current economic utility. This anthropocentric purpose should be distinguished from utilitarianism.' See Shelton, D. (1991), at 110.

[111] Taylor, P. (1998 a), at 216. Taylor has created an interesting concept of 'ecological human rights' which deepens the philosophical theme of the relationship between humanity and nature and tries to solve the problem of anthropocentrism. See, generally, Taylor, P. (1998 b), at 309.

[112] Ibid., pp. 327-328, referring to Aldo Leopold, The Land Ethic, in A Sand Country Almanac (1949).

[113] Ibid., at 311.

holistic approach combining ecological and social approaches in a balanced way to international environmental forums.

Shelton maintains that the view that mankind is part of a global ecosystem may reconcile the aims of human rights and environmental protection, because both ultimately seek to achieve the highest quality of sustainable life for humanity within existing natural conditions.[114]

Rodriguez-Rivera states that the human rights approach to environmental protection and the elaboration of a substantive right to the environment does not imply that it is the only or best approach for global environmental protection.[115] The problems of the global environment cannot be addressed through the implementation of a single strategy. What is needed, according to Rodriguez-Rivera, is an interdisciplinary approach that incorporates all areas of international and national law. An obvious gap exists today in the protection of human life and dignity from threats associated with environmental degradation, especially when such threats are the consequence of actions or inactions taken by an individual's own national government. This is where a human rights approach to environmental protection is the most effective strategy to achieve such protection.

Furthermore, regardless of the effectiveness of the right to the environment in solving global environmental problems, the human right to the environment either exists or does not exist. If a substantive human right to the environment exists, then the states have an obligation to respect that right.[116]

In addition, to justify the necessity of an environmental human right, it is important to note that international environmental law, although it gives some participatory role to actors other than states, primarily governs relations between states. Accordingly, international environmental agreements generally tend to focus on state responsibilities in preventing harm beyond the state's territory. The state has sovereignty over its natural resources and citizens within its borders. Issues left to international agreement are often those that have transboundary characteristics.[117] Environmental instruments do not generally provide direct protection to or enforceable rights for individuals or communities. That type of protection is seen more as the subject of domestic law and policy, regardless of the fact that many countries have not established effective legal protection for environmental assets or victims of environmental abuse.[118]

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[114] Shelton, D., 'Environmental Rights' in Alston, P. (ed.) (2001), at 190. Shelton points out, however, that conflicting differences of emphasis may still exist, because human rights law protects individuals and groups alive today and does not take intragenerational equity into account, as does environmental law. Thus, a serious gap exists within the human rights framework, because the very survival of future generations may be jeopardized by sufficiently serious environmental problems. Therefore, the right to the environment should imply significant, constant duties to persons not yet born. Ibid., pp. 190-192.

[115] Rodriguez-Rivera, L., 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source', 12 *Colorado Journal of International Environmental Law and Policy* 1 (2001):1-45, at 32.

[116] Ibid.

[117] More recently, states have started to conclude treaties and other instruments which address issues that are of both international and domestic concern, such as preventing the loss of biological diversity and combating desertification. These new instruments recognize to some extent the responsibilities and contributions of nongovernmental organizations, local communities, such as indigenous peoples, and private actors in implementing the goals of these agreements.

[118] Leighton, M.T. (1998), at 9.

On the other hand, the premise upon which human rights doctrine operates is the recognition of the inherent dignity of all human beings. As such, human rights law clarifies the duties owed by states to individuals and cultures within their jurisdiction. Thus, under human rights law, individuals have rights against state action or inaction.[119]

The argument has been made that there are signs of customary law developing in the area that combines the environment and human rights, although the identification of the 'customs' that could be said to form the basis of this development might be difficult to define.[120] It can be noted, in support of such an argument, that in a growing number of countries legislative and regulatory frameworks have been established which support the right to a satisfactory environment and refer to the substance of rights, remedies and guarantees related to implementation.[121] In addition, provisions on environmental rights are included in at least 118 national constitutions, with well over half of these providing for an individual right to a clean environment, although some present this as linked to a right to health or clean water.[122] The fact that since 1970 virtually no new national constitution has been adopted without reference to environmental rights[123] points to 'a sense of legal obligation, as opposed to motives of courtesy, fairness and morality', which, it has been stated, is what is required in order for something to be recognized as customary.[124] Furthermore, to the extent that declarations of environmental rights influence or reflect states' practices, they can be considered evidence of either existing law or law-making intention, thus contributing to further evidence of new customary international law.[125]

Certainly it can be argued that the inclusion of such a right in many national constitutions, as well as the reference to this right in many international declarations, is evidence that the right to the environment is – or is in the process of becoming – a general principle of law recognized by civilized nations[126] even if it cannot be claimed that it has risen to the level of custom.[127] This is supported by the fact that there have been numerous cases of national litigation with respect to violations of environmental rights.[128] If nothing else, these increasing references to environmental rights support the expectation that environmental rights should be considered when interpreting legal rules.[129]

1.1.2. Environmental Rights

The relation between the environment and human rights has led to considerable interest in the subject of 'environmental rights' – that is, the possibility of formulating

[119] Ibid.
[120] Soveroski, M. (2007), at 268.
[121] See Ksentini Report, para. 241.
[122] Earth Justice, Environmental Rights Report: Human Rights and the Environment, Earth Justice (2007), pp. 126-147, available at: <http://www.earthjustice.org/library/reports/2007-environmental-rights-report.pdf> (visited 10 September 2008).
[123] Taylor, P. (1998 b), at 350.
[124] Browlie, I., Principles of Public International Law, 7th ed., Oxford University Press (2008), at 8.
[125] Soveroski, M. (2007), at 268. See also Birnie, P.W, Boyle, A. E and Redgwell, C. (2009), pp. 24-25.
[126] Statute of the International Court of Justice, 59 Stat. 1031, Article 38 (1) (c), at 1060.
[127] Soveroski, M. (2007), at 268.
[128] For an overview, see Earth Justice (2007), pp. 70-76.
[129] See Birnie, P.W., Boyle, A.E and Redgwell, C. (2009), at 269.

claims relating to the environment in terms of human rights.[130] There is no general definition of environmental rights, but the concept includes rights that are part of both general human rights law and in the instruments of international environmental law.[131] The main focus of this doctoral dissertation has been, however, on human rights norms that have a particular relevance in the case of indigenous peoples. Therefore, in addition to general human rights law, instruments that deal specifically with the rights of indigenous peoples are important in this context, as will be shown later in the chapter concerning the environmental rights of indigenous peoples.

Many international human rights bodies, including those with authority to hear complaints or resolve disputes, have considered environmental issues in one way or another. These institutions commonly seem to support the idea that environmental degradation can affect human rights in demonstrable ways. However, the precepts and analyses upon which these bodies have acted and articulated the connection between human rights and the environment vary. Despite the fact that no single standard or analytical tool exists for evaluating environmental issues within human rights doctrine, there is legal precedent for considering these issues within the global institutional framework and, more concretely, region by region.[132]

So despite the fact that a specific universal right to the environment may not have been explicitly recognized, many other substantive human rights such as the right to life, health and property or procedural rights such as participatory rights or the right to effective remedies have been applied by human rights monitoring bodies in an environmental context.

1.1.2.1. A Brief Discussion of Procedural Environmental Rights

Since the articles of this dissertation focus mainly on substantive environmental rights – which, however, in the context of indigenous peoples, include the right to participate, as will be discussed later – this synthesis addresses some relevant aspects of general procedural rights in order to give a more comprehensive picture of the environmental rights dialogue.

Procedural environmental rights have developed particularly in the field of international environmental law.[133] During and after the Rio Conference, the lack of support for a strong substantive human right to the environment led activists to shift their attention to identifying those human rights whose enjoyment could be considered a prerequisite to environmental protection. In general, procedural rights were emphasized, especially the rights to environmental information, public participation, and remedies for environmental harm.[134]

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[130] See generally, for example, Boyle, A., and Anderson, M., (eds.) (1996); and Shelton, D. (2001).
[131] See, for instance, Shelton, D. (2001); Shelton, D, 'Environmental Rights in Multilateral Treaties Adopted between 1991 and 2001; 32 *Environmental Policy and Law* (2002): 70-77.
[132] Leighton, M.T. (1998), at 12.
[133] Already in the 1982 World Charter for Nature, it was agreed that 'All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation' (para. 23).
[134] Shelton, D. (2001), at 198.

Principle 10 of the Rio Declaration maintains:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

It is noteworthy that neither the World Charter for Nature nor the Rio Declaration speaks explicitly of 'rights' to information and participation. Despite this limitation, rights to public information, participation and access to remedies have become widely recognized in international environmental law.[135] Most recent multilateral and many bilateral agreements contain references to or guarantees of public participation.[136] The International Desertification Convention[137], which resulted from the work of an Intergovernmental Negotiating Committee set up at the Rio Conference, for instance, mentions public participation several times. It might have a special importance for indigenous peoples since it provides, for instance, that the parties should ensure that decisions are taken with the participation of populations and local communities[138] and that the parties are committed to promoting awareness and facilitating the participation of local populations.[139]

The development of international norms concerning public participation in environmental decision-making reflects a general move in international governance, as

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[135] Ibid., pp. 198-199.

[136] Besides the Rio Declaration and Agenda 21, in the UNCED context the UN Framework Convention on Climate Change, Article 4(1)(i) obliges parties to promote public awareness and to 'encourage the widest participation in this process including that of non-governmental organizations'. (The United Nations Framework Convention on Climate Change, opened for signature May 9, 1992, entered into force 21 March 1994, 1771 UNTS 107.) The Convention on Biological Diversity guarantees public participation in environmental impact assessment procedures in Article 14(1) a. (The Convention on Biological Diversity, adopted 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79.) Besides the UNCED documents, there are several environmental instruments which provide a right to public participation. One of them is the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland, adopted 25 February 1991, entered into force 10 September 1997, 30 ILM 800, ((1991)), which requires State parties to notify the public and to provide an opportunity for public participation in environmental impact assessment procedures related to proposed activities that may cause transboundary environmental harm (Art. 3). Furthermore, in final decisions on proposed activities, State parties must take due account of environmental impact assessments, including the opinions of individuals in the affected area (Art.6). The UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, in Particular in Africa (adopted 17 June 1994, entered into force 26 December, 1996), UN Doc.A/AC.241/15Rev.7, reprinted in 33 ILM ((1994)) 1328) deals with matters of public participation in several articles (3(a, c), 10(2)(e), 13(1)(b), 14(2), 19 and 25), and calls for an integrated commitment of all actors – national governments, scientific institutions, local communities and authorities and non-governmental organizations, as well as international partners – to work for the achievement of the aims of the Convention.

[137] United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, see ibid.

[138] Article 3 (a).

[139] Article 6 (a).

well as in numerous states, towards expanding the involvement of non-state actors in decision-making procedures.[140]

Public participation is based on the right of those who may be affected to have an influence in the determination of their future in relation to the environment.[141] In human rights instruments the right to participate in public affairs is widely recognized as part of democratic governance. The right to participate has two components: the right to be heard and the right to affect decisions.[142] It can be concluded, in the words of Boyle, that the participatory approach 'rests on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from notions of civic participation in public affairs already reflected in existing and civil rights.'[143]

International human rights conventions do not contain any direct provision on the right to public participation in environmental matters. However, it has been held that the right to political participation, as guaranteed by, e.g., the International Covenant on Civil and Political Rights, could be applied in environmental matters.[144] Similarly, the general freedom of expression can be seen as covering the right to express opinions about environmental issues, and freedom of association includes the right to peacefully associate with others for the purpose of protecting the environment. These general human rights ensure the right of the public to protest in environmental matters, to participate via discussions, and the right to influence and participate in decision-making and governance individually or in interest groups, as appropriate.[145]

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[140] Ebbesson, J., Public Participation, Chapter 29, in D. Bodansky, J. Brunnée and E. Hey (eds.) (2007), pp.681-703, at 682.

[141] Shelton, D. (2001), at 203.

[142] Ibid. Access to environmental justice can also be seen as forming a third component of the issue of participation. See Fitzmaurice, M., 'Public Participation in the North American Agreement on Environmental Cooperation', *International and Comparative Law Quarterly*, Vol. 52, (2003): 333-368, at 334.

[143] Boyle, A. E. (1996), at 60. Besides Article 25 of the International Covenant on Civil and Political Rights ((CCPR), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 302), examples of other international or regional human rights conventions where the right to participate is acknowledged are Article 21 of the Universal Declaration of Human Rights (G.A. Res. 217A(III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948)), Article 15 of the Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3), Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969, 660 UNTS 195), Articles 7, 8, 13 and 14 of the Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981, 1249 UNTS 13), Article 2 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly Resolution 47/135, 18 December 1992), Article 3 of the European Convention for Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222), Protocol 1 (1998), Article 13 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM (1982) 58), Article XIII of the American Declaration of the Rights and Duties of Man (adopted 2 May 1948, OEA/Ser.L.V//II.82 soc.6 rev.1, 1992), Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981**,** G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 UNTS 13), and Article 23 of the American Convention on Human Rights (entered into force 18 July 1978, O.A.S. Treaty Series No. 36, 1144 UNTS 123).

[144] Ebbesson, J. (1997), at 72.

[145] Kolari, T. (2004), at 28.

For indigenous peoples as groups, the participatory rights guaranteed by international human rights conventions are, however, rather limited since they protect individual participation in the realm of the public affairs of democratic states. *Mikmaq Tribal Society v. Canada*[146] illustrates the limitations of Article 25 of the CCPR, for the participation of indigenous peoples as a group. In the case brought to the UN Human Rights Committee (HRC), the Mikmaq Tribal Society alleged, among others, violations of Article 1 (self-determination)[147] and 25 (political participation) of the CCPR because they had been excluded from Canada's constitutional reform process. Article 25 states, in part: 'Every citizen shall have the right and the opportunity […] without reasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives.'

The HRC defined the issue to be resolved as 'whether the right under Article 25(a) is available only to individual citizens, or to groups or representatives of groups also.' In finding that Canada had not violated Article 25(a), the Committee stated: 'Article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens far beyond the scope of Art. 25(a).'[148]

By virtue of this opinion it would appear that Article 25(a) endorses the right to political participation only very narrowly, therefore denying indigenous peoples the right to participate collectively as a group directly in matters of concern to them.[149] It should be noted, however, that under Articles 27 and 1 of the CCPR, there are other possibilities for indigenous peoples to participate, as will be shown later in this synthesis.

Furthermore, it should be noted that the Inter-American Commission on Human Rights, in the *Belize Maya case*,[150]did not apply Article XX of the American Declaration (the right to vote and to participate in government), as claimed by the petitioners[151], but recognized a right to 'meaningful consultation' and 'informed consent' as being included within the right to property of an indigenous community, as will be explained in more detail elsewhere in this dissertation.

Based on the study concerning the norms and case practice of the right to public participation, it can be concluded that norms protecting the right of individual citizens to participate in democratic government do not indeed seem to reach the level of 'effective participation' in the circumstances that the specific protection of indigenous peoples requires due to the collective element inherent to their culture.

Besides the right to public participation, another procedural environmental right – the right to environmental information – when fully implemented, could, in principle, play an

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[146] *Mikmaq Tribal Society vs. Canada* (Communication No. 205/1986, CCPR/C/39/D/205/1986 (1990)).

[147] Concerning the right to self-determination in Article 1, the HRC decided that it was incompetent to review the allegations under this article and that self-determination, as a right of peoples, could not be invoked by individuals.

[148] Ibid., at Section 5.5.

[149] MacKay, F., A Briefing on Indigenous Peoples' Rights and the United Nations Human Rights Committee, Forest Peoples Programme, 2001, available at: <http://www.forestpeoples.org/documents/law_hr/unhrc_fpp_brief_dec01_eng.shtml#II_B_2> (visited 23 July 2009).

[150] *Maya Indigenous Communities of the Toledo District Belize*, Oct.12, 2004, Report No. 40/04 Case 12.053, available at: <http://www1.umn.edu/humanrts/cases/40-04.html > (visited 23 October 2006).

[151] See para.18.

important role for indigenous communities, for instance, in cases where the traditional resources of indigenous peoples are threatened with contamination or some other damage.

Most international human rights instruments set out a right to information. However, the focus of this right is not directed towards access to environmental information provisions as contained, for example, in the Aarhus Convention.[152] The traditional human rights approach to information is the right to seek, receive, and impart information and ideas as part of the freedom of expression. For instance Article 19 of the CCPR provides: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.'

Article 10 of the European Convention on Human Rights guarantees 'the freedom to receive information'. In the case of *Leander v. Sweden*[153], the Court unanimously stated:

> the right to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right to access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.[154]

Article 10 thus does not necessarily, in the light of jurisprudence, impose a duty on a state to keep and to make available to the public specific information. Neither does it result in a duty on the part of the state to require the submission of information by actors likely to cause adverse environmental effects.[155]

In *Guerra and Others v. Italy*[156], the European Court of Human Rights argued accordingly and held that by not providing 'essential information that would have enabled [the applicants] to assess the risks they and their families might run', Italy had failed to secure the applicants' right to respect for their private and family life (Art. 8). As to the applicability of Article 10 of the Convention, the Court reiterated that freedom to receive information, referred to in Article 10, paragraph 2 of the Convention, 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him'. According to the Court, that freedom, however, cannot be construed as imposing on a state, in circumstances such as those of the case at hand, a positive obligation to collect and disseminate information of its own motion.[157]

The Inter-American Commission, on the other hand, has found that in some cases states might have a positive obligation to provide information to members of the public. In the case of *Marcel Claude Reyes and Others v. Chile*,[158] the Commission found a violation

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[152] The Aarhus Convention obliges States parties to collect and publicly disseminate information, and respond to specific requests (Articles 4-5).

[153] *Leander v. Sweden*, ECHR (1987) Series A, No. 117.

[154] Para. 74.

[155] Ebbesson, J. (1997), at 75.

[156] *Guerra and Others v. Italy*, Application No. 116/1996/735/932, Judgment of 19 February 1998.

[157] Para. 53 of the judgment. See, on the other hand, in the field of international environmental law the Kiev Protocol on Pollutant Release and Transfer Registers to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 21 May 2003), where the State parties have an explicit obligation to establish and maintain a publicly accessible national pollutant release and transfer register; available at: <http://www.unece.org/env/pp/prtr/docs/PRTR_Protocol_e.pdf> (visited 23 July 2009).

[158] *Reyes and Others v. Chile*, Report No. 60/03, Case No. 12.108, October 10, 2003, available at: <http://www.foiadvocates.net/files/adm_report.pdf> (visited 9 March 2007).

of Article 13 of the American Convention on Human Rights, which guarantees the right to freedom of thought and expression, including the freedom to seek, receive, and impart information.[159] The petitioners had alleged that the State of Chile violated Article 13 when the Chilean Committee on Foreign Investment failed to release information about a deforestation project the petitioners wanted to evaluate.[160]

Article 6 of the European Convention on Human Rights and Fundamental Freedoms guarantees the right to a fair and public hearing by an independent and impartial tribunal.[161] In the European Court of Human Rights, in *Zander v. Sweden*[162], Article 6 of the European Human Rights Convention provided the basis for a complaint that the applicants had been denied remedy for threatened environmental harm.[163]

The Inter-American Court of Human Rights, in the *Awas Tingni* case, dealt with earlier, found a violation of the right to remedy guaranteed in Article 25 of the Convention. The Court noted that the article in question has established, in broad terms,the obligation of the States to offer, to all persons under their jurisdiction, effective legal remedy against acts that violate their fundamental rights. It also establishes that the right protected therein applies not only to rights included in the Convention but also to those recognised by the constitution of the law.[164]

The Court furthermore maintained that 'effective remedy [...] is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention.'[165] It stated furthermore that it is not enough for the remedies to exist formally, since they must also be effective.[166] The Inter-American Commission on Human Rights has also found a violation of the right to

[159] Paragraph 1 of Article 13 states: 'Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.'
[160] Para. 2. The right to information is also contained in the Inter-American Declaration of the Rights and Duties of Man (Art. IV), the Universal Declaration of Human Rights (Art. 19), and the African Charter on Human and Peoples' Rights (Art. 9).
[161] According to Article 6.1, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
[162] *Zander v. Sweden*, ECHR Series A (1993), No. 279-B.
[163] See also *Zimmerman and Steiner v. Switzerland* (ECHR,1 983, Series A, No. 66), where the Court found Article 6 applicable to a complaint about the length of proceedings for compensation for injury caused by noise and air pollution from a nearby airport. In the former European Commission on Human Rights, a case brought by members of Saami indigenous people does not relate directly to environmental matters, but to matters of culture and livelihood. In *S. v. Sweden* (Application 16226/90, 2 September 1992, unpublished), the Commission found a violation of Article 6 because no resource to a court had been available to the applicant against an administrative decision denying him a permit to maintain a herd of 400 reindeer.
[164] Para. 111.
[165] Para. 112.
[166] Para. 114. The same had been said in *Marcel Claude Reyes and Others v. Chile*, in para. 63.

effective remedy, for instance, in the *Belize Maya* case[167], *Mary and Carrie Dann*[168], and *Marcel Claude Reyes and Others v. Chile*.[169]

The right to effective legal remedies in environmental cases is certainly important for indigenous communities, although human rights law does not guarantee any special remedies for indigenous peoples. Unfortunately, however, as discussed in this dissertation, most severe environmental changes are often irreversible in nature. Therefore, a right to effective participation that clearly goes beyond the right of general public participation would seem to be the most effective procedural environmental right from the viewpoint of maintaining the traditional way of life of indigenous peoples.

1.1.2.1.1. The NAAEC and the Citizen Submissions Process

One quite exceptional environmental procedure that needs to be mentioned in the context of procedural environmental rights is the so-called 'Citizen Submissions Process' established by the North American Agreement on Environmental Cooperation (NAAEC).[170] The NAAEC not only contains institutional arrangements for public participation but is also a pioneering environmental agreement that establishes a formal procedure through which individuals, environmental organizations and business entities can file complaints.[171] More precisely, the NAAEC allows individuals and non-governmental organizations to make submissions alleging that a State Party is failing to

[167] According to para. 196: 'The State violated the right to judicial protection enshrined in Article XVIII of the American Declaration to the detriment of the Maya people, by rendering domestic judicial proceedings brought by them ineffective through unreasonable delay and thereby failing to provide them with effective access to the courts for protection of their fundamental rights.'

[168] *Mary and Carrie Dann v. the United States*, Case 11.140, Report No 75/02, Inter-Am. C.H.R., 27 December 2002, para. 173.

[169] Para. 63. The Commission refers to Inter-Am. Ct. H.R., *Bámaca Velásquez Case*, Judgment of November 25, 2000, para. 191.

[170] North American Agreement on Environmental Cooperation, the United States, Mexico, Canada, signed 14 September 1993, entered into force 1 January 1994, 32 ILM 1480. The homepage of the Commission for Environmental Cooperation for the NAAEC is at: <http://www.cec.org> (visited 9 June 2009). The NAAEC is designed to complement the existing environmental provisions of the North American Free Trade Agreement (NAFTA). The main reason for the conclusion of the NAAEC was that NAFTA had been strongly criticised for its insufficient and superficial treatment of the environment. Another reason was that the NAFTA agreement did not provide a satisfactory solution to the problem of the lax enforcement of Mexican environmental legislation, a fact that posed a threat to the environment not only in Mexico but also in the United States. North American Trade Agreement (NAFTA), the United States, Mexico, Canada, signed 17 December 1992, entered into force 1 January 1994, 32 ILM 605. (See Fitzmaurice, M. 2003, at 334.)

[171] Anyone residing or established in North America can bring a submission. The Secretariat determines if the submission merits a request for a response from a party based on criteria in Article 14(2). For a thorough study of the NAAEC, see, for instance, Fitzmaurice, M. (2003). See furthermore generally Raustiala, K. 'International "Enforcement of Enforcement" under the North American Agreement on Environmental Cooperation', 36 *Virginia Journal of International Law*, Spring (1996): 721-763.; Kibel, P. S., 'The Paper Tiger Awakens: North American Environmental Law after the Cozumel Reef Case', 39 *Columbia Journal of Transnational Law* 395, (2001): 395-482; Knox, J.H., 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission', 28 *Ecology Law Quarterly* 1, (2001): 1-122.

enforce its environmental law effectively.[172] Indigenous peoples, being also involved in other bodies of the NAAEC, have used this submission process, though so far not very actively.

The NAAEC Citizen Submissions Process is, as a result, primarily an information-forcing mechanism. There are no direct sanctions or even explicit recommendations. Moreover, the Secretariat does not have the power to reach affirmative conclusions as to whether the party in question is in fact failing to effectively enforce its law.[173] The procedure has been criticized for these deficiencies.[174] But at least by forcing parties to respond to complaints, and through the creation of factual records (a non-binding report prepared by independent experts), the procedure generates information about environmental enforcement by the country in question. If it does not strongly pressure the parties to comply, the procedure at least forces states to explain, and to give reasons for, their conduct and administrative choices.[175]

As pointed out by Knox, even though the NAAEC Citizen Submissions Process is obviously not supranational adjudication in the strict sense, it still has key elements of supranational adjudication: it allows private parties to claim that State Parties to an international environmental agreement have failed to comply with an obligation under the agreement and to have their claim reviewed by independent experts.[176]

The Secretariat of the NAEEC has considered a few Citizen Submissions involving indigenous groups. One example is the *Tarahumara* case[177], where an NGO[178] asserted that Mexico is failing to effectively enforce its environmental law by denying access to environmental justice to indigenous communities in the Sierra Tarahumara in the State of Chihuahua. The submitters particularly assert failures to effectively enforce environmental law relative to the citizen complaint process, to alleged environmental crimes and other alleged violations with respect to forest resources and the environment in the Sierra Tarahumara.[179]

Following the rules of procedure of the NAAEC Citizen Submissions, after requesting a response from Mexico, the Secretariat of the NAAEC decided to recommend the creation of a factual record, which was approved by the Council of the NAAEC.[180]

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[172] Article 14.

[173] See, generally, Joint Public Advisory Committee, 'CEC, Lessons Learned: Citizen Submissions Under Articles 14 and 15 of the North American Environmental Cooperation (June 6, 2001)', at: <http://www.cec.org/files/pdf/JPAC/rep11-e-final_EN.PDF.> (visited 23 March 2007).

[174] See criticism in, for instance, Kibel, P. S. (2001), pp. 469-471.

[175] Raustiala, K., 'Police Patrols and Fire Alarms in the NAAEC', 26 *Loyola of Los Angeles International and Comparative Law Review* 389, (2004): 389-413, at 397, available at: <http://ilr.lls.edu/issues/26/RAUSTIALA.pdf> (visited 20 July 2009).

[176] Knox, J.H. (2001), at 11.

[177] Submission ID: SEM-00-006, Mexico, 9/06/2000, available at: <http://www.cec.org/citizen/submissions/details/index.cfm?varlan=english&ID=57> (visited 24 March 2007).

[178]Comisión de Solidaridad y Defensa de los Derechos Humanos A.C.

[179] Submission ID: SEM-00-006, Mexico, 9/06/2000.

[180] See the Guidelines for Submission on Environmental Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation at <http://www.cec.org/citizen/guide_submit/index.cfm?varlan=english> (visited 24 March 2007).

Reasoning in favour of the factual record, which was later publicly released,[181] the Secretariat stated:

The effective enforcement by Mexican environmental authorities of the citizen complaint procedure is fundamental to the promotion of citizen participation in environmental protection […] The development of a factual record with respect to this submission would promote the effective enforcement of the Party's environmental law provisions that enable the indigenous peoples and other rural communities of the Sierra Tarahumara to participate, by filing complaints and denunciations, in the protection of the region's forests and the conservation of its ecosystems.[182]

Even though the factual record does not explicitly make any suggestions to Mexico, it clearly notes the problems concerning Mexico's failure to provide requested information, as well as the lack of resources in administration, which has a negative impact on the relationships between governmental authorities and indigenous communities.[183]

Even though the institutional arrangement of the NAAEC has been criticised for not being effective and beneficial particularly for indigenous peoples,[184] there have been, during the last few years, suggestions for improving the situation. In 2007, the Joint Public Advisory Committee (JPAC) of the Commission for Environmental Cooperation (CEC) made a special suggestion to the NAAEC Council to 'engage Indigenous communities in the work of the CEC'.[185] JPAC recognized the special relationship of indigenous peoples of North America with the earth[186] and acknowledged that environmental degradation affects the health and well-being of indigenous communities in many ways.[187] It further recognized that indigenous communities have a great deal of information, ideas, innovations and good practices that can be shared to give inspiration and help identify solutions to environmental problems.[188] JPAC recommended several short-, medium- and long-term actions for the CEC to improve the status of indigenous communities within its work.

The recommendations included, for instance, the integration of the concerns of indigenous communities into every CEC programme, extension of the participation of indigenous communities and integration of traditional knowledge into the projects of the CEC in order to create a holistic approach to promoting and achieving coordination and cooperation between the Parties on environmental issues.[189]

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[181] According to rules of procedure, the Council votes whether to make the factual record public or not.
[182] Final Factual Record Tarahumara Submission (SEM-00-006), Commission for Environmental Cooperation of North America, July 2005, at 20. Available at: < http://www.cec.org/files/pdf/sem/TarahumaraFR_en.pdf> (visited 25 March 2007).
[183] Final Factual Record, pp. 83-84.
[184] See Commission for Environmental Cooperation of North America, Joint Public Advisory Committee Public Workshop on Future Directions for the North American Agreement on Environmental Cooperation (NAAEC), 21 June 2004, Puebla, Mexico, Summary Record, distribution: General J/03-04/SR/02/Final ORIGINAL: English. Available at: <http://www.cec.org/files/pdf/JPAC/SR-Workshop-04-02_en.pdf> (visited 25 March 2007).
[185] Advice to Council No: 07-02, J/07-02/ADV/Final, available at: <http://www.cec.org/who_we_are/jpac/advice/index.cfm?varlan=english> (visited 26 March 2007).
[186] Item 4.
[187] Item 5.
[188] Item 6.
[189] Pp. 2-3. See also Advice to Council No: 04-01, J/04-01/ADV/Final, available at: <http://www.cec.org/files/pdf/ABOUTUS/Advice-04-01_en.pdf> (visited 26 March 2007).

The NAAEC serves as a unique model with respect to procedural environmental rights. Unlike, for instance, the Aarhus Convention, where indigenous peoples have not been actively involved at all, the NAAEC has the potential to become a regional environmental arrangement that can be used as an example for other environmental regimes, such as the Aarhus Convention itself, of how to recognize the special circumstances of indigenous communities in relation to environmental protection.

1.1.2.2. Environmental Rights of Indigenous Peoples

The right to cultural integrity of indigenous peoples, as guaranteed in international human rights law, is regarded in this dissertation as the main universal norm for protecting the environmental integrity of indigenous peoples. The right to a traditional way of life – as part of culture – is an environmental right that does not apply to all people but has a special significance for indigenous peoples, due to their special relationship with nature.

The human right to a distinct culture is widely acknowledged in international law. One of the major instruments recognizing the right of members belonging to minorities[190] to enjoy their culture is the International Covenant on Civil and Political Rights (CCPR), which has been ratified by most of the world's states.[191] In this dissertation, Article 27 of the CCPR can be seen as a basic norm to protect the right to culture of indigenous peoples. As maintained in this dissertation, based on case practice and the General Comments of the UN Human Rights Committee, it can be concluded that the right to culture under Article 27 entails positive obligations for states in two important ways. First, states are under an obligation to make sure that their actions do not harm the sustainability of the traditional livelihoods of indigenous peoples. With regard to environmental issues, this is a very significant obligation, imposing on states a duty to protect the culture of indigenous peoples from environmental interference that falls under their responsibility. Secondly, Article 27 requires 'effective participation' or 'meaningful consultation' with indigenous peoples in cases relating to the enjoyment of their culture. Development projects on their lands, as well as other kinds of environmental interference may threaten the traditional livelihoods of indigenous peoples, thus possibly amounting to violations of Article 27.

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[190] No single agreed definition of the term 'minorities' exists in international law. One definition which is still widely referred to in the context of international law is the one made by the UN Special Rapporteur on minorities, Francesco Capotorti. According to this definition, a minority is '[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.' UN Special Rapporteur Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Add. 1-7 (1977), para. 568.

[191] International Covenant on Civil and Political Rights (CCPR), G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171. Status of ratification: 161 (6 May 2008); Optional Protocol to the CCPR, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 59, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 302. There are 111 parties to the Optional Protocol (6 May 2008). A State party to the Covenant that becomes a party to the Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant.

It is not clear, however, what 'effective participation' or 'meaningful consultation' with indigenous peoples means under Article 27. It does not seem to signify a *veto* right of indigenous peoples in decisions affecting their right to culture. The meaningful consultation should, however, be a discussion in good faith that allows the indigenous community in question to have a real say in the matter. The Committee furthermore refers to 'affirmative measures' and 'legitimate differentiation' when needed and based on reasonable and objective criteria in order to correct conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27.[192]

It is beyond dispute that the effects of environmental interference, impacting the lands and traditional livelihoods of indigenous peoples, may prevent or impair the peoples' enjoyment of their culture. In this light it can be argued that the participatory rights of indigenous peoples in decisions – local, national or international – that directly affect their right to culture should go beyond the scope of the public participation of other citizens. Therefore, importantly, Article 27 seems to offer more effective protection, as far as participation is concerned, than Article 25 of the CCPR, which deals with the participation of the general public, as previously mentioned.[193]

It can justifiably be argued that in cases where the right to culture of indigenous peoples is threatened due to the negative impact of environmental change on their lands and traditional livelihoods, the only way for states to protect indigenous culture from environmental interference is to protect the environment. Thus, it can be argued that in some cases Article 27 of the CCPR implicitly requires states to engage directly in relevant environmental protection. Based on the considerations of the UN Human Rights

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[192] See Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), para. 6.2. It should be noted that para. 6.1 concerns positive measures of protection against the *acts* of a state. When it is a question of environmental protection, it is, however, sometimes more a matter of an act of *omission* by the state in relation to environmental protection. The General Comment, however, mentions the acts of other persons within the State party. If we take the problem of climate change as an example, the cause of global warming is the increased level of greenhouse gases, which happens because of many factors: it is partly caused by legal persons such as industrial or transportation companies, multinational corporations, and private persons.

[193] *Marshall v. Canada* (Communication No. 205/1986, CCPR/C/39/D/205/1986 (1991)) illustrates the limitations of Article 25 of the CCPR. In the case brought to the UN Human Rights Committee, the Mikmaq Tribal Society alleged, among other things, a violation of Article 25 on political participation because they were excluded from Canada's constitutional reform process. The UN Human Rights Committee defined the issue to be resolved as 'whether the right under Article 25(a) is available only to individual citizens, or to groups or representatives of groups also.' In finding that Canada had not violated Art. 25(a), the Committee stated that 'article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens far beyond the scope of art. 25(a)' (see para. 5.5). In relation to the Mikmaq claim concerning Canada's constitutional reform, it should be noted that national indigenous organizations representing indigenous peoples in general were asked to participate in the reform process. However, individual indigenous peoples were not accorded representation beyond their ability to participate through national organizations. The Mikmaq argued that this policy was racist in that it failed to recognize the distinct identities, histories and needs of indigenous peoples as individual peoples, but rather classified all indigenous peoples as one and the same along racial lines. (Available at: <http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/6dc358635454e5fac12569de00492e1b?OpenDocument&Highlight=0,CCPR%2FC%2F43%2FD%2F205%2F1986> (visited 27 May 2008.))

Committee, this protection should involve indigenous peoples, who must be able to participate effectively in decisions which affect them.

It should be noted that even though the Committee has used Article 27 as the main norm concerning indigenous peoples, it has made important statements concerning the possible application of Article 1, which guarantees the right of peoples to self-determination. The Committee has stated that the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular that set out in Article 27.[194] This view is supported by a development which began in 1999, at which point the UN Human Rights Committee started to apply Article 1 (on self-determination) to indigenous peoples.[195]

It can be argued that the application of Article 1 to indigenous peoples strengthens the environmental elements comprising, *inter alia*, the right to independently govern matters relating to their environment, including the control of traditional lands and territories, the use of natural resources, and participation in environmental decision-making.[196] The question of the self-determination of indigenous peoples will be discussed in the following section of this synthesis.

As maintained in this dissertation, in addition to the CCPR, the right to traditional livelihoods of indigenous peoples as part of their right to culture has been recognized by other widely ratified fundamental human rights conventions such as the International Covenant on Economic, Social and Cultural Rights (CESCR)[197], the UN Convention on the Rights of the Child[198], and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[199] Additionally, both the American Declaration of the Rights and Duties of Man[200] and the European Framework Convention for the Protection of National Minorities[201] recognize the right to culture. As maintained in this

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[194] *Apirana Mahuika et al v. New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000).

[195] Article 40 of the CCPR requires State parties to submit reports on measures taken to give effect to the rights defined therein. An initial report is to be submitted one year after the state ratifies the CCPR, and further reports are required periodically (normally every five years). State reports and the Concluding Observations of the UN Human Rights Committee can be found at: <http://www.unhchr.ch/html/menu2/6/hrc/hrcs.htm> (visited 5 March 2007). See Concluding Observations of the Human Rights Committee on Canada UN Doc. CCPR/C/79/Add.105 (1999). Explicit references to either Article 1 or to the notion of self-determination have also been made in the Committee's Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999); Norway, UN Doc. CCPR/C/79/Add.112 (1999); Australia, UN Doc. CCPR/CO/69/Aus (2000); Denmark, UN Doc. CCPR/CO/70/DNK (2000); Sweden, UN Doc. CCPR/CO/74/SWE (2002); Finland, UN Doc. CCPR/CO/82/FIN (2004); Canada, UN Doc. CCPR/C/CAN/CO/5 (2005); and the United States, UN Doc. CCPR/C/USA/CO/3 (2006).

[196] Kolari, T. (2004), pp. 126-127.

[197] The International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, entered into force 3 January 1976, 993 United Nations Treaty Series 3.

[198] The Convention on the Rights of the Child, adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

[199] The International Convention on the Elimination of All Forms of Racial Discrimination, adopted 7 March 1966, entered into force 4 January 1969, 660 UNTS 195.

[200] The American Declaration of the Rights and Duties of Man, adopted March 1948, OEA/Ser.L.V//II.82 soc.6 rev.1, 1992.

[201] European Framework Convention for the Protection of National Minorities, adopted 10 November 1994, entered into force 1 February 1998, 2151 UNTS 243.

dissertation, the European Convention for Human Rights and Fundamental Freedoms[202] does not directly recognize the right to culture as such, but the right of indigenous peoples to practise their traditional way of life as a part of their culture can be protected through other rights guaranteed in the European Convention such as the right to respect for private and family life, as discussed in this dissertation.[203]

The purpose of this dissertation is to show that the right to cultural integrity of indigenous peoples is a widely recognized right in international law and that this right includes the protection of their environmental integrity. As has been shown, the right to culture has been seen in the instruments studied, or by the monitoring bodies which interpret and apply them, as containing not just substantive protection but also including the right of indigenous peoples to participate in decisions that affect their rights and lives. References to 'effective participation' seem to be the most common formulation, but even expressions such as 'informed consent' and 'the right to self-determination' have been used in relation to the cultural protection of indigenous peoples, as explained in this dissertation. Even though the instruments analyzed here do not directly state that indigenous peoples have the right to be protected from environmental interference, the monitoring bodies directly recognize the special relationship of indigenous peoples to their lands and the environment, which is to be safeguarded from any interference for which a state can be held responsible.

Besides the right to culture, other human rights can also be applied in the protection of the traditional livelihoods of indigenous peoples from environmental interference. This dissertation includes the study of the rights to property, life, health, residence and movement, and inviolability of privacy or the home in the context of indigenous peoples and the environment. The other environmental rights dealt with are also often applied by human rights monitoring bodies to the situations of indigenous peoples with reference to distinctive indigenous cultural patterns. As discussed in this dissertation, human rights monitoring bodies have recognized that due to special cultural circumstances, general human rights can have a particular significance and applicability for indigenous peoples. This idea can be seen, for instance, in the statement of the Inter-American Commission of Human Rights, where the Commission emphasized the *distinct nature* of the right to property as it applies to indigenous people, 'whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality.'[204]

Regarding the interpretation of the right to property (Article 21 of the American Convention), the Inter-American Court of Human Rights has stated that it has to be understood in the light of the rights recognized under the common Article 1 (on self-determination) of the CCPR and CESCR and Article 27 of the CCPR, which call for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, including the right to enjoy their

[202] The European Convention for Human Rights and Fundamental Freedoms, adopted 4 November 1950, entered into force 3 September 1953, 213 UNTS 222.
[203] See, for instance, *G. and E. v. Norway*, Joined Applications 9278/81 and 9415/81 (1984), Decision of 3 October 1983, 35 Decisions and Reports (1984), 30-45.
[204] *Maya Indigenous Communities of the Toledo District (Belize Maya),* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004) at 727, para. 155 (available at: <http://www1.umn.edu/humanrts/cases/40-04.html> (visited 22 January 2007)).

particular spiritual relationship with the territory they have traditionally used and occupied.[205] The court has also stated that indigenous peoples have 'the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries.'[206]

The court has held that a state may not make any restrictions on the property rights of indigenous people unless it abides by the following three safeguards. First, the state must ensure the effective participation of the indigenous community, in conformity with their customs and traditions, regarding any plans for development, investment, exploration or extraction within their territory. Secondly, the state must guarantee that the community will receive a reasonable benefit from any such plan within their territory. Thirdly, the state must ensure that no concession will be issued within the indigenous peoples' territories unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment.[207]

Besides recognition of the collective rights of indigenous peoples to their land, resources and the environment as their right to property, the Inter-American Court of Human Rights acknowledges that the right to property necessarily includes 'the full participation of indigenous communities, according to their own customs.' Regarding the requirement of the effective participation of indigenous communities, the Court has made a special reference to Article 32 of the UN Declaration on the Rights of Indigenous Peoples, which requires that states consult and cooperate with indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.[208]

The Court has explained what the duty of the state to consult indigenous peoples means. According to the Court, the consultations must be carried out 'in good faith', through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Court has stated that indigenous peoples must be consulted in accordance with their own traditions during the early stages of a development or investment plan, not only when the need arises to obtain approval from the community. The Court has further stated that the state must also ensure that indigenous peoples are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily.[209]

Finally, the Court has considered that, regarding large-scale development or investment projects that would have a major impact within indigenous peoples' territory,

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[205] *Saramaka People v. Suriname*, Judgment of November 28, 2007, Preliminary Objections, Merits, Reparations and Costs, para. 95, available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf> (visited 10 January 2009).

[206] *Case of the Indigenous Community Yakye Axa*, para. 137 (*Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Case 12.313, Report No. 2/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 387 (2002)), and *Case of the Indigenous Community Sawhoyamaxa* (*Sawhoyamaxa Indigenous Community of the Enxet People v. Paraguay*, Case 0322/2001, Report No. 12/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 378 (2003), para. 118).

[207] *Saramaka People v. Suriname*, Para. 129.

[208] Ibid., para. 131. Article 32.1 of the UN Declaration.

[209] Ibid., para. 133.

the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[210]

The Inter-American Court cases set very important principles for the recognition of the collective property rights of indigenous and tribal peoples in relation to natural resources. Although, as held by the Court, Article 21 of the Convention (the right to property) does not *per se* preclude the issuance of concessions for the exploitation of natural resources in indigenous or tribal territories, it nonetheless requires a state to consult with or even obtain the consent of the communities affected by the development or investment project planned within territories which they have traditionally occupied if the state wants to legitimately restrict the right to communal property of an indigenous or tribal community. And not only that, but, according to the Court, the state must also reasonably share the benefits with the affected community and complete prior assessments of the environmental and social impact of the project.[211]

In addition to the general human rights instruments, both ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples[212] contain many provisions that are relevant for the protection of the environmental integrity of indigenous peoples as studied in this dissertation. Besides the norms protecting culture, traditional livelihoods and land rights, both instruments contain provisions that directly protect the environment as well. ILO Convention No. 169, for instance, guarantees that special measures will be adopted to safeguard the environment of indigenous peoples.[213] Furthermore, it recognizes the rights of indigenous peoples to natural resources, explicitly including the right of indigenous peoples to participate in the conservation of these resources.[214] The UN Declaration on the Rights of Indigenous Peoples maintains that states must legally recognize and protect the lands, territories and resources of indigenous peoples, and that such recognition must be conducted with due respect for the customs, traditions and land tenure systems of the indigenous peoples concerned.[215] Both ILO Convention No. 169 and the UN Declaration also require States to share benefits or provide equitable compensation in cases where the lands and resources of indigenous peoples are being interfered with by

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[210] Ibid., para. 134. The Court referred to the notion of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, according to which 'free, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects' (para. 135 of the *Saramaka Case*). See UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission Resolution 2001/65 (Fifty-ninth session), U.N. Doc. E/CN.4/2003/90, January 21, 2003, para. 66. The Court also referred to UNCERD, which has observed: 'As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought'. UNCERD, Consideration of Reports submitted by State parties under Article 9 of the Convention, Concluding Observations on Ecuador (Sixty-second session, 2003), U.N. Doc. CERD/C/62/CO/2, June 2, 2003, para. 16.

[211] Paras. 143 and 126-129.

[212] UN Declaration on the Rights of Indigenous Peoples, 7 September 2007, Sixty-first Session, A/61/L.67; available at: <http://www.iwgia.org/sw248.asp> (visited 5 January 2008).

[213] Article 4.

[214] Article 15.

[215] Article 26.3.

the state or a third party. [216] ILO Convention No. 169 also explicitly recognizes the need for an environmental and social impact assessment prior to any project that may have significant effects on lands owned or used by indigenous peoples. [217]

The ILO Convention No. 169 and the UN Declaration will be discussed in the following section, particularly from the viewpoint of participatory rights that reflect the legal status of indigenous peoples. Also the Convention on the Biological Diversity as well as the Rio Declaration – protecting the cultural and environmental integrity of indigenous peoples – will be dealt in the following section.

1.2. Indigenous Peoples in International Law: Towards an Equal Partnership with States

As discussed in this dissertation[218], historically, judicial discourse has contributed to the marginalization and decline of the majority of indigenous peoples around the world. The doctrines of 'discovery', 'terra nullius', and 'effective occupation' as forms of acquisition of property are only some examples of legal concepts that were used to justify the occupation of indigenous territories and the colonization of the populations and, on many occasions, even the enslavement, subjugation, and marginalization of those populations. The decolonization movements and growth of new states in the international sphere also adopted legal concepts that accorded with the safeguard of their own interests. So developed the idea of the 'nation-state', the right to self-determination identified with a strong idea of 'territorial sovereignty', and the preservation of colonial territorial borders based on the doctrine of *uti possidetis*, without consideration of the cultural associations of their populations, and denying all existence and legal viability to the historical claims of indigenous peoples to their territories.[219]

This 'classical' state-centred approach dates back to the 18th century Swiss legal theorist Vattel, who supported the idea of a separate body of law concerned exclusively with nation-states and who averred that states are the legitimate 'subjects' of international law.[220] Out of this approach developed the idea that all other socio-political groupings are merely considered 'objects' of international law. And accordingly, because states are the only players in this paradigm, only they can create international norms.[221]

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[216] See Article 15.2 of ILO Convention No. 169 and Articles 28 and 32.3 of the UN Declaration.
[217] ILO Convention No. 169, Article 7.3.
[218] See the article in this dissertation: Inherent Rights of Aboriginal Peoples in Canada – Reflections of the Debate in National and International Law.
[219] Del Toro, M., I., 'The Contribution of the Jurisprudence of the Inter-American Court of Human Rights to the Configuration of Collective Property Rights of Indigenous Peoples', Yale Law School, SELA Publications (2008), at 2-3, available at: <http://www.law.yale.edu/documents/pdf/sela/Del_Toro.pdf> (visited 10 September 2008). See also Anaya, J., Indigenous Peoples in International Law, Oxford, 2nd ed., at 3. (2004).
[220] Emmerich de Vattel: The Law of Nations or principles of the law of nature applied to the conduct and affairs of nations and sovereigns, from the French of Monsieur de Vattel, from the new edition, by Joseph Chitty, Philadelphia, 1999 (1883), available at: <http://www.constitution.org/vattel/vattel.htm> (visited 10 September 2008).
[221] See Maggio, G., Biodiversity, Chapter 3, in L. Watters (ed.), Indigenous Peoples, the Environment and Law, Carolina Academic Press, Durham, North Carolina (2004), pp. 43-74, at 45.

There have been, however, alternative viewpoints to the idea that only nation-states are subjects in international law. Thomas Aquinas and the influential 16th century Dominican theologian de Victoria acknowledged that non-state entities such as indigenous peoples are not mere objects, but possess rights independent of European monarchies.[222] This view was not, however, acceptable to the majority of state governments interested in acquiring colonial territories, but, on the contrary, many areas inhabited by peoples not forming a nation from the European-Western perspective were considered to be *terra nullius*. This was the case, for instance, in Canada, as studied in this dissertation. However, regarding Canada, at the very beginning of colonization, European settlers first dealt with indigenous communities on a nation-to-nation basis and sought to secure their assistance as trading partners and military allies. As their power and influence in North America grew, they increasingly claimed rights of suzerainty over their Aboriginal allies while still respecting their internal sovereignty and territorial rights. Under British colonial rule, however, the authority of Aboriginal governments was gradually eroded.[223]

The 1975 *Western Sahara* case partially eroded the principle of *terra nullius* when the ICJ noted that at the time of its occupation by Spain in the 19th century, the region now known as the Western Sahara was inhabited by peoples who, although 'nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.'[224]

As also discussed in this dissertation, the 'classical' view of international law continues to be reflected in ideas regarding the sovereign equality of states, the duty of non-intervention on the part of states in the internal affairs of other states, and state consent to international obligations. This approach effectively excludes the direct and official participation of other types of actors who have expertise and concerns that could help make the international system more broad-based, democratic, fair, and responsive to concerns arising outside the 'traditional' scope of nation-states and national governments.[225] This dissertation points out the core deficiencies of the doctrine of state sovereignty and legal subjectivity that restricts the ability of indigenous peoples to participate in the creation of international law in their areas of interest such as environmental issues. This is the prevailing condition, albeit, on the other hand, international law guarantees the effective participation of indigenous peoples as discussed in this dissertation and in the previous section of this synthesis.

Despite the deficiency, many positive developments have occurred during the last few decades regarding the legal status of indigenous peoples in international law. A famous early international attempt by indigenous peoples to get recognition of their legal status was the initiative of the Council of the Iroquois Confederacy in the 1920s. Deskaheh, the speaker of the council, led an attempt to have the League of Nations consider the Iroquois's long-standing dispute with Canada. Although Deskaheh got support among

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[222] On the Indians Lately Discovered (1532), Published lecture in Francisco de Victoria, De indis et de ivre belli relectiones (Classics of International Law Series, 1917 (translations by J. Bate based on Iaques Boyer ed., 1557; Alonso Munoz ed., 1565; and Johann G. Simon ed., 1696).

[223] See the article in this dissertation: Inherent Rights of Aboriginal Peoples in Canada – Reflections of the Debate in National and International Law, pp. 160-161.

[224] *Western Sahara (Request for Advisory Opinion)* 1975, International Court of Justice, paras. 75-83. Case summary available at: <http://www.icj-cij.org/idecisions/isummaries/isasummary 751016.htm> (visited 1 January 2009).

[225] See Maggio, G. (2004), pp. 45-46.

some League members, the League ultimately rejected this attempt, taking the position that the Iroquois grievances were a domestic concern of Canada and therefore outside the League's competency.[226]

As the Iroquois example shows, after the adoption of the state-centred approach to international law, matters concerning indigenous peoples have been seen as falling within the domestic issues of the states in which indigenous peoples live. The process of 'domestication' within the Canadian legal context has been discussed in this dissertation.[227]

In more recent years, however, benefiting from an international system in which assertions of domestic jurisdiction are less and less a barrier to international concern over issues of human rights, indigenous peoples have been successful in attracting significant attention to their demands at the international level.[228] Starting in the 1960s, indigenous peoples began drawing increased attention to demands for their continued survival as distinct communities with historically based cultures, political institutions, and entitlements to land. In the 1970s indigenous peoples enlarged their efforts internationally through international conferences and direct appeals to international intergovernmental institutions. [229]

Starting in the late 1970, indigenous peoples' representatives began appearing before UN human rights bodies in increasing numbers and with increasing frequency, basing their demands on generally applicable human rights principles. Indigenous peoples have enhanced their access to these bodies as several organizations representative of indigenous groups have achieved official consultative status with the UN Economic and Social Council, the parent body of the UN human rights apparatus. Indigenous peoples also have invoked procedures within regional human rights bodies, particularly those associated with the Organization of American States.[230]

In 1971, the Sub-Commission on Prevention of Discrimination and the Protection of Minorities appointed one of its members, Mr. Martinez Cobo, as Special Rapporteur to conduct a comprehensive study of discrimination against indigenous populations and to recommend national and international measures to eliminate such discrimination.[231] The study, completed between 1981 and 1984, covers a wide range of issues such as indigenous identity, culture, land and legal systems, health and medical care, housing, education and language. It concluded that indigenous peoples were facing discrimination in various fields due to the social conditions in which most indigenous peoples lived.[232] The study was an important starting point for a wider discussion of the unequal position that indigenous peoples faced in society due to their specific cultural characteristics.

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[226] See Niezen, R., The Origins of Indigenism: Human Rights and the Politics of Identity, University of California Press (2003), pp. 31-36.

[227] See also generally Gutiérrez Vega, P. 'The Municipalization of the Legal Status of Indigenous Peoples by Modern (European) International Law', in R. Kuppe and R. Potz (eds.), *Law and Anthropology, International Yearbook for Legal Anthropology,* Volume 12, Martinus Nijhoff Publishers (2005): 17-54.

[228] See Anaya, J. (2004), at 57.

[229] Ibid., pp. 56-57.

[230] Ibid., at 57.

[231] See 'Study of the problem of discrimination against indigenous populations', UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, by Special Rapporteur, Mr. Martinez Cobo, UN Doc.E/CN/4/Sub.2/1986/7(1986).

[232] The conclusions, proposals and recommendations are contained in Vol. V of the study, UN Document E/CN.4/Sub.2/1986/7 Add.4.

In 1982, the Working Group on Indigenous Populations (WGIP) was established by the United Nations Economic and Social Council.[233] Mrs. Erica-Irene Daes, Chairperson of the Working Group from 1983 to 1999, authored important studies which played a pivotal role in raising the issue of indigenous peoples' special relationship to lands in the wider public discussion. She conducted studies on, for instance, the protection of the heritage of indigenous peoples[234], on the relationship of indigenous peoples to their lands[235], and a study of indigenous peoples' permanent sovereignty over natural resources.[236] Within the work of the Chairperson, it became acknowledged that affirmative protection was needed for indigenous peoples in order for them to carry on their special relationship with their lands and environments.

The WGIP is an organ of the Sub-Commission on the Promotion and Protection of Human Rights. The working group's original mandate was to review developments concerning indigenous peoples and to work toward the development of corresponding international standards.[237] However, through its policy of open participation in its annual sessions, the working group became an important arena for the dissemination of information and exchange of views among indigenous peoples, governments, non-governmental organizations, and others.[238] The policy of open participation has thus acted as an important forum to strengthen the international legal status of indigenous peoples.

In 1985 the sub-commission approved the working group's initiative to draft a universal declaration on the rights of indigenous people for adoption by the UN General Assembly.[239] After many phases, in 1994 the sub-commission adopted the working group's draft and submitted it to the UN Commission on Human Rights, which subsequently established its own ad hoc working group to work on the declaration.[240]

Through the process of drafting a declaration, the sub-commission's Working Group on Indigenous Populations engaged states, indigenous peoples and others in a broad multilateral dialogue on the specific content of norms concerning indigenous peoples and their rights. This was a very important step historically, since the working group provided an important means for indigenous peoples to promote, for the first time, their own

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[233] Economic and Social Council Resolution 1982/34, available at: <http://ap.ohchr.org/documents/E/ECOSOC/resolutions/E-RES-1982-34.doc> (visited 4 November 2008).

[234] See ECOSOC Decision 1992/256 (July 20, 1992) authorizing the appointment of Erica-Irene A. Daes as a special rapporteur to conduct a study on the 'protection of the cultural and intellectual property of indigenous people'.

[235] UN Special Rapporteur, Mrs. Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Indigenous peoples and their relationship to land, Final working paper, 2001, E/CN.4/Sub.2/2001/21, paras. 12-13. The document is available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/78D418C307FAA00BC1256A9900496F2B/$File/G0114179.doc?OpenElement> (visited 10 July 2007).

[236] Daes, E-I. A., Final report of the Special Rapporteur: Indigenous peoples' permanent sovereignty over natural resources, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-sixth session, Item 5 (b) of the provisional agenda, E/CN.4/Sub.2/2004/30, 13 July 2004.

[237] Human Rights Commission Res. 1982/19 (Mar. 10, 1982); E.S.C. Res. 1982/34, May 7, 1982, U.N. ESCOR, 1982, Supp. No. 1, at 26, UN Doc. E/1992/82 (1982), paras. 1-2.

[238] Anaya, J. (2004), at 63.

[239] Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1985/22 (29 August 1985).

[240] Commission on Human Rights, Resolution 1995/32 (3 March 1995).

conceptions of their rights within the international arena, enabling them to make proposals and comments.[241] Eventually all the states of the Western Hemisphere came to participate in the working group discussion on the declaration.[242]

It should be mentioned that in 2007, the new Expert Mechanism on the Rights of Indigenous Peoples was created to replace and continue the work of the WGIP.[243] The mandate of the Expert Mechanism is to provide its thematic expertise in the manner and form requested by the Human Rights Council. To this end, it will focus mainly on studies and research-based advice. In addition, the Expert Mechanism may also make proposals to the Council for consideration and approval within the scope of its work, as set out by the Council. The Expert Mechanism will also work in cooperation with the Permanent Forum on Indigenous Issues, the Forum that will be discussed shortly below.[244]

ILO Convention No. 169 Concerning Indigenous and Tribal Peoples (1989) has played an important role in the development of the legal status of indigenous peoples in international law. Despite not gaining recognition of indigenous peoples as peoples in international law, one important aim of ILO Convention No 169. was to establish the conditions for self-management of indigenous (and tribal) peoples. This means that indigenous peoples should have the opportunity and a real possibility to manage and control their lives and decide their own future.[245]

Difficult challenges related to the legal status of indigenous peoples in the development of ILO Convention No. 169 arose concerning the debate on the use of the term 'peoples' to identify the beneficiaries of the Convention. Indigenous peoples were pressing for the use of the term 'peoples' over 'populations'. State governments, however, resisted the use of the term 'peoples' because of its association with the term 'self-determination', which, in turn, has been associated with the right of secession.[246] Working under a two-year deadline for completing the text, the negotiating committee agreed to the use of the term 'peoples' subject to a clarification that it was not intended to convey any implications under international law. The Committee felt that the ILO lacked competence to interpret Article I of the United Nations Charter[247] and referred the question of self-determination to the Working Group and its parent bodies.[248]

Although ILO Convention No. 169 does not explicitly recognize the right of indigenous peoples to self-determination, it does guarantee explicit rights for participation. Article 6, which is the key article in the Convention, requires governments to establish

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[241] Anaya, J. (2004), pp. 63-64.
[242] Anaya, J. (2004), at 64.
[243] Human Rights Council Resolution 6/36. Expert Mechanism on the Rights of Indigenous Peoples. 6th Session, 14/12/2007, A/HRC/RES/6/36, available at:
<http://ap.ohchr.org/Documents/dpage_e.aspx?si=A/HRC/RES/6/36> (visited 20 July 2008).
[244] See Office of the United Nations High Commissioner for Human Rights, Expert Mechanism on the Rights of Indigenous Peoples, mandate, available at:
<http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/mandate.htm> (visited 1 January 2009).
[245] ILO: 'ILO Convention on indigenous and tribal peoples, 1989 (No. 169) a manual', International Labour Organization (2000), at 10.
[246] See Anaya, J. (2004), at 59-60.
[247] The Charter of the United Nations, adopted 24 October, 1 UNTS XVI.
[248] Barsh, L. R., 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?' *Harvard Human Rights Journal* 33 (1994), reprinted in L. Watters (ed.), Indigenous Peoples, the Environment and Law, Carolina Academic Press, North Carolina (2004), pp.15-42, at 23.

means enabling indigenous peoples to effectively participate at all levels of decision-making in elective and administrative bodies. It also requires governments to consult indigenous peoples, through adequate procedures and indigenous peoples' representative institutions, whenever consideration is given to legislative or administrative measures which may affect such peoples directly. Article 7 furthermore recognises the right of indigenous peoples 'to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use.'

ILO Convention No. 169 does recognize indigenous peoples' collective rights to self-development, cultural and institutional integrity, lands and resources, and environmental security.[249] Under the Convention, special measures of protection aimed at indigenous peoples must not be 'contrary to the freely expressed wishes of the peoples concerned.'[250]

Moreover, national plans to implement the Convention must be developed with the participation of indigenous peoples and carried out in cooperation with them.[251] The Convention thus acknowledges indigenous peoples as distinct political entities within states, entitled to negotiate with state authorities and to be consulted 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.'[252] Indigenous peoples remain distinct as territorial and political entities over which states do not have unlimited power.[253]

ILO Convention No. 169 requires states to make good faith efforts to reach agreement with indigenous peoples' own 'representative institutions' – that is, institutions chosen by indigenous peoples themselves rather than by the states – before taking actions that affect these peoples.[254] The political rights of indigenous peoples, therefore, extend beyond the general human right to participate in the political life of the state guaranteed in Article 25 of the CCPR, which refers specifically to voting and candidacy for public office.

ILO Convention No. 169 is significant to the extent that it creates treaty obligations among ratifying states which are in line with current, more general trends in responding to indigenous peoples' demands. The convention is also important as part of a larger body of developments that can be understood as giving rise to new customary international law.[255] Since the 1970s, the demands of indigenous peoples have been addressed continuously in one way or another within the United Nations and other international normative discourse. As is shown in this dissertation, it is now evident that states and other relevant actors have reached a certain new common ground concerning minimum standards that should govern behaviour toward indigenous peoples. It seems evident that these standards are already, in fact, guiding behaviour.[256]

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[249] See ibid. See also the article in this dissertation: Environmental Rights Protecting the Way of Life of Arctic Indigenous Peoples: ILO Convention No. 169 and the UN Draft Declaration on Indigenous Peoples.
[250] Article 4.2.
[251] Article 7.1.
[252] Article 6.2.
[253] Barsh, R. L. (2004), at 23.
[254] Barsh, R. L., Indigenous Peoples, Chapter 36, in D. Bodansky, J. Brunnée and E. Hey (eds.) (2007), pp. 830-851, at 843.
[255] Ibid., at 61.
[256] Ibid.

Although ILO Convention No. 169 has been ratified by only twenty states[257], its principles concerning self-development and cultural integrity have been recognized in other international legal processes, for instance, at the 1992 Rio Summit on Sustainable Development.[258] The Summit adopted a Declaration on Environment and Development (the Rio Declaration), a program of action for achieving sustainable development (Agenda 21), and a statement of principles on sustainable forestry (Statement of Principles on Forests). Principle 22 of the Rio Declaration recognizes indigenous peoples as distinct social partners in achieving sustainable development, emphasizing the unique value of indigenous traditional cultures and ways of life.[259]

In a similar way, the Convention on Biological Diversity (CBD) creates an active role for indigenous communities to participate in the maintaining of environmental sustainability. Article 8 (j) is the key provision of the CBD in relation to indigenous and local communities. It has had a considerable impact on international discussions relating to the status of indigenous peoples.[260]

The CBD furthermore strengthens the recognition of the concept of 'benefit sharing'[261], which was already acknowledged by ILO Convention No. 169.[262] Two expert panels have been held regarding access to genetic resources and benefit sharing, looking also at traditional knowledge as benefit sharing with indigenous peoples and local communities.[263] The Fifth Conference of the Parties to the CBD established an Ad Hoc Open-ended Working Group on Access and Benefit-sharing, and the Sixth Conference of the Parties accepted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of Their Utilization.[264] Besides acknowledging the sovereign rights of states to their genetic resources, the guidelines also recognize the rights of indigenous and local communities to their traditional knowledge. Importantly, prior informed consent as well as benefit-sharing, according to the Guidelines, should guide access to traditional knowledge.[265] These guidelines are one of the first initiatives to provide clear and detailed recommendations in relation to the protection of traditional knowledge related to biological diversity with the main goal being the fair and equitable sharing of benefits.[266]

The CBD can be regarded as the most important legally binding instrument for indigenous peoples and other local communities to express their interests and demands for the protection of their traditional knowledge, and the protection of their intellectual

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[257] See at: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (visited 20 January 2010).
[258] Ibid.
[259] Ibid.
[260] Stoll, P. and von Hahn, A. (2008), at 33.
[261] See Permanent Forum on Indigenous Issues, Sixth session, New York, 14-25 May 2007, Item 4 of the provisional agenda, Report of the international expert group meeting on the international regime on access and benefit-sharing and indigenous peoples' human rights of the Convention on Biological Diversity. E/C.19/2007/8.
[262] Article 15.2.
[263] See Report of the Panel of Experts on Access and Benefit-sharing on the work of its first meeting (UNEP/CBD/COP/5/8) and Report of the Panel of Experts on Access and Benefit-sharing on the work of its second meeting (UNEP/CBD/abswg/1/2).
[264] For the guidelines, see Decision VI/24, sixth meeting of the Conference of the Parties to the CBD, 2001, available at: <http://www.cbd.int/decision/cop/?id=7198> (visited 10 February 2010).
[265] Ibid, paras. 31 and 44.
[266] Stoll, P. and von Hahn, A. (2008), at 39.

property rights. It should be noted that the UN Declaration on the Rights of Indigenous Peoples also includes explicit protection of traditional knowledge as the intellectual property of indigenous peoples.[267] Additionally, there have been many international developments in different forums concerning the protection of the intellectual property of indigenous peoples, which, no doubt, when completed, will play a significant role in the development of the legal status of indigenous peoples as well as the protection of their environmental rights.[268]

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[267] Article 31.

[268] The protection of traditional knowledge within the realm of intellectual property rights has also been addressed by the World Intellectual Property Organization (WIPO), often together with the United Nations Educational, Scientific and Cultural Organization (UNESCO). After consultations between Member States at the expert level, the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions was adopted in 1982 and has been widely used by WIPO Member States to realize a *sui generis* protection in the area of folklore. In 1996, the UNESCO/WIPO World Forum on the Protection of Folklore was held. It adopted a plan of action and recommended further work and consultations with a view to agreement on international protection of folklore. See WIPO: Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – an Overview, WIPO/GRTKF/IC/1/3. Additionally, so-called Roundtables on Intellectual Property and Traditional Knowledge were held in 1998 and 1999 to exchange views among governments and indigenous peoples on the issue of traditional knowledge and its protection. See WIPO Roundtables on Intellectual Property and Traditional Knowledge, available at: <http://www.wipo.int/globalissues/events/index.html> (visited 20 May 2009). In 2000, WIPO Member States decided to establish a special body to discuss intellectual property issues related to genetic resources, traditional knowledge and folklore. In particular, WIPO has submitted for discussion draft objectives and principles of protection, as well as draft articles that might serve as models for national, regional or international law-making. See Stoll, P. and von Hahn, A. (2008), at 37. The Federation of Indian Chambers of Commerce and Industry (FICCI), in cooperation with WIPO and the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry of the Government of India organized an International Conference on Traditional Knowledge at FICCI, New Delhi, India, on November 13, 2009, where the protection of the traditional knowledge of indigenous peoples were widely discussed as a part of the WIPO work. See WIPO, at <http://www.wipo.int/meetings/en/2009/tk_sem_delhi/> (visited 13 January 2010). Despite many efforts undertaken by WIPO, however, the aim of drafting an international treaty on the protection of indigenous and local communities with regard to their traditional knowledge and folklore remains quite controversial, while good progress has been made regarding the determination of crucial issues and elaboration of norms of protection. See Stoll, P. and von Hahn, A. ibid. It should be mentioned that the intellectual property rights of indigenous peoples have also been addressed by the World Trade Organization (WTO) in view of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). This Agreement contains standards for the protection of intellectual property rights. However, it does not specifically address protection of traditional knowledge. The 2001 Ministerial Conference of the WTO in Doha Quatar dealt particularly with this issue and instructed the competent subsidiary organ of the WTO, the Council on TRIPS, 'to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments'. See Para. 19 of the Ministerial Declaration, WTO Doc. WT/MIN (01)/DEC/W/1 of 14 November 2001. Revision and amendment of Article 27 (3) of the TRIPS Agreement has been proposed to ensure that the disclosure of the origin of the genetic resources and knowledge, innovations and practices of indigenous and local communities may or even should be required in granting a patent in cases where the invention in question is based on such resources or knowledge. See Doc. IP/C/W/474. An updated list of relevant documents concerning the relationship between the TRIPS Agreement and the CBD and the protection of traditional knowledge can be found in Doc. IP/C/W/368/Rev.1, at 68. The intellectual property rights applicable in relation to indigenous peoples are currently developing in many international forums. The WHO, for instance, dealt with traditional medicine and the intellectual property implications associated therewith at an Inter-Regional Workshop on

Taken together, the agreements adopted at Rio acknowledge a special status for indigenous peoples which is justified by their traditional dependency, their sustainable management of natural resources and the traditional knowledge they have concerning sustainable management. This status implicitly involves collective property rights and intellectual property rights, as well as the political rights necessary to maintain distinct legal institutions and participate collectively in decision-making.[269]

The term 'partnership' was used in Agenda 21. Since Agenda 21 was adopted by consensus at the UNCED, states could not object to the use of 'partnership' in other United Nations contexts.[270] By the time of the UNCED preparatory negotiations in 1989-1992, states, as well as many NGOs, echoed indigenous peoples' focus on land and other forms of tangible and intangible property as collective human rights, together with the right to self-determination.[271] Indigenous peoples' insistence on recognition of community ownership and control of land evolved into a more general principle: indigenous peoples have a major role to play in achieving sustainability as partners in decision-making and implementation on the ground. It follows that governments should respect the distinctive interests and perspectives of indigenous peoples and local communities, pursuing development through a more decentralized system of 'partnership' with them.[272]

As discussed in this dissertation, particularly within the context of the UNCED, the recognition of land tenure has been based on the assertion that indigenous peoples and other 'local communities' have accumulated valuable knowledge of the ecosystems from which they have traditionally drawn a livelihood, and have devised ways of managing living resources to ensure their long-term survival.[273] Indigenous peoples have also been successful in linking their culture and way of life with the protection of biodiversity.[274] In his address to the General Assembly celebrating the launch of the International Year of the World's Indigenous People (1993), the UN Secretary-General equated cultural and biological diversity, agreeing with indigenous leaders that the loss of indigenous cultures

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Intellectual Property Rights in the Context of Traditional Medicine in December 2000 that produced recommendations concerning the protection of traditional medicine, the strengthening of customary laws for the protection and documentation of traditional knowledge in the public domain and the equitable sharing of benefits from commercial use of traditional medicine. See the Report of the Inter-Regional Workshop on Intellectual Property Rights in the Context of Traditional Medicine, Bangkok, Thailand, 6-8 December 2000, WHO/EDM/TRM/2001.1, Chapter 9. Furthermore, the United Nations Conference on Trade and Development (UNCTAD), which was established in 1964 as a permanent intergovernmental body and serves as the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues, held an Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices in October 2000 to discuss the role of traditional knowledge. See UNCTAD Expert Meeting on Systems and National Experiences for Protecting Traditional Knowledge, Innovations and Practices, Geneva, 30 October-1 November 2000, available at: <http:/www.unctad.org/trade_env/traditionalknowledge.htm> (visited 7 June 2009).

[269] Barsh, R. L. (2004), at 24.

[270] Ibid.

[271] Barsh, R. L., (2007), at 839.

[272] Ibid.

[273] Ibid., at 840.

[274] For a review of these linkages, see L. Maffi (ed.), On Biocultural Diversity: Linking Language, Knowledge, and the Environment, Washington, D.C., Smithsonian Institution Press (2001).

continues to deprive humanity of the practical knowledge and experience necessary for its survival.[275]

The UNCED was able to establish a new approach in relation to the rights and legal status of indigenous peoples. As discussed in this dissertation, according to this approach, indigenous peoples' cultural practices need to be protected, because of their significance for the sustainability of the environment. As also maintained, this idea was, however, originally brought out earlier: for instance, in the Report of the World Commission on Environment and Development.[276] International recognition that indigenous peoples can make a valuable contribution to environmental protection has played an important role in the process of shifting the legal status of indigenous peoples from mere objects towards the recognition of their role as legal subjects.

This position, inevitably, raises questions concerning the responsibilities and legal duties of indigenous peoples in relation to the environment as well. As argued in this dissertation, the planet Earth can truly benefit from indigenous communities' traditional way of perceiving and interacting with the natural environment if these communities commit themselves to sustainable ways of carrying on and developing their cultural and economic livelihoods.[277]

The United Nations proclaimed 1993 the International Year of the World's Indigenous People, with a view to strengthening international cooperation in finding a solution to the problems faced by indigenous communities in areas such as human rights and the environment.[278] When the matter came before the Commission on Human Rights in the 1989-1990 session, the issue of whether to use the term 'peoples' dominated the negotiations. Fearing that the use of the term 'peoples' in the title of the Year would imply the right to self-determination, Canada and Brazil insisted on the singular form. Consensus on the Year became contingent on accepting the position of these two countries.[279]

The theme of the Year, 'A New Partnership', also reflected a political compromise on the right to self-determination. Indigenous organizations had pressed for a reference to 'self-determination' in the theme, but this was rejected by all of the governments as too provocative. Indigenous peoples, in turn, rejected themes based on 'cultural diversity' as too weak.[280]

The issue of the self-determination of indigenous peoples was also confronted at the United Nations World Conference on Human Rights held in Vienna in June 1993. Indigenous peoples' organizations participated actively in the Conference, claiming recognition of the rights of indigenous 'peoples' as collectives. Even though indigenous peoples were not able to win the battle of the 's' (people/peoples), their position, in fact,

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[275] Opening of International Year of Indigenous Peoples Is Marked at General Assembly Ceremony, UN Press Release No. GA/8447 (10 December 1992), at 1.
[276] Bruntland, G.(ed.), (1987), pp. 114-115.
[277] See the article in this dissertation: 'Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?'
[278] UNGA Resolution 45/164 of 18 December 1990. See also International Year of the World's Indigenous Peoples, 1993, UNGA Res. 48/133, 48 U.N. GAOR Supp. (No. 49) at 251, U.N. Doc. A/48/49 (1993), available at: <https://www1.umn.edu/humanrts/resolutions/48/133GA1993.html> (visited 7 November 2008).
[279] Barsh, R. L. (2004), at 25.
[280] Ibid.

got support from a majority of the states.[281] The Vienna Declaration[282] implicitly carried on the idea of partnership that emerged a year earlier in Rio by acknowledging the unique contribution of indigenous 'people' to the development and plurality of society.[283] Otherwise, the Vienna Declaration acknowledges the same basic principles that had so far been recognized in other international contexts: the demands for concerted positive steps to ensure respect for indigenous peoples' human rights as well as the requirement of the full and free participation of indigenous peoples, in particular in matters of concern to them.[284]

When the Working Group met at Geneva shortly after the World Conference on Human Rights, it had specific instructions from the General Assembly and the Vienna Declaration to complete the Draft Declaration on the Rights of Indigenous Peoples. Indigenous representatives were convinced of the symbolic necessity of enshrining self-determination in the Draft Declaration, regardless of whether a strong statement on self-determination would ultimately be adopted by the General Assembly.[285]

The Working Group acceded to indigenous participants' demands and adopted a text that quotes the Declaration on Decolonization and the international human rights covenants without qualification:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The decision was naturally welcomed with great satisfaction by the indigenous delegations. Some governments reiterated their earlier objections, while others accepted the new text, indicating that they would read it in conjunction with the Draft Declaration's provisions on the right to self-government.[286]

Following a recommendation of the World Conference on Human Rights in December 1993, the General Assembly proclaimed the International Decade of the World's Indigenous Peoples (1994-2004).[287] The goal of the Decade was to strengthen international cooperation to solve the problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health. The key to achieving that goal was to be found in the theme of the Decade, 'Indigenous people: partnership in action.' The United Nations committed itself to developing new partnerships between indigenous peoples and states and between indigenous peoples and the United Nations.[288] The General Assembly adopted an ambitious programme of activities and identified a number of specific objectives for the Decade: first and foremost the

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[281] Ibid.
[282] World Conference on Human Rights, Vienna, 14-15 June 1993, Vienna Declaration and Programme of Action, A/CONF. 157/23, 12 July 1993, available at: <http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En> (visited 8 November 2008).
[283] Vienna Declaration and Programme of Action, Principle 20.
[284] Ibid.
[285] Barsh, R. L. (2004), at 27.
[286] Ibid., at 28.
[287] UNGA Res. 48/163 (Dec. 21, 1993) proclaiming the 'International Decade of the World's Indigenous People' commencing Dec. 10, 1994.
[288] United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, Seventh session, New York, 21 April-2 May 2008, Item 5 of the provisional agenda, Human rights: dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other special rapporteurs, E/C.19/2008/2, para. 14.

establishment of a permanent forum on indigenous issues and the adoption of the United Nations Declaration on the Rights of Indigenous Peoples.[289]

In December 2004, the Assembly renewed its commitment to promote and protect the rights of indigenous peoples, proclaiming the Second International Decade of the World's Indigenous People (2005-2014).[290] In its Resolution 60/142, the General Assembly adopted the Programme of Action of the Second Decade[291], agreeing that 'Partnership for action and dignity' would be the theme of the new Decade.[292]

The goal of the Second Decade was to further strengthen international cooperation to resolve the problems faced by indigenous peoples in many areas, including culture, the environment and human rights by means of action-oriented programmes and specific projects, increased technical assistance and relevant standard-setting activities.[293]

The emphasis of the new decade was, however, to strengthen the active role of indigenous peoples in decision-making. The Decade thus promoted the idea of equal partnership. The main objectives set for the new Decade were to promote non-discrimination and the inclusion of indigenous peoples in all phases of the policy process; to promote full and effective participation of indigenous peoples in decisions that affect their lives, based on the principle of free, prior and informed consent; to promote development policies respectful of the culture and identity of indigenous peoples; to adopt targeted programmes and budgets for the development of indigenous peoples; and to strengthen monitoring of, and accountability for, commitments regarding the protection of indigenous peoples and improvement of their lives.[294]

The most important development connected with the International Decade was the establishment of the Permanent Forum on Indigenous Issues within the UN Economic and Social Council, which met for the first time in May 2002.[295] The establishment of the new Forum marked a fundamental milestone in the indigenous struggle to gain a position within the international community. The new body was unique in several ways, perhaps most importantly in the parity of its composition. The Forum is made up of 16 experts, 8 nominated by governments and the other 8 by indigenous organizations.[296]

The Forum is an advisory body to the Economic and Social Council (ECOSOC), with six mandate areas: economic and social development, culture, environment, education, health, and human rights. According to its mandate, the Forum provides expert advice and recommendations on indigenous issues to the ECOSOC programmes, funds and agencies of the United Nations, through the ECOSOC; raises awareness and promotes the integration and coordination of activities related to indigenous issues within the United

[289] Ibid., para. 15.
[290] UNGA Res. 59/174.
[291] A/60/270, Sect. II
[292] United Nations Economic and Social Council, Permanent Forum on Indigenous Issues, Seventh session, New York, 21 April-2 May 2008, Item 5 of the provisional agenda, Human rights: dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other special rapporteurs, E/C.19/2008/2, para. 17.
[293] Ibid., para. 14.
[294] Ibid., para. 16.
[295] ECOSOC Res. E/RES/2000/22 (July 28, 2000) establishing the Permanent Forum; Report of the First Session of the Permanent Forum on Indigenous Issues, U.N. Doc. E/2002/42/Supp. 43 (Wilton Littlechild, Rapporteur).
[296] Ibid., para. 25.

Nations system; and prepares and disseminates information concerning indigenous issues. The Forum holds two-week sessions annually in New York. Its first session was held in May 2002.[297]

The main objective of the Forum is to watch over and promote the interests of indigenous peoples throughout the whole United Nations system. For this reason, the Forum is highly committed to the promotion and practical implementation of the human rights of indigenous peoples.[298] Since the very first session of the Forum, the issue of human rights has been a separate item on the agenda.[299]

On the basis of the information and reports provided by indigenous peoples, United Nations agencies and states, and the ensuing debates during its sessions, the Forum has developed a substantial number of recommendations addressing the pertinent human rights problems of indigenous peoples. It has also worked with determination between sessions to further the rights of indigenous peoples. This is clearly reflected in a review of its recommendations at its sixth session.[300] The review demonstrates a concerted effort to address the wide range of human rights problems facing indigenous peoples.[301]

A fair number of recommendations of the Forum have been addressed to the Commission on Human Rights and, since 2006, to the Human Rights Council. These deal with issues such as special procedures and the implementation and monitoring of human rights standards, the inclusion of experts of indigenous peoples in the work of the Council, and the adoption of creative methods of work, with particular regard for the full participation of indigenous peoples.[302]

Issues pertaining to indigenous peoples' lands and environments have become more and more visible as the work of the Permanent Forum has developed in the last few years. In its Sixth Session in 2007, the Forum, as a special theme, dealt with the protection of the territories, lands and natural resources of indigenous peoples from many different angles.[303] The Permanent Forum highlights the ultimate importance of the ability of indigenous peoples to have control over their lands, stating:

> It is crucial that indigenous peoples be fully informed of the consequences of the use and exploitation of natural resources in their lands and territories through consultations, under the principle of free, prior and informed consent, with [the] indigenous peoples concerned. Through free, prior and informed consent, future conflicts can be avoided and the full participation of indigenous peoples in consultation mechanisms,

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[297] See Permanent Forum on Indigenous Issues, at: <http://www.un.org/esa/socdev/unpfii/en/about_us.html> (visited 9 November 2008).

[298] Report of the First Session of the Permanent Forum on Indigenous Issues, U.N. Doc. E/2002/42/Supp. 43, para. 29.

[299] The Forum has developed close collaboration with the Office of the High Commissioner for Human Rights and the Special Rapporteur. At the annual sessions in New York, the Special Rapporteur has presented his reports and engaged fully in the discussions of the Forum about the human rights situation of indigenous peoples. Upon the establishment of the Human Rights Council, the Forum expressed the wish that its Chairperson participate in the programmed activities of the Council related to issues of indigenous peoples, in order to promote collaboration and avoid duplication between the two mandates. Ibid., para. 30.

[300] E/C.19/2007/5.

[301] Ibid., para. 31.

[302] Ibid., para. 33.

[303] Permanent Forum on Indigenous Issues, Report on the Sixth Session 14-25 May 2007, Economic and Social Council Official Records Supplement No. 23, UN, New York, 2007, E/2007/43/E/C.19/2007/12.

environmental impact assessment and sociocultural impact assessments can be ensured.[304]

The following year the special theme concerned climate change and its implications and challenges in relation to the world's indigenous communities.[305] The Permanent Forum emphasized the contribution of indigenous communities in combating climate change due to their traditional knowledge.[306] The International Expert Group Meeting, in its report for the Permanent Forum, stated:

> In combating the climate change impacts already being experienced by many indigenous peoples and communities, governments and other actors must engage comprehensively and inclusively with indigenous peoples, ensuring their full and effective participation and honouring the right to self determination and the principle of free, prior and informed consent as set out in the United Nations Declaration on the Rights of Indigenous Peoples.[307]

The Permanent Forum furthermore called on states to take into account the special circumstances of indigenous peoples when implementing mitigation measures.[308]

The Permanent Forum indicates the strengthened status of indigenous peoples in international law. The Forum operates at the highest possible level within the UN system. Its mandate is very broad: in fact, all the mandate areas of ECOSOC itself. It has been estimated that the Forum will provide for a previously lacking holistic approach to indigenous issues in the UN system, while it seeks to guarantee that all UN bodies, in all their activities, take the particular needs and concerns of indigenous peoples into account.[309]

The former chair of the Permanent Forum has described the relationship between indigenous peoples and states as follows:

In this forum, indigenous peoples and governments for the first time meet on a more equal basis. The Permanent Forum constitutes a recognition by the international community that without the participation by the indigenous peoples themselves, it is not possible adequately to address the particular needs and concerns of our peoples. This way, the Permanent Forum symbolizes a new kind of partnership between indigenous peoples and governments and constitutes a landmark event in the struggle for recognition of the rights of indigenous peoples.[310]

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[304] Ibid., para. 21.
[305] Permanent Forum on Indigenous Issues, Report on the Eight Session, 21 April–2 May 2008, Economic and Social Council Official Records supplement No. 23, UN, New York, 2008, E/2008/43/E/C.19/2008/13.
[306] Ibid., para. 4.
[307] International Expert Group Meeting on Indigenous Peoples and Climate Change, Darwin, Australia, April 2-4, 2008, Summary Report, United Nations, Co-organizers United Nations University – Institute of Advance Studies, Secretariat of the United Nations Permanent Forum on Indigenous Issues, North Australian Indigenous Land and Sea Management Alliance (NAILSMA); issued in the Permanent Forum on Indigenous Issues, Seventh session, New York, 21 April–2 May 2008, E/C.19/2008/CRP.9, 14 April 2008, para. 2.
[308] Ibid., para. 6.
[309] Magga, O.H., Presentation by the Chairperson of the Permanent Forum on Indigenous Issues, The UN Permanent Forum on Indigenous Issues – Ambitions and Limitations, Seminar, September 1st, 2003, Resource Centre for the Rights of Indigenous Peoples, Guovdageaidnu, available at: <http://www.galdu.org/web/index.php?artihkkal=39&giella1=eng> (visited 1 January 2009).
[310] Ibid.

One of the key targets of the Permanent Forum on Indigenous Issues has been the push for an adoption of the UN Declaration on the Rights of Indigenous Peoples. The UN Declaration was adopted by the UN Human Rights Council on 29 June 2006 and by the UN General Assembly on 13 September 2007.[311] The Chair of the UN Permanent Forum on Indigenous Issues, Victoria Tauli-Corpuz, expressed her view concerning the significance of the Declaration by stating: 'The 13th of September 2007 will be remembered as a day when the United Nations and its Member States, together with indigenous peoples, reconciled with past painful histories and decided to march into the future on the path of human rights.'[312]

The UN Declaration indicates a historical shift in relation to the legal status of indigenous peoples in international law. For the first time, indigenous peoples participated in the drafting process of the actual text with an equal voice with governments.[313] Although the final decision-making was carried out in line with the general practice of international law, recognizing only states as parties to the instrument, it can be said that indigenous peoples, for the very first time in a global context, participated in the making of international law.

The UN Declaration 2007 is a step forward in the recognition of the rights of indigenous peoples in international law. In addition to the principles of self-development and cultural integrity adopted in ILO Convention No. 169, the Declaration opens up a totally new era in the acknowledgement of rights relating to self-determination. Not only does the Declaration explicitly recognise the right to self-determination and self-governance of indigenous peoples, but it also advances the concept of free, prior and informed consent in relation to decision-making concerning natural resources and other crucial matters. It was precisely these established rights that led a few key countries – Australia, Canada, New Zealand and the United States – to vote against the Declaration in the General Assembly.[314]

Although not binding in a strict legal sense, the Declaration in practice affirms the present views of the states in relation to many important rights of indigenous peoples. As stated by Fitzmaurice, the Declaration is a long-awaited affirmation of the position of indigenous peoples as important actors in the contemporary world whose interests must be taken into account by states. Additionally, it is a further indication that states and indigenous peoples must be engaged in a dialogue.[315]

The future will show the customary law value of the Declaration. As seen in classical international law, customary rules result from the combination of two elements: an established, widespread, and consistent practice on the part of states, and the *opinion juris*

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[311] The United Nations Declaration on the Rights of Indigenous Peoples, 7 September 2007, Sixty-first Session, A/61/L.67.

[312] Tauli-Corpuz, V., The Declaration on the Rights of Indigenous Peoples: A major victory and challenge (2007), at 1. Available at: <http://www.twnside.org.sg/title2/resurgence/206/cover1.doc> (visited 10 November 2008).

[313] See Davis, M., 'Indigenous Struggle in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples', *Melbourne Journal of International Law*, Vol. 9, No. 2 (2008): 1-33, at 2. See also, generally, Barsh, R.L., 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force', 18 *Human Rights Quarterly* (1996): 782-813.

[314] Tauli-Corpuz, V. (2007), at 2.

[315] Fitzmaurice, M. (2009), at 76.

sive necessitatis.[316] Moreover, when weighing different types of state acts, the traditional approach is to attach more value to what states do (physical acts) than to what they say (verbal acts).[317]

However, some legal scholars, such as Anaya, are of the opinion that customary international law crystallizes 'when a preponderance of states and other authoritative actors converge on a common understanding of the norms' contents and generally expect future behaviour in conformity with those norms.'[318] According to this view, actual state conduct is not the only or necessarily determinative indicium of customary norms.[319] Thus, according to this view, it is increasingly understood that explicit communication, of the sort that is reflected in numerous international documents and decisions, establishes customary rules of international law. Conforming domestic laws and related practice reinforce such customary rules of international law. Non-conforming domestic practice undermines the apparent direction of international norm-building only to the extent that the international regime holds out and eventually accepts as legitimate the non-conformity.[320]

Furthermore, human rights treaty bodies and international criminal courts and tribunals have tended to follow an approach that is based on deduction from fundamental principles, rather than on induction from state practice. Moreover, when identifying state practice, they emphasize what states say rather than what they do.[321] There is also a tendency to regard the pronouncements of the supervisory bodies of human rights treaties and international tribunals as indications of state practice, especially if these pronouncements are assented to by states.[322]

This approach was followed by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*).[323] In that case the Court observed that it 'must satisfy itself that the existence of the rule in the opinion juris of States is confirmed by practice', thus reversing the approach

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[316] The legal *locus classicus* on the point is the ICJ judgment in *the North Sea Continental Shelf* case; the Court was discussing the process by which a treaty provision might generate a rule of customary law, but its analysis is applicable to the creation of custom generally. See *North Sea Continental Shelf*, Judgment, ICJ Reports (1969), at 3, para. 77, where the Court observed that in order for state practice to qualify as custom, the practice must be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. For an analysis concerning the two-element theory, see Thirlway, H., 'The Sources of International Law', in M.D. Evans, International Law, Oxford University Press, Oxford (2003), pp.117-144, at 124-130.

[317] Kamminga, M.T., Final Report on the Impact of International Human Rights Law on General International Law, International Law Association (ILA), (2004), at 7.

[318] Anaya, J. (2004), at 61.

[319] Anaya and Williams state that 'with the advent of modern inter-governmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication may itself bring about a convergence of understanding and expectation about rules, establishing in those rules a pull toward compliance, even in advance of a widespread corresponding pattern of physical conduct.' See Anaya, J. and Williams, Jr., R., A., 'The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System', *Harvard Human Rights Journal*, Vol. 14, (2001), at 54-55, available at: <http://www.law.harvard.edu/students/orgs/hrj/iss14/williams.shtml#Heading8> (visited 2 January 2009).

[320] Ibid., at 55.

[321] Kamminga, M.T. (2004), at 8.

[322] Ibid.

[323] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits), Judgment of 27 June 1986 ICJ Reports 14.

it had taken in the *North Sea Continental Shelf* case.[324] Also in *Nicaragua*, the Court recognized that contrary practice does not undermine the formation of a rule of customary international law as long as the practice is condemned and the state in question does not claim to act as a matter of right.[325]

This approach is, however, somewhat disputable, and it seems that the identification of rules of customary international law differs depending on the subject matter. As maintained by Kamminga, as the international legal order becomes more and more concerned with areas governed by community values, the 'new' ways of identifying rules of customary international law will gain importance in due course.[326]

Regarding the UN Declaration on the Rights of Indigenous Peoples, the fact that a few key countries did not approve the Declaration may certainly diminish its value to a certain degree. On the other hand, it should be noted that the states that originally rejected the Declaration may still change their standpoints. In fact, there is already one example of such a change: the Australian government, after originally rejecting the Declaration, has now stated that it will endorse it. The government has been undergoing consultations with states, territories and other stakeholders regarding the impact of the Declaration, which, as maintained by Davis, is unusual given that the Declaration will have no legal effect in Australia. [327] This, in my view, reflects the fact that indigenous peoples' affairs are often extremely sensitive issues, and, consequently, the Universal Declaration on the Rights of Indigenous Peoples will carry a great deal of political weight in many countries.

Although it is not a legally binding instrument, human rights monitoring bodies have already started to apply the UN Declaration as a legal source. As mentioned in the previous section, the Inter-American Court of Human Rights has used Article 32 of the UN Declaration in determining what is required by 'consultation' and 'prior consent', concluding that in large-scale development or investment projects that would have a major impact within an indigenous or tribal people's territory, the state has a duty, not only to consult with the community, but also to obtain their free, prior and informed consent, in accordance with their customs and traditions.

Furthermore, in May 2008, despite the fact that the United States had objected to the Declaration, the Committee on the Elimination of All Forms of Racial Discrimination referred to the Declaration in its comments on the obligations of the United States under the CERD.[328] In this case the Committee had received complaints about nuclear testing and dangerous waste storage on Native American lands. The Committee stated:

> While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to

[324] Ibid., para. 184. For an analysis see Kamminga, M.T. (2004), pp. 7-8.
[325] Ibid., para. 186.
[326] Kamminga, M.T. (2004), at 8.
[327] See Davis, M. (2008), at 4.
[328] Committee on the Elimination of Racial Discrimination, Seventy-second session, Geneva, 18 February-7 March 2008, Consideration of Report Submitted by States Parties Under Article 9 of the Convention, Concluding observations, United States of America, CERD/C/USA/CO/6, 8 May 2008, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/G08/419/82/PDF/G0841982.pdf?OpenElement> (visited 3 January 2009).

interpret the State party's obligations under the Convention relating to indigenous peoples.[329]

The Supreme Court of Belize also applied the principles of the Declaration as a framework for determining land rights. Shortly after the adoption of the Declaration by the UN General Assembly, the Supreme Court of Belize made a decision relating to the rights of the Maya community to their lands and resources, applying the Declaration.[330] The Court explicitly stated its opinion that the Declaration poses 'significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned.'[331] Finally, it should be mentioned that Bolivia was the first country to adopt the UN Declaration on the Rights of Indigenous Peoples as national law.[332]

Today, indigenous peoples are working toward implementation of the Declaration. Work is currently being done with the UN Permanent Forum on Indigenous Issues to determine how the Declaration should be implemented by the UN and its agencies, and how the Declaration's implementation by Member States can be assessed.[333]

One question that has been asked is whether the Declaration really creates some new basic principles that had not already been accepted by the world community regarding indigenous peoples. It has been argued that the Declaration as such does not create anything new that other legally binding human rights instruments do not already guarantee. Victoria Tauli-Corpuz, the chair of the UN Permanent Forum on Indigenous Issues has stated:

The UN Declaration on the Rights of Indigenous Peoples sets the international minimum standards for the protection, respect and fulfilment of the rights of indigenous peoples. While it is a declaration and is therefore not legally binding as Conventions are, many of the articles are actually legally binding as these are lifted from the Convention on Civil and Political Rights and the Convention on Economic, Social and Cultural Rights. The Declaration does not set new international standards on human rights. It merely interprets International Human Rights Law as it applies to the specific situations of indigenous peoples as distinct peoples.[334]

There are legal scholars who argue that regardless of the Declaration, there is already a distinct body of customary law that accords with the indigenous right to demarcation, ownership, development, control and use of the lands they have traditionally owned or

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[329] Ibid., para. 29.

[330] *Aurelio Cal v. Attorney-General of Belize Claim* 121/2007, 18 October 2007, Supreme Court of Belize, available at: <http://www.elaw.org/node/1620> (visited 4 January 2009).

[331] Para. 133.

[332] National Law 3760, which is an exact copy of the UN Declaration, was passed on November 7, 2007. See IWGIA, at <http://www.iwgia.org/sw18043.as> (visited 4 July 2009).

[333] See International expert group meeting on the role of the United Nations Permanent Forum on Indigenous Issues in the implementation of Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples, 14-16 January, New York, United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, PFII/2009/EGM1/15, available at: <http://www.un.org/esa/socdev/unpfii/documents/EGM_Art_42_FAO.doc> (visited 5 July 2009).

[334] Tauli-Corpuz, V., 'The challenges of implementing the UN Declaration on the Rights of Indigenous Peoples', Summit in Ainu Mosir 2008, July 1-4, Hokkaido, Japan, available at: <http://www.tebtebba.org/index.php?option=com_content&view=article&id=22:the-challenges-of-implementing-the-un-declaration-on-the-rights-of-indigenous-peoples-&catid=50:unpfii> (visited 24 May 2009).

otherwise occupied and used.[335] Anaya and Wiessner demonstrate how, in their opinion, the domestic legal practice of the states that voted against the Declaration does not oppose the principle concerning indigenous peoples' right to lands.[336]

According to the present author, it is debatable whether it can be said that the recognition of the land rights of indigenous peoples can be regarded as international custom or *opinion juris*. However, what lies behind all the norms of the Declaration is the protection of the uniqueness of the specific culture of indigenous peoples. The rights to non-discrimination and to cultural integrity of indigenous peoples are accepted in many widely ratified, legally binding international instruments. Amongst those states that accept the concept of indigenous peoples, there are hardly any that oppose the recognition of the right to a distinct culture. As interpreted by monitoring bodies of international human rights instruments, the right to culture contains not only substantive protection – affirmative action – but also requires that indigenous peoples can control their internal matters and participate meaningfully in all decision-making that concerns them. The right to cultural integrity, in principle, contains the right to retain a specific way of life, which necessarily entails the recognition of land rights. Additionally, other specific cultural components such as language and spirituality are protected through the right to cultural integrity.

Cultural integrity recognizes that each culture is unique and all groups of people are equal no matter what culture they represent. The Declaration takes this principle further by specifying more precisely what the protection of cultural integrity requires, when fully implemented. That is to say, that the UN Declaration does not merely have moral or political value, nor will it have the value of customary law in the future, but, on the contrary, a valid argument can be made that the world's states are already at present committed to many of the key principles affirmed by the Declaration.

Furthermore, if indigenous peoples' own perspectives are taken into account, none of these instruments of international law truly creates anything that indigenous peoples do not already have. As discussed in this dissertation, particularly in the Canadian legal context, to indigenous peoples the concepts in question represent inherent rights, powers that they never relinquished. Only conquest by alien peoples interrupted their exercise of these rights. Indigenous peoples as first occupants assert that no state and no international body needs to 'give' them these rights. As inherent rights they cannot be 'given' nor 'extinguished'; they belong to indigenous peoples by definition. Rather, the world must acknowledge what has always been: that indigenous peoples as the first peoples are autonomous nations able to decide their own present and their own future. [337]

In international law, explicit recognition of the right to self-determination of indigenous peoples would establish that indigenous peoples are members of the international community who have a legal personality under international law; they are 'subjects' of international legal rights and duties rather than mere 'objects' of international

[335] Anaya, J. and Wiessner, S., 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist, Legal News and Research* (US) 3, (2007), at 3, available at: <http://www.law.arizona.edu/news/Press/2007/Anaya100307.pdf> (visited 25 May 2009).
[336] Ibid., pp. 3-4.
[337] See Zinsser, J., P., 'A New Partnership: indigenous peoples and the United Nations system', *Museum International*, No. 224, Vol. 56, No. 4. (2004), pp. 76-88, at 85. See also the article in this dissertation: 'Inherent Aboriginal Rights in Canada – Reflections of the Debate in National and International Law.'

concern.[338] This would naturally, at least in theory, indicate a big step with respect to their legal status in international law.

The adoption of the UN Declaration no doubt will also have an effect on the wording used in new United Nations documents and other international dialogue concerning indigenous peoples. Until now, most United Nations Member States have wanted to avoid explicit references to 'peoples' and 'self-determination' in these documents. After all, words create the world we live in. It should be noted that already before the adoption of the UN Declaration, in 2002, in the Johannesburg Summit to the Rio Conference[339], as well as in 2005, in the World Summit that marked the sixtieth anniversary of the United Nations, the term 'indigenous peoples' was recognized when the commitment of states to uphold the human rights of indigenous peoples was reaffirmed.[340]

It is important to note, however, that the states that opposed the Declaration have not expressed opposition to the practice of the UN Human Rights Committee to apply Article 1 (the right to self-determination) of the CCPR to indigenous peoples. This strengthens the argument that many of the world's states seem to be ready to accept the right of indigenous peoples to self-determination, but definitely not its full scope.

In light of the practice of the UN Human Rights Committee, self-determination is not explicitly limited to the internal aspect of this right: self-government. In any case, it can be seen from the Concluding Observations that this right, as applied to indigenous peoples by the Committee, does not seem to indicate a right to *veto*, but rather a meaningful, 'effective' participation in relation to indigenous peoples' traditional lands and resources and other significant matters.

The UN Declaration seems to go further by explicitly recognizing the concept of free, prior and informed consent. It is, however, somewhat debatable whether the Declaration fully recognizes the right to *veto*. Articles 19 and 32 of the Declaration state: 'States shall consult and cooperate in good faith with the indigenous peoples concerned […] *in order to* obtain their free, prior and informed consent' (emphasis added). There are scholars closely following the process who argue that the requirement to consult and cooperate was never intended to give a right of veto over land developments, although indigenous peoples regard it as a quasi-right to veto.[341] On the contrary, if it is true that the Declaration was not intended to give a right of veto to indigenous peoples, one may ask why it was so fiercely resisted. Even though there was concern amongst many states regarding the Declaration's statements concerning the right to self-determination the key opposing states, in the end, seemed to be even more concerned about the Declaration's provisions of extensive rights concerning natural resources, particularly in the light of the concept of free, prior and informed consent (Articles 19 and 32).[342]

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[338] Barsh, R.L. (2004), at 16.

[339] See <http://www.earthsummit2002.org/> (visited 2 June 2009).

[340] E/C. 19/2008/2, paras. 20-22, available at: <http://daccessdds.un.org/doc/UNDOC/GEN/N08/211/13/PDF/N0821113.pdf?OpenElement> (visited 9 November 2008).

[341] Davis, M. (2008). Online version available at: <http://kirra.austlii.edu.au/au/journals/MelbJIL/2008/17.html> (visited 20 July 2009).

[342] United Nations Permanent Forum on Indigenous Issues, The UN Declaration on the Rights of Indigenous Peoples, Treaties and the Right to Free, Prior and Informed Consent: The Framework for a New Mechanism for Reparations, Restitution and Redress. UNPFII Seventh Session, New York, 21 April-2 May, 2008. E/C.19/2008/CPR.12.

At the practical level, self-determination has been seen as indicating autonomy for indigenous peoples: the right to determine their own destiny. In specific terms, representatives of indigenous peoples explain this as meaning the right to govern their internal affairs according to their own 'political, economic, cultural and social structures'. Additionally, self-determination should mean that indigenous peoples can determine their own membership, negotiate with states, plan, participate in and benefit from the uses of their territories. They can celebrate their own beliefs on their sacred sites, have the means to preserve their traditions, customs and laws, administer their own health care, teach their children, and reclaim lost artefacts of their culture.[343]

One can ask whether in this description there is anything that the world's states actually oppose. The states opposing the UN Declaration had nothing against the right to self-determination in the light of internal self-governance; the goal of the opposition was to mitigate the risk that indigenous peoples could reject plans of the sovereign states to use resources that lie on the traditional lands of indigenous peoples, and the potential right of *veto* in relation to other public matters of government that may be significant to indigenous peoples.

During the lengthy process of the preparation and adoption of the UN Declaration, indigenous peoples have demanded the recognition of an unqualified right to self-determination. They have argued that since they are peoples – equal to all other peoples - under the United Nations Charter and international human rights covenants, they are entitled to an unqualified right to self-determination. What they ask at a practical level, however, seems to be the full recognition of their human rights as individuals and as groups. Sometimes this might require a commitment of states to the free, prior and informed consent of indigenous communities, whereas at other times proper consultation and benefit sharing might be enough.

One important feature of the era of self-determination is that whereas until now the concept of the culture of indigenous peoples has been developed within the framework of existing human rights norms and monitoring bodies, the right to self-determination gives indigenous peoples themselves the possibility to have a decisive voice regarding their own priorities for their future development. Whereas, for instance, Article 27 of the CCPR seems to protect traditional cultural components such as traditional way of life, the right to self-determination is not limited to the protection of 'frozen' culture but allows the people themselves to decide the direction of their development as a people and as individuals. This is important also from the viewpoint of environmental changes that may ultimately diminish the possibilities for indigenous peoples to practice their traditional culture.
All in all, the legal status of indigenous peoples is changing incrementally. Indigenous peoples have already achieved greater recognition of their collective rights than minorities and other social groups. Importantly, the UN Declaration furthers the development of collective rights, creating a good balance between individual and collective rights with the

[343] Zinsser, J., P. (2004), at 85, analyzing the meeting of the Working Group on Indigenous Populations, Geneva 20 July 1993. See the Report of the Working Group on Indigenous Populations (E/CN.4/ Sub.2/ 1992/33).

idea that collective and individual rights are not opposed to each other but, on the contrary, are both necessary for the protection of indigenous peoples.[344]

Additionally, indigenous peoples are gaining greater access to United Nations financial and technical assistance programs. Increased access will strengthen indigenous organizations and communities in concrete ways, enhancing their ability to pursue international legal recognition.[345]

Indigenous peoples have gradually achieved a large measure of legal personality as distinct societies with distinctive collective rights as well as a distinct role in national and international decision-making. Their international legal status has been defined as intermediary between that of non-self-governing territories and that of minorities.[346]

Besides the human rights norms, there has also been recognition of indigenous peoples' right to participate collectively in international decision-making, for example, in the 'partnership' theme of the International Year and International Decade of the World's Indigenous People. The *sui generis* standing of indigenous peoples in the international community is also exemplified by the establishment of the Permanent Forum on Indigenous Issues by ECOSOC. International financial and trade institutions have also begun to accord *sui generis* standing to indigenous peoples. In updating its policy on projects affecting indigenous or tribal peoples, the World Bank directed its staff to ensure the 'informed participation' of indigenous peoples in project planning, with 'full respect for their dignity, human rights, and cultural uniqueness,' and with 'full consideration' being given to their own preferences, with the aim of protecting them from adverse impacts and securing for them 'culturally compatible social and economic benefits'.[347] The World Bank has the potential to play a particularly important role in strengthening indigenous peoples' legal status and control of development on their lands.[348] As maintained in this dissertation, indigenous peoples have challenged the World Bank to adopt a more respectful relationship not only with indigenous peoples but also with the environment itself.

As discussed earlier in this synthesis, the UN Human Rights Committee has recognized the collective right of indigenous peoples to participate under their right to culture in Article 27 of the CCPR. Indigenous peoples' status within the practice of the UN Human Rights Committee has changed significantly: not only does the Committee recognize that indigenous peoples are protected under Article 27 (on minorities), but it also recognizes them as having a people's right to self-determination.

Similar principles concerning indigenous peoples as at the UN level may be seen within the Organization of American States (OAS). In 1989, the OAS General Assembly resolved to 'request the Inter-American Commission on Human Rights to prepare a juridical instrument relative to the rights of indigenous peoples.'[349] Pursuant to this task,

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[344] Gilbert, J. 'Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples', 14 *International Journal on Minority and Group Rights* (2007): 207-230, pp. 226, 229.
[345] Barsh, R. L. (2004), at 16.
[346] Barsh, R. L. (2007), at 841.
[347] World Bank, 'Indigenous Peoples', World Bank Operational Directive 4.20 (1991).
[348] See Barsh, R. L. (2004), at 31.
[349] AG/RES. 1022 (XIX-0/89). The proposal for a new OAS legal instrument on indigenous rights is described in Annual Report of the Inter-American Commission on Human Rights, 1988-89, O.A.S. Doc. OEA/Ser.L/V/II.76, Doc. 10, pp. 245-251 (1989).

the Inter-American Commission on Human Rights developed a Proposed American Declaration on the Rights of Indigenous Peoples.[350] Subsequently, the OAS General Assembly established, as an organ of the Permanent Council's Committee on Juridical and Political Affairs, a working group of OAS member status to study the commission's proposed declaration.[351] Although it reflects a range of views over multiple areas of concern to indigenous peoples, the written and oral commentary on the Proposed American Declaration touches substantially upon very similar principles to those enumerated in the UN Declaration and ILO Convention No. 169.[352]

The fact that the working group on the Proposed American Declaration as well as many OAS countries have expressed their support for using the UN Declaration on the Rights of Indigenous Peoples as the baseline or starting point for future negotiations concerning topics on which no consensus has been reached within the working group does not, however, mean that all OAS member states have taken such a position. Canada and the United States have expressed reservations concerning the final text under negotiation.[353]

Despite the struggles that the Proposed American Declaration on the Rights of Indigenous Peoples is facing, Inter-American case practice exhibits similar features to UN case practice. The consideration of the Court, according to which Article 21of the American Convention on Human Rights (the right to property) has to be read in conjunction with the common Article 1 (the right to self-determination) of the CCPR and CESCR, not only significantly enlarges the scope of the right to property, but also shows that the Inter-American Court is of the opinion that indigenous peoples are entitled to the right to self-determination of peoples as granted by the common Article 1. In relation to the right to self-determination of peoples under the common article, the Court has particularly mentioned the right to 'freely pursue their economic, social and cultural development' and the right to 'freely dispose of their natural wealth and resources' so as not to be 'deprived of [their] own means of subsistence.' The Court explicitly stated that it may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.[354]

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[350] Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on Feb. 26, 1997, at its 133rd session, 95th regular session, published in Annual Report of the Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.95, Doc.7 rev (March 14, 1996).

[351] See OAS General Assembly Resolution 1610 (XXXIX-0/99). See also General Assembly Resolution 1708 (XXX-O/00), which renewed the mandate of the working group.

[352] Anaya, J. (2004), at 66.

[353] See the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous peoples, at: <http://www.nwac-hq.org/en/documents/OASWG-Negotns-CanadaRESERVATION-IPresponseFINAL-Apr1408.pdf> (visited 1 June 2009).

[354] *Saramaka v. Suriname*, para. 93, Article 29 of the Convention. The Court refers to the Advisory Opinion of 'Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights', OC-10/89 of July 14, 1989. Series A No. 10, para. 37 and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 113-115 (endorsing an interpretation of international human rights instruments that takes into account the development in the *corpus juris gentium* of international human rights law over time and in present-day conditions). See also generally Brunner, L., 'The Rise of Peoples' Rights in the Americas: The Saramaka

In some respects, the Inter-American Court goes even further than the UN Human Rights Committee. As mentioned, regarding the requirement of the effective participation of indigenous communities, the Inter-American Court has made a special reference to Article 32 of the UN Declaration on the Rights of Indigenous Peoples, which requires that states consult and cooperate with indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.[355]

Additionally, whereas the UN Human Rights Committee allows only individual members of the indigenous communities to bring a complaint to the Committee, the Inter-American Court has recognized that the right to legal personality now also has to be interpreted in a collective manner in the case of indigenous peoples. Thus, according to the Court, the state must establish, in consultation with the indigenous community and with full respect for their traditions and customs, the judicial and administrative conditions necessary to ensure the recognition of their legal personality, with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the right of access to justice and equality before the law.[356]

To sum up, it can be said that several developments over the past ten years have signalled a change in the legal personality of indigenous peoples. First, in ILO Convention No. 169 and the agreements signed at the Rio Summit, states have explicitly recognized indigenous peoples' collective rights to internal decision-making, representation in national decision-making, land, and control of development. Although these rights fall short of full self-determination, they ensure the protection of indigenous peoples' collective existence and distinct institutions.[357] The concept that has emerged from these developments is 'partnership', which implies equality without the secessionist implications of 'self-determination.'[358]

'Partnership', as defined by Barsh, implies genuine reciprocity: mutual respect, informed consent, and shared benefits.[359] The outcome of the Rio Conference has played a significant role in creating genuine reciprocity by recognizing the valuable contribution that indigenous communities can make to the preservation of a sustainable environment, while at the same time acknowledging the importance of indigenous traditional communities' close relationship to nature for the communities themselves.

The right to self-determination, as understood in the UN Declaration, does not seem to give total freedom to determine political status, while strongly protecting the integrity of sovereign states.[360] Fitzmaurice states that 'the definition of self-determination in the Declaration is considered to be a compromise between the aspirations of indigenous

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People Decision of the Inter-American Court of Human Rights', *Chinese Journal of International Law* (2008): 1-13.

[355] *Saramaka v. Suriname,* para. 131. Article 32.1 of the UN Declaration.

[356] Ibid., para. 173.

[357] Barsh, R.L. (2004), pp. 21-22.

[358] Ibid., at 22.

[359] Barsh, R. L. (2007), at 839.

[360] As stated by Daes, 'The principle of self-determination as discussed within the Working Group and as reflected in the draft declaration was used in its internal character, that is short of any implications which might encourage the formation of independent States.' See UN Doc. E/CN.4/Sub2AC.4/1992/3 Add. 1, p. 5 (1992). See Article 46 of the UN Declaration on the Rights of Indigenous Peoples, which explicitly protects the territorial integrity of states.

peoples and the reluctance of States to grant a broadly understood right to self-determination.'[361] Thus, according to the UN Declaration, self-determination does not entail the right to secession. On the other hand, the argument can be made that since the Declaration now recognizes indigenous peoples as 'peoples', they should, accordingly, enjoy the rights of peoples under international law.[362] In relation to this view, the argument has been raised that although in non-colonial territories the right to self-determination does not amount to the right for a part of the population to secede from existing states, there might be exceptional circumstances in which a group may have a legally and politically tenable right to secession due to their demonstrable inability to achieve the established rights of self-determination guaranteed by law.[363]

What the UN Declaration does, however, recognize, is full self-determination as far as the economic, social and cultural development of indigenous peoples is concerned. The Declaration guarantees the right to self-government in internal and local matters.[364] In addition, effective and meaningful participation – the right to consultation or perhaps even free, prior and informed consent with respect to land and resource use and other important matters, such as participation in international decision-making – has a key role to play in the determination of economic, social and cultural development.

As discussed in this dissertation, one emergent view amongst international legal scholars is that indigenous peoples do have a right to internal self-determination, the right to determine their future within the existing nation-states. It has been argued, accordingly, that two possible methods of implementing the right of internal self-determination may be distinguished: democratic government and autonomy.[365]

During the drafting process of the UN Declaration, indigenous peoples emphasized the right to self-determination as the right of peoples to determine their political destiny in a democratic fashion. Self-determination is therefore at the core of democratic entitlement. Self-determination could thus facilitate special political arrangements in order to enhance the way in which indigenous peoples determine their lives within states.[366]

At the local level, the right to self-government means that indigenous peoples have the right to govern internal matters, such as their traditional lands, and to participate in decisions concerning their lands. The UN Declaration has been criticized for failing to establish terms and legal procedures which would help to determine the legal relationship between states and indigenous autonomous entities.[367] It should be noted, however, that the right to self-government was supported even by the states that abandoned the Declaration.

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[361] See Fitzmaurice, M. (2009), at 151.

[362] See Koivurova, T. 'Alkuperäiskansojen itsemääräämisoikeus kansainvälisessä oikeudessa' [The right of self-determination of indigenous peoples in international law] in M. Aarto and M. Vartiainen, Oikeus kansainvälisessä maailmassa [Law in a changing world], Edita Publishing Oy, Lapin yliopiston oikeustieteiden tiedekunta [University of Lapland, Faculty of Law] (2008), pp. 249-269, at 268.

[363] See *Reference re Secession of Quebec* (1998) 2 S.C.R. 217.

[364] Article 4.

[365] See Fitzmaurice, M., 'The Sámi People: Current Issues Facing an Indigenous People in the Nordic Region', *The Finnish Yearbook of International Law*, Volume VIII, Martinus Nijhoff Publishers (1997): 200-243, at 237.

[366] Davis, M. (2008), in chapter 'reflections on the most controversial provisions', 'Indigenous Peoples' Right to Self-Determination, available at: http://kirra.austlii.edu.au/au/journals/MelbJIL/2008/17.html> (visited 1 January 2010).

[367] Panzironi, F., Indigenous Peoples' Right to Self-Determination and Development Policy, Faculty of Law, University of Sydney (2006), at 87.

Furthermore, most of the countries that accept the fact that they have an indigenous population have established some sort of self-government system. Although there are no international legally binding instruments explicitly guaranteeing the right of indigenous peoples to self-government, it has been argued, for instance, that ILO Convention No. 169 establishes *de facto* recognition of the right to self-government.[368]

The right to (internal) self-determination cannot be limited to participation in local affairs since perhaps the most crucial issues for indigenous peoples are governed globally. It can thus be argued that the internal right to self-determination of indigenous peoples within existing states should reflect the question of international personality and the representation of indigenous peoples in international norm-making, since many issues crucial to indigenous peoples are decided in international forums. The right to self-government is an inherent part of sovereignty, and self-government means that the holder of that right has the discretion to act in a certain field in accordance with its own needs and will and without interference by another entity. Or, in terms of gradation, as argued by Meijknecht, the extent to which an entity is sovereign, autonomous, or self-governing is relative to the extent of its capacity to make decisions and take actions concerning its own existence. This, in turn, is an indication of the probability of the existence of legal capacity.[369]

Unfortunately, the Declaration does not make an explicit connection between the right to self-determination and the international representation of indigenous peoples, although it guarantees the right to effective participation at all levels of decision-making. As discussed in this doctoral dissertation, this issue has been taken into account in the Draft Nordic Saami Convention, which, besides guaranteeing the right to self-determination of the Saami people, states in Article 19 that 'the Saami parliament shall represent the Saami in intergovernmental matters. The States shall promote Saami representation in international institutions and Saami participation in international meetings.' Additionally, Article 16 (2) guarantees that State parties cannot engage in or allow any activity that could considerably damage the fundaments of the Saami culture, livelihoods or society, without the consent of the Saami Parliaments, which have a decisive vote.[370] This is a very strong statement that could also be applicable in the environmental context, where there is an environmental threat that could have a dramatic impact on the Saami people.

All in all, the right to self-determination, when fully recognized in international law, would open up a new era, going deeper into the relations between states and indigenous peoples, both domestically and internationally, indicating a decisive shift in the legal position of indigenous peoples from the status of being objects of international law to being legal subjects.

[368] See, for instance, Myntti, K., 'National Minorities, Indigenous Peoples and Various Modes of Political Participation' in F. Horn (ed.), Minorities and Their Right of Political Participation, The Northern Institute for Environmental and Minority Law, University of Lapland, Juridica Lapponica 16 (1996), pp. 1-25, at 24.
[369] Mejknecht, A., Towards international personality: The position of minorities and indigenous peoples in international law, Antwerpen: Intersentia-Hart (2001), pp. 35-37.
[370] See the analysis by Fitzmaurice in Fitzmaurice, M. (2009), pp. 152-156.

1.3. Arctic Indigenous Peoples: A Lesson to be Learned?

The Arctic region includes the ice-covered Arctic Ocean and surrounding land, covering all of Greenland and Spitsbergen, and the northern parts of Alaska, Canada, Finland, Island, Norway, Russia and Sweden. The Arctic as a region has great importance, especially for the unique nature of its geophysical and climatic conditions. The total area of the region is about 14.5 million square kilometres, and it has been inhabited by humans for close to 20,000 years. [371]

Environmental changes impacting human lifestyles are of great concern in the Arctic, especially the presence of hazardous chemicals and heavy metals, over-fishing, ozone depletion and, more recently, climate change.[372] These phenomena have also focused international attention on the Arctic as a critical zone for global environmental change, making the Arctic area a natural scientific laboratory for studying global environmental issues. [373] Some of the most alarming signs in recent years that Arctic environmental problems are global rather than regional concerns include the contamination of lichen and reindeer (which eat the lichen) in Northern Scandinavia in the aftermath of the Chernobyl disaster, the discovery of PCBs in the breast milk of Canadian Inuit women (which were found to be four times higher than those in women living in southern Canada), and Arctic haze, which provides the best example of the long-range transportation of atmospheric pollution.[374]

Additionally, the global quest for natural resources, the expansion of capitalist markets and the influence of transnational practices on the periphery has resulted in an internationalisation of the circumpolar north.[375] As pointed out by Nuttall, the anthropogenic causes and consequences of environmental change and degradation demonstrate how regional environmental change in the Arctic cannot be viewed in isolation, but must be seen in relation to global change and global processes.[376]

The Arctic regions of Alaska, Canada, Greenland, northern Scandinavia and Siberia are homelands for a number of diverse indigenous peoples. In Alaska the principal indigenous peoples are the Inupiat, Yup'ik, Alutiiq and Athabaskans. In Canada and Greenland, the largest indigenous people is the Inuit, although Canada also has a large number of other First Nations, such as the Athabaskans and Gwich'ins. In Scandinavia the indigenous population consists of the Saami people, and in Siberia the indigenous groups include the Chukchi, Even, Nenets and many more. In addition, there are Saami living on the Kola Peninsula in northwest Russia and Yup'ik in areas along the far eastern coasts of Siberia.[377] Indigenous peoples make up 10% of the Arctic population. However, nearly

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[371] Nuttall, M. (ed.), Encyclopedia of the Arctic. Preface. Harwood: Routledge (2004); available at: < http://www.routledge-ny.com/ref/arctic/preface.html> (visited 17 February 2009).
[372] Nuttall, M., Protecting the Arctic, Indigenous Peoples and Cultural Survival, Routledge, London (1998), at 1; Selin, H. and Selin, N., 'Indigenous Peoples in International Environmental Cooperation: Arctic Management of Hazardous Substances' RECIEL 17 (1) (2008): 72-83, at 74.
[373] Nuttall, M. Ibid.
[374] Nuttall, M. (1998), at 8. See also AMAP (Arctic Monitoring and Assessment Programme), Arctic Pollution Issues: A State of the Arctic Environment Report, AMAP, Oslo (1997), at vii.
[375] Nuttall, M. (1998), at 8.
[376] Ibid.
[377] See, for instance, Arctic Peoples, at: <http://www.allthingsarctic.com/people/index.aspx> (visited 13 November 2007).

half of all Canadian Arctic residents and the majority of the people living in Greenland are indigenous.[378]

From the early contacts with Europeans, indigenous societies have undergone significant changes.[379] Later, Arctic indigenous peoples have been increasingly affected by the above-mentioned processes of globalization and environmental changes, which have caused many socio-economic and other lifestyle changes.[380]

The various groups of indigenous peoples have their own distinctive cultures and languages, histories and economies ranging from reindeer herding and subsistence seal hunting to more commercial pursuits such as industrial fishing, salmon canning, timber production, oil-related business or financial enterprise.[381] Despite the processes of modernization, a great number of the members of different Arctic indigenous peoples continue to rely on natural resources and practice their traditional livelihoods, wholly or partly, for the maintenance of their economic, social and cultural prosperity.

Different components of modernization such as industrial development, environmental problems, social change, immigration and tourism all pose threats to the traditional lands and livelihoods of Arctic indigenous peoples. In response, indigenous groups have actively started to fight for and, in some cases, have achieved increasing recognition and self-governing power, as well as a degree of control over resource development and management.[382] Essential in the claims of the Arctic indigenous peoples has been that their demands for ownership of or title to lands and resources are based on two claims: that they have a unique and special relationship to the Arctic environment which is essential for social identity and cultural survival, and that they have never given up their rights over lands and resources in the first place. Their rights are thus original, inherent ones that states can only affirm.[383]

On the contrary, land has been expropriated and resources exploited without due regard to indigenous peoples. As has happened to many indigenous peoples around the world, claims to lands and resources in the Arctic are based on historical rights that have a strong cultural dimension: the Arctic environment not only sustains indigenous peoples in an economic sense, it also nourishes them spiritually, providing a fundamental basis for the distinctive cultures and ways of life they are seeking to protect.[384]

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[378] Arctic Climate Impact Assessment, Impacts of a Warming Arctic, Cambridge University Press (2004). See also Selin, H.and Selin, N. E., RECIEL 17 (1) (2008): 72-83, at 74.

[379] Cultural changes and the western way of life and implementation of state policies have increasingly affected indigenous existence in many ways at least from the beginning of the 20th century. See Arctic Human Development Report (AHDR), Stefansson Arctic Institute (2004), at 49; Nuttall, M., 'Indigenous Peoples, Self-determination and the Arctic Environment', in M. Nuttall and T. V. Callaghan (eds.), The Arctic – Environment, People, Policy, Harwood Academic, Amsterdam (2000), pp. 377 – 410, pp. 377-378.; Nuttall, M., Protecting the Arctic, Indigenous Peoples and Cultural Survival, Routledge, London (2002), pp. 53-54.

[380] See, generally, AHDR (2004).

[381] Nuttall, M. (1998), at 2.

[382] Ibid.

[383] Ibid., at 3.

[384] Ibid. See also AMAP (1997); ACIA (Arctic Climate Impact Assessment) 2005, Cambridge: Cambridge University Press, at 4; Inuit Petition to the Inter-American Commission on Human Rights, Violations Resulting from Global Warming Caused by the United States, December 7, 2005 by Sheila Watt-Cloutier et al. with the support of the Inuit Circumpolar Council.

Indigenous peoples and their communities feel that many of the social, economic and environmental problems they experience can be overcome by achieving political autonomy and economic self-sufficiency. At the very least, they demand the right to be involved in the decision-making processes that affect their environments and lives.[385]

Although protecting the Arctic environment is of great concern to indigenous peoples, they argue that environmental protection must constitute a vital part of an overall process of sustainable development throughout the circumpolar north. For indigenous peoples, as Nuttall maintains, sustainable development and environmental protection are not just a matter of improving the quality of life, but involve questions of social and economic equity, cultural survival, and political devolution. Increasingly, the debate over environmental protection and resource development in the Arctic culminates in who should benefit from the use of the Arctic environment and the development of its resources.[386]

Despite the fact that the national legal systems of the Arctic states reflect different historical, traditional and socio-cultural values, the legal systems in the Arctic states are also heterogeneous[387]; there is a general development in the Arctic states towards the recognition of internal self-determination in the form of different self-government arrangements.[388] Two main self-governance models that have been used in the Arctic are public government models, which give all the residents of the region a degree of self-government (for example, Nunavut and Greenland), and self-government based on indigenous membership only (for example, native tribal government in Alaska).[389]

Since the 1980s, indigenous peoples' organisations have become increasingly important actors in Arctic environmental politics, giving a greater voice to indigenous peoples throughout the Arctic area.[390] One important milestone for this activism took place as early as 1973, when the Arctic Peoples Conference was held in Copenhagen, where Greenlandic, Saami and Northern Canadian indigenous peoples gathered to share experiences of their marginalisation by government and industry.[391] The concerns of indigenous peoples regarding the preservation of their traditional livelihoods and environments formed the basis for further progress in international cooperation and joint action for participation in policy-making for their regions.[392]

Arctic indigenous peoples have established their own organizations from the late 1970s to the present. One of the most visible players in international arenas has been the Inuit Circumpolar Council (ICC), which was established in 1977 (as the Inuit Circumpolar Conference) in Alaska. The ICC has several primary goals such as seeking full and active participation in the political, economic, and social development in Inuit homelands and developing and encouraging long-term policies to safeguard the Arctic environment.[393]

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[385] Nuttall, M. (1998), at 15.
[386] Nuttall, M. (2000), at 378.
[387] Bankes, N., 'Legal Systems' in AHDR (2004), pp.101-118, at 102.
[388] See Broderstad, G. and Dahl, J., 'Political Systems' in AHDR (2004), pp. 85-100.
[389] Bankes, N. (2004); Broderstad, G. and Dahl, J., ibid.
[390] Nuttall, M., Indigenous Peoples' Organisations and Arctic Environmental Co-operation, in M. Nuttall and T.V. Callaghan (eds.) (2000), at 621.
[391] Kleivan, I., 'The Arctic peoples' conference in Copenhagen, November 22-25, 1973'. *Études Inuit Studies* 16 (1-2) (1992): 227-236.
[392] Semenova, T., 'Political mobilisation of northern indigenous peoples in Russia', *Polar Record* 43 (224), United Kingdom (2007): 23-32, at 24.
[393] See the ICC webpage at: <http://www.inuit.org/index.asp?lang=eng&num=2> (visited 9 May 2009).

Indigenous peoples have actively argued the case for the inclusion of indigenous knowledge in strategies for environmental management and sustainable development. Over the last decade in particular, these organisations have played an important role in agenda-setting and political debate with respect to the Arctic environment and resource development, and have gained international visibility and credibility through their participation in policy dialogue and decision-making processes at the regional, national and international levels.[394]

The process of Arctic environmental co-operation, starting with the signing in 1991 of the Declaration on the Protection of the Arctic Environment and the Arctic Environmental Protection Strategy (AEPS) by eight states of the region (the five Nordic states, Canada, the United States and the Russian Federation), is a regional environmental arrangement that involves Arctic indigenous peoples in its work in a unique way. From the beginning, an important objective of the AEPS, and one which has subsequently been carried on with the formation of the Arctic Council, has been to take notice of the concerns of indigenous peoples and to include their perspectives on the Arctic environment.[395]

Whereas the organizations of Arctic indigenous peoples were originally able to participate only as observers, the establishment of the Arctic Council in 1996 created for them a new category of permanent participant. The category of permanent participant is distinct from that of observer and was created 'to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council'.[396]

As discussed in this dissertation, the status of permanent participants means that although the eight Arctic states are the formal members of the Council, framework organizations of Arctic indigenous peoples have been given an unprecedented status in its work: they negotiate at the same table with the Arctic states and may submit proposals and statements for decisions. Even though final decisions are made by the Arctic states in consensus, the permanent participants must, according to the Declaration, be fully consulted.[397]

Besides active participation in all decision-making at the ministerial level, organizations of Arctic Indigenous Peoples as permanent participants are involved in all six working groups that carry out the main work of the Arctic Council.[398] At present, there are six indigenous organizations serving as permanent participants in the Arctic Council: the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, the ICC, the Russian Association of Indigenous Peoples of the North, and the Saami Council.[399]

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[394] Nuttall, M. (2000), at 621.
[395] Ibid., pp. 622-623.
[396] Arctic Council 1996. Declaration on the establishment of the Arctic Council, para. 3. ILM 34: 1385-1390.
[397] See also Koivurova, T. and Heinämäki, L. The Participation of indigenous peoples in international norm-making in the Arctic, *Polar Record* 42 (221) (2006):101-109, at 104.
[398] The Arctic Monitoring and Assessment Program (AMAP); The Protection of the Arctic Marine Environment (PAME); The Emergency Prevention, Preparedness and Response (EPPR); The Conservation of Arctic Flora and Fauna (CAFF); The Sustainable Development Working Group (SDWG); the Arctic Contaminants Action Plan (ACAP).
[399] See more at the Arctic Council webpage at: <http://arctic-council.org/section/permanent_participants> (visited 23 May 2009).

Quite recently, climate change has become a major topic in Arctic co-operation. Arctic indigenous peoples have been actively involved in climate change research, particularly the comprehensive Arctic Climate Impact Assessment (ACIA), which was published in 2004 and was established through cooperation between the International Arctic Science Committee (IASC) and the Arctic Council.[400] A unique feature of the ACIA, from the viewpoint of indigenous peoples, is that it uses indigenous knowledge in parallel with modern science.[401]

Arctic indigenous peoples have provided important experience and models for other indigenous peoples around the world. Changes in the national and regional arenas influence political culture at home and abroad and influence national behaviour in international forums.[402] Indigenous peoples' activism has been an important background factor in establishing the procedures of the Arctic Council.[403]

Joe Linklater, the Chair of the Gwich'in Council International describes its role as a permanent participant in the Arctic Council as follows:

> The Arctic Council has given indigenous peoples an opportunity to actively participate in policy changes that will affect those who choose to live in the Arctic. There is a genuine recognition of the role indigenous peoples can play at the Arctic Council meetings. As indigenous peoples we bring to the table a vast amount of valuable knowledge and we are able to contribute effectively to the discussions on the environment, health, education and social impacts since we are the people who live in the ever-changing circumpolar north.[404]

While gathered in Kuujjunaq on November 2008 to discuss the issue of Arctic Sovereignty, Inuit leaders from Greenland, Alaska and Canada expressed satisfaction with their meaningful and direct role as permanent participants in the Arctic Council, while at the same time, however, expressing their concern that 'the Council leaves many issues considered sensitive by member states off the table, including security, sovereignty, national legislation relating to marine mammal protection, and commercial fishing.'[405]

Concern was expressed, for instance, that Arctic governments have entered into Arctic sovereignty discussions without the meaningful involvement of the Inuit: for instance, the May 2008 meeting of five Arctic ministers in Ilulissat, Greenland. The Kuujjuaq summit noted that while the Ilulissat Declaration asserts that coastal nation-states have sovereignty and jurisdiction over the Arctic Ocean, it totally ignores the rights that the Inuit have gained through international law, land claims and processes of self-

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[400] Arctic Climate Impact Assessment (ACIA) (2005). New York: Cambridge University Press. Available at: <www.acia.uaf.edu/pages/scientific.html> (visited 4 November 2008). See also generally Koivurova, T. and Hasanat Md. Waliul, 'Climate Policy of the Arctic Council', in T. Koivurova, E. C. H. Keskitalo and N. Bankes (eds.), Climate Governance in the Arctic, Hanover: Springer-Verlag (2009) pp. 51-76.

[401] See ACIA, Chapter 3: Changing Arctic: Indigenous Perspectives (2005), pp. 61-97.

[402] Semenova, T. (2007), at 24.

[403] Ibid. See also Tennberg, M. 'Indigenous Peoples' Involvement in the Arctic Council', Northern Notes, IV (1996): 21-32.

[404] Arctic Council Permanent Participants: The Gwich'in Council International, March 2003, Interview by Gunn-Britt Retter, Technical Advisor, Indigenous People's Secretariat, Copenhagen, Denmark, available at: <http://www.gwichin.org/reports/interview-0303.pdf> (visited 20 June 2009).

[405] Arctic Sovereignty Begins with Inuit: Circumpolar Inuit Commit to Development of 'Inuit Declaration on Sovereignty in the Arctic', Siku News, 7 November 2008, available at: <http://www.sikunews.com/art.html?artid=5711&catid=2> (visited 20 June 2009).

government. Inuit leaders expressed their concern about the absence in the Ilulissat Declaration of any reference to international instruments that promote and protect the rights of indigenous peoples.[406]

The Kuujjuaq summit demonstrated the most active role of the Inuit at the national and international levels by stating:

> We, as Inuit leaders, strongly committed ourselves to working both nationally and internationally reminding various actors about the rights of Inuit in matters of the Arctic and called upon the organizers of the December 2009 meeting in Copenhagen of the United Nations Framework Convention on Climate Change to directly and fully involve Inuit in their deliberations and give support to the associated Arctic Day. We called upon the parties to the UN Convention on the Law of the Sea to take into account the rights and interests of Inuit in any matter concerning the Arctic. We called upon the G-8 countries to centrally involve Inuit in their 2010 conference to be hosted by the Government of Canada.[407]

Furthermore, the Kuujjuaq summit called upon Arctic governments to include the Inuit as equal partners in any future talks regarding Arctic Sovereignty. Inuit leaders insisted that 'in these talks, Inuit be included in a manner that equals or surpasses the participatory role Inuit play at the Arctic Council through the ICC's permanent participant status.'[408]

In April 2009, Inuit leaders from Greenland, Canada, Alaska and Russia launched a Circumpolar Inuit Declaration on Arctic Sovereignty.[409] The Declaration emphasizes how Inuit consent, expertise and perspectives are critical to progress on international issues involving the Arctic. It furthermore states that the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and Inuit self-determination and other rights require states to accept the presence and role of the Inuit as partners in the conduct of international relations in the Arctic.[410]

As argued in this dissertation, the Arctic Council, with its unique model of participation, could well serve as a new model enabling indigenous peoples to find a more reasonable status than that of an NGO in international decision-making concerning environmental issues that are relevant to indigenous peoples. This would reflect the current commitment of states to the human rights of indigenous peoples that guarantee their effective participation in matters that directly affect them.

The international indigenous peoples' caucus has also referred to the Arctic Council as a model that could be used in other regions of the world, particularly emphasising the principle of genuine partnership between states and indigenous peoples.[411]

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[406] Ibid.
[407] Ibid.
[408] Ibid.
[409] A Circumpolar Inuit Declaration on Sovereignty in the Arctic, Tromso, Norway, 28 April 2009, available at: <http://www.itk.ca/sites/default/files/20090428-en-Declaration-11x17.pdf> (visited 20 June 2009).
[410] See paras. 3.5 and 3.3.
[411] Indigenous Peoples' Caucus Statement for the Multi-Stakeholder Dialogue on Governance, Partnership and Capacity-Building, 2002. In preparation for the World Summit on Sustainable Development, para. 4, 'Sustainable development governance at all levels' (27 May 2002).

One very exceptional draft for a treaty in the Arctic area that goes even further than the model of the Arctic Council in relation to indigenous Saami people is the Draft Nordic Saami Convention, referred to earlier in this text. The Draft Convention is an excellent example of the active role of Arctic indigenous peoples in claiming the recognition of their rights. The idea for the Convention came from the Saami Council, which represents the Saami people in international forums such as the Arctic Council.[412] The Report on the Draft Saami Convention was submitted by the Expert Committee on October 2005. The composition of the Expert Committee was fully equal in representation as the three Nordic states and the three Saami Parliaments appointed one member each to the Committee, which thus consisted of six members plus their vice members to attain the goal set by the Saami Co-operation Council[413]: to produce a draft text for a Nordic Saami Convention.[414]

The Draft Convention, quite uniquely, enables the Saami to participate in an international treaty on an almost equal footing with the Nordic states.[415] The role of the Saami Parliaments in the Convention is powerful: the convention must be submitted for the approval of all three Saami Parliaments, and it cannot be ratified until the three Saami Parliaments have approved it.[416] As maintained by Koivurova, if the Draft Convention was substantially revised at the actual negotiation stage, then the Saami Parliaments would have an important *veto* power to halt the process if they perceived that the negotiated version of the Convention would undermine their already existing rights under international and national law.[417]

Originally, the idea that the Saami should be a party to the Nordic Saami Convention was even taken up by the working group that studied the need for and basis of the Convention.[418] This position was also supported by scholars. Alfredsson, for instance, was of the opinion that the Saami should be a party to the Convention. He states that although the traditional approach is that states conclude treaties, there can be exceptions. He states: 'Sovereign states may choose to make agreements with non-state entities; accordingly, it is easy and simple for the Nordic States, if they so decide for reasons of equality and justice, to conclude a new convention with and not only about the Sami.'[419] This approach was, however, not supported by the Norwegian and Finnish foreign ministries, which both

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[412] See the Report on the Draft Saami Convention, 'Pohjoismainen saamelaissopimus: Suomalais-norjalais-ruotsalais-saamelaisen asiantuntijaryhmän 27. lokakuuta 2005 luovuttama luonnos', Finnish Ministry of Justice Publication No. H-2183 F, 90-96, at 57.

[413] The Saami Co-operation Council consists of the ministers responsible for Saami affairs and the presidents of the Saami parliaments.

[414] See Koivurova, T., 'The Draft for a Nordic Saami Convention', *European Yearbook of Minority Issues*, Vol. 6, Koninklijke Brill NV., the Netherlands (2006): 103-136, at 107.

[415] See the legal analysis in Koivurova, T., 'The Draft Nordic Saami Convention: Nations Working Together', *International Community Law Review* 10 (2008 b): 279-293. The Draft Nordic Saami Convention has also been studied comprehensively by Fitzmaurice. See Fitzmaurice, M. (2009), particularly pp. 115-127.

[416] Article 49 of the Draft Nordic Saami Convention.

[417] Koivurova, T., (2008 b), pp. 287-288. According to Article 51 of the Draft Convention, if the Convention enters into force, amendments to the Convention must be made in cooperation with the three Saami Parliaments, and only after approval from all of them.

[418] Ibid., at 288.

[419] Alfredsson, G., 'Minimum Requirements for a New Nordic Sami Convention', 68 *Nordic Journal of International Law* (1999): 397-411, at 408.

argued that only states have a right to conclude treaties.[420] The Expert Committee concluded that an agreement between a state and a group of people like the Saami is not an agreement in the meaning of international law, and the same applies to the Saami Parliaments as representatives of the Saami. Similarly, the Expert Committee was of the view that if a treaty was concluded between the states and the Saami Parliaments, the respective convention would be confusing from a legal perspective.[421] Additionally, as Koivurova reminds us, the Draft Convention will still need to enter the actual negotiation stage, and, if successful, the ratification procedure involving the parliaments of the three states. Thus, accepting the Saami or Saami Parliaments as parties to the Convention might have raised many more obstacles than benefits.[422]

At this point, however, it is anything but clear whether the Draft Nordic Saami Convention will be approved by all the governments of the Nordic states. The Draft itself can be seen as an innovative Arctic example of a new basis for an international treaty which acknowledges an indigenous people as a people, equal to all other peoples. It can be said that the recognition of the right to self-determination of Saami People was the basis for the Draft Nordic Saami Convention.[423] It is not, however, easy to see how indigenous peoples could gain a similar position in a global international treaty involving many more states and a great number of indigenous peoples. Therefore, it seems to be more realistic to consider the model of the Arctic Council as the first step to improve the position of indigenous peoples in matters that are crucial for them, such as international environmental matters.

Due to their vast experience in Arctic environmental co-operation, Arctic indigenous peoples have also been, at least to some degree, able to have an influence in international environmental norm-making. Besides participation through NGO's, indigenous peoples have been able to participate through national delegations in some states that voluntarily allowed it. For instance, in the negotiation process on the Stockholm Convention on Persistent Organic Pollutants (2001)[424], representatives of some Arctic indigenous peoples participated in the national delegations of Canada and the United States.[425] The Stockholm Convention importantly recognizes in its preamble that 'Arctic ecosystems and indigenous

[420] The Report, pp. 300-302.
[421] The Report, pp. 148-150.
[422] Koivurova, T. (2008 b), at 291.
[423] Article 3 of the Draft states: 'As a people, the Saami have the right to self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions of international law and of this Convention, the Saami people have the right to determine their own economic, social and cultural development and to dispose, to their own benefit, over their natural resources.' From the Expert Report it becomes clear that the Saami people, under the current rules of international law, are not entitled to secede from the nation-states, but enjoy the external dimension of the right to self-determination by representing themselves in international norm-making procedures. See Henriksen, J.B., Scheinin, M. and Åhren, M., 'Saamelaisten itsemääräämisoikeus' (The self-determination of the Saami people), pp. 263-315 of the Report.
[424] The Stockholm Convention on Persistent Organic Pollutants, adopted 22 May 2001, entered into force 17 May 2004, UN Doc. UNEP/POPS/COMF/4, App II (2001), 40 ILM 532 (2001).
[425] Flöjt, M., 'Arktinen episteeminen yhteisö kansainvälisessä POPs-neuvotteluissa', [The Arctic epistemic community in the international POPs negotiation] in M. Luoma-aho, S. Moisio and M. Tennberg (eds.), Politiikan tutkimus Lapin yliopistossa [Political research at the University of Lapland] Rovaniemi: P.S.C. Inter, University of Lapland (2003), pp. 359-374.

communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional food is a public health issue.'[426]

As pointed out in this dissertation, the challenge of acting as part of the national delegation of a state in international forums is that the amount of influence the indigenous voice may achieve depends on each individual state, as well on the strength of the indigenous groups themselves. There are at least two areas in the Arctic where the Inuit people have been able to play a relatively active role at both the local and international levels, compared to other indigenous peoples of the world. Greenland and Nunavut are two areas where Inuit people constitute a clear majority and have been able to gain a rather extensive autonomous position in their home areas.[427] Additionally, the Inuit of Greenland and Nunavut are strongly represented in Arctic and global forums through trans-national NGO's, such as the ICC.[428]

Concerning the Inuit in Greenland, the new Act of 2005[429] gives full powers to the Government of Greenland to negotiate and conclude agreements under international law on behalf of Denmark 'where such agreements relate solely to matters for which internal powers have been transferred to the Greenland Authorities.'[430] However, as pointed out by

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[426] The Stockholm Convention, 2001, Preamble.

[427] As comprehensively studied by Loukacheva, the cases of Greenland and Nunavut, although they have similarities, also differ in many respects. Until 1954 Denmark, in its report to the UN, listed Greenland as a non-self-governing territory under Chapter XI of the UN Charter, thus confirming its colonial status in relation to the island. The Constitution of 1953 ended Greenland's colonial status by integrating the island into the Kingdom of Denmark. However, Greenland was given no choice other than to opt for integration with Denmark. See Loukacheva, N., 'Arctic indigenous peoples' internationalism: in search of a legal justification', *Polar Record* 45 (232) (2009): 51-58, at 54. Therefore, Alfredsson, for instance, has argued that unlike many other indigenous peoples, the Inuit of Greenland constitute 'a people' within the full meaning of international law. See Alfredsson, G.S., 'Greenland and the Law of Political Decolonization', *German Yearbook of International Law* 25 (1982): 290-308; Alfredsson, G.S., 'The Greenlanders and their human rights choices', in M. Bergsmo (ed.), Human Rights and Criminal Justice for the Downtrodden. Leiden: Martinus Nijhoff Publishers (2003), pp. 453-459. In May 2008 the report of the Danish-Greenlandic Self-Rule Commission recognised Greenlanders as 'a people' under international law. See Gáldu, Resource Centre for the Rights of Indigenous Peoples, at: <http://www.galdu.org/web/index.php?odas=2810&giella1=eng>. (visited 20 June 2009). According to Alfredsson, for instance, this opens various options for Greenland in terms of free association with, integration with, or independent existence from Denmark. See Alfredsson, G.S., 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law', in N. Ghanea and A. Xanthaki (eds.) (2005), pp.163-172. The Inuit in Canada, on the other hand, are not entitled to this possibility under current international law. Additionally, in comparison with the status of Greenland, the scope of Nunavut's autonomy is less advanced and is more centred on the resolution of acute internal matters rather then broad engagement in international affairs. See Loukacheva, N. (2009), at 54.

[428] See Loukacheva, N. (2009), at 54. See also, generally, Abele, F., and Rodon, T., Inuit Diplomacy in the Global Era: The Strengths of Multilateral Internationalism. Canadian Foreign Policy 13 (3): 45-63 (2007); Wilson, G.N., Inuit Diplomacy in the Circumpolar North. Canadian Foreign Policy 13 (3) (2007): 65-80.

[429] Act No. 577 of 24 June 2005 concerning the scope of the full powers to negotiate and conclude international agreements; see the Ministry of Foreign Affairs, Denmark, JTF. File No. 8.U.107, Circular note, available at: <http://ec.europa.eu/development/icenter/repository/annex6_dk_greenland_en.pdf> (visited 20 May 2009).

[430] The Act does not apply to agreements affecting defence and security matters; or agreements which should also apply to Denmark, or agreements to be negotiated within an international organisation of which Denmark is a member. An agreement pursuant to the full powers must in the title refer to 'the Kingdom of Denmark in respect of Greenland.' See the Ministry of Foreign Affairs, Denmark, JTF. File No. 8.U.107,

Loukacheva, this legislation does not amount to an actual transfer of power from Denmark to Greenland to act independently in international affairs, as the Danish kingdom is one subject of international law.[431] However, as Loukacheva maintains, there are no legal obstacles to recognition by the Danish or Canadian governments of the direct involvement of Greenland or Nunavut in international affairs, as long as it does not breach national sovereignty and covers matters relevant to the better fulfilment of the jurisdiction of these units.[432]

However, this kind of direct involvement has not happened as the practical level, at least consistently or on a large scale. Concerning Nunavut, it should be noted that the Nunavut Agreement contains a provision giving the Inuit at least a limited role in international environmental issues. It prescribes: 'The Government of Canada shall include Inuit representation in discussions leading to the formulation of government position in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area, which discussions shall extend beyond those discussions generally available to non-governmental organizations'[433]

But even participation as part of the national delegation of a state might not always be satisfactory from the point of view of indigenous peoples. Indigenous peoples often have a specific agenda that is not always easy to fit into the larger agenda of a state in a balanced manner. In 2006 Greenland, for instance, expressed a desire to have its own delegation in the Nordic Council and to take part in decision-making processes and participate independently in the work of the pillars of Nordic cooperation, such as the Nordic Council and the Nordic Council of Ministers.[434]

As discussed in this dissertation, one of the most significant global environmental processes – the regulation of climate change – is an important example of a situation where the role of indigenous peoples has been far from satisfactory, taking into account the serious nature of the impact of global warming on indigenous communities. The Inuit petition against the United States for the damage that global climate change is causing Inuit people can be seen, in addition to being a legal remedy, as an example of the activism of an Arctic indigenous people, the Inuit, in an attempt to make their voice heard in international forums. It is also a reflection of the fact that indigenous peoples have not been able to participate effectively in the global governance of climate change.[435] Not only Arctic indigenous peoples, but also other indigenous groups worldwide have been pushing for special status and recognition in international climate change governance in order to participate effectively.

It was a very conscious choice of the ICC to make its intentions concerning the petition public from the very beginning. The ICC wanted to highlight the contribution that this petition could make to the world by stating: 'It is our intent to educate not criticize, and to inform not complain […] After all, if we protect the Arctic we will save the

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Circular note, available at:
<http://ec.europa.eu/development/icenter/repository/annex6_dk_greenland_en.pdf> (visited 21 May 2009).
[431] Loukacheva, N. (2009), at 54.
[432] Ibid., at 55.
[433] Nunavut Agreement, 1992, part 9: 54-55 (5.9.2.), available at:
<http://npc.nunavut.ca/eng/nunavut/nlca.pdf> (visited 9 March 2008).
[434] Ibid.
[435] See the article in this dissertation: 'Rethinking the Status of Indigenous Peoples in International Law: Pondering the Role of Arctic Indigenous Peoples and the Challenge of Climate Change.'

world.'[436] Furthermore, the ICC Executive Council Resolution, which explains the purpose of the petition, emphasises the effective participation of indigenous peoples in the climate change regime in order to protect Inuit human rights and interests.[437]

It should also be noted that Arctic indigenous peoples have taken a leading role in the work of the UN Permanent Forum on Indigenous Issues, which was established in 2002. The first chair of the Permanent Forum was a Saami, Ole-Henrik Magga, which had an impact on the number of Saami representatives and NGOs attending the first round of the forum's sessions and increased the visibility of the Saami in the UN.[438] In the Seventh Session of the Permanent Forum on Indigenous Issues (2008), the ICC and Saami Council together formed the Arctic Caucus, which made important statements concerning climate change.[439] The Arctic Caucus recommended that the United Nations Framework Convention on Climate Change (UNFCCC) create a seat at the negotiating table specifically reserved for indigenous peoples, through which they would have direct access to decision-makers and would be able to offer their knowledge in constructive ways.[440] This suggestion comes close to the idea of permanent participation, where representatives of indigenous peoples could participate at the level at which the decisions are made. The Arctic Caucus also, however, expressed its solidarity with other indigenous peoples and reminded us that what we see clearly in the Arctic today will eventually be experienced by other peoples around the world.[441]

Already a year earlier, at its sixth session, the Permanent Forum appointed special rapporteurs to prepare a report on the impact of climate change mitigation measures on indigenous peoples. The recommendations of the Report highlighted the importance of the meaningful participation of indigenous peoples, making a special reference to the Arctic and stating that due to the special vulnerability of the Arctic, United Nations Member States and agencies should designate the Arctic region as a special climate change focal point.[442]

In April 2009, indigenous representatives from the Arctic, North America, Asia, Pacific, Latin America, Africa, the Caribbean and Russia met in Anchorage, Alaska for the Indigenous Peoples' Global Summit on Climate Change; the outcome of the summit was

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[436] Watt-Cloutier, S., Speech Notes for Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, 9th Conference of the Parties to the United Nations Framework Convention on Climate Change, Milan, December 10, 2003, Inuit in Global Issues, 17. ICC, available at: http://www.inuitcircumpolar.com/index.php?ID=253&Lang=En.> (visited 11 December 2007).

[437] Inuit Circumpolar Conference (ICC), ICC Executive Council Resolution 2003-1, available at: <http://www.inuit.org/index.asp?lang=eng&num=244> (visited 5 December 2007).

[438] See Lindroth, M., 'Indigenous-state relations in the UN: establishing the indigenous forum', *Polar Record* 42 (222) (2006): 239-248, at 242.

[439] United Nations Permanent Forum on Indigenous Issues. Statement by the Arctic Caucus – Inuit Circumpolar Council and the Saami Council, Presented by Patricia Cochran, Chair, Inuit Circumpolar Council, Seventh Session, New York, 21 April to 2 May 2008. Available at: <http://www.docip.org/Online-Documentation. 32.0.html?&L=0> (visited 2 June 2008).

[440] Ibid., Item 1.

[441] Ibid.

[442] Tauli-Corpuz, V. and Lynge, A., Impact of climate change mitigation measures on indigenous peoples and on their territories and lands (Submission by UNPFII members). Seventh session of the United Nations Permanent Forum on Indigenous Issues, New York, 21 April-2 May 2008. E/C.19/2008/10, available at: <http://www.un.org/esa/socdev/unpfii/en/session_seventh.html#Documents> (visited 23 May, 2008)

the Anchorage Declaration.[443] The Declaration calls upon the UNFCCC's decision-making bodies to establish formal structures and mechanisms for and with the full and effective participation of indigenous peoples, recommending that the UNFCCC organize regular Technical Briefings by indigenous peoples on traditional knowledge and climate change, recognize and engage the International Indigenous Peoples' Forum on Climate Change and its regional focal points in an advisory role, establish an indigenous focal point in the secretariat of the UNFCCC, appoint indigenous peoples' representatives in UNFCCC funding mechanisms in consultation with indigenous peoples, and finally, take the necessary measures to ensure the full and effective participation of indigenous and local communities in formulating, implementing, and monitoring activities, mitigation, and adaptation relating to the impact of climate change.[444]

Although Arctic indigenous peoples are in a specifically vulnerable position with respect to climate change, the effective participation of indigenous peoples in international environmental decision-making should not be restricted to Arctic indigenous peoples, because environmental issues are crucial to all indigenous peoples around the world. Should indigenous peoples be given a stronger position in international environmental decision-making, using for instance the 'permanent participant' model, the question then necessarily arises of who would represent indigenous peoples. It seems impossible that, since they are so numerous, all indigenous peoples of the world could represent themselves. One possibility, argued in this dissertation, would be for the United Nations Permanent Forum on Indigenous Issues to act as this representative body, bringing the indigenous voice to decision-making. This task would be suitable for the Permanent Forum, with its mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights, as mentioned previously.

This dissertation argues that one possibility would be for the Members of the Permanent Forum to participate in certain environmental regimes, using the model of the 'permanent participant'. Alternatively, the Forum itself could make proposals and statements concerning certain environmental issues in its official meetings, and then choose its representatives for the meetings of the parties to the environmental regime in question. All in all, Arctic indigenous peoples should play an active role, not only because the most severe environmental problems, such as climate change, are most visible in the Arctic, but also because of their vast experience working together with Arctic governments as permanent participants in the Arctic Council.

1.4. Conclusion

The main aim of this dissertation is to study how the traditional livelihoods and way of life of indigenous peoples are protected against environmental interference under international law. Particularly the first two articles – 'The Protection of the Environmental Integrity of Indigenous Peoples in Human Rights Law' and 'Environmental Rights Protecting the Way of Life of Arctic Indigenous Peoples: ILO Convention No. 169 and the

[443] See Indigenous Peoples' Summit on Climate Change, Anchorage Declaration, 2009, available at: <http://www.indigenoussummit.com/servlet/content/declaration.html> (visited 23 June 2009).
[444] The Anchorage Declaration, para. 4.

UN Draft Declaration on Indigenous Peoples' – deal with the human rights norms that are the most relevant from the viewpoint of indigenous peoples in relation to the use of their environment.

As a conclusion it can be said that the right to cultural integrity of indigenous peoples, which explicitly includes the right to traditional livelihoods, can be regarded as the main norm for the protection of the environmental integrity of indigenous peoples in general human rights law. The two international instruments that deal specifically with the rights of indigenous peoples also guarantee a rather extensive protection, for instance, through the land rights provisions.

The right of indigenous peoples to cultural integrity is recognized in many widely ratified international human rights instruments. This right, as accorded in present human rights law, includes the right to environmental integrity. According to the human rights monitoring bodies, the right to culture contains the right to be protected from outside interference, such as the harmful environmental effects of economic or development-related projects that take place in the lands indigenous peoples own, use and occupy. Not every case of interference, however, necessarily amounts to a violation of the right to culture. The crucial factor, according to the UN Human Rights Committee, seems to be that traditional livelihoods should remain sustainable.

The right to effective participation in decisions concerning the lands and environment of indigenous peoples has been seen by human rights monitoring bodies as being included within the right to culture of indigenous peoples. In addition to the right to culture, the right to property, as interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, includes the effective participation of indigenous communities. Furthermore, as previously mentioned, both ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples explicitly guarantee effective participation. Additionally, as discussed, both the CBD and the Rio Declaration emphasize the effective involvement of indigenous peoples in environmental planning and decision-making. The right to participate entails participation in decisions that directly affect the rights and lives of indigenous peoples. This dissertation argues that all kinds of serious human-caused environmental degradation which takes place on the lands of indigenous peoples or which has negative effects on their territories should fall within this category.

It is not entirely clear what it is meant by such participation, but the words 'effective', 'meaningful' and even 'informed consent' that are used, together with the requirement of 'affirmative action', clearly refer to something that goes beyond the average citizen's participation in the public affairs of the state. It certainly means more than just consultation, entailing a truly good faith discussion with the aim of reaching an agreement that is fair to all parties involved. Along with the requirement of effective participation, the Inter-American Court of Human Rights emphasizes benefit sharing as well as environmental and social impact assessment prior to any project that may affect the land rights of indigenous peoples. As mentioned previously, ILO Convention No. 169, the UN Declaration and the CBD all recognize the principle of benefit sharing or/and an equitable compensation. Additionally, along with the CBD and the Rio Declaration[445], ILO

[445] Although the environmental impact assessment is a national procedure under the CBD and Rio Declaration, not guaranteeing a special legal status for indigenous peoples' participation, as part of the

Convention No. 169 contains the requirement for environmental impact assessment. Therefore, it can be concluded that there are developments in international law according to which prior to any project that may have significant impacts on the traditional way of life of indigenous peoples, not only is a good faith consultation with the aim of finding an agreement with the community in question required, but an assessment of the environmental and social impacts must also be carried out. Additionally, the community in question should benefit from the project, or at least be compensated for any losses it suffers.

Besides the rights to culture and property, there are other human rights that can be used for the protection of the traditional way of life and environmental integrity of indigenous peoples. As discussed in this dissertation, rights pertaining to life, health, residence and movement, and the inviolability of privacy or the home have been applied by human rights monitoring bodies in cases relating to the environmental conditions of indigenous peoples. The other environmental rights dealt with in this study are also often applied by human rights monitoring bodies to the situations of indigenous peoples with reference to distinctive indigenous cultural patterns such as their close connection to the environment. Human rights monitoring bodies have thus recognized that due to special cultural circumstances, general human rights can have a particular significance and applicability for indigenous peoples.

At the regional level, the right to property, as applied in an expansive way by the Inter-American Commission and the Inter-American Court of Human Rights, by being linked to the cultural protection of indigenous peoples, seems to offer perhaps the strongest protection against environmental interference on lands indigenous peoples do not necessarily own, but occupy and use. In the Inter-American system, as maintained in this dissertation, there is a recognition that, in some cases, when environmental interference is serious enough, the free, prior and informed consent of the community in question might be necessary. Following the adoption of the UN Declaration on the Rights of Indigenous Peoples, the principle of free, prior and informed consent has been explicitly approved by the Inter-American Court of Human Rights. Additionally, the Inter-American system takes

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work programme on Article 8(j), Parties to the CBD have decided to develop, in cooperation with indigenous and local communities, guidelines for the conduct of cultural, environmental and social impact assessments regarding such developments. On the basis of recommendations by the Open-ended Working Group on Article 8 (j) and related provisions, the seventh meeting of the Conference of the Parties adopted the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to take place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities. According to these guidelines, it is expected that impact assessment procedures and methodologies embodied in the Voluntary Guidelines will play a key role in providing information on the cultural, environmental and social impacts of proposed developments and, thereby, help to prevent their potential adverse impacts on the livelihoods of indigenous and local communities concerned. See Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, Secretariat of the Convention on Biological Diversity (2004), at 1., available at: <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf> (visited 20 January 2010).

into account the customary laws and practices of indigenous communities when applying certain human rights, such as the right to property.

Concerning the participatory rights of indigenous peoples, a serious doubt can be expressed whether such rights offer effective protection against global environmental interference such as climate change. Even when indigenous peoples have been able to participate in environmental protection in their own territories, a serious gap is revealed when we talk about the participation of indigenous peoples in international environmental decision-making.

As shown in the article 'Rethinking the Status of Indigenous Peoples in International Environmental Decision-Making; Pondering the Role of Arctic Indigenous Peoples and the Challenge of Climate Change', global environmental problems such as climate change can have dramatic implications for the human rights of indigenous peoples, as illustrated by the Inuit Petition against the United States. Since, on one hand, the traditional human rights monitoring mechanisms are not necessarily useful tools for dealing with global environmental interference, as shown by the Petition, and whereas, on the other hand, the consequences of global environmental problems such as the impact of climate change are often irreversible, the most important issue from the viewpoint of indigenous peoples is having a possibility to influence the shaping of international environmental policies and law.

As discussed in this dissertation, the question of who can participate in the making of international law is traditionally seen as rather clear. Whereas states, as the primary subjects of international law, create international legal rules and principles, indigenous peoples are able to participate in international norm-making concerning the environment with the status of non-governmental organizations (NGOs). Along with other NGOs participating in international policy-making processes, organizations of indigenous peoples have only limited possibilities to influence the process and make their voices heard. This dissertation, however, claims that states, insofar as they have committed themselves to international human rights guaranteeing the effective participation of indigenous peoples, are under a legal obligation to strengthen the participatory status of indigenous peoples in international environmental decision-making.

In addition to already established and fully recognized human rights, at present, indigenous peoples are increasingly seen as the only distinct category of peoples other than nation-states that are entitled to self-determination. However, as has been mentioned, this right does not extend to a full right to secede from existing states; rather, indigenous peoples are entitled to govern their own affairs within states. This dissertation argues, however, that the right to self-determination cannot be limited to participation in local affairs since perhaps the most crucial issues for indigenous peoples are being governed at the global level. Self-determination should be interpreted as what it truly is: the ability and the right of a people to choose its own destiny. Even though in the case of indigenous peoples this must be done within the framework of existing states, self-determination should grant indigenous peoples a better status in international policy-making, given that they have no control over global problems through structures of national and local self-governance.

There are many ways in which states could strengthen the participatory position of indigenous peoples in environmental decision-making without jeopardizing their sovereignty. One would be to allow indigenous peoples to be a permanent and obligatory

part of national delegations of states in international environmental processes. In that case, however, how well indigenous peoples could make their voices be heard would be up to individual states. As suggested in this dissertation, the model of the Arctic Council might lead the way, as it does not equate indigenous peoples with NGOs or states but gives them a kind of intermediate position with permanent participant status but no formal decision-making power. If the permanent participation model were used, this dissertation suggests that the UN Permanent Forum on Indigenous Issues would be a suitable body to represent indigenous peoples in international environmental regimes.

As shown in the article 'Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?', one predominant presumption in present international legal and political discourse is that indigenous peoples, when allowed to participate, can make a valuable contribution to the sustainability of the global environment due to their traditional knowledge and practices relating to the environment. One concrete example examined in this dissertation to support this presumption shows how the commitment of the World Bank to respect the human rights of indigenous peoples can have a positive influence on the sustainability of the environment in which these peoples live. The World Bank not only requires the effective participation of indigenous peoples in Bank-funded projects that take place on the lands indigenous peoples traditionally occupy, but also requires that the borrower pay particular attention to the need to protect those lands and resources as well as the cultural and spiritual values that indigenous peoples attach to the lands. The World Bank also advises borrowers to take into account indigenous peoples' natural resource management practices and the long-term sustainability of such practices. Additionally, as already mentioned in this synthesis, indigenous peoples' participation in different forums with their message concerning a holistic worldview has the potential to play an important role in the global adoption of a new environmental ethic.

This dissertation maintains, however, that although the rights of indigenous peoples often seem to go hand in hand with the question of environmental integrity, there may be situations where protection of the traditional rights of indigenous peoples does not necessarily advance the sustainability of all natural species. This dissertation discusses two possible conflicting regimes – the International Whaling Regime and the Polar Bear Regime - where the requirement of sustainability might sometimes present challenges to the traditional hunting rights of indigenous peoples.

This dissertation asks whether indigenous peoples, once recognized as having special rights in relation to environmental use and the management of the environment, may also have duties towards the environment. The special status that indigenous peoples are now internationally accorded in relation to the environment as well as public statements and declarations made by indigenous peoples themselves describe the environmental responsibility that they have towards 'Mother Earth' and future generations.

Additionally the right to self-determination, when extended to indigenous peoples, means that indigenous peoples should be free to decide on the development of their culture. This dissertation argues that this should not, however, under any circumstances mean that indigenous peoples are free to engage in environmentally unsustainable practices. If indigenous peoples are to be subjects of international law, they must necessarily be bound by the same environmental principles – such as the requirement of sustainability – as states. Therefore, the cultural practices of indigenous peoples should

not be preserved and encouraged, even when necessary for their economic and social well-being, unless the sustainability of all species can be guaranteed.

Thus it can be said that the right to be a part of nature inherently includes the responsible use of nature. This dissertation maintains that if indigenous peoples accept the responsibility that their status as 'guardians of nature' entails, the Earth and humankind could truly benefit from traditional ways of perceiving and interacting with the natural environment. As mentioned previously, indigenous peoples have an important role to play since they have the potential to act as leading examples in international forums by bringing their holistic approach, which combines ecological and social concerns in a balanced way.

It can be concluded that the discussion of environmental rights, in the end, culminates in determining the legal status of indigenous peoples in international law. As discussed in this dissertation, when viewing recent developments in international law concerning the status of indigenous peoples, one realizes that the door of international law subjectivity is opening, cautiously but surprisingly consistently, to indigenous peoples. As mentioned, indigenous peoples have already achieved a large measure of legal personality as distinct societies with distinctive collective rights. For indigenous peoples, the question of international law subjectivity is fundamental. It is a crucial matter of equality and justice. In relation to international environmental decision-making, the effective participation of indigenous peoples is a matter of environmental justice. As described by Shelton, environmental justice seeks to ensure procedural equity through decision-making based on relevant criteria, and with the participation of those affected in order to produce an outcome that treats all affected groups fairly.[446]

As argued in the article 'Inherent Rights of Aboriginal Peoples in Canada – Reflections of the Debate in National and International Law' in this dissertation, the sovereignty of colonizers, such as Canada, based on the principle of *terra nullius* cannot be considered acceptable in the modern world. With regard to the Canadian example, given that Aboriginal peoples were there at the time of European contact and that their societies contained the same elements as those found in other societies, the only conclusion that can be drawn is that Aboriginal nations had rightful jurisdiction and ownership of the land when Europeans first arrived; these peoples were – and still are – holders of inherent Aboriginal rights.

This dissertation argues, however, that by defining and limiting inherent Aboriginal rights to the right to a traditional way of life, the Supreme Court of Canada unquestionably accepts the sovereignty of Canada over its Aboriginal peoples based on the principle of *terra nullius*. By accepting Canada's sovereignty the Court at the same time excludes any possibility for the recognition of Aboriginal sovereignty. The contradiction which necessarily follows from Canada's recognition of Aboriginal peoples as self-governing nations at the time of European arrival, on the one hand, and non-recognition of the rights of self-government of Aboriginal peoples by the Canadian legal system, on the other, has yet to be resolved. Going beneath the surface would reveal another aspect of the same contradiction: whereas the principle of *terra nullius* has been discredited by the world community and Canada itself in relation to the process of international decolonization, Canadian sovereignty and the extinguishment of Aboriginal sovereignty rely on the same principle.

[446] Shelton, D., 'Equity', in D. Bodansky, J. Brunnée and E. Hey (eds.) (2007), pp. 639-662, pp. 640-641.

This dissertation maintains that by recognizing inherent Aboriginal rights to traditional livelihoods and traditional use of land, while at the same time accepting the fact that Aboriginal peoples were self-governing peoples at the time of European contact, the Supreme Court of Canada opens up a justification for a wider recognition of the inherent rights approach. The extension of the inherent rights approach could mean that the Aboriginal peoples of Canada may have rights of self-government that are not solely subordinate to the Canadian legal system but perhaps comparable to or even above it. Instead of extinguishing Aboriginal rights, the inherent rights approach would require an affirmation of Aboriginal rights as the basis of land claims and self-government negotiations between the Canadian state and Aboriginal peoples.

The inherent rights approach, when fully applied by other countries that have based their sovereignty on similar circumstance to those of Canada, would recognize indigenous peoples as peoples equal to all other peoples. This would be a significant shift in the legal status of indigenous peoples, burying once and for all the last vestiges of colonization regarding indigenous peoples and heralding the birth of justice to counteract one of the great injustices of our history.

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The Protection of the Environmental Integrity of Indigenous Peoples in Human Rights Law

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Introduction

The aim of this article is to study how the environmental integrity[1] of indigenous peoples is protected through human rights mechanisms.[2] In this context, the protection

[1] There is no generally accepted definition of this widely used concept. However, generally, and also in the context of this article, 'environmental integrity' refers to the sustenance of important biophysical processes which support life and which must be allowed to continue without significant change in order to maintain the balance and health of life support systems of nature. See generally, for instance, Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International & Domestic Legal Perspectives* (Earthscan, London, Sterling, VA, 2008) at 3-22.

[2] Despite the fact that the world community has not as yet succeeded in agreeing on any universally accepted legally binding right to a 'clean' or 'decent' environment - regardless of attempts by different forums - some regional instruments, as well as several non-legally binding arrangements, in the fields of human rights and international environmental law, recognize this right. See, for instance, the African Charter of Human and People's Rights, Banjul, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *International Legal Materials* (1982) 58, Art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, San Salvador, adopted 17 November 1988, entered into force 16 November 1999, O.A.S. Treaty Series No. 69 (1988), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992), Art. 11; American Convention on Human Rights, San José, adopted 22 November 1969, entered into force 18 July 1978, O.A.S. Treaty Series No. 36, 1144 *United Nations Treaty Series* 123. The evolution of the concept of a human right to a clean environment dates back to the United Nations Stockholm Declaration on the Human Environment 1972 (Declaration of the U.N. Conference on the Human Environment of 16 June 1972, UN. Doc.A/CONF. 48/14/Rev.1 (1973)), which provides: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'(Principle 1). In the field of international environmental law, the ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention, Aarhus, signed 25 June 1998, entered into force 30 October 2001, 2161 *United Nations Treaty Series* 450) recognizes explicitly both a substantive and a procedural right to a clean environment.

of the environmental integrity of indigenous peoples means the protection of their cultural integrity[3] against any kind of environmental interference that negatively affects the ability of these peoples to practise their traditional, nature-based livelihoods. Cherie Metcalf illustrates this point, maintaining: 'Cultural protection for indigenous peoples involves providing environmental guarantees that allow them to maintain the harmonious relationship with the earth that is central to their cultural survival.'[4]

Both western science and indigenous peoples'[5] observations indicate that many of the world's present environmental problems – mainly caused or increased by the activities of human beings – are starting to have more direct and serious impacts on humans in many ways. One example of this trend is quite recently established extensive research known as Arctic Climate Impact Assessment (ACIA). This scientific report, which includes indigenous peoples' traditional knowledge, points to dramatic climatic changes in and effects on the Arctic environment and people, especially indigenous communities, many of whom still continue to practise a way of life that is closely connected to the natural environment. According to the ACIA, the traditional way of life of Arctic indigenous peoples is under enormous threat due to predicted and partly already occurring impacts of global climate change.[6]

Global climate change is a major example of environmental interference threatening indigenous peoples, particularly in the Arctic area. This is the reason why Sheila Watt-Cloutier, the president of the Inuit Circumpolar Council (ICC), an organisation

[3] 'Cultural integrity of indigenous peoples' means in this context the possibility for indigenous communities to enjoy and practice their cultural components such as traditional livelihoods without an external threat. Thus there is a fundamental interconnection between the environmental integrity and the cultural integrity of indigenous peoples (see *supra* note 1).

[4] Cherie Metcalf, 'Indigenous Rights and the Environment: Evolving International Law', 35 *Ottawa Law Review* (2003-2004) 103-140 at 107.

[5] The term 'indigenous peoples' is usually used in reference to those individuals and groups who are descendants of the original populations residing in a country. According to estimates, there are 300,000,000 to 375,000,000 indigenous people residing in some 75 countries, or about 6% of the world's population (see Table 1 in Robert K. Hitchcock, 'International Human Rights, the Environment and Indigenous Peoples', 5 *Colorado Journal of International Environmental Law and Policy* (1994) 1-21 at 3). No single agreed definition of the term 'indigenous peoples' exists. One of the most famous definitions is that of UN Special Rapporteur on Indigenous Peoples Martinez Cobo, which defines indigenous peoples as people who have '[a] historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories [… and are] determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity as the basis of their continued existence as peoples, in accordance with their own cultural, religious, social institutions and legal systems' (The Study of the Problem of Discrimination against Indigenous Population: UN Doc.E/CN4/Sub 2/1986/7 (1987), Vol. V, para. 379).

[6] See ACIA, *Arctic Climate Impact Assessment* (Cambridge University Press, 2005), particularly Chapter 3: Changing Arctic: Indigenous Perspectives, at 61-97 (available at: <www.acia.uaf.edu/pages/scientific.html> (visited 30 March 2007)).

representing Inuit people in four Arctic states[7], has filed a petition, together with other Inuits, against the United States in the Inter-American Commission on Human Rights[8]. According to the petition, the impacts of climate change, which are caused by acts and omissions by the United States, violate the Inuits' right to culture and other fundamental human rights protected by the American Declaration of the Rights and Duties of Man.[9]

Due to the present fact that the Inter-American Commission on Human Rights has not made a final decision whether it will consider the case, the petition is not analyzed in this article. The petition is, however, an excellent example of how the environmental integrity and cultural integrity of indigenous peoples go hand in hand. Some parts of the petition are thus used as examples of how environmental interference such as climate change can have detrimental effects on the environmental integrity and thus violate the human rights of indigenous peoples.

Although the Inuit petition is the first human rights case seeking to prove the link between the impacts of climate change and human rights, the interconnection between these two has been recognized in other forums by the international community. Worthy of mention in this respect is a recent resolution of the UN Human Rights Council on climate change and human rights.[10] Although the resolution does not specifically refer to indigenous peoples, it highlights the implications of climate change for human rights and requests the Office of the United Nations High Commissioner for Human Rights to conduct a study of the relationship between climate change and human rights.[11]

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[7] Alaska (USA), Canada, Greenland (Denmark) and Russia.

[8] The Inter-American Commission on Human Rights (IACHR) is one of the two bodies in the Inter-American system for the promotion and protection of human rights. The IACHR is an autonomous organ of the Organization of American States (OAS). Its mandate is found in the OAS Charter and the American Convention on Human Rights. Its mandate is to receive and investigate individual human rights petitions as well as to observe the general human rights situation in the member states by making on-site visits to countries and stimulate public consciousness regarding human rights. It submits cases to the Inter-American Court of Human Rights and appears before the Court in the litigation of cases.

[9] These include their rights to the benefits of culture, property, the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home. See American Declaration of the Rights and Duties of Man, OAS, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc. 6 rev.1 (1992) at 17; Inuit Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by the acts and omissions of the United States, December 7, 2005, at 5 (available at: <www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>, (visited 29 March 2007)).

[10] UN General Assembly, Human Rights Council, Seventh session, Agenda item 3, *Human rights and climate change*, A/HRC/7/L.21/Rev.1, 26 March 2008 (available at: <ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/7/L.21/Rev.1> (visited 24 April 2008)).

[11] *Ibid*., para. 1.

In addition to the implications of climate change, the environmental integrity of indigenous peoples can be threatened by many other factors such as economic or development-related projects of the state or third parties in the lands of indigenous peoples. The traditional, nature-based way of life is often considered to be the crux of the culture of indigenous peoples.[12] As pointed out by the UN Special Rapporteur on Indigenous Peoples: 'The relationship with the land and all living things is at the core of indigenous societies.'[13] It is the traditional way of life which distinguishes indigenous communities from other people, making them special beneficiaries of environmental rights.

Environmental rights comprise those human rights that can be used to protect indigenous peoples from environmental interference.[14] Besides the right to culture, other human rights can also be applied in the environmental context. This article studies the applicability of the rights to life, health, property, residence and movement and inviolability of privacy or the home in the context of indigenous peoples and the environment.[15]

The right to culture of indigenous peoples, as guaranteed in international human rights law, is regarded in this study as the main norm for protecting the environmental

[12] Indigenous peoples often live in the most vulnerable ecosystems, such as in areas of the highest biological diversity or in the extremely sensitive Arctic regions. According to estimates made in 1990, around 200 million of the world's 300 million indigenous people are living in vulnerable ecosystems. See the Report of the Commission on Human Rights at its forty-sixth session, E/1990/22-E/CN.4/1990/94 (1990), at 8.

[13] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-third Session, Item 5 of the provisional agenda, *Prevention of discrimination and protection of indigenous peoples and minorities: Indigenous peoples and their relationship to land*, Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes, Item 13 (available at: <www.hri.ca/fortherecordCanada/documentation/commission/e-cn4-sub2-2001-21.htm> (visited 16 March 2007)).

[14] There is no definition of 'environmental rights', but the concept includes rights from both human rights law and international environmental law (see, for instance, Dinah Shelton, 'Environmental Rights' in Philip Alston (ed.), *Peoples' Rights* (Oxford University Press, 2001) 185-258; Dinah Shelton, 'Environmental Rights in Multilateral Treaties Adopted between 1991 and 2001', 32 *Environmental Policy and Law* (2002) 70-77.

[15] Procedural rights, such as rights to participation, environmental information and effective remedies no doubt have some relevance in the protection of the rights of indigenous peoples from environmental interference. They are not, however, covered in this study. As to right to public participation, see *infra* note 57. Regarding the right to environmental information, no cases have been brought by members of indigenous peoples. According to the case law, it seems that the European system does not recognize a positive obligation of a state to inform citizens upon request. See, for instance, the case of *Leander* v. *Sweden* (European Court of Human Rights, ECHR Series A (1987), No 117, para. 74.). On the other hand, the Inter-American Commission on Human Rights recognizes the positive duty of a state in some cases to distribute information (see *Marcel Claude Reyers et al v. Chile,* Case No. 12.108, Report No. 60/03, 10 October 2003, para. 2 (available at: <www.foiadvocates.net/files/adm_report.pdf> (visited 9 March 2007)). As regards the right to effective remedies, even though it applies to indigenous peoples, it is clearly a general right applicable to all people, thus it does not have much special weight in cases involving indigenous peoples.

integrity of indigenous peoples. The right to a traditional way of life – as a part of the culture – is an environmental right that does not apply to all people but has a special significance for indigenous peoples due to their special relationship to nature.

The other environmental rights dealt with in this study are also often applied by human rights monitoring bodies to the situations of indigenous peoples with reference to distinctive indigenous cultural patterns such as the close connection to the environment. Human rights monitoring bodies have thus recognized that due to special cultural circumstances, general human rights can have a particular significance and applicability for indigenous peoples. This idea can be seen, for instance, in the statement of the Inter-American Commission of Human Rights in the *Belize Maya* case,[16] where the Commission emphasized the *distinct nature* of the right to property as it applies to indigenous people, 'whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality.'[17]

Even though the environmental rights of indigenous peoples have also been developed in the field of international environmental law, starting with the Rio Conference on Sustainable Development[18], this article focuses on general human rights law. Despite the significance of instruments specifically designed to protect the rights of indigenous peoples such as ILO Convention No. 169[19] and the UN Declaration on

[16] *Maya Indigenous Communities of the Tolero Distric (Belize Maya),* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004) at 727 (available at: <www1.umn.edu/humanrts/cases/40-04.html> (visited 22 January 2007)).

[17] *Ibid.*, para. 155.

[18] The Rio Declaration on Environment and Development declares in Principle 22 concerning indigenous peoples: 'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.' (Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/Conf.151/26/Rev.1 (Vol. 1) (1993), at 3, 31 *International Legal Materials* (1992) 874); The Convention on Biological Diversity, created as an outcome of the Rio Conference, sets legally binding rights for indigenous peoples and requirements for the state in that respect. Article 8(j) states: 'Subject to [their] national legislation, [countries shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations, and practices' (Convention on Biological Diversity, Rio de Janeiro, adopted 5 June 1992, entered into force 29 December 1993, 1760 *United Nations Treaty Series* (1992) 79.

[19] International Labour Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, adopted 27 June 1989, entered into force 5 September 1991, 28 *International Legal Materials* (1989) 1382.

the Rights of Indigenous peoples[20], these instruments are not covered in this study. These instruments contain such an extensive number of rights which are relevant in the environmental context that a separate study is needed.[21]

The Protection of the Cultural and Environmental Integrity of Indigenous Peoples under the International Covenant on Civil and Political Rights

The human right to a distinct culture is widely acknowledged in international law. One of the major instruments recognizing the right of members belonging to minorities[22] to enjoy their culture is the International Covenant on Civil and Political Rights (CCPR), which has been ratified by most of the global community.[23]

Article 27 of the CCPR can be seen as a basic norm to protect the right to culture of indigenous peoples. Article 27 of the CCPR applies to minorities and recognizes, *inter alia*, an individual right to enjoy one's culture in community with other members

[20] UN Declaration on the Rights of Indigenous Peoples, 7 September 2007, Sixty-first Session, A/61/L.67 (available at: <www.iwgia.org/sw248.asp> (visited 5 January 2008)).

[21] See Leena Heinämäki, 'Environmental Rights Protecting the Way of Life of Arctic Indigenous Peoples: ILO Convention No. 169 and the UN Draft Declaration on Indigenous Peoples', in Timo Koivurova, Tanja Joona and Reija Shnoro (eds), *Arctic Governance* (Juridica Lapponica 29, The Northern Institute for Environmental and Minority Law, Arctic Centre, University of Lapland, 2004) 231-259.

[22] No single agreed definition of the term 'minorities' exists in international law. One definition which is still widely referred to in the context of international law is the one made by the UN Special Rapporteur on minorities, Francesco Capotorti. According to this definition, a minority is '[a] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.' UN Special Rapporteur Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Add. 1-7 (1977), para. 568.

[23] International Covenant on Civil and Political Rights (CCPR), G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 *United Nations Treaty Series* 171. Status of ratification: 161 (6 May 2008); Optional Protocol to the CCPR, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 59, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 *United Nations Treaty Series* 302. There are 111 parties to the Optional Protocol (6 May 2008). A State Party to the Covenant that becomes a party to the Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.

of the cultural collective.[24] Thus, even though protection is afforded to the individual members of minority groups, the substance of minority rights entails a collective dimension,[25] which has a particular importance for members of indigenous peoples. The UN Human Rights Committee, the monitoring body of the CCPR[26], has interpreted this article as including the 'rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong'.[27] In reaching this conclusion, the Committee recognizes that indigenous peoples' subsistence and other traditional economic and social activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival.[28]

Even though Article 27 primarily sets out the negative obligation of states not to deny members of minorities the right to enjoy their culture, to profess and practise their religion or to use their own language, in the legal literature and in the work of the UN Human Rights Committee positive obligations have been derived from the provision.[29] For instance, the Committee's General Comment No. 23 (50)[30], adopted in 1994, refers explicitly to this dimension:

> Although 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. Conse-

[24] Article 27 states: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'

[25] See Raija Hanski and Martin Scheinin, *Leading Cases of the Human Rights Committee* (Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2003) at 375. In *Sandra Lovelace* v. *Canada* (Communication No. 24/1977, UN Doc. CCPR/C/OP/1 (1985)), the Committee says in para. 15: 'In the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language, "in community with the other members" of her group, has in fact been, and continues to be, interfered with, because there is no place outside the Tobique Reserve where such a community exists.'

[26] The UN Human Rights Committee was established under Article 28 of the CCPR. It is composed of 18 independent experts in the field of human rights elected by the States Parties to the CCPR (see CCPR, Arts 28-34). Although they are nominated and elected by the States Parties to the CCPR, the members of the Committee 'serve in their personal capacity', meaning that they are independent and do not represent the states that nominated them (CCPR, Art. 28(3)).

[27] *Lubicon Lake Band v. Canada,* Communication No. 167/1984, CCPR/C/38/D/167/1984 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/c316bb134879a76fc125696f0053d379?Opendocument> (visited 21 January 2007)).

[28] See also *Kitok* v. *Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988) (available at: <www1.umn.edu/humanrts/undocs/197-1985.html> (visited 21 January 2007)).

[29] Hanski and Scheinin, *Leading Cases of the Human Rights Committee*, *supra* note 25.

[30] Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art.27), UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994 (available at: <www.unhchr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument > (visited 1 January 2008)).

> quently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.[31]

The Committee implicitly acknowledged the environmental dimension of the recognition of the positive protection obligation by maintaining that in the context of indigenous peoples, the right to culture under Article 27 may apply to a way of life that is closely connected to a territory and the use of its resources. The Committee clarified that the right comprises traditional activities such as fishing and hunting. It furthermore stated that the enjoyment of such rights may require positive legal measures of protection and measures to ensure the *effective* participation of members of minority communities in decisions which affect them.[32]

Furthermore, the Committee concluded by noting that Article 27 relates to rights whose protection imposes specific obligations on States Parties. The Committee further stated that the protection of such rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, which also enriches the fabric of society as a whole.[33]

In July 2000, the Committee added that Article 27 requires of states necessary steps to protect the titles and interests of indigenous persons in their traditional lands and to secure the continuation and sustainability of the traditional economies of indigenous minorities.[34]

The General Comments of the UN Human Rights Committee are adopted by a consensus of the members of the Committee and may be regarded as creating an important and authoritative source of interpretation of the Covenant.[35] Even though they are not binding in a strictly legal sense, they can be considered as 'quasi-authoritative' sources in the interpretation of the articles of the CCPR. Thus it can be argued that if subsistence activities are to be safeguarded, the land, resources and environment of indigenous peoples also require protection against environmental interference.[36]

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[31] *Ibid.*, para. 6.1.

[32] *Ibid.*, para. 7.

[33] *Idem.*

[34] Concluding Observations of the Human Rights Committee: Australia, UN Doc. CCPR/CO/69/AUS (2000), paras 10-11.

[35] See, for instance, Manfred Nowak, 'The International Covenant on Civil and Political Rights' in Raija Hanski and Markku Suksi (eds), *An Introduction to the International Protection of Human Rights. A Textbook* (2nd revised edn, Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2002) 79-100 at 94.

[36] See also Fergus MacKay, 'From Concept to Design: Creating an International Environmental Ombudsperson', *A Project of the Earth Council San José, Costa Rica, The Rights of Indigenous Peoples in International*

The Human Rights Committee's Practice Relating to Indigenous Peoples and the Environment

The Committee's jurisprudence recognizes the inter-linkage between the right to the benefits of culture and protection from environmental interference in the territories that indigenous peoples are entitled to own or use. Overall, in dealing with indigenous issues, Article 27 of the CCPR, which grants minorities the right to a culture, has been central in the Human Rights Committee's practice. The Committee has increasingly interpreted the Article in a creative and expansive manner.[37]

In the *Lubicon Lake Band* v. *Canada*, the applicants alleged that the government of the province of Alberta had deprived the Lake Lubicon Indians of their means of subsistence and their right to self-determination by selling oil and gas concessions on their lands. The UN Human Rights Committee found that historical inequities and certain more recent developments, including oil and gas exploration, were threatening the way of life and culture of the Lake Lubicon Band and were thus violating minority rights, contrary to Article 27 of the CCPR.[38]

Besides making the general point that competing land use may violate the right of an indigenous group to enjoy their own culture, the case demonstrates how the cumulative effect of a step-by-step development with adverse consequences for the life of the indigenous inhabitants ultimately constitutes a violation of Article 27.[39] In this respect, the Committee held that:

> The Committee recognizes 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 part of the culture of the community to which they belong. […] Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue.[40]

Law, Forest Peoples Programme (Project Director: The Nautilus Institute for Security and Sustainable Development, Berkley, California, March 1998) at 8.

[37] Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous People's Claims in International and Comparative Law', 31 *New York University Journal of International Law and Politics* (2001) 189-250 at 204-205.

[38] *Lubicon Lake Band*, *supra* note 27, para. 33.

[39] See Scheinin's analysis regarding paras 32.2 and 33 (Martin Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous Land and Competing Uses of Land' in Theodore S. Orlin, Allan Rosas and Martin Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 2000) 159-222 at 166).

[40] *Lubicon Lake Band*, *supra* note 27, paras 32.2 and 33.

As pointed out by Benedict Kingsbury, the decision in the *Lubicon Lake Band case* implies that the right of the members of a group to enjoy their culture may be violated if they are allocated neither the land nor control of resource development necessary to pursue economic activities of central importance to their culture, such as hunting or trapping, and that the right to enjoy culture may extend to the maintenance of the group's cohesiveness through the possession of a land base and pursuit of important cultural activities of an economic nature.[41]

Another case which is relevant to the environmental integrity of indigenous peoples is *I. Länsman et al.* v. *Finland*.[42] Here the applicants claimed that stone quarrying activity permitted in a reindeer-herding area infringed their rights under Article 27 of the CCPR, in particular their right to enjoy their own culture, which has traditionally been and remains essentially based on reindeer husbandry.

Although the Committee did not find a violation of Article 27, it made an important statement with regard to environmental integrity by taking a rather cautious position on arguments related to the economic development of a country. The Committee's decision states:

> 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 margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have *a certain limited impact* on the way of life of persons belonging to a minority will not *necessarily* amount to a denial of the right under article 27.[43]

Hence it is seems clear that there might be cases where the consequences of environmental degradation go beyond 'a certain limited impact', amounting to a denial of the right protected under the Article 27, unless a state is able to take positive steps to safeguard the rights of indigenous peoples against the environmental interference. The Committee supported this view by stating in *I. Länsman* case that if mining activities in the Angeli area were to be significantly expanded, then this might constitute a violation of the authors' rights under Article 27. The committee noted that economic activities,

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[41] See Benedict Kingsbury, 'Claims by Non-State Groups in International Law', 25 (3) *Cornell International Law Journal* (1992) 481-514.

[42] *I. Länsman et al.* v. *Finland*, Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994) (available at: <www1.umn.edu/humanrts/undocs/html/vws511.htm> (visited 21 January 2007)).

[43] *Ibid*., para. 9.4 (emphases added).

in order to comply with Article 27, have to be carried out in such a way that the authors can continue to benefit from reindeer husbandry.[44]

Although implying that states have a certain degree of discretion in such cases[45], the Committee emphasized that the economic well-being of the majority is not a legitimate justification for interfering with the culture of minorities, as the sustainability of the indigenous livelihood is protected by Article 27. Article 27 thus prohibits states from endangering the practicing of a traditional livelihood to the extent that it loses its capacity to sustain the members of the indigenous community.[46]

In *I. Länsman*, the Committee also referred to its General Comment on Article 27, according to which measures must be taken to ensure *effective* participation of members of minority communities in decisions that affect them.[47] The Committee thus applied a two-part test of consultation and economic sustainability. Accordingly, the Committee noted that the members of the Saami people had been consulted during the proceedings and that the quarrying that had taken place thus far had had only a 'certain limited impact', thus it had not adversely affected reindeer herding in the area.[48]

In the later *J. Länsman* case[49], the Committee came to similar conclusions with regard to the criteria of the combined test of consultation and sustainability.[50] Significantly, the

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[44] *Ibid.*, para. 9.8.

[45] *Ibid*., para. 7.12.

[46] *Ibid*., paras. 9.5.-9.8.

[47] *Ibid.*, paras 9.5. and 9.6. Human Rights Committee, General Comment No. 23(50), *supra* note 30, paras 7 and 9.6. The test of effective participation is also reflected in para. 7 of the Committee's General Comment No. 23(50).

[48] *I. Länsman et al.* v. *Finland*, *supra* note 42, para. 9.6. For the analysis of the two-part test, see Scheinin, 'The Right to Enjoy a Distinct Culture', *supra* note 39, at 168. In the *I. Länsman* case, the Committee emphasized that Article 27 does not protect only traditional means of livelihood of minorities, and the fact that the Saami have 'adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant' (see para. 9.3. of *I. Länsman*, *supra* note 42).

[49] *J. Länsman et al.* v. *Finland,* Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/67b455218cbd622d80256714005cfdad?Opendocument> (visited 21 January 2007)).

[50] *Ibid.*, paras 7.8, 7.9, 8.3, 9.3 and 10.5. For the 'test' see *supra* notes 48. In any case, no violation was found in *J. Länsman*. A similar case concerning environmental issues and the right to culture of the Saami people of Finland is *A. Äärelä and J. Näkkäläjärvi* v. *Finland* (Communication No. 779/1997, UN.Doc. CCPR/C/73/D/779/1997), where the Committee found that the requirements of consultation and sustainability had been met, thus finding no violation (para. 7.5 and 7.6). In this case, however, the Committee found a violation of Article 14(1) on the right to be equal before the court, in conjunction with Article 2 on the right to effective remedies, due to the failure of the Finnish Court of Appeal to allow the authors the opportunity to challenge one of the submissions of the state during the proceedings therein

Committee also expressed concern about continued logging, together with other measures of economic development, which could ultimately lead to a violation of Article 27.[51] This statement is important as it makes it clear that even though in this particular case the circumstances did not as yet amount to a violation of Article 27, the situation might be different if the environmental interference became more serious in nature.[52]

In the case *Apirana Mahuika et al.* v. *New Zealand*,[53] the Human Rights Committee considered the status of the traditional fishing activities of the Maori people of New Zealand. The Committee recalled its General Comment on Article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State Party. The Committee continued by referring to the *I. Länsman* case, noting that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process related to these measures and whether they will continue to benefit from their traditional economy.[54] In this particular case, the Committee concluded that the consultation procedures had been adequate.[55]

Based on the jurisprudence and the General Comments of the UN Human Rights Committee, it can be concluded that the right to culture under Article 27 entails positive obligations for states in two important ways. First, states are under an obligation to make sure that their actions do not harm the sustainability of the traditional livelihoods of indigenous peoples. With regard to environmental issues, this is a very relevant

(para. 7.4) and because Finnish law requires the loser in court proceedings to pay the costs of the winner without allowing the judge any discretion to lower the amount of costs awarded (para. 7.2). In *J. and E. Länsman et al.* v. *Finland* (Communication No. 1023/2001. U.N.Doc. CCPR/C/83/D/1023/2001 (2005)) no violation was found either. (The document is available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/fa24fc7cd513751bc1256fe900525608?Opendocument> (visited 21 January 2007)).

[51] *J. Länsman, supra* note 49, paras 10.5-10.7.

[52] In this case, at least partly, the finding of non-violation was based on assessing the logging project on a quantitative scale, an argument on which the State Party had relied. This does not, however, do full justice to the case of the authors, who had emphasized the strategic (qualitative) importance of the specific forest lands in question (paras 10.6, 4.5 (State Party) and 2.4 (the authors). See also Scheinin, 'The Right to Enjoy a Distinct Culture', *supra* note 39, at 170.

[53] *Apirana Mahuika et al.* v. *New Zealand*, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000) (available at: <www1.umn.edu/humanrts/undocs/547-1993.html> (visited 21 January 2007)).

[54] *Ibid*., para. 9.5.

[55] Interestingly, the case dealt with the challenge of balancing indigenous rights to natural resources with the state's efforts to conserve natural resources. The reasoning of the Committee demonstrates that indigenous peoples' participation in environmental decision-making involves not only proposed projects that might have harmful environmental impacts but also nature conservation plans. See Tuula Kolari, *The Right to a Decent Environment with Special Reference to Indigenous Peoples* (Juridica Lapponica 31, The Northern Institute for Environmental and Minority Law, Arctic Centre, University of Lapland, 2004) at 14.

obligation, imposing on states a duty to protect the culture of indigenous peoples from environmental interference that falls under their responsibility. Secondly, Article 27 requires 'effective participation' or 'meaningful consultation' with indigenous peoples in cases relating to the enjoyment of their culture. Not only development projects on their lands, but also other kinds of environmental interference may threaten the traditional livelihoods of indigenous peoples, thus possibly amounting to violations of Article 27.

It is not clear, however, what 'effective participation' or 'meaningful consultation' with indigenous peoples means under Article 27. It does not seem to signify a *veto* right of indigenous peoples in decisions that affect their right to culture. The meaningful consultation should however be a discussion in good faith that allows the indigenous community in question to have a real say in the matter. The Committee furthermore refers to 'affirmative measures' and 'legitimate differentiation' when needed and based on reasonable and objective criteria in order to correct conditions which prevent or impair the enjoyment of the rights guaranteed under Article 27.[56] It is beyond dispute that the effects of environmental interference, impacting the lands and traditional livelihoods of indigenous peoples, may prevent or impair the peoples' enjoyment of their culture. In this light it can be argued that the participatory rights of indigenous peoples in decisions – local, national or international – that directly affect their right to culture should go beyond the scope of the public participation of other citizens. Therefore, importantly, Article 27 seems to offer more effective protection as far as participation is concerned than Article 25 of the CCPR, which deals with the participation of the general public.[57]

[56] See General Comment No. 23 (50), *supra* note 30, para. 6.2. It should be noted that para. 6.1 concerns positive measures of protection against the *acts* of the State. When it is a question of environmental protection, it is, however, sometimes more the *omission* of the state in relation to environmental protection. The General Comment, however, mentions the acts of other persons within the State Party. If we take the problem of climate change as an example, the cause of global warming is the increased level of greenhouse gases, which happens because of many factors: it is partly caused by legal persons such as industrial or transportation companies, multinational corporations, and private persons.

[57] *Marshall* v. *Canada* (Communication No. 205/1986, CCPR/C/39/D/205/1986 (1991)) illustrates the limitations of Article 25 of the CCPR. In the case brought to the UN Human Rights Committee, the Mikmaq Tribal Society alleged, among other things, a violation of Article 25 on political participation because they were excluded from Canada's constitutional reform process. The UN Human Rights Committee defined the issue to be resolved as 'whether the right under Article 25(a) is available only to individual citizens, or to groups or representatives of groups also.' In finding that Canada had not violated Art. 25(a), the Committee stated that 'article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens far beyond the scope of art. 25(a)' (see para 5.5). In relation to the Mikmaqs' claim concerning Canada's constitutional reform, it should be noted that national indigenous organizations representing indigenous peoples in general were asked to participate in the reform process. However, individual indigenous peoples were not accorded representation beyond their ability to participate through national organizations. The

It can be justifiably argued that in cases where the right to culture of indigenous peoples is threatened due to the negative effects of environmental change on their lands and traditional livelihoods, the only way for states to protect indigenous culture from environmental interference is to protect the environment. Thus it can be concluded that in some cases Article 27 of the CCPR implicitly requires states to directly engage in relevant environmental protection. Based on the considerations of the UN Human Rights Committee, this protection should involve indigenous peoples, who must be able to participate effectively in decisions which affect them.

It should be noted that even though the Committee has used Article 27 as the main norm concerning indigenous peoples, in the above-mentioned *Apirana Mahuika* case the Committee made important statements concerning the possible application of Article 1, which guarantees the right of peoples to self-determination. The Committee stated that the provisions of Article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular that set out in Article 27.[58]

From the point of view of the environmental rights of indigenous peoples, the fact that Article 27 may be interpreted in the light of the right to self-determination is significant for at least two reasons: protection of natural resources for the maintenance of the sustainability of a traditional, nature-based lifestyle and the right to effective decision-making concerning their lands and natural resources for the same reason. This view is supported by an interesting development which began in 1999, at which point the UN Human Rights Committee started to apply Article 1 (on self-determination) to indigenous peoples.[59]

It can be argued that the application of Article 1 to indigenous peoples strengthens the environmental elements comprising, *inter alia*, the right to independently govern

Mikmaq argued that this policy was racist in that it failed to recognize the distinct identities, histories and needs of indigenous peoples as individual peoples, but rather classified all indigenous peoples as one and the same along racial lines. (Available at: <www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/6dc358635454e5fac12569de00492e1b?OpenDocument&Highlight=0,CCPR%2FC%2F43%2FD%2F205%2F1986> (visited 27 May 2008.))

[58] *Apirana Mahuika*, *supra* note 53, para. 9.2.

[59] Article 40 of the CCPR requires States Parties to submit reports on measures taken to give effect to the rights defined therein. An initial report is to be submitted one year after the state ratifies the CCPR, and further reports are required periodically (normally every five years). State reports and the Concluding Observations of the UN Human Rights Committee can be found at: <www.unhchr.ch/html/menu2/6/hrc/hrcs.htm> (visited 5 March 2007). See Concluding Observations of the Human Rights Committee on Canada UN Doc. CCPR/C/79/Add.105 (1999). Explicit references to either Article 1 or to the notion of self-determination have also been made in the Committee's Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999); Norway, UN Doc. CCPR/C/79/Add.112 (1999); Australia, UN Doc. CCPR/CO/69/Aus (2000); Denmark, UN Doc. CCPR/CO/70/DNK (2000); Sweden, UN Doc. CCPR/CO/74/SWE (2002); Finland, UN Doc. CCPR/CO/82/FIN (2004); Canada , UN Doc. CCPR/C/CAN/CO/5 (2005); and the United States, UN Doc. CCPR/C/USA/CO/3 (2006).

matters relating to their environment, including the control of traditional lands and territories, the use of natural resources, and participation in environmental decision-making.[60]

Despite the fact that there does not seem to be a common understanding of the legality of the views of the UN Human Rights Committee in relation to the right to self-determination of indigenous peoples, some kind of authoritative position must be given to the body of the treaty, which has been ratified by the majority of states and was established specifically for the purpose of monitoring the fulfilment of the obligations of the State Parties, and has the task of interpreting the given articles when applying them to individual cases. [61]

The Recognition of the Cultural and Environmental Integrity of Indigenous Peoples in other Human Rights Instruments

In addition to the CCPR, the right to culture has been recognized by other widely ratified fundamental human rights conventions. One of them is the International Covenant on Economic, Social and Cultural Rights (CESCR),[62] which recognizes the right of everyone 'to take part in cultural life' and to benefit from the 'moral and material interests of any scientific, literary or artistic production' authored by him or her, which, according to some authors, raises the possibility of the protection of traditional knowledge and intellectual property rights.[63] With regard to cultural

[60] Kolari, *The Right to a Decent Environment*, *supra* note 55, at 126-127.

[61] According to the Committee of the International Law Association, treaty interpretations by monitoring bodies become authoritative only if states do not oppose them. For an analysis on these issues, see the study of the International Human Rights Law and Practice – Committee of International Law Association (ILA),'Final Report on the Impacts of Findings of the United Nations Human Rights Treaty Bodies' (available at: <www.ila-hq.org/html/layout_committee.htm> (visited 11 December 2007)). A study of the right of indigenous peoples to self-determination is beyond the scope of this article. It should be mentioned, however, that the recently adopted UN Declaration on the Rights of Indigenous Peoples recognizes this right. See *supra* note 20. Article 3 states: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

[62] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), adopted 16 December 1966, entered into force 3 January 1976, 993 *United Nations Treaty Series* 3. Status of ratification: 157 (1 March 2008).

[63] Article 15(1). The Committee on Economic, Social and Cultural Rights held 'A Day of Discussion' on 27 November 2000, during which members stated that traditional knowledge and intellectual and cultural

protection, the CESCR provides that states must take steps to achieve the full realization of the right to culture.[64]

In the state reporting system established by the Covenant and overseen by the Committee on Economic, Social and Cultural Rights, particular attention has been paid on many occasions to the cultural and environmental integrity of indigenous peoples.[65] For example, the Committee has urged Finland[66], with regard to land rights, 'to finalize its review of the legislation concerning the Sami population with a view to ratifying ILO Convention No. 169.' Furthermore, the Committee recommended that Finland settle the question of Sami land title as a matter of high priority.[67]

heritage, both as individual and collective rights, could be addressed in relation to Article 15(1)(c). See the Committee on Economic, Social and Cultural Rights, Report on the 22nd, 23rd and 24th Sessions, UN Doc. E/C.12/2000/21, 27 November 2000, paras 578-635. See also Fergus MacKay, 'Cultural Rights', in Margot E. Salomon (ed.), *Economic, Social and Cultural Rights: A Guide for Minorities and Indigenous Peoples* (Minority Rights Group International, 2005) 83-93 at 83. Very similar to the CESCR in language, the Universal Declaration of Human Rights (G.A. res. 217 A (III), UN Doc. A/810 at 71 (1948), adopted 10 December 1948), recognizes that everyone has 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits', and 'the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (Art. 27 (1) and (2)).

[64] Article 15(2).

[65] In terms of the effective protection of the environmental rights of indigenous peoples, the CESCR's lack of a system of individual complaint is a clear weakness. Thus it should be noted that the UN has been discussing an optional protocol to the CESCR that would permit individuals and groups to file complaints concerning perceived violations of the rights guaranteed in the Covenant. See draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Note by the Secretary-General. UN Doc. E/CN.4/199/105, 23 August 1996, paras 24-28 (available at: <www.hri.ca/fortherecordcanada/vol2/optionalchr02.htm> (visited 19 January 2007)). See also the report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, UN Doc. E/CN.4/2004/44, 15 March 2004 (available at: <www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.44.En?Opendocument> (visited 19 January 2007)).

[66] Finland's fourth periodic report, E/C.12/4/Add.1, 9 December 1999 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.4.Add.1.En?Opendocument> (visited 18 January 2007)).

[67] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, E/C.12/1/Add. 52, 1 December 2000, para. 25 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.52.En?Opendocument> (visited 18 January 2007)). The Committee on Economic, Social and Cultural Rights has recognized the importance of cultural rights for individual and collective identity, as well as the relationship between cultural rights and other rights such as land and resource rights, in other Concluding Observations. See, for instance, the Concluding Observations on Panama, UN Doc. E/C.12/1/Add.64, 24 September 2001, para. 12 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.64.En?Opendocument> (visited 18 January 2007)); Colombia, UN Doc. E/C.12/1995/12, 28 December 1995, para. 12 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/975c32e988faf98a8025648a004ecd6f?Opendocument> (visited 18 January 2007)); and Ecuador, UN Doc. E/C.12/1/Add. 100, 7 June 2004, para. 58 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/

Another country where the Committee dealt with the rights of indigenous peoples partly in relation to the environment is Panama.[68] The Committee expressed deep concern about the persisting disadvantage faced in practice by members of indigenous communities in Panama, and in particular about the marked disparities in the levels of poverty, literacy and access to water, employment, health, education and other basic social services. The Committee was also concerned that the issue of the land rights of indigenous peoples has not been resolved in many cases and that their land rights are threatened by mining and cattle ranching activities which have been undertaken with the approval of the State Party and have resulted in the displacement of indigenous peoples from their traditional ancestral and agricultural lands.[69]

Interestingly, the Committee on Economic, Social and Cultural Rights has also started to address indigenous issues in the light of Article 1 (on self-determination) of the Covenant, which is common to the both Covenants For instance, regarding the Russian Federation, the Committee expressed concern about the 'precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant.'[70]

In a more general statement[71] on the realization of economic, social and cultural rights, the Commission on Human Rights (today the Human Rights Council) emphasized the centrality of the right to culture for indigenous peoples, stating: 'Without affording full guarantees for their cultural rights, including the right not to assimilate and the right to cultural autonomy, the protection offered to indigenous peoples by other rights can become practically meaningless.'[72]

E.C.12.1.Add.100.En?Opendocument> (visited 19 January 2007)).

[68] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Panama, *supra* note 67.

[69] *Ibid.*, para. 12.

[70] Concluding Observations of the Committee on Economic, Social and Cultural Rights: the Russian Federation, UN Doc. E/C.12/1/Add.94, 12 December 2003, para. 39 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.94.En?Opendocument> (visited 19 January 2007)). See also Committee on Economic, Social and Cultural Rights, General Comment No. 15, the Right to Water (CESCR Arts 11 and 12) UN Doc. E/C.12/2002/11, 20 January 2003 para. 7 (available at: < <www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (visited 28 May 2008)).

[71] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-fourth session, Item 8 of the provisional agenda, 'The Realization of Economic, Social and Cultural Rights', E/CN.4/Sub. 2/1992/16, 3 July 1992, Final Report submitted by Mr. Danilo Türk, Special Rapporteur on human rights (available at:
<www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.1992.16.En?Opendocument> (visited 17 January 2007)).

[72] *Ibid.*, para. 198.

Besides the Covenant on Economic, Social and Cultural Rights, the right to enjoy one's culture has also been guaranteed by the UN Convention on the Rights of the Child.[73] Article 30 of the Convention states:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

The language of the Article resembles that of Article 27 of the CCPR, though it adds a direct reference to indigenous peoples. The recommendations of the Committee on the Rights of the Child acknowledge the important connection between indigenous peoples and the environment by stating: 'The enjoyment of the rights under article 30, in particular the right to enjoy one's culture, may consist of a way of life which is closely associated with a territory and the use of its resources. This may particularly be true of members of indigenous communities constituting a minority.'[74]

A third convention, the Convention on the Elimination of Racial Discrimination (CERD)[75], can also be applied in environmental contexts. Its Article 1(1) defines 'racial discrimination' as '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

[73] The Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 UN GAOR Supp. (No. 49), at 167, UN Doc. A/44/49 (1989), adopted 20 November 1989, entered into force 2 September 1990, 1577 *United Nations Treaty Series* 3. Status of ratification: 193 (6 May 2008).

[74] Committee on the Rights of the Child, 34th Session, 15 September-3 October 2003, Day of General Discussion on the Rights of Indigenous Children, Recommendations, para. 4 (available at: <www.treatycouncil.org/section_211882.htm> (visited 18 January 2007)). In the framework of state reports, the Committee has expressed concern for indigenous children in its concluding observations. Relevant in the environmental context are, for instance, the Concluding Observations on Burundi (Concluding Observations of the Committee on the Rights of the Child: Burundi, UN Doc.CRC/C/15/Add.133 (2000)): the Committee states that it is 'deeply concerned about the poor situation of Batwa children and the lack of respect for almost all of their rights, including the rights to health care, to education, to survival and development, to a culture and to be protected from discrimination' (para. 77). Furthermore, the Committee 'urges the State party urgently to gather additional information on the Batwa people, to strengthen the representation of Batwa in national policy-making and to elaborate a plan of action to protect the rights of Batwa children, including those rights related to minority populations and indigenous peoples' (para. 78).

[75] International Convention on the Elimination of All Forms of Racial Discrimination, Geneva, adopted 7 March 1966, entered into force 4 January 1969, 660 *United Nations Treaty Series* 195. Status of ratification: 173 (6 May 2008).

rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'[76] Articles 1(4) and 2(2) contemplate affirmative action, or a state's taking 'special and concrete measure' to redress current or historical inequities, particularly in the social, economic and cultural realms. Furthermore, the Convention guarantees the right to 'equal participation in cultural activities'[77].

The concern for the 'effect' of discriminatory practices is reiterated in Article 2(1)(c), signifying that a conscious intent to discriminate is not a prerequisite to ascribing responsibility. If 'policies', 'laws' or 'regulations' create or perpetuate discrimination, that fact alone, according to the Article, makes a state accountable.[78]

The Committee on the Elimination of Racial Discrimination (CERD) recognized in a General Recommendation adopted in 1997 that the situation of indigenous peoples has always been a matter of close attention and concern.[79] The Committee urged states to ensure freedom from discrimination and to provide conditions 'allowing for a sustainable economic and social development compatible with [indigenous peoples'] cultural characteristics'.[80] States were also asked to ensure the participation of indigenous peoples in public life and to ensure 'that no decisions directly relating to their rights and interests are taken without their *informed consent*'.[81]

Free and informed consent of indigenous peoples was also highlighted by the Committee on the Elimination of Racial Discrimination, which has recognized the land rights of indigenous peoples in clear terms. The Committee called 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.[82]

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[76] (Emphasis added.)

[77] Article 5 e (VI).

[78] See Elaine Ward, *Indigenous Peoples between Human Rights and Environmental Protection; Based on an Empirical Study of Greenland* (The Danish Centre for Human Rights, Copenhagen, 1993) at 23-24.

[79] Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on Indigenous Peoples, A/52/18, Annex V (1997), 18 August 1997, para.1 (available at: <www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (visited 19 January 2007)).

[80] *Ibid.*, para. 4(c).

[81] *Ibid.*, para. 4(d) (emphasis added).

[82] *Ibid.*, para. 5.

Decisions concerning the lands and traditional livelihoods of indigenous peoples certainly fall within the scope of this statement, as they are often directly related to the rights of indigenous peoples. According to these General Recommendations, for instance, the lands of indigenous peoples should not be used for projects that may have a negative impact on these lands without the informed consent of the indigenous community in question.

The Convention's supervision system includes consideration by the Committee on the Elimination of Racial Discrimination of communications from individuals or 'groups' claiming to be victims of violations of rights specified in the Convention.[83] States' recognition of the competence of the Committee to consider such communications is, however, optional. Compared with the number of states that are parties to the CCPR's Optional Protocol (which provides for an individual complaints procedure), relatively few states have made declarations under Article 14.[84] Furthermore, the complaint procedure has been little utilized, and the main channel of indigenous peoples' concerns is the examination of periodic reports submitted by states describing how they have implemented the Convention in their territory.[85]

In its Concluding Observations on state reports, the Committee on the Elimination of all Forms of Racial Discrimination has dealt with issues relating to indigenous peoples and expressed concerns if merited. For instance, regarding Canada[86], the Committee noted with concern in 2002 that the process of implementing the recommendations adopted in 1996 by the Royal Commission on Aboriginal Peoples, concerning a variety of issues such as land and self-governing rights[87], had not yet been completed and requested the State Party to indicate in detail in its next

[83] Article 14.

[84] States must make a declaration in order to recognize the competence of the Committee. A total of 49 states have made such a declaration (available at: <www.ohchr.org/english/countries/ratification/2.htm#reservations> (visited 16 March 2007)). A total of 118 states have accepted the Optional Protocol of the CCPR, thus recognizing the competence of the Committee (available at: <www.ohchr.org/english/countries/ratification/5.htm> (visited 17 March 2007)).

[85] Harriet Ketley, 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples',8 *International Journal on Minority and Group Rights* (2001) 331-368 at 340. Some authors believe that indigenous peoples are unaware of the potential use of Article 14 for complaints concerning breaches of their collective rights (see Gudmundur Alfredsson, 'The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries', 59 (2) *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, Heidelberg Journal of International Law* (1999) 529-542 at 538).

[86] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, A/57/18, 1 November 2002, paras 315-343 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.57.18,paras. 315-343.En?Opendocument> (visited 17 January 2007)).

[87] The Royal Commission on Aboriginal Peoples (RCAP) (available at: <www.ainc-inac.gc.ca/ch/rcap/index_e.html> (visited 16 March 2007)).

periodic report which recommendations of the Royal Commission it had responded to and in what way.[88]

Another example which is relevant for the protection of the environmental integrity of indigenous peoples is the Committee's observations on Sri Lanka,[89] where the creation of a national park on the ancestral forestland of a local indigenous people, the Vedda, raised the Committee's concern. The Committee refers to its General Recommendation XXIII, which 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'.[90]

A third interesting example is the Committee's findings on the United States.[91] The Committee expressed concern about a practice of the State whereby treaties signed by the Government and Indian tribes can be abrogated unilaterally by Congress. A further point of concern was the fact that land possessed or used by Indian tribes can be taken without compensation by a decision of the Government. The Committee was also concerned about plans to expand mining and nuclear waste storage on Western Shoshone ancestral land, placing the land up for auction for private sale, and other actions affecting the rights of indigenous peoples.[92] The Committee recommended that the United States ensure effective participation by indigenous communities in decisions affecting them, including those concerning their land rights, as required under Article 5(c) of the Convention.[93]

The Committee furthermore asked the State Party to pay attention to the Committee's general recommendation XXIII on indigenous peoples, which stresses the importance of securing the *informed consent* of indigenous communities and calls, *inter alia*, for recognition and compensation for loss. The State Party was also encouraged to use ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries as a guideline.[94]

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[88] *Ibid.*, para. 329. Furthermore, the Committee expressed concern about the difficulties which may be encountered by Aboriginal peoples before the courts in establishing Aboriginal title over land, since no Aboriginal group had been able so far to prove the Aboriginal title. The Committee recommended that Canada examines ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts (para. 330).

[89] Concluding Observations of the Committee on the Elimination of Racial Discrimination: Sri Lanka, A/56/18, 14 September 2001, paras 321-324 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.18, paras 321-342. En?Opendocument> (visited 22 January 2007)).

[90] *Ibid.*, para. 335.

[91] Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, A/56/18, 14 August 2001, paras 380-407 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.18,paras. 380-407.En?Opendocument> (visited 22 January 2007)).

[92] *Ibid.*, para. 400.

[93] *Idem*.

[94] *Idem*.

A fourth international/regional instrument which recognizes the right to the benefits of culture is the American Declaration of the Rights and Duties of Man[95] under the Inter-American Human Rights system.[96] The Charter of the Organization of American States also places cultural development and respect for culture in a position of supreme importance.[97]

When applying the rights recognized in the American Declaration in relation to indigenous peoples, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights[98] have emphasized the need to pay attention to and take into account the unique and special context of indigenous peoples' culture and history. As stated, for instance, in the Commission's 1997 Report on the Situation of Human Rights in Ecuador, 'certain indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival.'[99]

In the case law relating to indigenous peoples, however, the Inter-American Commission and Court have not focused on applying a specific right to culture, which only the American Declaration recognizes.[100] Instead, the right to culture is implicitly but strongly included in other rights such as the right to property. Therefore the related case law will be dealt with in other sections of this article.[101]

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[95] American Declaration of the Rights and Duties of Man, *supra* note 9.

[96] Article XIII states: 'Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions of any literary, scientific or artistic works of which he is the author.'

[97] Charter of the Organization of American States, Arts 2(f), 3(m), 30 and 48, Bogotá, Colombia, adopted 30 April 1948, entered into force 13 December 1951, 119 *United Nations Treaty Series* 3.

[98] The Inter-American Court of Human Rights was established in 1979 with the purpose of enforcing and interpreting the provisions of the American Convention on Human Rights, *supra* note 8. Its two main functions are thus adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it. Under the latter, it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states.

[99] Report on the Human Rights Situation in Ecuador, OEA/Ser.L/VII.96, Chapter IX (available at: <www.cidh.oas.org/countryrep/ecuador-eng/chaper-9.htm> (visited 22 January 2007)).

[100] Article XIII.

[101] Concerning regional human rights systems, the African Charter on Human and Peoples' Rights states: 'All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind' (Art. 22(1)). The African Commission on Human and Peoples' Rights recently concluded a study of indigenous peoples in Africa which placed much emphasis on cultural rights. Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by resolution at the 35th Ordinary Session in 2004.

Finally, it should be mentioned that in the European human rights system, the right to culture of national minorities and indigenous peoples within that framework is recognized in the Framework Convention for the Protection of National Minorities.[102] In this Convention the right to culture comprises such essential elements of identity as religion, language, traditions and cultural heritage.[103] The European Convention for Human Rights and Fundamental Freedoms[104] does not directly recognize the right to culture as such, but the right of indigenous peoples to practise their traditional way of life as a part of their culture can be protected through other rights guaranteed in the European Convention such as the right to respect for private and family life, as will be shown later in this article.

The purpose of this and the previous sections was to show that the right to cultural integrity of indigenous peoples is a widely recognized right in international law and that this right comprises the protection of their environmental integrity. As shown in this section, the right to culture has been seen in the instruments studied, or by the monitoring bodies which interpret and apply them, as containing not just substantive protection but also including the right of indigenous peoples to participate in decisions that affect their rights and lives. References to 'effective participation' seem to be the most common, but even expressions such as 'informed consent' and 'the right to self-determination' have been used in relation to the cultural protection of indigenous peoples. Even though the instruments that were analyzed here do not directly state that indigenous peoples have the right to be protected from environmental interference, the monitoring bodies directly recognize the special relationship of indigenous peoples to their lands and the environment, which is to be safeguarded from any interference for which a state can be held responsible.

[102] Framework Convention for the Protection of National Minorities, Strasbourg, opened for signature 1 February 1995, entered into force 1 February 1998, 34 *International Legal Materials* (1995) 351.

[103] Article 5.

[104] European Convention for Human Rights and Fundamental Freedoms, Rome, 4 November 1950, entered into force 3 September 1953, 213 *United Nations Treaty Series* 222, amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

Other Human Rights Applicable to Indigenous Peoples and the Environment

The Right to Life

The right to life is often considered one of the most fundamental human rights. International human rights treaties and customary law recognized by states support the obligation of states not to undertake acts that harm or threaten human life. The right to life has been guaranteed by almost all the major human rights instruments. For example, Article 3 of the Universal Declaration of Human Rights states, 'Everyone has the right to life, liberty and security of person.' In a similar vein, Article 6 of the CCPR states that 'every human being has the inherent right to life.' Additionally, this right has been recognized in the United Nations Convention on the Rights of the Child[105], the European Convention on Human Rights and Fundamental Freedoms[106], the African Charter on Human and Peoples' Rights[107], the American Convention on Human Rights[108], and the American Declaration of the Rights and Duties of Man.[109] Many treaties, including the CCPR, attempt to clarify the content of the right to life by prohibiting only the 'arbitrary deprivation' or 'intentional deprivation' of life. In relation to this right, however, states' obligations extend beyond the requirement of arbitrary or intentional deprivation of life. There seems to be a general understanding that the human right to life itself requires a precautionary approach by governments, which means that government officials must prevent harm or threats to human life, where they can be foreseen.[110]

[105] Article 6.

[106] Article 2.

[107] Article 4.

[108] Article 4.

[109] Article 1.

[110] For instance the Inter-American Court of Human Rights has interpreted the obligation as requiring states to exercise their power in a manner that legally ensures the full enjoyment of human rights, including preventing, investigating and punishing any violation of the rights provided by the American Convention on Human Rights (see, e.g., *Valesquez Rodriguez Case,* Inter-Am. Ct. H.R. 1988, App. VI, at 70-71 (OAS/Ser. L/V/III.19, doc. 13, 31 August 1988)). In its Report on the Situation of Human Rights in Ecuador, the Inter-American Commission on Human Rights stated that 'the right to have one's life respected is not [...] limited to protection against arbitrary killing' (Report on the Human Rights Situation in Ecuador, OEA/Ser.L/V/II.96. Ch. 8; available at: <cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm> (visited 23 October 2007)). Furthermore, in its Third Report on the Situation of Human Rights in the Republic of Guatemala (OEA/Ser.1/V/II. 67, doc. 9), when finding Guatemala responsible for acts and omissions detrimental to indigenous peoples' 'ethnic identity and against development of their traditions, their language, their economies and their culture' (para. 114), it characterized these as 'human

In its General Comment No. 6, the UN Human Rights Committee has also stated that the right to life 'has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures.'[111]

With regard to the environmental dimension of the right to life, the UN Human Rights Committee has indicated that state obligations to protect the right to life can include positive measures designed to reduce infant mortality and protect against malnutrition and epidemics.[112] In *E.H.P.* v. *Canada*[113], a case concerning the storage of radioactive waste near the home of the claimants, the Committee said the case raised 'serious issues with regard to the obligation of States parties to protect human life'.[114]

The Inter-American Commission on Human Rights has also recognized the environmental dimension of the right to life by laying down that:

> The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.[115]

Furthermore, when discussing the connection between the physical environment and the right to life, the Inter-American Commission concluded that environmental degradation can 'give rise to an obligation on the part of a state to take reasonable measures to prevent the risk to life associated with environmental degradation.'[116] The Commission noted that human rights law 'is premised on the principle that rights inhere in the individual simply by virtue of being human', and that environmental degradation, 'which may cause serious physical illness, impairment and suffering on the part of the local populace, [is] inconsistent with the right to be respected as a human being.'[117]

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rights also essential to the right to life of peoples' *(ibid.)*.

[111] Human Rights Committee, General Comment No. 6, The Right to life (Art.6), UN Doc./A/37/40 (1982), 30 April 1982, Item 5 (available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument> (visited 16 March 2007)).

[112] *Ibid.*, para. 5.

[113] *E.H.P.* v. *Canada,* Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 (1984) at 20, para. 8 (available at: <www1.umn.edu/humanrts/undocs/html/67-1980.htm> (visited 15 March 2007)). In *E.H.P.* v. *Canada*, a group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened the right to life of present and future generations.

[114] *Ibid.*, para. 8.

[115] Report on the Human Rights Situation in Ecuador, *supra* note 99.

[116] *Idem.*

[117] *Idem.*

The Inter-American Commission has also dealt with the right to life in an individual petition brought by the Yanomami community against the Brazilian government.[118] In the petition, the Commission explicitly recognized that environmental degradation can violate the right to life. In that case, the Brazilian government had constructed a highway through Yanomami territory and authorized the exploitation of the territory's resources. These actions led to an influx of non-indigenous people who brought contagious diseases that spread to the Yanomami, resulting in disease and death.[119] The Commission found that, among other things, the government's failure to protect the integrity of Yanomami lands had violated the Yanomami's rights to life, liberty and personal security, which are guaranteed by Article 1 of the American Declaration of the Rights and Duties of Man.[120] In this statement, the Commission importantly tied the interference with the lands of indigenous peoples to the violation of their right to life.

The right to the benefits of culture, guaranteed in Article XIII of the American Declaration of the Rights and Duties of Man, was not applied by the Commission. However, it made a clear statement recognizing the cultural integrity of the Yanomami people by noting that the Brazilian state had failed to protect their rights[121] by failing to establish a park for the protection of the cultural heritage of the Yanomami and in proceeding to displace the Yanomami from their ancestral lands, which had negative consequences for their culture and traditions.[122]

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[118] *Case of Yanomami Indians*, Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66 doc. 10 rev. 1 (1985) (available at: <www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (visited 15 March 2007)).

[119] *Ibid.*, under the section 'Background', para. 3.

[120] *Ibid.*, under the section 'The Inter-American Commission on Human Rights, resolves', para. 1. The European Court of Human Rights, in the case *Önerydildiz* v. *Turkey (*Application No. 48939/99, Decision of 18 June 2002), found that the Turkish authorities had violated Article 2 regarding the right to life of the European Convention for the Protection of Human Rights and Fundamental Freedoms by not informing people living near a landfill about the risks of methane explosions that the uncontrolled site formed to the people. The Court stated that a violation of the right to life can be envisaged in relation to environmental issues not only in cases of potentially dangerous activities such as the operation of nuclear installations but also in other areas liable to give rise to a serious risk to life or various aspects of the right to life (para. 64 of the Decision).

[121] In the *Yanomami* case, *supra* note 118, the Commission found a violation of the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI) of the American Declaration of the Rights and Duties of Man.

[122] *Ibid.*, para. 2, under 'Considerations'. The Commission also recognized that the protection of ancestral lands is an essential component of indigenous peoples' right to culture in its Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin. Inter-Am. C.H.R., Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin 76, OEA/Ser.L/V/II.62, doc.10, rev. 3 (1983), at II.B.15.

It is beyond dispute that humanity's ultimate survival is indelibly linked to the state of the Earth's environment.[123] It has also been increasingly recognized by human rights monitoring bodies that there are situations where environmental destruction can seriously affect human life. This is particularly true in the case of indigenous peoples because of their special relationship to the lands and natural resources. Therefore it can be argued that environmental protection and the prevention of serious environmental harm fall under the obligations of states.

The Right to Health

The right to health can be seen as relevant for the protection of the environmental integrity of indigenous peoples, particularly because of their intimate connection with the natural environment. The right to health,[124] similarly to the right to life, is guaranteed by many international human rights instruments, including the Universal Declaration of Human Rights[125], the International Convention on Economic, Social and Cultural Rights (CESCR)[126], the United Nations Convention on the Rights of the Child[127], the European Social Charter[128], the African Charter on Human and Peoples' Rights[129], and the American Declaration of the Rights and Duties of Man.[130] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador') also guarantees the right to health by formulating this right as ensuring 'the enjoyment of the highest level of physical, mental and social well-being.'[131]

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[123] See generally Prudence Taylor, *An Ecological Approach to International Law, Responding to Challenges of Climate Change* (Routledge, London, New York, 1998).

[124] The World Health Organization, which addresses health concerns in a variety of cultural and social contexts, defines health as 'a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity' (Constitution of the World Health Organization, opened for signature 22 July 1946, Preamble, Official Records of the World Health Organization, Vol. 2, at 100). The definition and application of the universal right to health, then, must account for the complex interplay of physical, mental and social experiences and circumstances, and the varying cultural and social norms used to evaluate them. Michael F. Willis, 'Economic Development, Environmental Protection, and the Right to Health', 9 *Georgetown International Environmental Law Review* (1996) 195-220 at 197.

[125] Article 25(1).

[126] Article 12.

[127] Article 24.

[128] European Social Charter, Turin, adopted 18 October 1961, revised May 1996, entered into force 1 July 1999, 529 *United Nations Treaty Series* 89, Article 11.

[129] Article 16.

[130] Article XI

[131] Article 10.

The only United Nations' human rights treaty which in its text directly refers to environmental issues in relation to the right to health is the United Nations Convention on the Rights of the Child, which proclaims in Article 24:

> 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. […]
>
> 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures […]
>
> c) to combat disease and malnutrition […] through *inter alia* the application of readily available technology and through the provision of *adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;* […]
>
> e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of, basic knowledge of child health and nutrition, […] hygiene and *environmental sanitation* and the prevention of accidents.[132]

In the context of the state reporting procedure, the UN Committee on the Rights of the Child has issued observations calling for better compliance with Article 24(2)(c) in some of its Concluding Observations. For instance, it recommended that Jordan 'take all appropriate measures, including through international cooperation, to prevent and combat the damaging effects of environmental pollution and contamination of water supplies on children and to strengthen procedures for inspection.'[133] The Committee also expressed concern regarding South Africa and 'the increase in environmental degradation, especially as regards air pollution'. It recommended that South Africa fight environmental degradation, and particularly air pollution, by facilitating 'the implementation of sustainable development programmes to prevent environmental degradation, especially as regards air pollution.'[134]

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[132] Article 24 (emphases added). For a deeper analysis of the right to health of the child in the environmental context, see Malgosia Fitzmaurice, 'The Right of the Child to a Clean Environment', 23 *Southern Illinois University Law Journal* (1999) 611-656.

[133] UN Committee on the Rights of the Child, Concluding Observations on Jordan, U.N.Doc.CRC/C/15/Add.125 (2000), 2 June 2000 at para. 50 (available at: <www1.umn.edu/humanrts/crc/jordan2000.html> (visited 15 March 2007)). See U.N. Committee on the Rights of the Child, Concluding Observations on South Africa, U.N. Doc. CRC/C/15/Add. 122 (2000), 22 February 2000, at para. 30 (available at: <www1.umn.edu/humanrts/crc/southafrica2000.html> (visited 15 March 2007)).

[134] UN Committee on the Rights of the Child, Concluding Observations on South Africa, *ibid*, at para. 30.

The close relationship between environmental integrity and health has been recognized by various studies concerning international human rights. UN Special Rapporteur on human rights, Fatma Zohra Ksentini of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities[135] identified the right to health as a fundamental right and analyzed the effects of the environment on that right.[136] After studying various international human rights documents and national constitutions, she concluded that, under customary international law, 'everyone has a right to the highest attainable standard of health.'[137] Furthermore, she came to the conclusion that 'in the environmental context, the right to health essentially implies feasible protection from natural hazards and freedom from pollution.'[138] The so-called Ksentini Report also made references to the cultural and environmental integrity of indigenous peoples. Her final report emphasized that indigenous peoples must genuinely participate in all decision-making regarding their lands and resources.[139]

The UN Committee on Economic, Social and Cultural Rights has clarified that the right to 'the highest attainable standard of physical and mental health' in Article 12(1) of the International Covenant on Economic, Social and Cultural Rights is not confined to the right to health care. The Committee explained how the drafting history and the wording of Article 12(2) acknowledge that the right to health includes a wide range of socio-economic factors promoting conditions for healthy lives of people, extending to 'the underlying determinants of health, such as food and nutrition, housing, access to

[135] The body has changed its name and is now the Sub-Commission on Promotion and Protection of Human Rights.

[136] Fatma Zorah Ksentini, 'Review of Further Developments in the Fields With Which The Sub-Commission Has Been Concerned: Human Rights and the Environment', U.N. Doc. E/CN.4/Sub.2/1994/9, 6 July 1994, paras 176-187.

[137] *Ibid.*, para. 176.

[138] *Idem*. Other rapporteurs of the UN have also found connections between environmental degradation and the right to health. The United Nations' Special Rapporteur on the right to health, Paul Hunt, noted that the right to health gives rise to an obligation on the part of a State to ensure that environmental degradation does not endanger human health (see Paul Hunt, 'Right of Everyone to the Highest Standard of Physical and Mental Health: Addendum, Mission to Peru', UN Doc. E/CN.4/2005/51/Add.3 (2005), 4 February 2005, para. 54). A reference to human rights generally in relation to the environment was also made by Special Rapporteur Rodolfo Stavenhagen of the UN Commission on Human Rights, who took particular account of indigenous peoples. He concluded that 'the effects of global warming and environmental pollution are particularly pertinent to the life changes of Aboriginal people in Canada's North, a human rights issue that requires urgent attention at the national and international levels, as indicated in the recent Arctic Climate Impact Assessment' (Economic and Social Council, Commission on Human Rights, Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum, Mission to Canada, U.N. Doc. E/CN.4/2005/88/Add. 4, 2 December 2004, para. 94).

[139] Ksentini Report, *supra* note 136, para. 94.

safe and potable water and adequate sanitation, safe and healthy working conditions, and *a healthy environment*'.[140] Furthermore, the Committee goes on to say that victims of violations of the right to health should have access to remedies at both the national and international levels and should be entitled to adequate reparation.[141]

Emphasizing the environmental dimension of the right to health, the UN Committee on Economic, Social and Cultural Rights issued a General Comment relating to the implementation of the right to health, in which the special circumstances of indigenous peoples were highlighted.[142] The Committee considered that indigenous peoples have the right to specific measures to improve their access to health services and care, which should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. According to the Committee, the vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected.[143] The Committee further noted that 'in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension.'[144] In this respect, the Committee considered that 'development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.'[145]

In this statement, the Committee importantly recognized that the specific cultural circumstances of indigenous peoples, particularly their traditional way of life and traditional foods, are closely linked to the right to health. Particularly because of the traditional foods of indigenous peoples, both the rights to life and health can have a specific applicability in indigenous cases. In the Arctic area, for instance, certain Arctic indigenous groups are among the most exposed populations in the world as far as certain contaminants are concerned. Some of these contaminants are carried to the Arctic through long-range transport and accumulate in animals that are used as traditional foods.[146]

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[140] Committee on Economic, Social and Cultural Rights, General Comment 14 (2000), Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right to Highest Attainable Standard of Health (Art. 12),UN Doc. E/C.12/2000/4 (2000), 11 August 2000, at para. 4 (emphasis added) (available at: <www.cetim.ch/en/documents/codesc-2000-4-eng.pdf>).

[141] *Ibid.*, para. 59.

[142] *Idem.*

[143] *Ibid.*, para. 27, according to which, 'states should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health.'

[144] *Idem.*

[145] *Idem.*

[146] AMAP (Arctic Monitoring and Assessment Programme), *Arctic Pollution Issues: A State of the Arctic*

The Committee has also recognized the particular vulnerability of indigenous peoples in its General Comment No. 12 in relation to the right to adequate food.[147] The Committee has furthermore emphasized that the food should be culturally acceptable[148], which means that the food should correspond to the cultural traditions of indigenous peoples. According to the UN Special Rapporteur on the Right to Food, Jean Ziegler, this has special implications for indigenous peoples, for whom culturally appropriate foods derive from subsistence-based activities such as hunting, gathering or fishing, which are essential for maintaining their livelihoods.[149]

Other kinds of environmental interference, such as the consequences of global climate change, can also decrease the access of indigenous peoples to their traditional food. With regard to the right to health, the Inuit petition against the United States describes how the populations, accessibility and quality of fish and game upon which the Inuit rely for nutrition have diminished due to disappearing sea-ice and changing environmental conditions. In addition to issues of traditional nutrition, the petition clarifies how the Inuit's health is also adversely affected by changes in insect and pest populations and the movement of new diseases northward. Furthermore, the quality and quantity of natural resources of drinking water have decreased, which has adversely affected Inuit health. The petition highlights that it is not only physical health that is at stake, but also the Inuit's mental health that has been damaged by the destruction of cultural activities and transformation of the once familiar landscape.[150]

As pointed out above, it is not only physical health that is threatened by the negative effects of environmental change on the traditional livelihoods of indigenous peoples, since the traditional way of living is an important part of the identity of many indigenous people. According to the ACIA report, the loss of important cultural activities such as subsistence harvesting causes psychological stress, anxiety, and uncertainty.[151]

The Inter-American Commission on Human Rights has also recognized the close relationship between environmental degradation and the right to health, especially in

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Environment Report, AMAP, Oslo (1997), at vii.

[147] Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Rights to Adequate Food (Art.11), E/C/12/1995/5, 12 May 1999, para. 13 (available at: <www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?OpenDocument> (visited 14 May 2008)).

[148] *Ibid.*, para. 11.

[149] UN General Assembly, The Right to Food, A/60/350, para. 29 (available at: <daccessdds.un.org/doc/UNDOC/GEN/N05/486/96/PDF/N0548696.pdf?OpenElement> (visited 14 May 2008)).

[150] Inuit petition, *supra* note 9, paras 87-88.

[151] Arctic Climate Impact Assessment, *Impacts of Warming Climate: Final Overview Report* (Cambridge University Press, 2004) at 111 (available at: <www.amap/no/acia/> (visited 16 April 2007)).

the context of indigenous peoples. In the *Yanomami* case, besides the right to life, the Commission recognized that harm to people resulting from environmental degradation violated their right to health in Article XI of the American Declaration.[152] Additionally, in the *Belize Maya case*, the Commission noted that indigenous people's right to health and well-being was so dependent on the integrity and condition of indigenous land that 'broad violations' of indigenous property rights necessarily impacted the health and well-being of the Maya.[153]

The Right to Residence and Movement and Inviolability of Privacy or the Home

As previously discussed, environmental degradation can lead to situations where the integrity of the lands and traditional way of life of indigenous peoples becomes threatened. The right of indigenous peoples to peacefully live in their homelands and practise their way of life is protected in human rights law – in addition to other rights discussed in this article – through the rights to residence and movement and inviolability of privacy or the home. These rights are established in most of the major human rights instruments, including the Universal Declaration of Human Rights[154], the CCPR[155], the American Convention on Human Rights[156], the American Declaration of the Rights and Duties of Man[157], the European Convention on Human Rights and Fundamental Freedoms[158], and the African Charter on Human and Peoples' Rights[159].

One interesting case concerning indigenous peoples and the use of their environment brought to the UN Human Rights Committee is *Hopu and Bessert* v. *France*.[160] The authors of the communication, who were indigenous Polynesians, claimed to be the lawful owners of a tract of land in Nuuroa, Tahiti, where the French Polynesian authorities had started the construction of a hotel. The hotel was being built on a

[152] *Yanomami case*, under the section 'The Inter-American Commission on Human Rights, resolves', *supra* note 118, para. 1.

[153] *Belize Maya* case, *supra* note 16, paras 154-156.

[154] Articles 12 and 13(1).

[155] Articles 12 and 17.

[156] Articles 11 and 22.

[157] Articles VIII and IX.

[158] Articles 2(1) and 8 of Protocol 1.

[159] Articles 4 and 12(1).

[160] *Hopu and Bessert* v. *France*, Communication No 549/1993, UN Doc. CCPR/C/60/D/549/1993/Rev.1/(1997) (available at: <www1.umn.edu/humanrts/undocs/549-1993.html> (visited 16 March 2007)).

traditional burial ground of the indigenous inhabitants of Tahiti and at a fishing lagoon still used by many families for their subsistence practices.

Quite exceptionally, the Committee did not deal with the issue under Article 27, but used Articles 17 and 23 as the basis for its judgement. A problem with the application of Article 27 was the declaration by France according to which Article 27 is not applicable to France. Precluded from proceeding with Article 27, the Committee turned to the notions of 'privacy' and 'family' used in Articles 17 and 23 and concluded that the construction of the hotel on the traditional burial grounds constituted an interference with the authors' right to family and privacy.

The reasoning of the Committee, however, reveals that it is indeed the right to culture that is at issue in this case, despite the fact that Article 27 cannot be applied. The Committee stated:

> It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. […] [The] burial grounds in question play an important role in the authors' history, culture and life.[161]

The findings of the Committee were indeed contested by four members of the Committee who stated:

> The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.[162]

This case interestingly shows the commitment of the UN Human Rights Committee to protect the cultural integrity of indigenous peoples. This cultural protection seems to open the way for broadening the scope of application of other human rights provisions in matters related to the protection of the environmental integrity and important cultural values of indigenous peoples.

Another case concerning indigenous peoples and environmental use is the *Yanomami* case referred to earlier[163]. In that case, the Inter-American Commission on Human Rights found a violation of the right to residence and movement, since some

[161] *Ibid.*, para. 10.3.

[162] *Ibid.* see dissenting opinion by Thomas Buergenthal, David Kretzmer, Nisuke Ando and Lord Colville, para. 5.

[163] *Yanomami* case, *supra* note 118.

Yanomami people had to leave their traditional lands because of a series of adverse changes caused by the government's development projects.[164]

There is also a case brought by members of a Saami people before the former European Commission on Human Rights that involves interference with 'private and family life', *G. and E.* v. *Norway*.[165] In this case, two members of the Saami people alleged a violation of Article 8 of the European Convention due to a proposed hydroelectric project that would flood part of their traditional grazing grounds. The Commission recognized that traditional practices could constitute 'private and family life' within the meaning of Article 8. It questioned, however, whether the amount of land to be destroyed was large enough to be regarded as 'interference', finding that, in any case, the project was justified as necessary for the economic well-being of the country. The application was therefore inadmissible.[166]

There are many ways in which environmental degradation can lead to the violation of the rights to residence, movement and home. The Inuit petition is again enlightening regarding the consequences of global warming for the rights to residence, movement and inviolability of privacy and the home. The petition proclaims that the United States' acts and omissions contributing to global warming violate the Inuits' right to residence and movement because climate change threatens their ability to maintain residence in their communities. Additionally, according to the petition, the Inuits' right to inviolability of the home is violated due to the adverse effects of climate change on private and family life. Specifically, climate change harms the physical integrity and habitability of individual homes and entire villages. The petition explains how coastal erosion caused by increasingly severe storms threatens entire coastal communities. In addition to this, melting permafrost causes building foundations to shift, thus damaging Inuit homes and community structures. The petition claims that the destruction is forcing the coastal Inuit to relocate their communities and homes farther inland, which causes great expense and distress.[167]

Displacement of indigenous peoples from their land is a harsh but unfortunately relatively common consequence of damage to the environment upon which they

[164] *Ibid.*, under the section 'The Inter-American Commission on Human Rights, resolves', para. 1.

[165] *G. and E.* v. *Norway*, Joined Applications 9278/81 and 9415/81 (1984), Decision of 3 October 1983, 35 *Decisions and Reports* (1984) 30-45.

[166] *Ibid.*, at 32-33 and 35. There are three interesting cases brought by people other than indigenous peoples to the European Court of Human Rights in which the Court has found a violation of Article 8 in relation to environmental issues: *Lopez-Ostra* v. *Spain*, ECHR Series A (1994), No. 303C; the *Case of Guerra and Others* v. *Italy* (Application No. 116/1996/735/932), Judgment of 19 February 1998; and the *Case of Fadeyeva* v. *Russia* (Application No. 55723/00) Judgment of 9 June 2005.

[167] Inuit petition, *supra* note 9, at 95.

depend.[168] Every type of forced displacement places the affected people in an extremely vulnerable position, one in which their very lives are often threatened.[169] Besides the question of displacement, interference in the lands of indigenous peoples can make it impossible for these communities to properly enjoy their human rights such as the rights to home or privacy. The rights to residence, movement and inviolability of the home or privacy impose positive obligations on the state in relation to the protection of the environmental integrity of the lands of indigenous peoples.

The Right to Property

The right to property can be applied to situations where the lands of indigenous peoples are under a threat due to environmental interference. One relevant instrument guaranteeing the right to property is the Convention on the Elimination of All Forms of Racial Discrimination (CERD), according to which State Parties are obliged to, *inter alia*, respect and observe the right 'to own property alone as well as in association with others.'[170] Interestingly and importantly, the Convention opens the possibility for affirmative action when needed in order to guarantee the equal enjoyment of this right. Article 1(4) states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This article could be applied in the protection of lands of indigenous peoples against environmental interference. Taking into account the special significance that the land has for indigenous peoples, special measures under Article 1(4) could be adopted

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[168] See, for instance, Robert K. Hitchcock, 'International Human Rights, the Environment, and Indigenous Peoples', 5 *Colorado Journal of International Environmental Law and Policy* (Winter 1994) 1-22 at 12. For the displacement of indigenous peoples, see generally Maria Stavropoulou, 'Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?', 5 *Colorado Journal of International Environmental Law and Policy* (Winter 1994) 105-125.

[169] Stavropoulou, 'Indigenous Peoples Displaced from their Environment', *ibid.*, at 110.

[170] Art. 5(d) (v). The Universal Declaration of Human Rights uses somewhat similar language by declaring: 'Everyone has the right to own property alone as well as in association with others' (Article 17(1)), and 'No one shall be arbitrarily deprived of his property' (Article 17(2)).

in order to guarantee equality with the other members of the society. As will be shown shortly below, this view is supported by the considerations of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The American Declaration of the Rights and Duties of Man includes the human right to 'own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'[171] Similarly, the American Convention on Human Rights declares: 'Everyone has the right to the use and enjoyment of his property. [...] No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'[172]

As mentioned earlier in this article, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have repeatedly emphasized the need to take into account the particular cultural context of indigenous peoples when applying the rights, such as the right to property, contained in the American human rights instruments. In this regard, for instance, in the *Awas Tingni* case[173], the Inter-American Court, in discussing the right to property, acknowledged the link between cultural integrity and indigenous communities' lands by maintaining that the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures.[174]

The Court stated in very clear terms that the right to property must be read and understood in the context of indigenous peoples' specific culture and lifestyle, to which they have a right, by stating that indigenous peoples 'by the fact of their very existence', have the right to live freely in their own territory.[175] The Court highlighted indigenous peoples' special relationship to their lands by stating that the close ties of indigenous peoples with the land must be recognized and understood as the fundamental

[171] Article XXIII. The Inter-American Commission on Human Rights acknowledges the fundamental nature of this right by stating that 'various international human rights instruments, both universal and regional in nature, have recognized the right to property as featuring among the fundamental rights of man.' Inter-Am. C.H.R., Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V/II.85, doc. 9 rev (1994) ch. 6, at 464.

[172] Article 21.

[173] *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua,* Judgment of 31 August 2001, Inter-Am. Ct. HR., (Ser.C), No. 79 (2001) (available at: <www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (visited 22 January 2007)). In its decision, the Inter-American Court concluded that Nicaragua had violated the rights of the Mayagna community of Awas Tingni by granting a logging concession within the community's traditional territory without its consent and by ignoring the consistent complaints and requests of the Awas Tingni urging demarcation of the territory.

[174] *Ibid.*, para. 149.

[175] *Idem.*

basis of their culture, their spiritual life, their integrity, and their economic survival.[176] Furthermore, The Court maintained: 'For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.'[177]

In *Awas Tingni*, the Court interpreted the protection of 'property' under the American Convention on Human Rights to mean the protection of property rights as understood by the indigenous community involved.[178] In that case, the Court held that the government of Nicaragua had violated the Awas Tingni's rights to property protection when granting concessions to a foreign company for logging on their traditional lands.[179] The Court also expansively defined property as including 'those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.'[180]

The Court held that Article 21 of the American Convention on Human Rights protects the right to property in a sense that includes the right of members of the indigenous communities to communal property.[181] When specifying the concept of property in indigenous communities, the Court noted: 'Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the

[176] *Idem*.

[177] *Idem*.

[178] *Ibid.* para. 151.

[179] *Ibid.*, para. 173.

[180] *Ibid.*, para. 144. The Inuit petition against the United States argues that that the definition given by Inter-American Court of Human Rights in *Awas Tingni* consists of personal property, intellectual property and intangible rights of access. See Inuit petition, *supra* note 9, at 83. Intellectual property rights are more clearly set in the Proposed American Declaration on the Rights of Indigenous Peoples (OEA/Ser.L./V/II.110, Doc. 22 (March 2001) (available at: <cidh.org/Indigenas/Indigenas.en.01/index.htm> (visited 23 October 2006)). Article 20 of the Proposed Declaration guarantees 'the right to the recognition and the full ownership, control and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection for their intellectual property [...] as well as to special measures to ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations.' The Inuit petition argues that the Inuits' intellectual property, in the form of their traditional knowledge, is an 'intangible object capable of having a value'. Furthermore, the Inuit possess intangible property rights of access to the harvest of resources. According to the Inuit petition, climate change diminishes the value not only of the Inuits' personal property but their intellectual property as well, because the unprecedented rapid climate change has made much of the traditional knowledge inaccurate, affecting the Inuit's ability to 'use, share, market and bequeath that [knowledge] to future generations', as guaranteed in the above-mentioned Proposed Declaration, thus making their traditional knowledge less valuable. See Inuit petition, at para. 84.

[181] *Awas Tingni, supra* note 173, para. 173.

land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community.'[182] The Court held that indigenous peoples' customary law must be especially taken into account when analyzing the right to property: 'As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration.'[183]

The Court stated that Nicaragua must adopt in its domestic law the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property.[184] When ruling on the delimitation, demarcation, and titling of the lands of the members of the Awas Tingni Community, the Court importantly stated that this had to be done 'with *full participation* by the Community and taking into account its customary law, values, customs and mores'.[185] The Court stated furthermore that until the above-mentioned operations had been fulfilled, the State Party had to abstain from any acts that might lead the agents of the state itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna Awas Tingni Community live and carry out their activities.[186]

From the point of view of environmental integrity, the *Awas Tingni* case is a significant one. It is the first legally binding decision by an international/regional tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so.[187] The Inter-American Court affirmed indigenous peoples' collective rights to their land, resources, and environment, connecting these rights with the right to property. This case sets a legal precedent in other cases where the environment and thus the culture and traditional livelihoods of indigenous peoples are infringed due to acts or omissions of states or state actors.

The Inter-American Commission on Human Rights has also recognized the inherent linkage between environmental degradation and the human right to property in the *Belize Maya* case.[188] In its decision, the Commission found that Belize had violated the Maya people's right to use and enjoy their property by granting concessions to third parties to exploit resources that degraded the environment within lands traditionally

[182] *Ibid.*, para. 149.

[183] *Ibid.*, para. 151.

[184] *Ibid.*, para. 138.

[185] *Ibid.*, para. 164 (emphasis added).

[186] *Ibid.*, para. 173.

[187] James Anaya and Claudio Grossman, 'The Case of Awas Tingni v. Nicaragua: A New Step in International Law of Indigenous Peoples', 19 *Arizona Journal of International and Comparative Law* (2002) 1-15 at 2.

[188] *Belize Maya case*, *supra* note 16.

used and occupied by the Maya people.[189] The Commission noted that indigenous people's international human right to property is based on international law and does not depend on domestic recognition of property interests.[190] Furthermore, the Commission noted that 'the right to use and enjoy property may be impeded when the State itself, or third parties acting with the acquiescence or tolerance of the state, affect the existence, value, use or enjoyment of that property.'[191]

Importantly, the Commission noted that while states may encourage development as a means of securing economic and social rights, they nevertheless have an obligation to take positive measures to ensure that third parties do not infringe upon property rights, especially those of indigenous people.[192] This is a very clear and strong statement concerning the positive obligations of the state to protect the rights of indigenous peoples against environmental interference that falls within the responsibility of the state.

Furthermore, in the *Belize Maya* case, as noted in the introduction of this article, the Commission emphasized the *distinct nature* of the right to property as it applies to indigenous people, recognizing the centrality of the lands to the cultural vitality of indigenous peoples.[193] In this respect, the Commission stated:

> Similarly, the concept of family and religion within the context of indigenous communities, including the Maya people, is intimately connected with their traditional land, where ancestral burial grounds, places of religious significance and kinship patterns are linked with the occupation and use of their physical territories.[194]

The *Belize Maya* case also contains important considerations in relation to economic development that might have negative consequences for the environmental integrity and rights of indigenous peoples. The Commission emphasized the states' obligation to take 'positive measures' in the protection of property rights against infringements.

[189] *Ibid.*, paras 153, 194.

[190] *Ibid.*, para. 117. Similarly to the decision in *Awas Tingni*, the Commission noted that indigenous property rights are broad, and are not limited 'exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition' (*ibid.*). Interestingly, the failure of the State to recognize indigenous property rights was one basis for the Commission's finding of a violation of the Maya people's right to property (para. 152). With regard to the basis of the property right, the Commission again emphasized international law in the *Case of Mary and Carrie Dann* and made a particular reference to the Proposed American Declaration on the Rights of Indigenous Peoples, Article XVIII (*Case of Mary and Carrie Dann* v. *the United States*, Case 11.140, Report No 75/02, Inter-Am. C.H.R., 27 December 2002, para. 129 (available at: <www.cidh.oas.org/annualrep/2002eng/USA.11140.htm> (visited 24 October 2006)).

[191] *Belize Maya case*, *supra* note 16, para. 140.

[192] *Ibid.*, paras 149-150.

[193] *Ibid.*, para. 155.

[194] *Idem.*

Additionally and importantly, in finding a violation of the right to property, the Commission recognized rather extensive participatory rights of the Maya by stating that the State of Belize had violated the right of the Maya people to property 'by granting logging and oil concessions to third parties to utilize the property and resources […] in the absence of *effective consultations* with and the *informed consent* of the Maya people.'[195]

In relation to the right to equality, the Commission stated in the *Belize Maya* case that it is not sufficient for states to provide for equal protection in their law: 'States must also take the legislative, policy or other measures necessary to ensure the effective enjoyment of these rights.'[196] The Commission continued, stating that 'the right to equality before the law does not mean that the substantive provisions of the law will be the same for everyone, but that the application of the law should be equal for all without discrimination. The protection is intended to ensure equality, not identity of treatment, and does not necessarily preclude differentiations between individuals or groups of individuals.'[197] Furthermore, the Commission noted that the principle of equality may also sometimes require states to take affirmative action as a temporary measure in order to diminish or eliminate conditions which cause or help to perpetuate discrimination, including vulnerabilities, disadvantages or threats encountered by particular groups such as minorities.[198]

The Commission then mentioned that indigenous peoples have historically suffered racial discrimination, and that one of the greatest manifestations of this discrimination has been the failure of state authorities to recognize indigenous customary forms of possession and use of lands.[199] At the end of the discussion on equality, the Commission referred to the statement of the UN Committee on the Elimination of Racial Discrimination, which states: 'In many regions of the world indigenous peoples have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and […] have lost their land and resources to colonists, commercial companies and State enterprises. Consequently the preservation of their culture and their historical identity has been and still is jeopardized.'[200]

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[195] *Ibid.*, para. 194 (emphasis added).

[196] *Ibid.*, para. 162.

[197] *Ibid.*, para. 166.

[198] *Idem.*

[199] *Ibid.*, para. 167.

[200] *Ibid.*, para. 167. Reference to the Committee on the Elimination of Racial Discrimination, General Recommendation XXIII, on indigenous peoples, adopted on 18 August 1997, CERD/C51/Misc. 13/Rev. 4 (1997), para. 3.

The Commission thus echoed the words used in its Ecuador report[201]: 'Within international law generally, and inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival – a right protected in a range of international instruments and conventions.'[202]

In *Belize Maya*, the Commission found that the State of Belize had not complied with its obligations under Article II of the American Declaration of the Rights and Duties of Man (the right to equality) by failing to establish the legal mechanisms necessary to clarify and protect the communal property right of the Maya people, which is in contrast to the property rights arising under the formal system of titling, leasing and permitting provided under the law of Belize.[203]

The analysis of the Commission concerning the requirement of equality is very significant as regards the protection of the environmental integrity of indigenous peoples. The Commission recognized in very clear terms that 'affirmative action' might be required of a state in order to protect the rights of indigenous peoples. The Commission does not, however, clarify which forms the 'special protection' should take. The right to effective participation, as highlighted in the *Belize Maya* case, could already be a step towards achieving effective protection of the environmental integrity of indigenous peoples when truly implemented.

The Commission seems to go further than the UN Human Rights Committee in relation to 'effective participation' by referring to the 'informed consent' of the Maya people in relation to logging and oil concessions on their traditional lands. This should be understand to mean that without the approval of the indigenous people in question, development activities should not take place in lands traditionally occupied by indigenous peoples. It is not clear what this could mean in relation to other kinds of environmental interference that do not concern an active project on indigenous peoples' lands but may nevertheless have severe consequences for their lands as property.

Another case brought before the Inter-American Commission on Human Rights dealing with the right to property in relation to indigenous peoples and their land is *Mary and Carrie Dann* v. *the United States*.[204] The petition alleged that the United States had steadily expropriated ancestral lands of the Western Shoshone to the benefit of the government and non-Indians, and that without sufficient resources, the Western

[201] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OAS/Ser.L/V/II.96.Doc.10 rev 1, 24 April 1997, Chapter IX.

[202] *Belize Maya* case, *supra* note 16, para. 169.

[203] *Ibid.*, para. 162.

[204] *Mary and Carrie Dann* v. *the United States*, *supra* note 190.

Shoshone have not been able to oppose the government's encroachment and erosion of their land base.[205] The Commission found, among other things, that the right to property under Article XXIII of the American Declaration of the Rights and Duties of Man had been violated. According to the Commission, all of the circumstances suggested that the Danns had not been afforded equal treatment under the law with regard to the determination of their property interests in the Western Shoshone ancestral lands, contrary to Article II of the American Declaration (the right to equality).[206]

Besides recognition of the need for effective consultation and even informed consent in relation to the right to property, the Inter-American Court and Commission cases discussed above are important for their recognition of the land rights of indigenous peoples as property rights by denying the restrictive interpretation of the right to property and thus accepting that this right also protects the lands that indigenous peoples use and occupy.[207] This sets a very important precedent for the protection of traditional livelihoods that are practised on lands indigenous peoples do not necessarily 'own' in a restrictive sense but merely use and occupy.

Compared to the Inter-American Human Rights system, the European Court of Human Rights[208] does not provide a very promising avenue for indigenous peoples in relation to the protection of their right to property. In the European human rights system, there are no indigenous cases that directly relate to the protection of property under Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms[209], which states: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'[210]

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[205] *Ibid.*, para. 39.

[206] *Ibid.*, para. 145.

[207] See para. 148 of the *Awas Tingni* case (*supra* note 173), where the Court stated: 'Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention – which precludes a restrictive interpretation of rights –, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.'

[208] The European Court of Human Rights was established under the European Convention on Human Rights of 1950 to monitor compliance by the Parties. (See the homepage of the Court at: <www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/> (visited 1 January 2008)).

[209] Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, adopted 20 March 1952, entered into force 18 May 1954, *European Treaty Series* No. 9 (1952).

[210] Article 1.

The European Court of Human Rights has considered environmental issues in relation to property, without, however, applying the property provision, Article 1 of Protocol No. 1. Kate Cook has pointed out that the extensive margin of appreciation afforded to the state under this provision to interfere with property rights means that it is not very likely to provide effective protection in environmental cases.[211] In the European Court of Human Rights there have, however, been cases relating to the infringement of property rights, but to which other Articles had been applied. For instance, in *Zander* v. *Sweden*[212], the impact of the petitioners' degraded drinking water directly related to their property rights, but violation was found of Article 6(1), the right to remedies, since their right to be protected from such contamination was not protected in Swedish environmental law.[213]

Based on the discussion above, it can be concluded that the extensive margin of appreciation afforded to the state under the European human rights system might make it challenging for indigenous peoples to seek the protection of their lands and livelihoods against environmental interference, at least when this interference can be seen as necessary for the country's economic development. In this respect, both the UN Human Rights Committee, and perhaps specifically the Inter-American Commission and the Court, provide a stronger mechanism for indigenous peoples, since both of these systems recognize that when states encourage economic development in the lands of indigenous peoples, they are under the obligation to take positive measures to ensure that third parties do not infringe upon the human rights of the indigenous peoples.

Concluding Remarks

The right of indigenous peoples to cultural integrity is recognized in many widely ratified international human rights instruments. The right to culture of indigenous peoples, as accorded in present human rights law, includes their right to environmental integrity. According to the human rights monitoring bodies, the right to culture contains the right to be protected from the harmful environmental effects of economic or development-related projects that take place in the lands indigenous peoples own, use and occupy. Not every case of interference, however, necessarily amounts to a violation of the right to culture. The crucial factor, according to the UN Human Rights Committee, seems

[211] Kate Cook, 'Environmental Rights as Human Rights', *European Human Rights Law Review* (2002) 196-215 at 206.

[212] *Zander* v. *Sweden*, ECHR Series A (1993), No. 279-B.

[213] *Ibid.*, para. 24. See the analysis of the case in relation to environmental rights in Cook, 'Environmental Rights as Human Rights', *supra* note 211, at 209-210.

to be that the traditional livelihood, as an integral part of the culture of indigenous peoples, should remain sustainable.

Environmental changes taking place not only in the Arctic but throughout the world are often serious and irreversible in nature. Therefore procedural rights, particularly the right to participate in environmental decision-making, play a central role. The right to effective participation has been seen by human rights monitoring bodies as being included within the right to culture of indigenous peoples. In addition to the right to culture, the right to property, as interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, includes the effective participation of indigenous communities. It is not entirely clear what it is meant by such participation, but the words 'effective' and 'meaningful' and even 'informed consent', together with the requirements of 'affirmative action', clearly refer to something that goes beyond the average citizen's participation in the public affairs of a state. The right to participate entails participation in decisions that directly affect the rights and lives of indigenous peoples. There is no doubt that environmental degradation that takes place on the lands of indigenous peoples or has effects on their lands should fall within this category.

Besides the rights to culture and property, there are other human rights that can be used for the protection of the traditional way of life and environmental integrity of indigenous peoples. As discussed in this article, rights pertaining to life, health, residence and movement, and the inviolability of privacy or the home can be applied in this respect. Many kinds of serious environmental interference can lead to a violation of these rights. The right to property, as applied in an expansive way by the Inter-American Commission and the Inter-American Court of Human Rights, by linking the right to property to the cultural protection of indigenous peoples, seems to offer perhaps the strongest protection against environmental interference on the lands indigenous peoples do not necessarily own, but occupy and use.

The cases concerning indigenous peoples and the environment have all dealt with the direct use of lands of indigenous peoples by the state or third parties. Therefore the right to the sustainability of the culture or the participatory rights must, to some extent, be understood within this context. What remains open is the question concerning participatory rights in cases where the state does not directly act on the lands of indigenous peoples but causes other kinds of environmental interference by its actions or omissions. The Inuit petition is the first case trying to make a state responsible for the consequences of global climate change; at issue are the consequences of actions and omissions of the state, rather than direct interference of the state on the lands of indigenous peoples. It will be interesting to see whether the Inter-American Commission on Human Rights is willing to take an even more

expansive line of interpretation than it has to date, thus amounting to a new level of protection of the environmental integrity of indigenous peoples.[214]

Concerning the participatory rights of indigenous peoples, it is arguable whether they will be able to reach a level where they would offer effective protection against global environmental interference such as climate change. Even when indigenous peoples have been able to participate in environmental protection in their own territories, a serious gap is revealed when we talk about the participation of indigenous peoples in international environmental decision-making.

This article concludes that states have already legally committed themselves to the *effective* participation of indigenous peoples. This, in my view, gives a legal justification for the extended participatory position of indigenous peoples in international forums as well. Nevertheless, this is not yet reflected in states' behavior concerning international environmental processes, where the states, accepting themselves as the only capable legal subjects in this respect, have offered indigenous peoples a possibility to participate only through non-governmental organizations along with other interest-based groups.

It can be concluded that the effective protection of indigenous peoples' traditional nature-based livelihoods imposes positive obligations on states to protect the environment effectively, together with indigenous peoples. There could be many ways in which states could strengthen the participatory position of indigenous peoples in environmental decision-making without jeopardizing their sovereignty. One would be to allow indigenous peoples to be a constant and obligatory part of the national delegations of states in international environmental processes.[215] States could agree that within the

[214] On November 16, 2006, the Commission rejected the petition by stating that 'the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration. The Inter-American Commission on Human Rights, 16 November 2006 (available at: <graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> (visited 25 October 2007)). After a request of the petitioners, the Inter-American Commission decided to hold a public hearing to hear more evidence on the link between global warming and human rights. Request for a Hearing on the Relationship Between Global Warming and Human Rights (available at: <www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf> (visited 13 January 2008)). The Response of the Inter-American Commission on Human Rights (available at: <www.ciel.org/Publications/IACHR_Response_1Feb07.pdf> (visited 13 January 2008)). At the time of writing of this article, the Commission has not published its present intentions concerning the case.

[215] It should be noted that some states have allowed the participation of representatives of indigenous peoples in some international environmental processes. For instance in the negotiation process of the Stockholm Convention on Persistent Organic Pollutants, representatives from some Arctic indigenous peoples participated in the national delegations of Canada and USA. See Mika Flöjt, 'Arktinen episteeminen yhteisö kansainvälisessä POPs-neuvotteluissa' [The Arctic epistemic community in the international POPs negotiations], in Mika Luoma-Aho, Sami Moisio and Monica Tennberg (eds), *Politükan tutkimus Lapin yliopistossa* [Political Research at the University of Lapland] (P.S.C. Inter, University of Lapland, 2003) 359-374.

national delegations, indigenous peoples would have a right to make statements and proposals concerning the position of a state in relation to environmental protection. The participation, however, should be real and effective so that indigenous representatives have a true possibility to be heard and to influence decision-making in order to achieve an effective protection of the environmental integrity of their traditional lands.

THE PROTECTION OF THE ENVIRONMENTAL INTEGRITY OF INDIGENOUS PEOPLES IN HUMAN RIGHTS LAW

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Environmental Rights Protecting the Way of Life of Arctic Indigenous Peoples: ILO Convention No. 169 and the UN Draft Declaration on Indigenous Peoples

1. Introduction

The Arctic is characterized as one of the most vulnerable environments on the globe. The plants and animals of the region have adapted to harsh and variable weather conditions, which paradoxically has in many cases made them more sensitive than usual to human activities. The Arctic remains a clean environment in comparison to most other areas of the world, yet the region's ecosystems and peoples, especially indigenous peoples, who depend directly upon natural resources, are threatened by pollution and other anthropogenic interference from a number of different sources.[1]

The Arctic is the homeland of a large number of indigenous peoples, who have subsisted for thousands of years on the resources of the land and sea as hunters, fishers, gatherers and reindeer herders. In Alaska the principal indigenous peoples are the Inupiat, Yup'ik, Alutiiq and Athabaskans; in Canada and Greenland, the largest indigenous people is the Inuit, although these countries also have many First Nations, such as Athabaskans and Gwich'ins; in Scandinavia the indigenous population consists of the Saami; and in Siberia the indigenous groups include the Chukchi, Even, Nenets, Nivkhi, Itelmen and Yukaghir. In addition, there are Saami living on the Kola Peninsula in north-west Russia and Yup'ik in areas along the far eastern coasts of Siberia.

Despite rapid and extensive social, economic and political changes, many indigenous peoples of the Arctic continue to rely on natural resources, wholly or partly, for their economic and cultural survival. The living resources of the Arctic provide them with a fundamental basis for their social identity and spiritual life. Indigenous views on animals, nature and the relations between human beings and their environment lie at the heart of indigenous discourses on environmental protection. Historical, archaeological and anthropological evidence suggests that, during challenging times, Arctic peoples have elaborated an ecological knowledge that was crucial to their successful adaptation to changing environmental conditions. Indigenous peoples' organizations claim that the Arctic indigenous cultures have practiced sustainability for thousands of years and continue to do so today, providing models for global environmental management.[2]

According to assessments of the Arctic Monitoring and Assessment Programme (AMAP), certain Arctic indigenous groups are among the most exposed populations in the world where certain environmental contaminants are concerned. Some of these contaminants are carried to the Arctic through long-range transport and accumulate in animals that are used as traditional foods. Some contaminants also have significant sources within the Arctic, giving rise to serious concerns in certain

local and sub-regional areas.[3]

Expected and in part already documented changes in climatic patterns and biological diversity will have dramatic influences on the ecosystems, food-webs, numbers and natural surroundings of the animals in the Arctic and, by and large, the traditional way of life of the region's indigenous peoples. Global climate change, which is connected to many other environmental problems such as ozone depletion and the loss of biodiversity, is expected to occur in the Arctic in a form that will be many times more intense than anywhere else in the world. [4]

Environmental problems lead to infringements of indigenous peoples' human rights because of those peoples' close connection to nature. Arctic environmental problems affect not only *the rights of indigenous peoples to their traditional territories* and *natural resources of their territories* but also other human rights such as *cultural rights*, especially *the right to traditional livelihoods*, *the right to health and a healthy life*, *the right to an adequate standard of living* and *the right to development*. Within the field of human rights, many *rights of the child* are also at issue because of environmental degradation. In particular, certain organic pollutants pose serious risks to the health of Arctic indigenous children in being transferred directly from mothers with high contamination levels to children through breast-feeding.[5]

Protection for the above-mentioned environment-related rights and other environmental rights of indigenous peoples can be found both in human rights law and in international environmental law. Even though many of the provisions protecting environmental rights are general in nature and not specific to indigenous peoples, the special relationship that indigenous peoples have to nature, especially in the form of traditional livelihoods, means that environmental rights can be considered particularly important for them. The environmental rights of indigenous peoples refer primarily to the rights to be protected from environmental interference, including the substantive rights mentioned in the previous section. Secondly, they denote the rights of indigenous peoples to protect the environment themselves, including procedural rights such as *participatory rights* and *the right to effective remedies*. Environmental rights can be either individual or collective in nature. A common element of the environmental rights of indigenous peoples is that they are connected to the protection of the traditional, nature-based livelihoods and lifestyles of those peoples. As has become obvious, environmental problems pose direct challenges to carrying on traditional livelihoods safely. Environmental rights are rights among which one can find protection against these challenges.

Environmental rights can be found not only in general instruments of international law but in indigenous-specific instruments as well. The purpose of this article is to look at the environmental rights that can be found in two international instruments that seek to protect the rights of indigenous peoples explicitly, namely, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) and the UN Draft Declaration on Indigenous Peoples (1994). The article aims to determine the kinds of provisions that exist in these two

instruments for the protection of indigenous culture and traditional livelihoods from environmental interference. It seems that the most effective environmental provisions are procedural (participatory) in nature. In any event, in most cases they are based on and linked with substantive rights. Provisions are often formulated such that, as a starting point, the indigenous peoples have a particular substantive right. To guarantee the realization of this right, the state has an obligation to safeguard its implementation. An essential part of this protection, however, is the active participation of indigenous peoples in the implementation of the right in question.

ILO Convention No. 169, which revised the organization's earlier Indigenous and Tribal Peoples Convention No. 107 (1957)[6], is the only indigenous- specific convention in international law. It is based on an attitude of respect for the cultures and ways of life of indigenous and tribal peoples. It presumes their right to continued existence and to development along lines they themselves desire. The Convention also provides a number of articles setting out the right of these peoples to be involved in the decision-making process as it affects them.

The UN Draft Declaration on Indigenous Peoples was prepared by the UN Working Group on Indigenous Populations after its review of the rights and current political and economical situation of indigenous peoples. The conclusion of the Working Group's survey and report was that there was a strong need for a new legal document concerning the rights of indigenous peoples.[7] The Draft Declaration contains many types of rights, from strong participatory rights, e.g. the right to self-determination, to several different rights pertaining to lands and environments, culture, religion, language, labour, etc. The focal point of the Draft Declaration is, I would say, even more so than in the ILO Convention, to present indigenous peoples as key players in all fields in the issues that are important for their lives and for them collectively as peoples.

To date, only two Arctic states - Denmark and Norway - have ratified ILO Convention No. 169, while, at this writing, Finland and Sweden are preparing for ratification by harmonizing their national laws to accord with the content of the Convention. The Draft Declaration on Indigenous Peoples is still under preparation in the UN Commission on Human Rights. The purpose of this article is to ascertain the potential of the environmental provisions of both instruments.

2. Environmental Rights in ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries

This section examines the environmental requirements that can be found in ILO Convention No. 169, i.e. which provisions of the Convention protect the traditional, environment-based cultures and livelihoods of indigenous peoples. Because of indigenous peoples' direct link to nature and natural resources, environmental protection is a crucial and inseparable part of the protection of their culture. In the Convention, all of the different categories of human rights mentioned above are

present; the instrument contains elements of individual and collective rights (land rights) as well as substantive and procedural rights (participatory rights). The aim of the sections to follow is to examine the potential of the ILO Convention, that is, to ascertain the kind of environmental provisions which the instrument sets out in principle for the countries that have committed themselves to it.

2.1 Background and Overview of ILO Convention No. 169

As mentioned above, ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) amends the earlier Convention No. 107 (1957), marking a change in the ILO's approach to indigenous and tribal peoples. Protection is still the main objective but it is based on respect for indigenous and tribal peoples' cultures, their distinct ways of life, and their traditions and customs. When Convention No. 107 was adopted, indigenous and tribal peoples were seen as "backward" and temporary societies. The belief at the time was that indigenous peoples had to be brought into the national mainstream in order to survive and that this should be done though integration and assimilation. As time went on, this approach came to be questioned, largely due largely to a growing awareness and to increasing numbers of indigenous and tribal peoples participating in international fora such as the United Nations Working Group on Indigenous Populations.[8]

A cardinal difference compared to the old convention is that the revised one presumes that the peoples concerned are in most cases able to speak for themselves and take part in the decision-making process and that their contribution will be a valuable one in the country in which they live. This fundamentally different approach is to be ascribed principally to the indigenous peoples themselves.[9] Since its adoption, Convention No. 169 has gained recognition as the foremost international policy document on indigenous and tribal peoples. Convention No. 169 has been ratified by 17 countries.[10] Convention No.107 is now closed to ratification; however, it remains binding on those who have already ratified it until they ratify Convention No. 169.

Even though Convention No. 169 takes an approach advocating respect for the culture, ways of life, traditions and customary laws of the indigenous and tribal peoples, it does not mean that these peoples should always remain as they once were, fixed in their traditional cultural patterns. Indigenous and tribal peoples have the right to change like all other nations and all other peoples if they so wish. In most cases, they will have to adapt to a changing national situation, to a changing economy and to a changing environment. The important thing, however, is that they have the right to choose whether to change, to what extent, and how.[11]

Furthermore, the protection of the traditional livelihoods of indigenous peoples does not mean that the means of practicing those livelihoods may not shift over time. In *Länsman et al v. Finland*, the Human Rights Committee made an important observation in emphasizing that, contrary to the State Party's submission, Article 27

of the CCPR[12] does not protect the traditional *means* of livelihood of minorities. The fact that the Saami had adapted their methods of reindeer herding over the years and practice it using modern technology does not prevent them from invoking Article 27 of the Human Rights Covenant.[13]

ILO Convention No.169 does not clearly define who are indigenous and tribal peoples. It only describes the peoples it aims to protect. The Convention applies to:

> a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs and traditions or by special laws or regulation; b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[14]

The ILO did not consider the word 'indigenous' by itself enough. Article 1 of the Convention illustrates the basic idea that the ILO is more interested in the present social situation than in who got there first. This is not a definition, but a statement of coverage. The word 'tribal' is an attempt to describe a kind of social organization, outside the mainstream and run partially by its own rules and customs.[15] In sum, the ILO focuses on the present situation, although historical continuity is important as well. The challenge is how to improve the living and working conditions of indigenous and tribal peoples so that they can continue to exist as distinct peoples if they wish to do so.[16]

Self-identification as indigenous and tribal is regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply.[17] The Convention adopts an approach based on both objective and subjective criteria. The objective criterion is that a specific indigenous or tribal group or people must meet the requirements of Article 1.1 and recognize and accept a person as belonging to the group or people. The subjective criteria are that a person identify him- or herself as belonging to the group or people or that the group consider itself to be indigenous or tribal under the Convention.

The ILO worked for three years during the adoption of the Convention to decide whether or not to change the term 'populations' in Convention No. 107 to 'peoples' in the new Convention. The inclusion of the term 'peoples' instead of 'populations' was the outcome of lengthy discussions and consultations outside the meetings. It was finally agreed that the only correct term was 'peoples', because this recognizes the existence of organized societies with an identity of their own rather than mere groupings sharing some racial or cultural characteristics. After lengthy negotiations,

it was decided that 'the use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law' (third paragraph of Article 1).

The inclusion of this paragraph responded in part to the concern expressed by several governments over whether the use of the term 'peoples' in this connection would mean recognition in international law of the peoples' right to secede from the countries in which they live. It was also decided that it was outside the competence of the ILO to determine how the term 'self-determination' should be interpreted in general international law. It was understood, however, that the Convention does not impose any limitation on self-determination or take any position for or against self-determination. In other words, there is nothing in Convention No. 169 which would be incompatible with any international legal instrument that may establish or define the right of indigenous and tribal peoples to self-determination.[18]

ILO Convention No. 169 is divided into three main sections: the first deals with general policy (arts. 1-12); the second concerns substantive issues such as land (arts. 13-19), recruitment and conditions of employment (art. 20), vocational training, handicrafts and rural industries (arts. 21-23), social security and health (arts. 24-25), education and means of communication and contacts and co-operation across borders (art. 32); the third deals with the administration and procedural provisions (art. 34-44).

2.2 Provisions Protecting the Way of Life and Environments of Indigenous Peoples

One important aim of Convention No. 169 is to establish the conditions for self-management of indigenous and tribal peoples. The Convention provides the means by which indigenous and tribal peoples can take control of their own lives and destinies, and gain greater recognition of their distinct cultures, traditions and customs, as well as more control over their own economic, social and cultural development.[19] The Preamble to the Convention recognizes 'the aspirations of these peoples to *exercise control* over their own institutions, *ways of life*, and *economic development* and to *maintain* and *develop* their *identities*, languages, and religions, within the framework of the States in which they live' (emphasis added). Article 2 continues by stating that 'governments *shall* have the responsibility for developing, *with the participation of the peoples concerned*, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. Such action shall include measures for b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions' (emphasis added).

Self-management as defined in the Convention means that indigenous and tribal peoples should have the opportunity and a real possibility to manage and control

their lives and to decide their own future.[20] One of the most developed forms of indigenous self-management can be found in the Arctic, namely, Greenland Home Rule, which was established in 1979 after the passing of the Home Rule Act in 1978. The Greenlandic Inuit became the first Inuit to achieve a degree of self-government. In practice, this means that while Greenland remains part of the Kingdom of Denmark, the Greenland Home Rule authorities have assumed control over and responsibility for a number of public institutions and have undertaken policies that aim to develop the country in terms of its own social and economic conditions and available natural resources.[21]

A traditional, nature-based way of life is still a dominant element of the cultures of many Arctic indigenous peoples. Traditional livelihoods form an essential part of the cultural as well as the social and economic rights mentioned in Article 2 of the ILO Convention. Even today many groups of these peoples subsist on the resources of nature as hunters, fishers and reindeer herders. Then again, many individuals in indigenous groups have given up traditional lifestyles and adapted to or chosen a more typically Western way of life. ILO Convention No. 169 considers both courses of action equal. The most important thing is that indigenous peoples themselves have a right to choose whether they would like to keep their traditional way of living or not. The main point is that they are not forced to give up the traditions because the traditions might become too difficult or even impossible to maintain. Article 5 (c) highlights this by prescribing that states have an obligation to adopt policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work. This is to be done with the participation and co-operation of the indigenous peoples.

There is no doubt that environmental problems pose formidable challenges to the traditional livelihoods of indigenous peoples. According to AMAP and other scientific research, Arctic indigenous peoples will be, and partly already are, on the front line when environmental changes occur in the Arctic. As mentioned before, many changes in the natural environment are already causing problems, in particular to people who depend directly upon natural resources. With some exceptions, such as non-indigenous reindeer herders in northern Finland[22], the people in question are indigenous peoples.

ILO Convention No. 169 does not directly mention the fact that environmental problems are causing changes in the circumstances in which indigenous livelihoods are practiced. However, in several provisions[23] the Convention refers quite clearly to environmental protection and the special value that the environment has for indigenous peoples. Furthermore, in any case, the states have committed themselves to protect certain rights and values by agreeing to be bound by human rights law, on the one hand, and international environmental law, on the other. Accordingly, there is no doubt that the states are required to guarantee all the rights agreed upon in the Convention, even if environmental conditions change.

There are two specific provisions of the Convention that are central to how the instrument should be applied. Article 6 is the most important article in the entire

Convention. It requires governments to establish means enabling indigenous and tribal peoples to participate at all levels of decision-making in elective and administrative bodies. It also requires governments to *consult* indigenous and tribal peoples, through adequate procedures and their representative institutions, whenever consideration is given to legislative or administrative measures which *may affect such peoples directly*.

Consultations are compulsory whenever any legislative or administrative measure is being explored, planned or implemented that may have a direct effect on indigenous and tribal peoples. Such measures include amendments to the national constitution, new agricultural legislation, land rights decrees or procedures for obtaining land titles, national education or health programmes and services, or *any public policies affecting indigenous and tribal peoples*.[24] The environmental policy of a country is a good example of a public policy that certainly has an influence on indigenous peoples.

Some actors were concerned that the rather imprecise language of Article 6 could be abused. It can, of course, but paragraph 2 of the article states that the consultations 'shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures'. This does not give indigenous and tribal peoples a right of *veto* but requires discussions in good faith. Note also the language in 6 1(b): 'governments *shall* establish means by which these peoples can freely participate "to *at least the same extent* as other sectors of population, at all levels of decision-making"' (emphasis added). We find here an opening for special treatment where merited, in short, affirmative action.[25]

According to the ILO Guide to the Convention No. 169, the Convention is a further development of the organization's concern for particularly disfavoured groups and its general human rights approach towards equality. Equality can require special treatment for groups who are at a disadvantage, such as indigenous and tribal peoples, women and working children. Affirmative action, as this special treatment is also known, does not necessarily entail positive discrimination but does include actions to overcome past discrimination. In addition to ensuring general human rights applicable to all citizens, the Convention grants indigenous and tribal peoples rights applicable only to these peoples. The recognition of special rights is not to be considered as a form of discrimination against non-indigenous citizens but rather as recognition of the distinctiveness of indigenous and tribal peoples' characteristics, needs and aspirations.[26]

Article 4 also emphasizes that the 'enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way when special measures are adopted'. In the case of environmental protection, it would hardly be discriminatory towards the rest of the population if indigenous peoples had a say, provided, of course, that the measures in question related to environmental protection only and not, for example, to land rights.

Article 7, paragraphs 3 and 4. seem to put even more weight on this kind of

an interpretation by making special reference to environmental protection and indigenous involvement in it. Paragraph 3 of Article 7 states: 'Governments *shall* ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the *social, spiritual, cultural and environmental impact* on them of planned development activities. The results of these studies *shall* be considered as *fundamental criteria for the implementation* of these activities' (emphasis added). Paragraph 4 requires that 'Governments *shall* take measures, in co-operation with the peoples concerned, to *protect and preserve the environment of the territories* they inhabit'.

Furthermore, paragraph 2 of Article 7 sets the improvement of the conditions of life and levels of health as a priority in plans for the overall economic development of areas where indigenous peoples live. The paragraph requires special projects to be designed to promote the development of the areas in question. This is to be done with the participation of indigenous peoples. The level of health or good conditions of life are directly linked with environmental conditions, especially in the case of indigenous peoples. Finally, it is relevant to notice the wording of Articles 6 and 7; both use the expression "states *shall"*, which indicates obligation.

Article 6.1 (b) emphasises the participation of indigenous peoples 'at *all levels* of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them'. For instance, transboundary environmental problems, handled at international level, can be seen as *directly affecting* the lives of indigenous peoples and therefore *concerning* them. Does this mean that indigenous peoples have a right to have their representatives in international environmental negotiations? There seems to be no strong argument why Article 6.1(b) should not be interpreted in this way. Furthermore, Article 4 of the Convention talks about *special measures* that 'shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, *cultures and environment* of the peoples concerned'. One such special measure could be to confirm the position of indigenous peoples in environmental matters on both national and international levels by guaranteeing, when necessary, the representation of these peoples in elective institutions and administrative and other bodies of a state that are responsible for environmental policies. This would enable indigenous peoples to have a direct influence on not only indigenous issues but also environmental questions that are, in fact, crucial to their lives.

Article 7.1 goes even further as concerns the right of indigenous peoples 'to *decide their own priorities for the process of development* as it *affects their lives*, beliefs, institutions and *spiritual well-being* and the *lands they occupy or otherwise use*, and to *exercise control*, to the extent possible, over their own *economic, social and cultural development*'. In addition, 'they *shall participate* in the formulation, implementation and evaluation of plans and programmes for national and regional development which may *affect them directly*' (emphasis added).

Article 7.1 talks about 'deciding their own priorities' and 'exercising control' over the developments which can easily be seen in an environmental context.

It is clear that the lives, spiritual well-being, lands, or the economic, social and cultural development of indigenous peoples are closely related to environmental considerations. Furthermore, the Article uses the mandatory 'shall' when mentioning priorities for the process of development. This intention cannot easily be interpreted other than as it is stated: 'indigenous peoples shall decide their own priorities [in the matters in question] and shall participate in the formulation, implementation and evaluation of plans and programmes'. Environmental plans and programmes could be seen as forming an important part of these programmes. Regional and national development can be seen as including both domestic and international environmental policy.

In the ILO Convention expresses the view that indigenous peoples should be able to participate in the protection of the environments of the territories they inhabit, as noted when Article 7.3 was mentioned. But if indigenous peoples could influence environmental protection only on the lands they own or otherwise occupy, this would be without real meaning, for the consequences of global environmental problems are dramatically changing the living conditions of the environments of these peoples.

For example, in the Northwest Territories of Canada, the Nunavut self-government model[27] gives the Inuit-majority government the power to decide on the local environmental agenda. But is this procedure really valuable if the representatives of the Nunavut Government do nothing or have no more to say than the rest of the population of the country when Canada decides on its international environmental policy? The consequences of global climate change or the risks posed by certain persistent organic pollutants are, according to estimates, serious issues particularly where the health and traditional livelihoods of certain Arctic indigenous peoples are concerned. Canada has, of course, a general international obligation to protect all people living in its territory. Yet, ILO Convention No.169 requires more than that: indigenous peoples have to be able to influence policies concerning them and participate freely in this decision-making. As mentioned, the language in Article 6.1(b) '…freely participate, to *at least* the same extent as other sectors of the population'…(emphasis added) could be seen as opening up the possibility for indigenous peoples to participate more effectively than the rest of the population in the matters (such as environmental protection) that are more relevant and valuable for them than for others.

The Territory of Nunavut is of course only one example and still a largely hypothetical one, since Canada has not ratified ILO Convention No. 169. Actually, compared to the situation of many other Arctic indigenous groups, the Inuit of Nunavut are able to influence their environmental protection rather substantially, at least at the local level. Unlike most other Arctic indigenous land-claim agreements, the Nunavut Land Claim Settlement gives Inuit not only control of land but also rather extensive mineral rights. If Canada were a Party to ILO Convention No. 169, Article 15 (exploration or exploitation of natural resources), mentioned above, would not even apply as such. In Nunavut, as well as in the Greenland Home Rule

area[28], the Inuit themselves have much to say as to whether and to what degree they want to exploit natural resources, and how to find a proper balance between exploitation, on the one hand, and preserving the traditional livelihoods, on the other. It is obvious that there can be a sharp confrontation between these two goals. ILO Convention No. 169 protects the traditional indigenous way of life but only as far as indigenous peoples themselves are willing to maintain it. This is exactly how Article 7 (1) of the Convention puts it: 'the peoples concerned shall have the right to decide their own priorities for the process of development as it affect their lives…the lands…, and to exercise control, to the extent possible, over their own economic, social and cultural development'.

Inuit in Nunavut are not lacking legal protection on the international level either; the Nunavut Agreement contains an interesting provision that provides the Inuit with at least a limited role in international environmental negotiations. The Nunavut Agreement prescribes that 'the Government of Canada shall include Inuit representation in discussions leading to the formulation of government positions in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area, which discussions shall extend beyond those discussions generally available to non-governmental organizations'.[29]

Even though this provision refers literally to wildlife harvesting rights, it could be argued that many other environmental issues are directly related to harvesting rights and could therefore fall under the obligation imposed by the provision. For example, different kinds of pollution and other environmental changes strongly affect the harvesting of animals and it would therefore be of utmost importance for the Inuit to have a standing in international negotiations concerning all environmental issues that affect the well-being of wildlife.

In practice, many countries – among these the Arctic countries - include indigenous representation in their national governments when negotiating international environmental agreements. The Biodiversity Convention (1992) and the Stockholm Convention on Persistent Organic Pollutants (1991) are two examples of instruments in whose drafting indigenous peoples participated very actively not only through NGOs but also as part of national delegations. Generally speaking, however, indigenous representation is rather limited and depends upon the activity of a certain indigenous group and the willingness of an individual state. In light of the provisions of the ILO Convention it could be argued that indigenous peoples have a right to participate in international environmental negotiations as well as national ones, and that states have an obligation to guarantee their official representation in these processes.

As regards the participatory rights in international environmental processes of Arctic indigenous peoples in particular, the most innovative environmental agreement is the Declaration on the Establishment of the Arctic Council (1996).[30] The initiative for the environmental co-operation between Arctic States was launched in 1987. In 1991, the eight Arctic states met again in Rovaniemi to sign the Rovaniemi Declaration, by which they adopted the Arctic Environmental

Protection Strategy (AEPS).[51] In addition to emphasizing the states' responsibility to protect and preserve the Arctic environment, the Declaration highlights the importance of 'recognizing the special relationship of the indigenous peoples and local populations of the Arctic and their unique contribution to the protection of the Arctic environment'.[52] It was recognized that the Arctic Environmental Strategy must incorporate the knowledge of indigenous peoples.[33]

A major feature of the Arctic Council (AC) is the involvement of indigenous peoples as Permanent Participants. In principle, permanent participation is open to all Arctic indigenous organizations equally upon certain conditions; for example, the number of Permanent Participants at any time should be fewer than the number of Member States in the Council. At present, there are six indigenous organizations that are Permanent Participants in the AC, i.e. the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, the Inuit Circumpolar Conference, the Saami Council and the Russian Association of Indigenous Peoples of the North. The status of Permanent Participant means that indigenous peoples can sit at the same table as the ministers when decisions are discussed and made. They have the right to make statements and proposals, but no right to make decisions; Permanent Participants are not part of the consensus.[34]

The status of Arctic indigenous peoples in the Arctic Council has been characterized as unprecedented. Even though it is soft law in nature, the Arctic environmental process seems to be a very unique process in the field of international law in general and from the viewpoint of indigenous peoples in particular. Compared to the possibilities that indigenous peoples have elsewhere, the opportunities of Arctic indigenous peoples to influence the protection of their environment and livelihoods are well developed, within the limits of participation of course. Arctic indigenous peoples do not have any decision-making power, so even though they may have their voices heard, real possibilities to affect the decisions of the Arctic Council in controversial matters are necessarily limited.

Calling for the right to have more decision-making power in each individual Arctic country, and responding to social change and threats to the Arctic environment, Arctic indigenous peoples have demanded the right to self-determination and have claimed self-government based on historical and cultural rights to the ownership of lands and resources.[35] ILO Convention No. 169 does not directly refer to the right of self-determination, unlike the Draft Declaration on Indigenous Peoples (Article 3). As mentioned above, the ILO concluded that it was outside its competence to interpret the political concept of self-determination. However, Article 7.1 of the Convention uses somewhat comparable language with regard to the exercise of control over indigenous peoples' economic, social and cultural development. For the Arctic indigenous peoples, Article 7.1 seems to highlight some very relevant aspects of this issue, although it remains silent about self-determination. According to Nuttall, self-determination for the indigenous peoples of the Arctic is the right to live a particular way of life, to practice a specific culture or religion, to use their own languages, and to have the ability to determine the future course of economic development.[50] The

question is more one of indigenous autonomy and self-government than of secession from the states.

As regards indigenous peoples' right of self-determination in international law, both the 1970 Friendly Relations Declaration and the 1993 Vienna Declaration and Programme of Action show that there is no general unilateral right in international law to secession and independent statehood by part of the population of an independent and democratic state. Although indigenous peoples can be regarded as 'peoples' in international law in every social, cultural and ethnological sense of the term and for the purpose of the international law of self-determination of peoples, this does not mean that they are entitled to claim the right of self-determination in its external sense, that is, in the form of secession, unless they live in a state with a profoundly undemocratic or repressive government. Yet, as an internal aspect of self-determination, indigenous peoples have the right to freely pursue their economic, social and cultural development without outside interference.[37]

In the Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government, adopted by the United Nations Meeting of Experts in Nuuk, Greenland, in 1991, the experts declared that they shared the view that indigenous peoples constitute distinct peoples and societies with a right to self-determination that includes the rights of autonomy, self-government and self-identification; they further asserted that indigenous peoples have the right to self-determination as provided for in the international covenants on human rights and public international law as a consequence of their continued existence as distinct peoples. According to the conclusions and recommendations of the expert meeting, an integral part of the right of self-determination is the inherent and fundamental right to autonomy and self-government.[38]

Although ILO Convention No. 169 does not directly refer to the rights of self-determination or self-government, it seems to guarantee a whole set of other rights offering indigenous peoples effective participation in matters affecting their lives and cultures. Land rights in particular are rather developed, a fact that has actually dissuaded many countries from ratifying the Convention. However, as long as one talks about participatory rights without a right of *veto*, as is seemingly the case in the ILO Convention, the meaning of participation in practice can become questionable where the parties disagree.

In addition to having effective participation, it is important that indigenous peoples have effective remedies to express their views on how their states have succeeded in complying with their commitments and to try to enforce their rights when necessary. One way for indigenous peoples to express their opinion about the issues in ILO Convention No. 169 is the reporting procedure set out in the instrument. For example Norway, which has ratified the Convention[39], sends its reports on the implementation of the Convention to the Saami Parliament for its comments. These comments form an integral part of the report under the terms of an agreement entered into between the Norwegian Government and the Saami Parliament. This co-operation has been established as a permanent procedure to ensure the inclusion

of the opinion of the Saami Parliament in the formal reporting procedure on Convention No. 169. The Saami Parliament has indicated its willingness to enter into an informal dialogue with the Committee of Experts, together with the Norwegian Government, to facilitate the implementation of the Convention. The Norwegian Government has stated that it shares the wish to facilitate the implementation of the Convention in this way, believing that open co-operation between governments and representative indigenous bodies may contribute effectively to the international promotion of indigenous rights and cultures, and it therefore fully supports the proposal for a supplementary dialogue.[40]

ILO Convention No. 169 itself contains no supervisory system. The supervisory system of the ILO, which can be used for the purposes of the Convention, is based on Articles 22 and 26 of the ILO Constitution, which provide for regular state reporting to an independent Committee of Experts and for an individual complaints procedure, respectively. Under the latter, any government, delegate to the International Labour Conference or the governing body of the ILO may file a complaint alleging violation of a convention by a ratifying state. This results in the establishment of a Commission of Inquiry, whose recommendations may be published, and referral of the matter to the International Court of Justice.[41] Another complaint procedure is provided by Article 24, where a 'representation' may be filed by any worker or employer organization alleging violation of a ratified convention, this results in the appointment of a Governing Body Committee consisting of a government member, employer member and worker member.[42] If the dispute is not resolved, the representation, the government's response and the Committee's commentary may be published.

Although neither of the complaints procedures has ever been invoked under Convention No. 107 (because of indigenous groups' rejection of the substantive elements of that instrument), the supervisory system potentially provides indigenous groups with an indirect means of enforcing their collective rights against the states that have ratified Convention No. 169. The ILO process does not grant standing to indigenous groups, but a complaint could conceivably be filed on behalf of an indigenous community by a labour union or by the ILO Governing Body itself acting upon information provided to it by indigenous groups or an NGO. ILO Convention No. 169 thus also offers some scope for the enforcement of the collective rights of indigenous peoples.[43]

2.3 Environmental Rights in Land Rights Provisions

Crucial to the protection of the environment and traditional livelihoods as an important part of indigenous cultures are the *Land Rights Provisions* in Convention No.169. The articles concerning these provisions (arts. 13-19) are often considered the crux of the Convention. My intention is not to go into the details of all of the land right provisions but to examine the significance of the provisions for the protection of indigenous livelihoods from environmental interference. Clearly, land and its

natural resources are the principal source of livelihood, social and cultural cohesion, and spiritual welfare of many indigenous peoples.

In Article 13, the Convention requires governments to respect the special importance of the cultures and spiritual lives of indigenous peoples and of their relationship with the lands or territories which they occupy, including in particular the collective aspect of this relationship. The Convention recognizes both individual and collective aspects of the concept of land. The concept of land encompasses the land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g. for a home or dwelling. Land can also be shared among different communities or even different peoples. This means that a community or people lives in a certain area and also has access to, or is allowed to use, another area. This is especially the case with grazing lands, hunting and gathering areas and forests.[44] The concept of land usually embraces the entire territory that a people uses, including forests, rivers, mountains, sea, the surface and the sub-surface.[45]

The basic provision on land rights in Convention No. 169 is Article 14. It requires that the rights of ownership and possession of the peoples concerned to the land they traditionally occupy be recognized. Governments are to take steps as necessary to identify the lands which the peoples concerned traditionally occupy and to guarantee effective protection of their rights of ownership and possession (Article 14.2). Note the word 'effective'. This means that there has to be real and practical protection and not just protection in law.[46] The article deals with the rights of both ownership and possession. There are many cases in which indigenous and tribal peoples do not have full title to their traditional lands. After a long discussion, it was concluded that in some circumstances the right to possession and use of the land would satisfy the conditions laid down in the Convention, as long as there was a firm assurance that these rights would continue. This may be the case, for instance, in situations where isolated indigenous and tribal peoples live on reservations or where there is shared use of certain lands. In the latter case, the right to possession may be more appropriate than full title.[47] In the Arctic, Saami reindeer herders are a typical example of a group that shares use of certain lands.

The *use* of lands which indigenous and tribal peoples do not occupy but to which they have had access for their subsistence and traditional activities was recognized in the Convention as an 'additional' right and not as an alternative to ownership. The relevant provision (in Article 14.1) was inserted to cover the situation of many indigenous and tribal peoples with long-established grazing, hunting or gathering rights to lands to which they do not have written title. The Convention states: 'Measures *shall* be taken, in appropriate cases, to safeguard this right'. Although it does not specify what an appropriate case would be, this provision has to be read in the context of Article 23, which calls for the recognition and strengthening of traditional activities, including hunting and grazing. In other words, indigenous and tribal peoples should not lose the opportunity to exercise their rights when these lands are developed; they have those rights, and governments 'shall, with the

participation of these peoples and whenever appropriate, ensure that these activities are strengthened and promoted' (Article 23.1).

Here again, in the above-mentioned provisions, the Convention reinforces the protection of traditional lifestyles and the importance of the participation of indigenous peoples in the maintenance of these activities. Article 14.1 points out very clearly that government is to take measures to safeguard these rights. There is no question that the obligation to ensure that these activities are strengthened and promoted could mean strict environmental protection requirements, even including the participation of indigenous peoples in the process.

Article 15 is the second main land rights article, and in this context perhaps even more interesting than Article 14, for it concerns the rights of indigenous peoples to the resources pertaining to their lands. This is an especially difficult provision, and it is drafted in terms which are not always specific because it has to apply to many different national situations.[48] The first paragraph states: 'the rights of these peoples to the natural resources pertaining to their lands *shall* be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources'. The provision recognizes that governments often retain exclusive ownership of some of the natural resources in different forms – whether mineral, sub-surface, or even sometimes renewable resources – but says that indigenous peoples have a claim to these, too, within a particular framework.[49]

The second paragraph of the article phrases this argument by providing that when a government retains the ownership of mineral or sub-surface resources, it has to consult indigenous peoples before it allows any programmes for the exploration or exploitation of these resources in order to determine whether and to what degree their interest would be prejudiced. Special attention should be drawn to the fact that this impact assessment has to be undertaken before allowing exploration or prospecting. The article then goes on to provide that, '*wherever possible*, these peoples shall be able to participate in the benefits of the exploitation of resources, and shall always receive fair compensation for any damages they may sustain as a result of these activities' (emphasis added).

How should we understand the expression 'wherever possible' here? This expression has to be read in connection with Article 6 of the Convention, referred to earlier, which requires consultation, participation and effective measures to allow these peoples to have a real say in the decisions that affect them. It also has to be seen together with Article 7, which requires assessments of the social, spiritual, cultural and environmental impact on the peoples of development activities and guarantees that they will be able to participate in the decisions taken on whether these activities are carried out. It should be borne in mind that the Convention has to be read as a whole and that the individual articles do not stand alone.

With regard to the special importance of the environment to the Saami people, the Norwegian Ministry of Culture has instructed the regional board responsible for managing Crown land in Finnmark to ask the opinion of the Saami Assembly before taking any decision concerning land-use projects. The reindeer herding districts are

legally entitled to be consulted, have the right to be compensated in the event of economic damage, and may bring lawsuits before the courts if they consider a project inadmissible.[50]

For indigenous peoples, land without decent and adequate resources is not worth much in terms of economic and cultural survival. Therefore, it is of utmost importance for these peoples that their interests be seriously taken into account when development activities are carried out. In indigenous self-governing areas, such as the Nunavut Territory or the Home Rule Area of the Greenland, where indigenous peoples themselves have extensive resource rights, it is - and must be - up to the peoples themselves to a considerable extent to decide on the use of their resources. Article 14 does not require that the land be occupied or used in a traditional manner. This would confine indigenous peoples to a particular lifestyle instead of giving them the opportunity to change as they see fit.

The importance of natural resources for indigenous peoples and the connection between natural resources and the right to self-determination has also been acknowledged by the UN Human Rights Committee. Two interesting observations by the Committee concerning Arctic indigenous peoples may be cited in this regard.

In April 1999, the Committee considered the fourth periodic report of Canada on the implementation of the Covenant (CCPR). In its concluding observations, it urged Canada 'to report adequately on implementation of Article 1 (right of self-determination) of the Covenant in its next periodic report'. It emphasized that the right of self-determination requires, *inter alia*, that all peoples (including indigenous peoples) must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.[51]

In October 1999, the Committee followed a similar approach when considering the fourth periodic report of Norway. In its concluding observations, it said that it 'expects Norway to report on the Saami people's right to self-determination under Article 1 of the CCPR, including paragraph 2 of that article (natural wealth and resources)'.[52] The considerations reflected Norwegian domestic policy, as there was at the time an active debate on indigenous self-determination.

In addition to the UN Human Rights Committee, the Inter-American Commission on Human Rights has acknowledged the importance of lands and resources to the survival of indigenous culture and, by implication, to indigenous self-determination. Traditional livelihoods on the land are accepted as an integral part of the cultures of indigenous peoples which they have a right to pursue.[53] That understanding is a widely accepted tenet of contemporary international concern over indigenous peoples.[54] It follows from indigenous peoples' articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits. Furthermore, indigenous peoples typically have looked to a secure land and natural resources base to ensure the economic viability and development of their communities.

To return to the ILO Convention, there is still one more interesting point to be raised, a provision in Article 16 that prohibits the removal of indigenous and tribal

peoples from the lands they occupy. Paragraph 3 of the article establishes the right of displaced indigenous and tribal peoples to return, whenever possible, to their traditional lands as soon as the grounds for relocation cease to exist. It is important that this is included as, in many cases, indigenous and tribal peoples are removed from their lands because of an emergency situation, such as an ecological disaster, war or other conflict. Far too often, when the cause has passed, the indigenous and tribal peoples find that they have lost their land forever. This provision states that this should not be the case. It goes on to provide that when return is not possible, the peoples should be provided in all possible cases with lands of a quality and legal status that are at least equal to those of the lands they have lost, and that these lands should provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they are to be so compensated under appropriate guarantees.[25]

In the Arctic area, it is well known that an ecological disaster such as a nuclear accident, a large-scale oil accident, or the very unbalanced - some might say explosive - state of the environment in Russia as a whole could lead to an environmental situation in which the Arctic indigenous peoples would be much more vulnerable than the population at large due to their direct contact with the environment. The disaster does not even have to be a disaster in the traditional sense: the consequences of climate change (e.g. a rise in sea level, and rapid changes in the quality and quantity of animals that ensure subsistence) or of persistent organic pollutants (cancer, neurobehavioral impairment), just to mention two relevant global environmental problems, might, in the future, affect the resources of indigenous lands so dramatically that some indigenous groups will have to move or to be moved from their traditional lands. Even less dramatic environmental changes could substantially diminish the value of the lands. Governments would face new challenges, and the question would be whether the provisions of Article 16 could be interpreted in such a situation to mean that the states are required to offer indigenous groups another piece of land or at least to pay monetary compensation for the lands lost.

These are certainly not typical situations, for which the provisions of Article 16 were formulated. On the other hand, the Guide to the ILO Convention refers specifically to the case of an ecological disaster. In practice, states will have to start considering such matters in the near future if the destruction of the environment continues at its present pace. Finally, we should not forget the main purpose of ILO Convention No. 169, which is to protect the survival of the cultures and ways of lives of indigenous peoples.

3. Environmental Rights in the Draft Declaration on Indigenous Peoples

This section examines environmental rights in the Draft Declaration on Indigenous Peoples, those that are connected to the protection of the livelihoods of indigenous

peoples as well as conservation of the environment, which is crucial for the protection of livelihoods. The purpose is not to study the Draft Declaration in as much detail as the ILO Convention but to consider the potential of the Draft Declaration for extending and strengthening the environmental provisions of the Convention. Accordingly, the Draft Declaration is examined partly in light of the provisions of the Convention.

3.1 Background and Overview of the Draft Declaration on Indigenous Peoples

The special consideration given by the United Nations to promoting the human rights of indigenous communities has its roots in the early 1970s. In 1971 the Economic and Social Council authorized the Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights[36]) 'to make a complete and comprehensive study of the problem of discrimination against indigenous populations and to suggest the necessary national and international measures for eliminating such discrimination, in co-operation with the other organs and bodies of the United Nations and with the competent international organizations'.[37]

A year later, the Sub-Commission appointed a Special Rapporteur, Mr. Jose R. Martinez Cobo,[38] to undertake this study. The result was the submission of a report covering a wide range of issues – including cultural, linguistic, health and housing matters and the definition of indigenous populations under different legal systems – with recommendations to the Sub-Commission.[39] In 1982, the Working Group on Indigenous Populations was established.[40] Its tasks included reviewing 'the evolution of standards concerning the rights of indigenous populations' and submitting conclusions to the Sub-Commission. After reviewing the materials before it and consulting the interested parties, in August 1994 the Working Group came up with a Draft Declaration on the rights of indigenous peoples. The report of the Working Group which contains this Draft Declaration[41] was communicated to the 35th Meeting of the Human Rights Sub-Commission, where it was welcomed with satisfaction. The Sub-Commission decided to call this instrument 'the United Nations Declaration on the Rights of Indigenous Peoples'. It is still in the process of being accepted, with most of its articles yet to be accepted by the Human Rights Commission. The goal of the Working Group preparing the Draft Declaration is to secure its acceptance by the year 2004, the year marking the end of the Decade of Indigenous Peoples.

The operational paragraphs of the Draft Declaration consist of forty-five articles, divided into seven parts. Part I echoes the universally accepted principle of equality and non-discrimination in the enjoyment of human rights and freedoms and considers 'the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law' applicable to indigenous individuals and

peoples (arts.1-2). Specifically, it recognizes the rights of these peoples to exercise their self-determination (art.3) and to maintain their distinct characteristics (art. 4), including their right to nationality (art. 5). These rights are supplemented further in parts II, III and IV in provisions that, *inter alia*, elaborate the rights of these peoples to develop their identity (arts. 8-9) and to enjoy their own cultural, religious, and linguistic rights (arts. 12-14); that set out a right to education (art. 15-16), media (art. 17) and to labour laws (art. 18); and that extend protection against all forms of violence and genocide (arts. 6-7 and 11).

Even though most of the articles of the Draft Declaration deal with collective rights, the instrument also refers to a number of individual rights. These include, for example, the right of the indigenous person to life, liberty and security (art. 6) and to equality with other individuals in rights and dignity (art.2).

3.2 Potential of the Draft Declaration vis-à-vis ILO Convention No.169

The Draft Declaration contains numerous explicit progressive provisions which are intended to protect and strengthen the identity and collective rights of indigenous peoples. Many of these rights are relevant also in the context of this article. The right of indigenous peoples to maintain distinct characteristics, institutions, and autonomy (arts. 4, 31 and 33) and to freely pursue the right of self-determination (art.3), as well as economic, social and cultural rights, the right to take part in the decision-making process, and a right to be consulted in matters affecting their rights and interests, are all relevant in the protection of indigenous livelihoods and environments.

The Preamble of the Draft Declaration describes the very comprehensive significance that the natural environment has for indigenous peoples. It 'recogniz[es] the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies' and is 'convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs'. The Preamble goes on to recognize that 'respect for indigenous knowledge, culture and traditional practices contributes to sustainable and equitable development and proper management of the environment'.

What these provisions convey is that environmental protection is essential for indigenous peoples but that indigenous peoples are, in fact, able to offer a valuable contribution to environmental protection and sustainable development. Here we can find an indirect reference to 'indigenous traditional ecological knowledge', which has been introduced actively in international law and has been used specifically in the Arctic environmental co-operation process and the documents and programmes

of the Arctic Council.

The Draft Declaration considers itself applicable to indigenous peoples. Unlike the 1989 ILO Convention, which describes these communities as 'peoples in independent countries' and uses the designation 'peoples' in a qualified way, the Declaration makes no such references or qualifications. Furthermore, Article 3 of the Draft Declaration recognizes the right of self-determination of these peoples in the same way as this right is defined by the international legal documents (e.g. in Article 1(1) of the two International Covenants and Article 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples – resolution 1514 (XV)). At the same time, however, it is apparent that the sovereign rights of these 'peoples' have been restricted and thus the subjects in question are not, strictly speaking, 'fully sovereign' entities. Even if the terms indigenous or peoples have not been explicitly defined in the Draft Declaration, the criteria which are sometimes used to identify these peoples have been implicitly acknowledged.[62]

The right of self-government has been seen in the Draft Declaration as an essential part of the right of self-determination. Article 31 reads as follows:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Although this article does not directly link the right of self-government to land rights issues (with an exception referring to land and resource management and to environment), the connection between land rights and the right of self-determination (and self-government as part of it) becomes obvious in the Declaration.

Compared to the forms of self-management that the ILO Convention grants, the content of this provision is further developed. Self-government or autonomy arrangements can come into being in consequence of the requirements of the ILO Convention, but the Convention itself does not expressly guarantee these rights. Even if substantive and participatory rights are well developed, the right of self-government is not merely a question of participation. It is about the power to decide. It is not governments allowing indigenous peoples to express their views about significant matters; it is the right of indigenous peoples to decide themselves what they want in matters most important to them. In environmental matters, the right to self-government plays a role of utmost importance. Unfortunately, ILO Convention No. 169 does not quite achieve the same level where the right of self-government is concerned as the Draft Declaration does.

Several provisions of the Draft Declaration safeguard the substance of the right of indigenous peoples to the protection of their traditional livelihoods. Article 4

refers to indigenous peoples' right to 'maintain and strengthen their distinct political, economic, social and cultural characteristics…', of which the traditional way of life is an integral part. The article emphasizes that at the same time indigenous peoples have the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. Article 21 refers to indigenous peoples' right to 'maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities'. The article further states that indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 7 strengthens this provision by declaring that 'indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for a) any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities (emphasis added); b) any action which has the aim or effect of dispossessing them of their lands, territories and resources'. Article 23, for its part, refers to indigenous peoples' 'right to determine and develop priorities and strategies for exercising their right to development'.

Environmental disaster and inadequate measures on the part of the state to prevent it could be one example of an action under Article 7 that would have the effect of depriving indigenous peoples of their cultural values or dispossessing them of their lands, territories and resources. National economic development projects can lead to the situation described in Article 23 where the indigenous peoples' right to determine and develop their own priorities and strategies for their development is infringed. If such circumstances should materialize, indigenous peoples have, according to Article 21, a claim for just and fair compensation.

ILO Convention No. 169 also grants indigenous peoples extensive substantive rights to their traditional livelihoods. It is more participatory rights and decision-making powers that have been enlarged and specified in the Draft Declaration in many ways. The right of self-determination itself is a major addition in this context. Furthermore, the general participation provisions of Articles 19 and 20 of the Draft strengthen the ILO provisions. According to Article 19, 'indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'.

Article 20 goes further by stating that 'indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them', continuing that 'States shall obtain free and informed consent of the peoples concerned before adopting and implementing such measures'. Here we see a clear enlargement of the right of participation compared to that set out in the ILO Convention. Article 6 of the ILO Convention speaks about 'consultations' whenever consideration is being

given to legislative or administrative measures that may affect indigenous peoples directly. Later, in the same connection, Article 6 (b) requires governments to 'establish means by which indigenous peoples can freely participate… at all levels of decision making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them'.

The Draft Declaration does not content itself with this but instead requires that states obtain the free and informed consent of indigenous peoples before adopting and implementing measures that affect the rights, lives and destinies of those peoples. Even though the requirement of 'free and informed consent' does not necessarily refer to the right of veto, it clearly has more weight than consultation 'in good faith'. Both provisions can be interpreted as requiring a real discussion about the matter, but the concept of free and informed consent emphasizes that indigenous peoples really must know exactly what they are consenting to and must be able to consider the situation carefully. The statement can be interpreted as referring to negotiations and a real possibility on the part of indigenous peoples to affect the decision. Furthermore, the right of participation according to Article 20 of the Draft imposes the condition that participation be carried out through procedures determined by indigenous peoples themselves. This gives extra weight to the interpretation according to which states cannot easily ignore the consent of indigenous peoples in the decision-making processes that concern them or may affect them directly.

3.3 Land Rights in the Draft Declaration in Light of Environmental Protection

Land rights provisions have also been strengthened to some extent in the Draft Declaration as compared to the ILO Convention. Where the ILO Convention requires states to respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, the Draft Declaration sets out a form of rights by stating in its Article 25 that 'indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.' This is essentially the same idea found in the Convention.

Article 26 distinguishes all the necessary elements of the right to land, providing that 'indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by

States to prevent any interference with, alienation of or encroachment upon these rights'.

With regard to resource rights, it ought to be noted that Article 26 refers to 'resources which [indigenous peoples] have traditionally owned or otherwise occupied or used', not to all resources of the land. This provision could easily be misleading if it is not read with Article 30, which strengthens this interpretation by recalling the obligation of states to obtain the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. However, Article 26 speaks about the total environment, which includes flora, fauna, sea-ice and specifically the traditional lands of indigenous peoples. The article recognizes the importance of indigenous traditions and customs for the development and management of resources and requires states to take special measures to prevent any interference with, alienation of or encroachment upon the land rights set out elsewhere in the article.

One hypothetical but interesting example in the Arctic context could be a situation in which climate change makes the sea-ice too unpredictable and fragile to be used for hunting, which is a very important part of the way of life of many coastal indigenous groups. This is a typical example of the predicted - and to some extent already observed - consequences of global warming in the Arctic.[63] According to Article 26, indigenous peoples have a right to own, develop, control and use the total environment, including, for example, sea-ice. In light of Article 26, it can be argued that states are in fact obligated to do their best to slow climate change because this environmental problem interferes with indigenous peoples' land rights by preventing the effective use of land.

Article 27 mentions the 'right to the restitution of the lands, territories and resources which indigenous peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent (emphasis added). Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status'.

Where the environment of indigenous peoples becomes unsuitable to live in because the land has been polluted or the resources diminished, those peoples have the right, according to Article 27, to just and fair compensation in the form of lands, territories and resources equal in quality, size and legal status to the land lost. If the environmental problem in question is local, it should not be difficult to identify the state responsible for the problem. However, most serious environmental problems in the Arctic are global or transboundary in nature. In such cases, it is extremely difficult to point to a single state as the one responsible for the problem.

As has become clear by now, environmental protection is crucial for the maintenance of the traditional livelihoods of indigenous peoples. This is why Article

28 mention talks about indigenous peoples' 'right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation', and concludes by specifically prescribing that storage or disposal of hazardous materials is not to take place on the lands and territories of indigenous peoples.

In contrast to Article 7.4 of the ILO Convention, where the protection of the environment falls mainly to the responsibility of states and indigenous peoples only co-operate with this protection, Article 28 of the Draft Declaration offers a much more active role to indigenous peoples. Indigenous peoples themselves have a right to protect their environment and receive assistance from the states and through international co-operation. Here, it can be argued that indigenous peoples are entitled to receive assistance, e.g. the resources needed for environmental protection. All in all, to be able to protect their environment, indigenous peoples have to be able to participate in environmental management on all levels of decision-making, even when the environment is protected through international co-operation. It is interesting to note also Articles 40-41 of the Draft Declaration, which refer to the participation of indigenous peoples on the international level when intergovernmental organizations and the United Nations system consider matters related to the promotion of their rights.

Article 30, referred to above, is the last environmental provision of the Draft Declaration. It repeats the ideas in the ILO Convention but is once again more forceful in that it requires the free and informed consent of indigenous peoples instead of simple consultations. It states that 'indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.' The same article refers to agreement with the indigenous peoples concerned, according to which just and fair compensation is to be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. The compensation for any harmful impact to indigenous peoples is granted here in the same way as in the ILO Convention.

4. Conclusions: The Potential of ILO Convention No. 169 and the Draft Declaration

The ILO Convention has clearly made a significant contribution to the debate at international level. It has set out conditions for self-management for indigenous and tribal communities; it has given partial recognition to their claim to be regarded as

peoples; and it has recognized in clear terms their right to a continued existence as distinct entities. The Convention should provide significant protection to indigenous and tribal peoples in their own countries when governments ratify the instrument, while pushing other international bodies to go even further in recognizing such peoples' rights.[64]

Even though the environmental and many other provisions of the Draft Declaration are in part more developed than in ILO Convention No. 169, the potential of the Draft Declaration is clearly not on a par with that of the ILO Convention. When and if the Draft Declaration is accepted, it will still be a Declaration, not a legally binding instrument.

What is interesting about the Draft Declaration, however, is not just its extensive provisions but the informal supervisory system it sets out. The system is clearly something new in this type of document and reflects the flexible approach of the Draft Declaration to indigenous participation throughout negotiations. The UN Working Group of Indigenous Populations (WGIP) has adopted an informal complaint procedure for the Draft Declaration in which oral or written reports may be made to the group of five experts acting in their individual capacities with a mandate from ECOSOC to review developments that concern indigenous peoples. Although the WGIP is not equipped to formally investigate complaints or to require states to respond to such submissions, the process is a means of placing pressure on states to respect the collective rights of their indigenous citizens and of offering a potential future avenue for the development of a formal complaints procedure under a future Convention on the Rights of Indigenous Peoples.[65]

To put the Draft Declaration in perspective vis-à-vis the ILO Convention, the UN instrument is intended as a Declaration, a document representing the aspirations of the peoples concerned; it is not intended to be a Convention, which can be ratified and becomes binding. Then again, Declarations of the United Nation's General Assembly (UNGA) have a substantial effect on the formation of customary law, which makes up part of the context in which international agreements are to be interpreted. Thus, once accepted by the UNGA, the Draft Declaration may affect the interpretation of the provisions of the ILO Convention. In any event, the two instruments form a coherent whole in international law. However, as Swepston notes, the significance of the ILO Convention will not be clear until it has been ratified and its application can be analysed.[66] For the present, the number of ratifications is rather low, as mentioned before.

From the point of view of protecting the environmental rights of indigenous peoples, the ILO Convention and Draft Declaration together form a rather extensive package that entails many strong rights. The language of the provisions of both instruments is partly so general that it leaves open several interpretations. This can be considered disadvantageous to the protection of the livelihoods and environments of indigenous peoples, particularly as environmental problems are usually not the simplest of questions to solve. Another possible limitation of the provisions of both instruments is that most were not originally drafted to be used in an environmental

context, although many can be considered fitting for protection against many types of environmental interference. For Arctic indigenous peoples, ratification of the ILO Convention by the rest of the Arctic states, as well as completion and approval of the Draft Declaration, would be a very promising development and of utmost importance as the survival of traditional livelihoods becomes more challenging in the rapidly changing environment.

(Endnotes)

[1] AMAP (Arctic Monitoring and Assessment Programme), 'Arctic Pollution Issues: A state of the Arctic Environment Report, AMAP, Oslo (1997), p.vii
[2] Nuttall, M., 'Indigenous Peoples, Self-determination and the Arctic Environment' in Nuttall, M. and Callaghan, T 'The Arctic Environment, People, Policy'. OPA (Overseas Publishers Association) N.V. Published by license under the Harwood Academic Publishers imprint, part of The Gordon and Breach Publishing Group (2000), pp.377-409 at pp. 377, 390, 395
[3] AMAP (1997), p. vii
[4] See the reports of the Arctic Climate Impact Assessment (ACIA) at http://www.acia.uaf.edu/ and Conservation of Arctic Flora and Fauna (CAFF) at http://caff.is/
[5] AMAP (1997), p. 175
[6] ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries
[7] E/CN.4/Sub.2/1993/29.
[8] ILO, 'ILO Convention on indigenous and tribal peoples, 1989 (No.169) a manual', International Labour Organization (2000), pp.4-5.
[9] Tomei, M. and Swepston, L., 'Indigenous and Tribal Peoples: A guide to ILO Convention No. 169', International Labour Organization (1996), p. 2.
[10] By 11th June 2003.
[11] Tomei, M. and Swepston, L. (1996), p. 3.
[12] Article 27 of the CCPR states: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'
[13] I. Länsman et al v. Finland, (note 30, supra), para. 9.3.
[14] Article 1.1 of the Convention.
[15] Swepston, L. 'Economic, Social and Cultural Rights Under the 1989 ILO Convention' in Horn, F. (ed.), 'Economic, Social and Cultural Rights of the Sami, International and National Aspects', University of Lapland, The Northern Institute for Environmental and Minority Law (1998), pp. 38-46 at 41.
[16] ILO manual (2000), p. 7.
[17] ILO manual (2000), p. 8.
[18] Tomei, M. and Swepston, L. (1996), p. 7.
[19] ILO manual (2000), p. 10.
[20] ILO manual (2000), p. 10.
[21] Nuttall, M., 'Greenland: Emergence of an Inuit Homeland' in Minority Rights Group (ed.), 'Polar Peoples: Self-determination and Development', MRG, London (1994), pp. 1-7.
[22] In Finland, reindeer-herding is not an exclusive right of the Saami.
[23] Articles 4, 7.3, 7.4 and 15 of the Convention.
[24] ILO manual (2000), p. 15.
[25] Swepston, L., 'Economic, Social and Cultural Rights Under the 1989 ILO Convention' in Horn, F., 'Economic, Social and Cultural Rights of the Sami, International and National Aspects', University of

Lapland, Northern Institute for Environmental and Minority Law (1998), pp. 38-46 at 42.
[26] Tomei, M. and Swepston, L. (1996), p. 11.
[27] Tungavik Federation of Nunavut (representing the Inuit) and government representatives signed the *Nunavut Land Claims Agreement* in Iqaluit on May 25, 1993 (the Agreement and general information about the self-government of Nunavut are available at http: www.inac.gr.ca). Finally, in June 1993, Parliament enacted two separate pieces of legislation – the *Nunavut Land Claims Agreement Act* (ratifying the Nunavut land claim settlement) and the *Nunavut Act* (creating a Nunavut Territory and Government). Taken together, these two measures constitute the terms of a new social contract – or terms of confederation – between the Inuit of Nunavut (85% of the population are Inuit) and the people and government of Canada. See generally Hicks J., 'The Nunavut Land Claim and the Nunavut Government: Political Structures of Self-Government in Canada's Eastern Arctic' in Petersen, H. and Poppel, B. (eds.) 'Dependency, Autonomy, Sustainability in the Arctic', Ashgate (1999), pp. 21-53. On April 1, 1999, the new territory of Nunavut came into being and it is run by the public government. Nunavut is the largest land claim ever settled in Canada.
[28] The Home Rule Act states that the resident population of Greenland has fundamental rights to the natural resources of Greenland. As for sub-surface resources, a Joint Committee, chaired by a Greenlandic person and comprising an equal number of representatives of the Home Rule Authorities and of the Government of Denmark, decides on exploration and exploitation activities.
[29] Nunavut Agreement 1992, p. 54.
[30] Canada-Denmark-Finland-Iceland-Norway-the Russian Federation-Sweden-United States, Declaration on the Establishment of the Arctic Council, Ottawa, 19 September 1996.
[31] The history of the negotiation process is described in Rothwell, D., 'The Polar Regions and the Development of International Law'. Printed in Great Britain at the University Press, Cambridge. Published by the Syndicate of the University of Cambridge (1996), pp. 229-242 and Tennberg, M., 'The Arctic Council. A Study in Governmentality'. University of Lapland, Rovaniemi, yliopistopaino (1998), pp.53-61. A brief presentation can be found in Caron, D., 'Toward an Arctic Environmental Regime' in Ocean Development and International Law in Vol. 24 (1993), pp.377-398 at pp.378-379.
[32] The 1991 Declaration on the Protection of the Arctic Environment and the 1991 Arctic Environmental Protection Strategy.
[33] AEPS, p. 6.
[34] The participation and traditional ecological knowledge of Arctic indigenous peoples are also included in working groups, programmes and action plans of the Arctic Council such as Sustainable Development Working Group (SDWG), Conservation of Arctic Flora and Fauna (CAFF), Arctic Climate Impact Assessment (ACIA) and Arctic Council Action Plan to Eliminate Pollution of the Arctic.
[35] Nuttall, M. (2000), p.379.
[36] Ibid.
[37] E.-I.A. Daes, 'The Right of Indigenous Peoples to Self-Determination in the Contemporary World Order', in D. Clark and R. Williamson (eds.), *op.cit.* (note 10), pp. 47-57, at 50-51.
[38] The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government. Report of the Meeting of Experts to review the experience of countries in the operation of schemes of internal self-government for indigenous peoples. Nuuk, Greenland, 24-28 September 1991, UN doc. E/CN.4/1992/42.
[39] 19th June, 1990.
[40] Tomei M. and Swepston, L. (1996), p. 10.
[41] Article 29.
[42] In accordance with the tripartite representative structure of the ILO.
[43] Roy, C. and Kaye M. 'The International Labour Organization: A Handbook for Minorities and Indigenous Peoples', Minority Rights Group International and Anti-Slavery International (2002), pp. 31-35.
[44] ILO manual (2000), p. 30.
[45] Ibid, p. 29.
[46] Ibid, p. 19.

[47] Ibid, p. 18.
[48] Ibid, p. 19.
[49] Swepston, L. 'Economic, Social and Cultural Rights under the 1989 ILO Convention' (1998), p. 44.
[50] Tomei, M. and Swepston, L. (1996), p. 18.
[51] UN doc. CCPR/C/79/Add. 105, para. 7.
[52] UN doc. CCPR/C/79/Add. 112, para. 17.
[53] Case No. 7615 (Brazil), Inter-Am. C.H.R. Res. No. 12/85, Annual Report of the Inter-American Commission on Human Rights, 1984-1985, O.A.S. Doc. O.E.A./Ser. L/V/II. 66, doc. 10, rev. 1 (1985) and Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaragua Population of Miskito Origin, O.A.S. Doc. OEA/Ser.L/V/II. 62, doc. 10, rev. 3 (1983), OEA/ Ser.L/V/II. 62, doc 26 (1984) (Case No. 7964 (Nicaragua)).
[54] See U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1986/7, add. 4, at 39 (1986) (Jose R. Martinez Cobo, special rapporteur: 'It must be understood that, for indigenous populations, land does not represent simply a possession or means of production...It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.")
[55] Tomei M. and Swepston, L. (1996), p. 22.
[56] Economic and Social Council changed the name year 1999.
[57] See resolution 1589 (L) of 21 May 1971 of the Economic and Social Council. The idea of conducting such a study was initiated by resolution 4 B (XXIII) on 26 August 1970 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The discussion on this matter was triggered when the members of the Sub-Commission started examining the 1969 report of the Special Rapporteur on 'the Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres', which contained a chapter on indigenous problems (UN Doc. E/CN.4/Sub.2/301).
[58] See resolution 8 (XXIV) of 18 August 1971 of the Sub-Commission.
[59] Study of the problem of discrimination against indigenous populations, by Jose R. Martinez Cobo, E/CN.4/Sub.2/1986/7 and Add.1-4.
[60] For the authorization to establish this Working Group, see resolution 1982/34 of 7 May 1982 of the Economic and Social Council.
[61] E/CN.4/Sub.2/1993/29.
[62] For instance, Article 8 of the Draft Declaration affirms the right to identify oneself "as indigenous and to be recognized as such" – an apparent endorsement of the subjective criterion. Article 9 refers to the rights of indigenous peoples and individuals "to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned". Article 32 acknowledges the rights of these peoples "to select the membership of their institutions in accordance with their own procedures". In essence, therefore, a measure of recognition has been given to the legitimacy of using some of the traditional objective and subjective criteria for the purpose of identification. See Gayim E., 'The UN Draft Declaration on Indigenous Peoples, Assessment of the Draft Prepared by the Working Group on Indigenous Populations', University of Lapland (1994), pp. 41-42.
[63] AMAP (1997)
[64] Swepston, L., 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' in Anaya, J. (ed.), International Law and Indigenous Peoples, Ashgate Dartmouth (2003), pp. 129-366, at 365., Published originally in Oklahoma City University Law Review, Vol. 15, 1990.
[65] Ketley, H., 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples', in International Journal on Minority and Group Rights, Volume 8 No. 4, 2001, pp.331-368 at 344-345.
[66] Swepston, L. (2003), p. 365.

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Inherent Rights of Aboriginal Peoples in Canada – Reflections of the Debate in National and International Law

LEENA HEINÄMÄKI

TABLE OF CONTENTS

1. Introduction

With few exceptions, the indigenous peoples in Canada and many other parts of the world (e.g., Australia and New Zealand) were colonised on the basis of the principle of *terra nullius*.[1] Even though it was later acknowledged that this basis was neither legally valid nor morally acceptable, this historical injustice has never been corrected. It has also been recognised both domestically and internationally that many indigenous groups in Canada and other countries were self-governing nations when the Europeans arrived; yet – despite some positive developments – the right of these peoples to self-government remains a disputed and confused issue. In most cases, self-government was severely curtailed during colonisation; in some it was extinguished entirely.

In today's world, racial equality and the prohibition of racial discrimination are accepted principles in most if not all of the national laws of democratic states and in international law. Partly because of this progress, but mostly due to strong demands by indigenous peoples themselves, there have been some positive developments regarding the rights of indigenous peoples both nationally and internationally, especially since the 1980s. What hinders real progress in the legal status and rights of indigenous peoples, however, is the fact that it is states that grant these rights. States and international law regard the rights of indigenous peoples as affirmative, additional protection to the general human rights or civil rights that these groups need because of their vulnerable position in their nation-states. Indigenous peoples are seen as entitled to practice their culture and enjoy rights that are needed for their cultural protection as long as this does not pose any threats to the legal, political or economical situation of the states that grant these rights to them.

Even though the long continuing policy of assimilation that most indigenous peoples of the world have faced has officially been abandoned, the peoples are still suffering the consequences of that policy, which, in the name of protection, took over their rights and authority by replacing them with new rights. These new rights, despite the positive protection, are obviously something less than what indigenous peoples consider themselves entitled to. Indigenous peoples consistently demand that they be recognised as *peoples* with the rights of peoples (self-determination), not of minorities or merely individual citizens. Indigenous peoples claim that only when they are accepted as peoples in the sense in which the term is used in international law can they truly be in charge of future developments in their lives and cultures.

[1] In the earliest understandings of the international law of nations, 'discovery' assured rights against other European nations of exclusive trade, purchase of lands and the right of conquest. The 'discovering' states laid claim to all the lands of the colonised territory as sole sovereigns. For purposes of international law, indigenous lands prior to any colonial presence were considered legally unoccupied, or *terra nullius* (vacant lands). Under this fiction, discovery was employed to uphold colonial claims to indigenous lands and to bypass any claim to possession by the natives in the 'discovered' lands. See Anaya, J., Indigenous Peoples in International Law (2d ed. 2004), pp. 24–29. As international law assumed a more statist character, indigenous peoples became less the subjects of international law and more the objects of domestic jurisdiction. See Strelein, L. 'From Mabo to Yorta Yorta: Native Title Law in Australia', Journal of Law & Policy, Vol. 19:225, 2005, pp. 225–271, at 228. This issue will be discussed more comprehensively in the Canadian context in section 4.1.

Interestingly and importantly, there have been some developments in international law, as well as in some national laws and governmental policies, that seem to acknowledge that there are 'inherent' rights of indigenous peoples,[2] i.e., rights other than those granted by the states where the peoples live and that exist independently of whether the states recognise them. The aim of this article is to study this issue with particular reference to the Canadian legal system.

The official policy of the Federal Government of Canada since 1995 has been to recognise an 'inherent' right of Aboriginal peoples[3] to self-government as an Aboriginal right under section 35(1) of the Constitution. Although it does not define the term 'inherent' explicitly, the Federal Government acknowledges that the Aboriginal peoples of Canada have the right to self-government that derives from their historical occupation of the area that is now called Canada.

Two competing theories can be found in the discussion of Aboriginal rights in Canada, 'the inherent rights approach'[4] and 'the contingent rights approach'.[5] The aim of this article is to study the extent to which the Canadian legal system follows the inherent rights approach when dealing with Aboriginal rights. As mentioned above, the Constitution of Canada does not expressly recognise any inherent rights for Aboriginal peoples, although the Federal Government interprets the inherent right of Aboriginal peoples to self-government to be a part of the 'existing Aboriginal and treaty rights of the Aboriginal peoples', which section 35(1) of the Constitution recognises and affirms. However, there are some important decisions and statements of the Canadian courts where the inherent rights approach has been applied, at least to a certain extent. This has been the case especially where Aboriginal title to land is concerned, in particular traditional uses of land such as hunting and fishing. In a few instances, courts have accepted that Aboriginal title or right to land and forms of traditional land use are

[2] The concept of inherent Aboriginal rights is widely used particularly in Canadian legal and political discourse. However, a precise definition of the concept is lacking. The Federal Government of Canada, the Royal Commission on Aboriginal Peoples (RCAP) and the Supreme Court of Canada all share the view that the concept of inherent rights in Canada derives from the historical occupation of land by Aboriginal peoples. According to the Supreme Court of Canada, Aboriginal rights are pre-existing rights, for their original source is not Canadian law; an Aboriginal right is a legal right deriving from the Indians' historic occupation and possession of their tribal lands. See sections 3.3 and 3.4.

[3] In the Canadian context, the word 'Aboriginal' is commonly used instead of 'indigenous', which is more common in the international context. Accordingly, 'Aboriginal' in this article is used when referring to Aboriginal peoples of Canada, whereas the word 'indigenous' is applied when discussing international law. The Aboriginal peoples of Canada consist of different First Nations (Indian tribes), Inuit and Métis. See also footnote 23.

[4] The inherent rights theory views Aboriginal rights as inherent in the nature of Aboriginality. According to the inherent rights theory, Aboriginal sovereignty and forms of government, as the means by which Aboriginal identity and social organisation are reproduced, predated the settlement of Canada and continue to exist notwithstanding the interposition of Canadian state. Being inherent, such rights do not depend on executive or legislative conferral for their existence, although their reception and therefore enforcement in Canadian law is at least dependent upon juridical recognition of their existence. See Asch, M. and Maclem, P., 'Aboriginal Rights and Canadian Sovereignty: An Essay on R.v. Sparrow', Alberta Law Review, Vol. 29, No. 2, 1991, pp. 495–517, at 503.

[5] The contingent rights theory requires a legislative or executive action or constitutional amendment of the state concerned for a right to exist. Ibid. at 501–502.

'inherent, pre-existing rights', given that their original source is not Canadian law even though they are now recognised there.

This article asserts that the recognition by the Supreme Court of Canada of a right to the use of the land of Aboriginal peoples within this frame opens up a justification for a wider recognition of the inherent rights approach. The argument is that even though the Court has yet to extend the inherent rights theory to include an inherent right to self-government for Aboriginal peoples – the right is recognised by the Federal Government – there does not seem to be any legally valid argument to exclude self-government from the scope of inherent Aboriginal rights.

The basis for not recognising an inherent right to self-government for Aboriginal peoples rests on the Supreme Court's unquestioned acceptance of Canadian sovereignty over Canadian territory and indigenous peoples pursuant to the principle of *terra nullius*.[6] This article maintains that Canada cannot base its sovereignty on this doctrine, because the doctrine is both morally unacceptable and legally unfounded. The doctrine has been discredited by national courts[7] as well as the International Court of Justice,[8] and evidence from Europeans' interactions with Aboriginal peoples indicates that the new arrivals did not in fact consider the territory that is now called Canada *terra nullius*.

A second critical limitation that Canadian courts have placed on the inherent rights approach, in addition to the unquestioned acceptance of Canadian solemn sovereignty relates to whether Aboriginal rights that once existed still exist. The existence of an Aboriginal right, according to the courts, depends on whether or not the right has been extinguished by the state. The inherent theory of Aboriginal rights would suggest that the existence of Aboriginal rights is not to be determined by reference to actions of the Canadian state; in other words, inherent rights cannot be extinguished, at least not without the full consent of Aboriginal peoples.

This article asserts that the Canadian extinguishment policy[9] towards Aboriginal rights is not only incompatible with the inherent rights approach but also incon-

[6] The Supreme Court of Canada has not used the term *terra nullius* as such, but refers to the doctrine of discovery as a legal justification for the sovereignty of present-day Canada over its territory and Aboriginal peoples. See, e.g., *R.v. Van der Peet* [1996] 2 S.C.R. 507, section 36 (Introduction). <<http://scc.lexum.umontreal.ca/en/1996/1996rcs2-507/1996rcs2-507.html>>. The basis for the doctrine of discovery derives from the same basic idea of non-recognition of equal status of indigenous peoples to European 'civilized' nations, which meant that European nations who 'discovered' the territories inhabited by indigenous peoples were allowed to regard these territories as falling under their solemn sovereignty.

[7] See, e.g., the Supreme Court of Australia concerning *Mabo v. Queensland* (1992), 107 A.L.R. 1 (Aust. H.C.)

[8] *Western Sahara (Request for Advisory Opinion)* 1975, International Court of Justice.

[9] Before passage of the Constitution Act 1982, any Aboriginal right derived from the common law could be extinguished unilaterally and without the consent of Aboriginal people where an Act of Parliament directly contradicted it. Since the adoption of section 35(1) of the Constitution Act, 1982, which recognises and affirms existing Aboriginal and treaty rights, extinguishment of Aboriginal rights is only possible by alleged consent of an Aboriginal party. According to Canada's present extinguishment policy, Aboriginal peoples are required to 'cede, release, surrender or modify' their undefined Aboriginal rights in exchange for a set of defined treaty rights in land claims and self-government agreements. In practical terms, Aboriginal people of Canada are able to settle their land claims and self-government agreements only if they give up their other Aboriginal rights, i.e., those not set out in the agreements. See section 4.2.

sistent with Canada's international obligations concerning the rights of indigenous peoples. The Federal Government's extinguishment policy has been criticised by United Nation's Human Rights Committee (HRC) in the light of Article 1 of Convention on Civil and Political Rights (CCPR),[10] which provides for a peoples' right to self-determination.

The findings of the HRC merit study here not only because they bear on the central issues of this article but also because the CCPR can be considered the most important and extensively ratified[11] global human rights convention. Moreover, more than a hundred countries have accepted the jurisdiction of the HRC by becoming members to the Optional Protocol to the CCPR.[12] Canada plays a very significant role with regard to the rights of not only its own Aboriginal peoples but also other indigenous peoples throughout the world. As one of the leading countries where Aboriginal issues are concerned, Canada can make a valuable contribution to the creation of positive international law as well as customary international law.

As any discussion of inherent rights inevitably raises questions about the status of Canadian Aboriginal peoples not only within Canada but also in international law, and because the Human Rights Committee itself considers Canada's extinguishment policy incompatible with Aboriginal peoples' right to self-determination, this study also takes up the right of indigenous peoples to self-determination in international law. As will be shown in this article, despite some positive developments, international law does not as yet grant what indigenous peoples are seeking – recognition of a status inherently equal to that of other peoples of the world.

Rules of international law concerning decolonisation, such as the 'salt-water doctrine', prevented indigenous peoples from benefiting from the decolonisation regime.[13] Yet indigenous peoples are victims of the same historical injustice – colonisation – as peoples of overseas colonies; the recognition of the right to self-determination of indigenous peoples would seem to be the only solution for ending their colonial relationship with their nation-states. The recognition of self-determination in its external

[10] UN Doc. A/6316 (1966) 999 UNTS 171.

[11] 152 states are parties to the CCPR, see <<http://www.unhchr.ch/pdf/report.pdf>>.

[12] 104 states have ratified the first Optional Protocol. See <<http://www.unhchr.ch/pdf/report.pdf>>.

[13] Under Principle IV of UN General Assembly Resolution 1541 (XV) of December 15, 1960, a right to a 'full measure of self-government' applies only in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.' By requiring that 'salt-water' separate the people claiming self-determination under the United Nations Charter from the metropolitan area of the nation-state, traditional state actors intended to deny the right to secede to peoples living in the confines of the contiguous metropolitan territory, thereby invalidating potential claims of 'nations within', such as the Kurds, Basques, or, as in many cases, indigenous peoples. See Wiessner, S., 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', Harvard Human Rights Journal, vol. 12, 1999, reprinted in Anaya, J. (ed.), International Law and Indigenous Peoples, The Library of Essays in International Law, Ashgate/Dartmouth, Aldershot, England, Burlington USA (2003), pp. 257–128, at 122, footnote 308. In fact, the only indigenous group benefiting from the 'salt-water doctrine' of decolonisation were the Inuit people of Greenland. After a long struggle, they obtained a quite extensive version of home rule from Denmark. The Inuit in Greenland have not chosen separation from Denmark, even though the option has occasionally come up, and in 1999/2000, the Greenland Home Rule Government established the Commission on Self-Governance with a mandate to explore Greenland's status and place in the Danish realm in light of the evolution of international law. See chapter 6 of the AHDR (Arctic Human Development Report), 2004. Akureryi: Stefansson Arctic Institute, p. 109.

sense is of course not as yet what most states are willing to accept. This fact does not prevent the present author from criticising the old structures when they are based on unacceptable grounds. Moreover, according to basic social constructivist thinking, everything changes.[14] Overseas colonisation, which was acceptable in its day, later became unacceptable and was eradicated. My argument is that since the principle of *terra nullius* no longer finds support in the modern world, neither policies nor legal systems based on this principle should be accepted.

The principle of *terra nullius*, inherent Aboriginal rights and Canada's extinguishment policy towards Aboriginal rights are all tied together in a very deeply rooted and contradictory manner. The first serious contradiction is that between, on the one hand, the Supreme Court's recognition of the concept of inherent Aboriginal rights and, on the other the same court's limitation of this concept. The Court's interpretation of the concept of inherent Aboriginal rights as usufructory rights to land, such as rights to fish and hunt, is problematic, because this limitation is based on the recognition of the solemn sovereignty of Canada over the territory and Aboriginal peoples involved. What makes this limitation problematic is that the sovereignty of Canada is based on the idea of *terra nullius*, as will be pointed out in this study.

Secondly, the extinguishment of inherent Aboriginal rights by the Canadian state is troublesome and can justifiably be questioned. The whole idea of the extinguishment of an Aboriginal right again relates to the question of sovereignty based on the principle of *terra nullius*. A relevant question to be asked, in terms of legality and justice, is whether and on what basis inherent Aboriginal rights can be limited or extinguished.

2. The Status of Aboriginal Peoples in the Canadian Legal Framework

When North America was being colonised by European settlers, France and Great Britain first dealt with the Aboriginal peoples on a nation-to-nation basis and sought to secure their assistance as trading partners and military allies.[15] As their power and influence in North America grew, the two nations increasingly claimed rights of suzerainty over their Aboriginal allies while respecting their internal sovereignty and territorial rights. Great Britain continued this approach after France ceased to be a colonial rival following the Seven Years War. On October 7, 1763, the British Crown issued a proclamation that, in many ways, has been regarded the most important 'precedent' for Aboriginal rights in Canada.[16]

[14] See Onuf, N., The Constitution of International Society. EJIL Vol. 5, No. 1, 1994, pp. 1–19.

[15] Slattery, B., 'The Hidden Constitution: Aboriginal Rights in Canada, in Bold, M. and Long, J.A. (eds.), The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press, 1985, pp. 114–138, at 115.

[16] The Royal Commission on Aboriginal Peoples, The Right of Aboriginal Self-Government and the Constitution, A Commentary (1992), pp. 9–11. By the Proclamation, King George III made it clear that his government recognised that there were several 'nations' of Indians which should be dealt with as nations and that the lands of these nations could not be purchased until the King's government reached agreements with them on a nation-to-nation level through a public meeting called for that purpose. Thus King George confirmed that relationships with Indians and matters of Indian land were international matters until international agreements creating the basis for domestic relationships could be reached. At the same time, how-

As Crawford points out, however, it seems that while clearly recognising Indians as self-governing nations, the main concern of the Royal Proclamation was not to confirm or establish rights to self-government but to regulate the procedures for trade with and the cession of land by the Indians.[17] Nevertheless, as Mr Justice Judson of the Supreme Court of Canada noted in *Calder v. Attorney General of British Columbia*:[18]

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the lands as their forefathers had done for centuries.[19]

Likewise, the Supreme Court of Canada decision in *R. v. Sioui*[20] supports the Proclamation's view that Aboriginal peoples were seen as self-governing nations by Great Britain and France. In the view of the Supreme Court, a similar policy was continued by Great Britain after the fall of New France:

> The British Crown recognized that the Indians had certain ownership rights over their land, it sought to establish trade with them, which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible.[21]

ever, he declared Indian peoples to be under 'Our Sovereignty, Protection and Dominion.' Ibid. at 11. See the printed text of the Proclamation in Brigham, C.S., (ed.), British Royal Proclamations Relating to America, Vol. 12, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: 1911), pp. 212–218.

[17] Crawford, J., Aboriginal Self-Government In Canada; a Research Report for the Canadian Bar Association, Committee on Native Justice, (1995). John Borrows, on the contrary, sees the Royal Proclamation as part of a treaty between First Nations and the Crown which stands as a positive guarantee of First Nation self-government. He claims that First Nations were not passive objects, but active participants in the formulation and ratification of the Royal Proclamation. See Borrows, J., 'Constitutional Law from a First Nation Perspective: Self-government and the Royal Proclamation', University of British Columbia Law Review, 1994, vol. 28, pp. 1–47, at 3–4. See also Borrows, J., 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Asch, M. (ed.), Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, UBC Press, University of British Columbia, 1997, pp. 155–172, at 155. Brian Slattery interprets the Proclamation to mean that the King asserted ultimate sovereignty over Indians while at the same time acknowledging their semi-autonomous status, describing them as nations or tribes 'with whom We are connected, and who live under Our Protection.' Thus the King recognised that the Indians were entitled to undisturbed possession of the lands reserved to them, and defined these reserves as any Indian lands that had not been ceded to or purchased by the Crown. The King claimed these lands as part of his dominions, but at the same time recognised the existence of an Indian interest requiring extinguishment by cession or purchase. In technical terms, the Indian interest constituted a legal burden on the Crown's ultimate title until surrendered. See Slattery, B., 'The Hidden Constitution: Aboriginal Rights in Canada' in Bold, M. and Long, J.A.: The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press, 1985, pp. 114–138, at 120–121.

[18] *Calder v. Attorney-General of British Columbia* (1973), 34 D.R.R. (3d) 145, also reported: [1973] S.C.R.313, [1973] 4 W.W.R.1. The document can be found at <<http://library.usask.ca/native/crnlc/vol07/091.html>>.

[19] Ibid. 103(156); at <<http://library.usask.ca/native/crnlc/vol07/091.html>>.

[20] [1990], 1 S.C.R. 1025.

[21] Ibid. The citation can be found at <<http://www.lexum.umontreal.ca/csc-scc/cgi-bin/srch.pl?language=en&method=all&database=en%2Fjug&query=indian+band&x=9&y=9>>, under section b) Extrinsic Evidence.

Under British colonial rule, the authority of Aboriginal governments was gradually eroded, however. Using the pretext of 'protecting' Indians, the British systematically took over Aboriginal authority. This policy of diminishing Aboriginal peoples' independence and their capacity to govern themselves was continued by the Canadian government when it assumed the responsibility from the British for discharging the provisions of the Indian treaties. Under the British North America Act (BNA Act) of 1867, the Canadian minister responsible for Indian affairs exercised total control over Indians and their lands.[22]

In 1876, Parliament passed the Indian Act, legislation that consolidated all existing laws concerning Indian peoples[23] in the provinces and territories. This Act and its subsequent amendments provided Canada with the means to recognise and assimilate Indian peoples and their governments. After the enactment of the Indian Act and various other laws of general application, the right to self-government and the exercise of historical governmental authority were severely curtailed without Aboriginal consent or even consultation. This has given rise to many of the difficulties still experienced today in the relations between Canadian Aboriginal peoples and the Canadian state.[24]

The contradiction between the Federal Government's goals of providing a protective framework for practicing the Aboriginal way of life and, at the same time, imposing uncustomary forms of government on Aboriginal peoples continued throughout the late nineteenth and early twentieth centuries. Recognition and assimilation became a continuing dilemma, pervading every aspect of the relationship between Canada and the Aboriginal peoples in the country.[25]

[22] Section 91 (24) of the BNA Act granted Parliament jurisdiction over 'Indians and lands reserved for the Indians'. This measure was executed within the context of the special relationship between Indian peoples and Canada that had been incorporated into the Proclamation of 1763. See Leory Little Bear, Boldt, M. and Long, J.A. (eds.), Pathways to Self-Determination, Canadian Indians and the Canadian state (1984), University of Toronto Press, Introduction, p. XI.

[23] The Federal Government used its section 91 (24) power to create a statutory definition of 'Indian' for the purpose of the Indian Act. This definition was more limited in scope than that of the word 'Indians' in section 91 (24). It excluded many people who, prior to its passage, considered themselves to be Indian, and who were recognised as such by society. The Métis and Inuit were specifically excluded under the act; however, by the Supreme Court's decision in *Re Eskimos* ([1939] 2 D.L.R. 417 (S.C.C.)), the Inuit were later deemed to fall within the meaning of 'Indians' contained in section 91 (24). The inclusion of this in the Constitution has not resulted in the enactment of Inuit-specific legislation, however. Meanwhile, the Métis have still not been afforded such recognition by the Federal Government or by the appellate courts; however, there is clearly a reasonable argument to be made that they also fall within the meaning of 'Indians' in section 91 (24). Section 35(2) of the Constitution Act of 1982 defines the 'Aboriginal peoples of Canada' as including 'the Indian, Inuit and Métis peoples of Canada'.

[24] Morse, B.W., 'The Inherent Right of Aboriginal Governance' in Hylton (ed.), Aboriginal Self-Government in Canada, 2nd edition (1999), Purich Publishing Ltd. Saskatoon, Saskatchewan Canada, pp. 16–44 at 20–22.

[25] Cassidy, F., Bish, L. (1989), Indian Government, Its meaning in Practice (1989), Oolichan Books and The Institute for Research on Public Policy, Canada, pp. 5–6. Borrows submits that the absence of political and legal remedies to contest the injustices which Aboriginal peoples faced has contributed to their unacceptable socio-economic status within a generally prosperous society. As a result of this treatment, Aboriginal peoples became 'uncertain citizens', who were loosely associated with the Canadian political community but were denied the institutions, rights and/or resources necessary to meaningfully participate in the life of the country, either collectively or as individuals. See Borrows, J. 'Uncertain Citizens: Aboriginal Peoples and the Supreme Court', The Canadian Bar Review, 2001, vol. 80., pp. 15–41, at 17.

During the 1960s and 1970s, the drive for Aboriginal self-government began to develop into a movement, a concerted effort to carve out a place for Aboriginal governments in a federal-provincial system. The 'Indian self-government movement' became significantly stronger when the Trudeau Government issued a provocative statement in 1969 on Indian policy. The statement, which became known as the White Paper, was based on the view that the government's guiding principle should be to treat 'Indian people' in the same way as it treated others, thus assimilating Aboriginal peoples into the Canadian mainstream.[26]

The response and resistance to the White Paper on the part of Aboriginal peoples were powerful.[27] The Trudeau Government eventually backed away from the White Paper policy as the formal statement of its approach to the administration of Indian affairs. Consequently, the assertion of and drive towards self-government has increasingly been put forward in federal policy. Self-government has been asserted as a fact to be recognised, not as a path to assimilation.[28]

The drive toward greater Aboriginal self-government has emerged not only in band or tribal council operations but also in the relations established by existing treaties and the land claims movement. Treaty and land claims issues revolve around the notion of Aboriginal rights, rights now recognised in the Constitution. These issues have come to be increasingly tied up with the question of Aboriginal government and its relationship to Canada's constitutional order.[29]

The land claims have helped draw attention to an additional facet of the quest for self-government: the effort to control the management and development of the land and natural resources within currently recognised traditional territories of Aboriginal

[26] Throughout the 1960s, Indian affairs had followed a policy of encouraging provinces to provide more services to Indian people and of encouraging Indian people to become directly involved in the day-to-day administration of these and other services. With the White Paper, it became clear that this process of devolution and community development had become a policy of termination. See Cassidy, F. and Bish, R.L. (1989), pp. 8–9, Boldt, M. and Long, J.A., The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press (1985), Introduction, pp. 7–8.

[27] Harold Cardinal, President of the Indian Association of Alberta, expressed his criticism of the White Paper in his book *The Unjust Society: The Tragedy of Canada's Indians*. Cardinal's book was a leading voice in the opposition to the White Paper.

[28] Cassidy, F. and Bish, R.L. (1989), pp. 8–9, Boldt, M. and Long, J.A., The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press (1985), Introduction, pp. 7–8.

[29] Approximately one-half of Canada's status Indians (a person registered or entitled to be registered as an Indian according to the criteria established in the Indian Act) are 'treaty Indians' belonging to a nation of Indians who were the signatories to a treaty. England, France, and later Canada engaged in treaty making for several reasons, e.g., trade, assistance in wars, enabling new settlement. The last of the original treaties was signed in 1923. The principal areas not covered were most of British Columbia, the Yukon, the Northwest Territories, Labrador, and northern Quebec. Recent comprehensive claims settlements, settlements involving previously unextinguished Aboriginal rights, may also be seen as treaties. The first of these was concluded in Quebec in 1971. In the first of what have been called the modern treaties, the basis was laid for an expanded exercise of Indian government. In 1973, the Federal Government established the Office of Native Claims and agreed to consider comprehensive claims as well as outstanding grievances of a more specific nature. To date, a comprehensive claims agreement has been reached in the western Arctic, and agreements or agreements in principle have been achieved in the Yukon, the Northwest Territories and the eastern Arctic.

peoples. For many Aboriginal peoples in Canada, the land and self-government issues cannot be separated. As pointed out by Cassidy and Bish, the land question is, at its roots, a question of the authority and jurisdiction of self-government.[30]

In 1982, Aboriginal and treaty rights were embodied in the written constitution for the first time in Canadian history. The passage of the Constitution Act, 1982[31] created a new context for the re-emergence of the debate between the contingent and inherent theories of Aboriginal rights. Three provisions in particular are relevant. The first is section 25, which provides:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 25 thus shields Aboriginal rights from potential judicial holdings whose application would constitute violations of individual or collective rights and freedoms enshrined in the Canadian Charter of Rights and Freedoms.

The second relevant provision is section 35. Section 35(2) defines the 'aboriginal peoples of Canada' as including 'the Indian, Inuit and Métis peoples of Canada', a clause that is of particular importance to the Métis, whose legal status as an Aboriginal people had previously been ambiguous.[32] Section 35(3) ensures, among other things, that the rights obtained through the settlement of contemporary land claims are to be considered as constitutionally equivalent to treaty rights and therefore protected under the Constitution Act, 1982. Finally, and most importantly, section 35(1) provides that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'

The third provision of note in the Constitution Act, 1982 is section 37. The Act did not specify the scope and content of the 'aboriginal and treaty rights' that it recognised and affirmed. This was to be done, at least in part, through a series of conferences to be held pursuant to section 37(1). According to section 37(1)(2), each of these conferences was to 'have included in its agenda constitutional matters that directly affect the aboriginal peoples of Canada.' However, these conferences, which ended in 1987, were not successful in resolving the question and thus, despite recognition and affirmation of existing Aboriginal rights in the text of the instrument, the Canadian Constitution remains silent on their specific scope and content.

[30] Cassidy, F. and Bish, R.L. (1989), pp. 13–15.

[31] The Constitution Act, 1982 can be found at <<http://lois.justice.gc.ca/en/const/annex_e.html>>.

[32] See Catherine Bell, 'Who are the Métis People in Section 35(2)?', Alberta Law Review, Vol. 29, No. 2, 1999, pp. 351–381 at 352. See also footnote 23.

3. Aboriginal Rights as Inherent Rights

3.1. *Aboriginal Rights as defined by the Supreme Court of Canada, particularly in* Van der Peet.

In its 1996 judgment in *Van der Peet*,[33] the Supreme Court of Canada finally addressed the question, 'How should the Aboriginal rights recognised and affirmed by section 35(1) of the Constitution Act, 1982 be defined?'[34]

The Supreme Court judgment in *Van der Peet* reaffirmed that until their incorporation into the Constitution in 1982, Aboriginal rights existed as common-law rights.[35] According to the Court, the doctrine of aboriginal rights exists, and is recognised and affirmed by section 35(1) because of 'one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.'[36] The *Van der Peet* decision explicitly affirmed that Aboriginal rights form a corpus of rights that is broader than suggested by the term 'Aboriginal title',[37] and in fact, 'Aboriginal

[33] *Van der Peet v. The Queen* (1996) 137 DLR (4th) 289 (SCC). The appellant, an Aboriginal person was charged with selling 10 salmon caught under the authority of an Indian food fish licence, contrary to British Columbia Fishery Regulations. The restrictions imposed by these Regulations were alleged to infringe the appellant's Aboriginal right to sell fish and accordingly were invalid because they violated section 35(1) of the Constitution Act, 1982.

[34] *Van der Peet*, at 299, or par. 15 in section V, Analysis, at <<http://www.lexum.umontreal.ca/csc-scc/en/pub/1996/vol2/html/1996scr2_0507.html>>. Earlier, in St. Catherine's Milling and Lumber Company v. The Queen [(1888) 14 AC 46], Aboriginal rights were characterised as a 'personal and usufructuary right, depending upon the good will of the sovereign' (54). Since the Supreme Court decision in *Calder* [*Calder et al. v. Attorney-General of British Columbia* (1973) 34 DLR (3d) 145], Aboriginal rights have been seen by Courts as a kind of 'way of life' rights, including a range of economic activities from 'hunting, fishing and trapping' to the means to enable 'meaningful participation in contemporary society and economic development on Native lands'. See DIAND: In All Fairness: A Native Claims Policy (1981), Queen's Printer, Ottawa, p. 7. In the period following *Calder*, issues raised by the ambiguities in that judgment regarding the content and existence of Aboriginal rights – including the fundamental relations between indigenous peoples and the state – have been primarily addressed not by the courts but through negotiations on the land question, and the Aboriginal rights clause of the Canadian Constitution Act 1982. Nonetheless, in a number of judgments, especially *Sparrow* ([1990], 70 D.L.R. (4th) 385 (S.C.C.)), the Supreme Court of Canada has played a role. However, only with the 1996 decision in *Van der Peet* did the Court finally articulate a definition of Aboriginal rights in law that is specific enough to resolve the basic ambiguities raised in *Calder*. See Asch, M. From Calder to *Van der Peet*, Aboriginal Rights and Canadian Law, 1973–96 in Havemann, P. (ed.): Indigenous Peoples' Rights in Australia, Canada & New Zealand (1999), Oxford University Press. pp. 428–443 at 428–429.

[35] *Van der Peet* at 302, or par. 28.

[36] par. 30.

[37] Aboriginal title is described as a 'sui generic' interest in land, that is, a land title in a class of its own, in *Delgamuukw v. British Columbia* [1993], (104) D.L.R. (4th) 470 (B.C.C.A.). According to the Supreme Court, its characteristics cannot be explained fully by reference either to English property law or to rules of property found in Aboriginal legal systems (par. 112). Furthermore, according to the Court, the distinctive character of Aboriginal title has at least three different dimensions. The first dimension is its inalienability. This means, as the appellants had argued, that lands held under Aboriginal title 'cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties.' (par. 113). The second distinctive dimension of Aboriginal title is its source. Under English property law, all land rights held by private persons can in principle be traced back to the Crown as their ultimate source. Accordingly, in the

title' is only one kind of Aboriginal right.[38] The judgment explains that the phrase 'recognised and affirmed' in the Constitution is a means to reconcile the sovereignty of the Crown with the fact that Aboriginal peoples already occupied their lands and were living in organised societies at the time of first contact with Europeans.[39] As the judgment stated:

> the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.[40]

Therefore, 'The content of aboriginal rights must be directed at fulfilling both of these purposes'.[41]

The premise is that Aboriginal rights are not to be defined 'on the basis of the philosophical precepts of the liberal enlightenment'.[42] This means that the crucial defining characteristic of Aboriginal rights is that they 'are rights held only by aboriginal members of Canadian society [and] arise from the fact that aboriginal peoples are *aboriginal*.'[43] The court concluded that Aboriginal rights are specific to each culture and 'their scope and content must be determined on a case by case basis'.[44]

In determining whether a practice, custom, or tradition is an Aboriginal right, the court places heavy reliance on the word 'distinctive' in the phrase 'occupied by distinctive aboriginal societies', differentiating it from 'distinct', which is defined as 'unique' to a culture.[45] To be considered 'distinctive' and an Aboriginal right, any practice, tradition, or custom must be central and 'integral' to a particular Aboriginal culture.[46] While such a practice, tradition, or custom may have evolved into a different

St. Catherine's Milling Case (V.R. [1988] 14 A.C. 46 P.C.), the Privy Council suggested that the source of Aboriginal land rights in Canada was the Royal Proclamation issued by the British Crown in 1763, after the cession of New France to Great Britain. The Royal Proclamation recognised Aboriginal peoples as autonomous nations living under the protection of the British Crown and laid down certain basic rules protecting their rights to lands in their possession. In Delgamuukw, the Supreme Court held that although the Royal Proclamation recognised Aboriginal title, it was not the source of Aboriginal title. In the Court's view, Aboriginal title 'arises from the prior occupation of Canada by Aboriginal peoples', that is, from their historic occupation of the land prior to the assertion of British sovereignty (par. 114.). Thus, unlike ordinary interests in land, Aboriginal title does not find its origins in the Crown. A third distinctive dimension of Aboriginal title is that it is held communally. Under English property law, most land interests are held by individual persons, although this is not necessarily the case. By contrast, Aboriginal title is an inherently communal right. As the Supreme Court explains: 'Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to that land are also made by that community.' (par. 115).

[38] *Van der Peet* at 310, or par. 74.
[39] *Van der Peet* at 300, or par. 74.
[40] *Van der Peet* at 309–310, or par. 43.
[41] *Van der Peet* at 310, or par. 43.
[42] *Van der Peet* at 300, or par.19.
[43] *Van der Peet* at 300, their emphasis, or. par. 19.
[44] *Van der Peet* at 318, or par. 69.
[45] Asch, M. 1999. pp. 436–437.
[46] *Van der Peet* at 310, or par. 46.

contemporary form, to be an Aboriginal right it must have originated at a time before[47] and not solely as a response to European contact.[48] The term 'distinctive' also describes the specificity of any presumed Aboriginal right. As they are not general rights, 'the court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive) . . . [but] must look instead to the defining and central attributes of the aboriginal society in question'.[49]

In asserting that Aboriginal rights are neither 'general and universal' nor based on 'philosophical precepts of the liberal enlightenment' nor 'true of every human society', the justices categorically exclude any fundamental political right, such as a right to self-determination, derived from abstract principles.[50] Nonetheless, the Supreme Court's approach provides a means to include rights associated with the political sphere. For example, a contemporary system of Aboriginal self-government may be protected as an Aboriginal right where it could be linked to a distinctive, pre-European-contact political practice of that society. However, a government recognised and affirmed in this way would be subject to regulation by other governments once the *Sparrow* test[51] had been met. In short, following *Van der Peet*, Aboriginal rights of a political nature are not defined as 'political rights' flowing from abstract principles, but as 'way of life' rights deriving from the distinctiveness of Aboriginal societies before European contact.[52]

As pointed out earlier, the Supreme Court of Canada has thus far not recognised an (inherent) right to self-government of Aboriginal peoples in any of its decisions. This issue was directly addressed in *R. v. Pamajewon v. The Queen*,[53] where the Supreme Court stated that 'aboriginal rights, including any asserted right to self-government,

[47] *Van der Peet* at 310, or par. 59–61.

[48] *Van der Peet* at 320, or par. 73.

[49] *Van der Peet* at 314, or par. 56.

[50] Aboriginal rights discourse of the period has achieved no progress with respect to fundamental political rights flowing from abstract principles. Indeed, following *Van der Peet*, the state has taken a step backwards and affirmed an ideology most reflective of the period prior to *Calder*. The problem may be described in this way: on the basis of abstract principles, indigenous peoples must be presumed to hold fundamental political rights flowing from their original self-determining status. Therefore, it is incumbent upon those who would deny them these rights to demonstrate either that indigenous peoples, like other peoples, never held them or that the rights were legitimately extinguished after European settlement. See Asch, M. 1999, p. 438. This issue will be discussed in section 4.1.

[51] See footnote 85.

[52] Asch, M. 1999. pp. 436–437. In the British Columbia Court of Appeal decision, *Delgamuukw*, [1993], (104) D.L.R. (4th) 470 (B.C.C.A.), Justice Lambert in his minority opinion took a significantly different approach than other judges to the issue of the nature and content of Aboriginal title. Unlike the other judges, who regarded Aboriginal title as immutably tied to traditional practices and land uses at the time of assertion of sovereignty, he said that 'Aboriginal rights are evolving rights. They are not frozen at the time of sovereignty or any other time. The evolution which occurred before sovereignty and the evolution which occurred after sovereignty are both relevant to an understanding of the rights.' See Delgamuukw (B.C.C.A.), 648. In Lambert's view, Aboriginal rights of self-government and self-regulation were not necessarily extinguished by Crown sovereignty. The two could co-exist. Subject to some qualifications, the Aboriginal peoples could retain their rights to manage use of the land and resources encompassed by their Aboriginal title and to regulate internal relationships within their own societies through their own customs, traditions and practices. See *Delgamuukw*, 726–731.

[53] *R. v. Pamajewon v. Her Majesty The Queen* [1996] 2 S.C.R. 821.

must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right.'[54] The appellants had claimed an inherent right to self-government and the right to be self-regulating in economic activities, asserting that section 35(1) of the Constitution recognises and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands. The Court ruled that since the evidence presented at trial did not demonstrate that gambling, or the regulation of gambling, was an integral part of the distinctive cultures of the First Nations in question at the time of contact with Europeans, the activity was not protected by section 35(1).[55]

Even though it rejected the self-government claim in *Pamajewon*, the Supreme Court, acting much as it did in *Van der Peet*, left open the possibility for the recognition of the right to Aboriginal self-government in cases where this right could be seen as an Aboriginal right linked to a distinctive practice of that particular society predating European contact.

3.2. *Two Theories of Aboriginal Rights – Inherent or Contingent?*

This section introduces two theories related to the Aboriginal rights discussion in Canada as studied comprehensively by Michael Asch and Patric Macklem.[56] This introduction will make it possible to illustrate in later chapters how these theories, particularly the inherent rights theory, have been applied in Canada's legal and political systems.

In 1970, Chief Justice Davey wrote the following in *Calder v. Attorney General of British Columbia*[57] with respect to the Aboriginal rights of the Nishga Nation:

> [The Nishga] were at the time of settlement a very primitive people with few of the institutions of civilized society . . . I have no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive peoples are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation.[58]

There are three elements in Chief Justice Davey's statement that merit comment. First, it involves an assessment of Aboriginal society by the same standards that the

[54] *R. v. Pamajewon v. Her Majesty The Queen* [1996], in the section On Appeal from the Court of Appeal for Ontario. This document can be found on the web page of the Supreme Court of Canada, at <<http://www.lexum.umontreal.ca/csc-scc/en/index.html>>.

[55] Ibid.

[56] Asch, M. and Macklem, P., Aboriginal Rights and Canadian Sovereignty: an Essay on *R. v. Sparrow*. Alberta Law Review 1991, vol. 29 nro 2, pp. 498–517.

[57] [1970], 13 D.L.R. (3d) 64 (B.C.C.A). The document can be found at <<http://library.usask.ca/native/cnlc/vol07/043.html>>.

Even though Nisga'a ultimately lost the case, which was brought to the Supreme Court as well, *Calder* is considered a very significant case for the development of Aboriginal rights. *Calder* started an era which saw a marked increase in land claims and self-government negotiations between Canada and Aboriginal peoples. Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution. Methuen Publications (Toronto 1984), p. 64.

[58] Ibid. at 66, at <<http://library.usask.ca/native/cnlc/vol07/043.html>>.

Europeans applied to the Aboriginal peoples of North America two or more centuries before. Second, it implies that Aboriginal rights are dependent upon Crown recognition. That is, Chief Justice Davey was of the view that the Nishga Nation could not assert Aboriginal title to territory upon which Nishga people have hunted, fished and roamed 'since time immemorial'[59] because the Crown did not recognise such a right at the time of European settlement. Third, the Chief Justice assumed that the Crown, and thereafter Canada, acquired territorial sovereignty over British Columbia by 'occupation' or, more precisely, settlement. The second and the third assumptions in particular combine to provide the jurisprudential basis for the contingent theory of Aboriginal right.[60]

The contingent rights approach views the existence or non-existence of Aboriginal rights to be contingent upon the exercise of state authority. It therefore assumes the legitimacy of executive and legislative authority over Aboriginal peoples and sees rights as emanating from state recognition of a valid Aboriginal claim to freedom from state interference. An Aboriginal right to fish, for example, is dependent upon the state conferring such a right; enforcement of a right in Canadian law is at least dependent upon judicial recognition of its existence.

The inherent theory of Aboriginal right gives rise to an approach to Aboriginal sovereignty and self-government that stands in stark contrast to that envisioned by the contingent rights perspective. According to the inherent rights approach, Aboriginal sovereignty is a term used to describe the totality of powers and responsibilities necessary or integral to the maintenance and reproduction of Aboriginal identity and social organisation. Under the inherent rights theory, Aboriginal sovereignty and Aboriginal forms of government, as the means by which Aboriginal identity and social organisation are reproduced, predated the settlement of Canada and continue to exist notwithstanding the interposition of the Canadian state. The Canadian state may choose to recognise aspects of Aboriginal sovereignty and Aboriginal forms of self-government through executive, legislative or judicial action. Unlike in the contingent theory of Aboriginal right, however, such action is not necessary for the existence of Aboriginal sovereignty and native forms of self-government but only for their recognition in Canadian law.[61]

3.3. *The Inherent Rights Policy of the Canadian Federal Government – Recognition of an Inherent Right to Self government*

In August 1995, the Federal Government announced its official policy approach to implementing the inherent right to Aboriginal self-government.[62] It acknowledged the Aboriginal peoples' assertion concerning their inherent right to self-government and

[59] Ibid. at 148, per Judge Judson.

[60] Asch, M. and Maclem P., 'Aboriginal Rights and Canadian Sovereignty: An Essay on R.V. Sparrow,' Alberta Law Review, Vol. 29, No.2, 1991, pp. 495–517 at 501.

[61] Ibid., pp. 501–503.

[62] Government of Canada (1995), Aboriginal self-government: Federal Policy guide. Ottawa: Government of Canada. The document can be downloaded at <<http:www.ainc-inac.gc.ca/pr/pub/sg/plcy e.html>>.

recognised this right as an existing right within section 35 of the Constitution Act, 1982.[63] Thus, the Federal Government stated that it believed that the inherent right to self-government is an 'existing' right, which is currently enforceable through the courts by virtue of being 'recognised and affirmed' by section 35(1).[64]

The Federal Policy Guide does not however define what it means by 'inherent right'. Recognition of an inherent right, according to the government, is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.[65] The government also recognises that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations.[66] The government maintains furthermore that its approach to implementation focuses on practical and workable agreements on how self-government will be exercised rather than on trying to define self-government in abstract terms.[67]

Important in the government's recognition of the inherent right to self-government is that it is a right within the framework of the Canadian Constitution. Aboriginal jurisdictions and authorities should, therefore, work in harmony with jurisdictions that are exercised by other governments.[68] Furthermore, according to the government, the inherent right of self-government does not include a right of sovereignty in the sense in which this term is used in international law, and will not result in sovereign independent Aboriginal nation-states. On the contrary, implementation of self-government

[63] Government of Canada, Federal Policy Guide, Aboriginal self-government. The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-government. 'Introduction'.

[64] Government of Canada 1995, Federal Policy Guide, part 1: Policy Framework, The Inherent Right of Self-Government is a Section 35 Right.

[65] Restoring self-government would enable Indian, Inuit and Métis communities to exercise direct law-making control over their lives in areas relating to their needs, cultures, values, and aspirations in such vital fields as health care, child welfare, education, housing, land issues, and economic development. There are also a number of headings of law-making authority where the Federal Government has declared that there are no compelling reasons for Aboriginal governments or institutions to exercise legislative powers. These subject areas cannot be readily characterised as either integral to Aboriginal societies or internal to their territories. Federal policy groups them under two main headings: 1) powers related to Canadian sovereignty, defence, and external relations; and 2) other national interest powers. See Government of Canada 1995, Scope of Negotiations.

[66] Government of Canada 1995, Federal Policy Guide, part 1: Policy Framework, The Inherent Right of Self-Government is a Section 35 Right.

[67] Government of Canada 1995, Introduction.

[68] In light of the wide array of Aboriginal jurisdictions or authorities that may be the subject of negotiations, provincial governments are necessary parties to negotiations and agreements where the subject-matter of the negotiations normally falls within provincial jurisdiction or may have impacts beyond the Aboriginal group or Aboriginal lands in question. Territorial governments should be party to any negotiations and related agreements on implementing self-government north of the sixtieth parallel. However, a provincial refusal to participate must not be allowed to derail negotiations, as the foundation of the inherent-right theory is that the right is an immediately exercisable and enforceable one. Where a province is unwilling to participate, bilateral agreements between Aboriginal governments and the Federal Government would still be possible.

should enhance the participation of Aboriginal peoples in the Canadian federation and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.[69]

Even though the Federal Government does not define in exact terms what it means by 'an inherent right', according to The Royal Commission on Aboriginal Peoples (RCAP), established by the government in 1991, all governments in Canada recognise that the inherent right of Aboriginal self-government has the following characteristics:

a) It is an existing Aboriginal and treaty right that is recognized and affirmed in section 35(1) of the Constitution Act, 1982.
b) Its origins lie within Aboriginal peoples and nations as political and cultural entities.
c) It arises from the sovereign and independent status of Aboriginal peoples and nations before and at the time of European contact and from the fact that Aboriginal peoples were in possession of their own territories, political systems and customary laws at that time.
d) The inherent right of self-government has a substantial degree of immunity from federal and provincial legislative acts, except where, in the case of federal legislation, it can be justified under a strict constitutional standard.[70]

Thus, according to RCAP, inherent Aboriginal right to self-government is a right which is protected by the Constitution and whose origin lies within the original occupation of the land by Aboriginal peoples, who were sovereign and independent nations at the time of European contact.

3.4. *The Inherent Rights Approach in Canadian Jurisprudence*

The decisions of the Supreme Court of Canada have made it clear that Aboriginal rights and title to land existed as a legal right prior to the colonisation of North America by Europeans.[71] They were not created by the Royal Proclamation of 1763 or any other executive or legislative act.[72] This apparently means that Aboriginal peoples' rights to their traditional lands are not derived from the legal systems which the Europeans imposed upon them. By acknowledging that Aboriginal rights do not originate in the Canadian legal system, the Supreme Court of Canada recognises their inherent, pre-existing nature.

[69] Government of Canada 1995, Within the Canadian Constitutional Framework. Furthermore, the Federal Government maintains that the Charter of Rights and Freedoms binds all existing governments in Canada and would also apply to present and any future Aboriginal governments. Government of Canada 1995, Canadian Charter of Rights and Freedoms.

[70] The Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, 1996. Volume 2 – Restructuring the Relationship, Part One, 3. Governance, 2.3.2. The report can be downloaded from the web page of the Indian and Northern Affairs of Canada <<http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html>>.

[71] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 376–379 per Justice Dickson., can be found at <<http://www.musqueam.bc.ca/Guerin%20v_%20The%20Queen.htm>>. *Roberts v. Canada*, [1989] 1 S.C.R. 322 at 340, can be found at <http://www.lexum.umontreal.ca/csc-scc/cgi-bin/srch.pl?language=en;method=all;database=en%2Fjug;query=indian%20band;x=9;y=9;firsthit=1>> (14.3.2006).

[72] *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 379 per Justice Dickson.

In *Guerin v. The Queen*, Mr Justice Dickson said that in the *Calder* case the Supreme Court 'recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.'[73] He also stated that 'the assumption implicit in *Calder* that Indian title is an independent legal right is supported by the principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants'.[74] Dickson noted that that principle had been approved in *Amodu Tijani v. Secretary, Southern Nigeria*,[75] where the Judicial Committee of the Privy Council decided that the presumptive title of the African inhabitants of Southern Nigeria was based on their system of customary laws, which existed prior to the cession of that territory by Britain.[76]

Implicit in Dickson's approach to Aboriginal title in *Guerin* is a presumption that the Aboriginal peoples of Canada had rights to their lands by virtue of their own laws prior to European colonisation. This involves acknowledgement that the Aboriginal peoples had legal systems, which in turn presupposes the existence of governmental structures. This conclusion is consistent with Judson's observation in *Calder* that the Aboriginal peoples were organised in societies.[77]

The Canadian court decisions have not, however, explicitly required proof of Aboriginal law to establish Aboriginal title.[78] In *Calder*, for example, an admission that the Nisga'a Indians were in possession of their traditional lands at the time the Crown allegedly acquired sovereignty seems to have been sufficient. In *Baker Lake*, proof that the Inuit as an organised society had been in exclusive possession of their lands when sovereignty was asserted by Great Britain was also accepted as sufficient to establish their claim to Aboriginal title. The cases therefore reveal that actual proof of an Aboriginal system of land law is not necessary to establish Aboriginal title.[79] Instead, as Madam Justice Wilson repeated in *Roberts v. Canada*,[80] Aboriginal title is 'a legal right derived from the Indians' historic occupation and possession of their tribal lands.'[81]

[73] *Guerin* at 376.

[74] *Guerin* at 378.

[75] *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399.

[76] A summary of the case can be found at <http://www.nigeria-law.org/Amodu%20Tijani%20%20V%20%20The%20Secretary,%20Southern%20Provinces.htm>>.

[77] McNeil, K. 1997, p. 136. Indeed, in *Baker Lake v. Minister of Indian Affairs* [(1980) 1 F.C. 518 at 557], Mr Justice Mahoney made the existence of an organised society a prerequisite for proof of Aboriginal title. An organised society was apparently necessary for there to be pre-existing rights which could be recognised by the common law after the Crown acquired sovereignty. This interpretation is supported by the following statement by Lambert J. in *Delgamuukw* (B.C.C.A) at 630: 'The reason why there must be an organised society is that it is only in such a society that the practices of the people reveal that there are recognised rights which underlie the practices.'

[78] According to McNeil (1997, footnote 13, p. 248), in common law courts, laws of Aboriginal peoples are generally treated as factual matters requiring evidentiary proof: see *Angu v. Attah* (1916), P.C. Gold Coast 1874–1928 43 at 44; *Effuah Amissah v. Effuah Krabah* (1936), 2 W.A.C.A. 30 at 31; *Re Bed of Wanganui River*, (1955) N.Z.L.R. 419 at 432.

[79] McNeil, K. 1997, p. 137.

[80] Roberst v. Canada, [1989] 1 S.C.R. 322.

[81] *Roberts v. Canada*, [1989] 1 S.C.R. 322, at 340. Wilson J. was relying on the *Calder* decision, as Judge Dickson had done in *Guerin*. The issue of the basis of Aboriginal title was revisited in the British Columbia Court of Appeal decision in *Delgamuukw v. The Queen*. On the issue of the source of Aboriginal title, Justice

It seems that the courts are vacillating between two possible sources of Aboriginal title – Aboriginal occupation and Aboriginal laws – without pronouncing clearly in favour of one or the other.[82] According to McNeil, however, the fact that the Courts have not required proof of Aboriginal law as a prerequisite for establishing Aboriginal title can be interpreted as the Courts' favour for occupation as the source of Aboriginal rights. McNeil considers this approach rightful, because Aboriginal land law would have been developed to govern landholding within the Aboriginal nations themselves and not to determine the land rights of those nations vis-à-vis others, especially colonising European powers, and hence the Canadian Crown.[83]

3.4.1. *To What Extent does* Sparrow *Embrace the Inherent Rights Approach?*

As mentioned earlier, the Constitution Act, 1982 did not specify the scope and content of the 'aboriginal and treaty rights' that have since been recognised and affirmed. In *R.v. Sparrow*,[84] however, the Supreme Court of Canada was for the first time provided with the occasion to give meaning to section 35(1). Even though the Court accepted that Canada enjoys sovereignty and is therefore entitled to exercise legislative authority over Aboriginal peoples, the Court held that Aboriginal rights that exist at common law are now 'recognised and affirmed' by section 35(1) and that, as a result, laws that interfere with the exercise of such rights must conform to constitutional standards of justification.[85]

With regard to the inherent nature of Aboriginal rights, the Court reaffirmed the holding of Justice Dickson in *Guerin v. the Queen*[86] that Aboriginal rights are not contingent upon the exercise of legislative or executive authority, and to this extent the Court in *Sparrow* embraced the inherent theory of Aboriginal rights. In the Court's

Macfarlane repeated Justice Dickson's oft-quoted statement in *Guerin* that Aboriginal land rights arise from 'the Indians' historic occupation and possession of their tribal lands,' concluding from this that 'proof of presence amounting to occupation is a threshold question.' (492). Relying on *Calder*, he said that 'Aboriginal rights arise by operation of law, and do not depend on a grant from the Crown' (492). He also quoted a passage from Justice Wilson's judgment in *Roberts v. Canada*, which included the statement that 'Aboriginal title pre-dated colonisation by the British and survived British claims of sovereignty.' (493).

[82] For different views of judges, see McNeil, K. 1997, pp. 137–141.

[83] McNeil, K. 1997, p. 153.

[84] [1990], 70 D.L.R. (4th) 385 (S.C.C). The defendant, a member of the Musqueam Band was prosecuted for using a fishing net that was longer than permitted by the band's food fishing licence. The defence was based on an argument that Sparrow was exercising an 'existing' Aboriginal right' under section 35 of the Constitution Act of 1982. The Supreme Court of Canada opted for a liberal interpretation of 'existing' Aboriginal rights under the Constitution, 'so as to permit their evolution over time'; in other words, the Court ordered that the right to fish was allowed to be exercised in a contemporary manner (at 1093). The document can be found at <http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1075.html>>..2006).

[85] More specifically, the Court held that, upon proof of an infringement of a section 35(1) right, the government must at least demonstrate a valid legislative objective, and any allocation of priorities after such objective has been implemented must give 'priority' to Aboriginal interests (s.c. 'Sparrow test'). It also stated that in future cases it may require adequate consultation with Aboriginal peoples as a precondition of the constitutionality of laws that infringe section 35(1) rights (at 1077–1080).

[86] [1985], 13 D.L.R (4th) 321 (S.C.C.), Describing the nature of the Musqueam Indian Band's interest in their land as 'a pre-existing legal right not created by Royal Proclamation, by section 18(1) of the Indian

view, the reason for concluding that the Musqueam Nation enjoys a right to fish lies not in the presence of state action conferring such a right but instead arises from the fact that fishing is integral to Musqueam self-identity and self-preservation.[87] More specifically, the Court stated:

> The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day.[88]

Elsewhere in their reasoning, Justices Dickson and La Forest made a similar point:

> The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected with their cultural and physical survival.[89]

The Court avoided some of the implications of adopting the inherent theory of Aboriginal right by adopting two significant views. First, it unquestioningly accepted that the British Crown, and thereafter Canada, obtained territorial sovereignty over the land mass that is now Canada by the mere fact of settlement and the doctrine of *terra nullius*. The Court's acceptance of the settlement thesis appears to exclude any possibility of the recognition and affirmation of a constitutional right to Aboriginal sovereignty. Second, embracing the settlement thesis permitted the Court to rein in the scope of section 35(1) by relying on the contingent rights approach to the requirement in section 35(1) that Aboriginal rights be 'existing'.[90]

The definition of 'existing' offered by the Court essentially weakens the constitutional protection of Aboriginal forms of self-government that would otherwise flow from the inherent theory of Aboriginal right. Here, the Court implicitly relies on the contingent theory of Aboriginal right in the definition it gives to the requirement in section 35(1) that Aboriginal rights be 'existing' before they receive constitutional recognition and affirmation. The inherent theory of Aboriginal right would suggest that the existence of Aboriginal rights is not to be determined by reference to actions of the Canadian state.[91]

The Court, however, held that prior to 1982 Aboriginal rights could be extinguished by the Canadian state. If extinguished prior to 1982, Aboriginal rights no longer 'exist' within the meaning of section 35(1) and their existence is not protected against

Act, or by any other executive order or legislative provision,' Dickson J. in *Guerin* firmly opted for the inherent theory of Aboriginal rights. *Guerin v. The Queen*, [1984]2 S.C.R. 335 at 376–379 per Dickson J., can be found at <<http://www.musqueam.bc.ca/Guerin%20v_%20The%20Queen.htm>>.

[87] Asch, M. and Maclem, P., 1991, p. 505.

[88] *R. v. Sparrow* [1990] 1 S.C.R. 1075., at 1094. The document can be found at: <<http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1075.html>>.

[89] Ibid. at 1099.

[90] Ibid. at 507.

[91] Ibid. at 507.

state action. If such rights were only regulated, they continue to exist within the meaning of section 35(1) despite their regulation and can serve to check subsequent legislative or executive curtailment.[92]

The definition of 'existing' offered by the Court makes for a somewhat qualified constitutional right of Aboriginal self-government. To extend the fishing example further, pre-1982 federal laws respecting fishing by the Musqueam Nation may well have regulated the Musqueams' ability to determine among themselves how, when and by whom fishing is to occur. Whether this form of self-government by the Musqueam Nation continues to exist and, accordingly, is recognised and affirmed by section 35(1), is dependent upon a finding that the practice was not extinguished by law prior to 1982.[93]

As such, the commitment to a right to Aboriginal self-government in *Sparrow*, initiated by the adoption of the inherent theory of Aboriginal right, is ultimately rendered fragile and tentative by the Court's subsequent embrace of a competing contingent rights approach and the Court's unquestioned acceptance of Canadian sovereignty.[94]

At this point of the study, it can be concluded that, according to the Supreme Court of Canada, Aboriginal rights are 'inherent' rights, for their original source is not the Canadian legal system; they are recognised as pre-existing rights. These rights are seen as way-of-life rights, as described in the previous chapter. It is not totally clear whether the right to self-government of Aboriginal peoples falls within this category of 'inherent rights'. Even though recognised by the Federal Government, it has not been explicitly recognised by the Supreme Court, although the Court has cautiously opened up the possibility for its recognition. Many noted Canadian authors, such as Slattery, are of the view that the right of Aboriginal peoples to self-government was never extinguished and is therefore a constitutional right. In the words of Slattery:

> [o]ver the years, the right was whittled away by the provisions of the Indian Act. However, it seems the right of self-government as such was never extinguished. The important consequence is that, when Section 35 of the Constitution Act, 1982 took effect, the right of self-government was still extant and featured among the 'existing aboriginal and treaty rights' recognized in the section.[95]

[92] Ibid. at 507–508.

[93] Ibid. at 508.

[94] Asch, M. and Maclem, P. 1991, p. 508. The Court in *Sparrow* implicitly relied on the settlement thesis, one of the four principles of law upon which states have traditionally relied to justify the acquisition of new territory. According to the principle, justification can be based on the settlement or acquisition of territory that was previously unoccupied or is not recognised as belonging to another political entity. The settlement thesis, of course, is reasonable in cases where the land over which sovereignty is asserted was unoccupied prior to settlement. The difficulty arises in cases where it is used as a justification for the assertion of territorial sovereignty over prior occupants. Asch, M. and Maclem, P., 1991, p. 511.

[95] Slattery, B., First Nations and the Constitution: A Question of Trust. Canadian Bar Review (1992) 71, pp. 261–293, at 279. See generally also Clark, B., Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada. McGill-Queen's University Press. Montreal and Kingston (1990), and Hogg, P.W. and Turpel, M.E., 'Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues', The Canadian Bar Review, Vol. 74, No. 2, June 1995, pp. 187–222.

4. Important Limitations in the Inherent Rights Approach

This chapter studies two important limitations that the Supreme Court of Canada placed on the inherent rights approach. The first is non-recognition of any form of Aboriginal sovereignty based on the recognition of the solemn sovereignty of Canada over the territory and Aboriginal peoples living there. The second is that, according to the Supreme Court of Canada and the practice of Federal Government, Aboriginal rights can be extinguished under certain conditions. Both limitations are problematic and are criticised by the present author.

4.1. *The Problem with Canadian Sovereignty Based on the Principle of* Terra nullius

The Federal Government's understanding of Aboriginal rights, accepted without question by Canadian courts, is based on the assumption that the Canadian state holds sovereignty and underlying title to all of Canada.[96]

In this respect, federal policy fits within a definitional framework already established by the Supreme Court of Canada, which it stated in *Sparrow*: 'it is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.'[97]

As *Sparrow* and other leading contemporary court decisions indicate,[98] Canadian legal ideology at present relies, in particular, on the settlement thesis as a justification for Canadian sovereignty. This thesis rests on the idea that the territory claimed by the colonists was previously a *terra nullius*, a territory without people that was either

[96] 'Underlying title' refers to more than the ultimate ownership of land; it also includes the jurisdiction to govern the land in question. Asch, M. and Zlotkin, N., 'Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations' in Asch, M. (ed.): Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, UBC Press, University of British Columbia, Vancouver 1997, pp. 208–229, at 211–212.

[97] *R.* v *Sparrow*, at 1103. <<http://www.lexum.umontreal.ca/csc-scc/en/pub/1990/vol1/html/1990scr1_1075.html>>. Within this framework, Aboriginal rights and title are seen as common law rights that survived the assertion of sovereignty by Britain and later by Canada. As common law rights (until their entrenchment in the Constitution in 1982), Aboriginal rights and title were weaker than the prerogative rights of the Crown and, later, the rights of the British and Canadian Parliaments. Hence, the legitimate expression of Aboriginal rights could not survive in the face of conflicting legislation passed by the appropriate body. See Asch, M. and Zlotkin, N., 'Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations' in Asch, M. (ed.): Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, UBC Press, University of British Columbia, Vancouver 1997, pp. 208–229, at 211–213.

[98] One important US Supreme Court decision embracing the doctrine of *terra nullius* and one much cited in the Canadian Aboriginal rights context is *Johnston* v *McIntosh*. (21 U.S. [8 Wheat.] 543 [1823]). In this decision Justice Marshall 'invented a body of law which was virtually without precedent.' (McNeil, K., Common Law Aboriginal Title, Oxford, Clarendon Press, 1989, p. 301.) Although Marshall stayed within the realm of English property law by recognising that Aboriginal peoples acquired a right of occupancy arising from actual possession, the theory of rights informing in his analysis is his application of the doctrine of discovery to support Crown title in, and acquisition of sovereignty powers necessarily diminished Indian rights to sovereignty and Indian people's powers necessarily diminished Indian rights to sovereignty and

previously unoccupied or not recognised as belonging to another political entity. Since the territory that is now Canada obviously was not unoccupied, the rationale has been to rely on the presumption that the territory was not 'recognized as belonging to another political entity.' The premise of this approach has been to assert that, in law, the original inhabitants did not possess political rights or underlying title that required recognition by the colonisers.[99]

A commonly accepted justification for the assertion of sovereignty by settlement in such circumstances is the view that the settlers were superior to the original inhabitants, especially with respect to a characteristic akin to political organisation, in short, that, in contrast to the settlers, the original inhabitants were either too primitive to possess 'sovereignty' or, at best, possessed it in such a rudimentary form that its existence did not deserve to be respected by the more 'advanced' settler society.[100] Thus, when examined in light of the competing claims of the settlers and the original inhabitants, territorial sovereignty more appropriately vests in the former. This justification surfaced with colonial expansion and included such particulars as the superiority of Christianity over heathen religions, of agriculture over hunting and gathering, of Western cultural institutions such as private property over non-Western notions and of one skin colour over another.[101]

Indian people's power to alienate their land. According to Justice Marshall 'absolute ultimate title [was] considered [in international law] as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.' (*Johnston v McIntosh*, 592. <<http://www.utulsa.edu/law/classes/rice/ussct_cases/JOHNSON_V_MCINTOSH_1823.HTM>>). Settlement on Indian lands and conquest were considered legitimate methods to acquire Indian interests. (See Bell, C. and Asch, M., 'Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation' in Asch, M., Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, UBC-Press, University of British Columbia, pp. 38–74, at 45.) Subsequent decisions by Marshall's court in any event limited the doctrine of discovery and clarified that the only legitimate method to acquire title to occupied lands was purchase or cession. The leading decision on this point is *Worcester v. Georgia*. (31 U.S. 515 pet. 1832) In Worcester v. Georgia, Marshall accepted that the Crown somehow acquired sovereignty but argued that the principle of discovery did not affect the right of those already in possession. (544) He concluded, rather, that, in accord with international opinion, title to occupied lands could only be acquired through cession. Furthermore, in his opinion Indians did not automatically cease to be sovereign and self-governing nations upon entering treaties nor were those rights necessarily diminished upon discovery. Rather, powers of government both internal and external to Indian territory, continued unless they were surrendered by treaty, overruled by congressional enactments, or limited in their exercise by reasonable state regulation. (584) This theory of continuance, often referred to as the doctrine of residual sovereignty, is the basis for the authority of Indian Nations in the United States to enact and enforce their own laws within their own territories. Although substantial restraints have been placed on the contemporary exercise of Aboriginal government, particularly in the areas of criminal law, the underlying legal theory is recognition of a pre-existing inherent right to sovereign jurisdiction and a continuing right to tribal government within Indian territories. Asch. M. and Bell, C., at 46.

[99] Asch, M., First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology' in Cook, C. and Lindau, J.D. (eds.): Aboriginal Rights and Self-government, McGill-Queen's University Press 2000, pp. 148–167, at 149–150.

[100] See generally J. Crawford, The Creation of States in International Law, Oxford University Press, 1979, pp. 176–181.

[101] See generally R.A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest, New York, Oxford University Press, 1990); and Asch, M., Home and Native Land: Aboriginal Rights and the Canadian Constitution, Toronto, Methuen, 1984, at 22–25 and 42–46.

As Asch and Maclem point out in their study of *Sparrow*, it is precisely this version of the settlement thesis that lies behind the view that Aboriginal sovereignty was extinguished by the assertion of sovereignty by the Crown. No other interpretive frame used to justify the acquisition of new, populated territories by a sovereign can make sense of the position that Aboriginal sovereignty was extinguished by the assertion of Crown sovereignty. It is based on the dominant understanding of section 91(24) of the Constitution Act, 1867 as conferring legislative power on Parliament to pass laws governing native peoples without their consent.

With reference to Asch and Maclem again, this explains why 'there was from the outset never any doubt that sovereignty and legislative power . . . vested in the Crown.' The reason for certainty in the view of the authors lay in perceived European superiority. This furthermore renders coherent the contingent theory of Aboriginal rights as dependent upon Canadian executive or legislative action. Sovereignty is viewed as an erroneous label for a bundle of rights dependent for their existence on the sovereign authority of the Canadian state, and the constitutional recognition of Aboriginal forms of self-government is contingent upon their non-extinguishment by legislative or executive action prior to 1982.[102]

Thus a belief in the superiority of European nations ultimately supports the unquestioned acceptance of Canadian sovereignty and the invocation of the contingent rights approach to the term 'existing' in section 35(1) of the Constitution Act, 1982 by the Court in *Sparrow*. Although it embraces the inherent rights approach where the origin of Aboriginal rights is concerned, the Court's move away from an inherent rights approach can only be supported by the acceptance of the principle of *terra nullius* and thus a belief in the superiority of European nations.[103] This, according to the above-mentioned authors, violates the fundamental principles of justice and human rights in the modern world, such as the assumed equality of peoples, especially of their ability to govern themselves, and the basic right of a people to self-determination.[104] The authors therefore suggest that section 35(1) of the Constitution Act, 1982 has to be interpreted by reference to the overarching value of equality of peoples. Such a value entails a constitutional embrace of the inherent theory of Aboriginal right.[105]

[102] Asch, M. and Maclem, P., 'Aboriginal Rights and Canadian Sovereignty: an Essay on R.v. Sparrow' in Alberta Law Review 1991, vol. 29 nro 2, pp. 498–517, at 511–512.

[103] Asch, M. and Maclem, P., 1991, 512.

[104] This theme is taken up in the part of this article dealing with international law.

[105] Asch, M. and Maclem, P. (1991), p. 512. In the alternative, these authors suggest that the judiciary deepen Sparrow's tentative commitment to an Aboriginal right to self-government. The recognition of the inherent right to self-government, according to Floyd McCormick, is important for three reasons, in addition to the equality of peoples: First, the term distinguishes these rights from others (e.g., treaty rights and constitutional rights) that Aboriginal peoples claim under Canadian law; second, it serves to distinguish these rights within Canadian society as collective rights which may be legitimately claimed due to the historical relationship between Aboriginal peoples and the Canadian state; third, it explains the nature of those rights. It acknowledges that the legal instruments which protect those rights in Canadian law did not create them; that by either international or common law, or normative argument they have always existed. Instruments of law merely recognise and protect them. See McCormick, F. Inherent Aboriginal Rights in Theory and Practice: The Council for Yukon Indians Umbrella Final Agreement, at 46.

Thus, for the above-mentioned reasons, the principle of *terra nullius* cannot be accepted in the contemporary world. There are also other reasons why this doctrine is an invalid basis for the sovereignty of Canada. First of all, the doctrine no longer finds support in the world community. The doctrine was rejected directly in circumstances similar to those found in Canada by the International Court of Justice in its 1975 advisory opinion in *Western Sahara*. In that case, the Court was asked to address specifically the following question, 'Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?'[106] The Court responded by saying that it was not, largely because the information furnished to the Court showed that at the time of colonisation Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them. Moreover, Spain entered into treaty arrangements with local inhabitants in the late nineteenth century and therefore did not treat the indigenous peoples as living in a *terra nullius*.[107]

The situation in Canada, with some important exceptions, is highly similar. The Crown recognised the existence of political authorities who could negotiate on the behalf of collectivities.[108] Furthermore, the British Crown entered into such treaties much earlier than the nineteenth century and continued the practice into the twentieth. Therefore, it seems obvious that the British Crown recognised that the land was not a *terra nullius* and ought to have made treaties prior to settlement in all areas of what is now Canada.[109] On balance, one has good reason to believe that the principle of *terra nullius* did not apply even at the time when Europeans came to the territory that is now Canada. Accordingly, the fact that the Supreme Court of Canada used *terra nullius* as a justification for Canada's sovereignty is not only morally but also legally incorrect.

The principle of *terra nullius* has also been discredited by the High Court in Australia – another settler state that arose from British colonisation.[110] In *Mabo v. Queensland*, a 1992 decision of the High Court of Australia, the judges rescinded the premise because, as Justice Brennan stated, it relies on 'a discriminatory denigration

[106] *Western Sahara (Request for Advisory Opinion)* 1975, International Court of Justice, case summary at: <<http://www.icj-cij.org/icjwww/idecisions/isummaries/isasummary751016.htm>>.

[107] *Western Sahara*, paras 75–83.

[108] Asch, M., 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology' in Cook, C. and Lindau, J.D. (eds.): Aboriginal Rights and Self-government, McGill-Queen's University Press, Montreal & Kingston, London, Ithaca. 2000, pp. 148–167, at 157.

[109] Ibid. at 157. For a comprehensive treatment of treaty-making between Aboriginal peoples and the Crown, see also Borrows, J., 'Domesticating Doctrines: Aboriginal Peoples after the Royal Commission', 46 McGill Law Journal 651, 2001, pp. 615–661, at 617–641. The provinces of British Columbia and Newfoundland represent the major areas where the treaty-making process still has not been finalised. Recent years have seen the development of a process to negotiate such treaties in British Columbia. However, Newfoundland insists that the true indigenous people of that place were exterminated and therefore that the land can be considered a de facto *terra nullius* with respect to sovereignty and underlying title of contemporary Indigenous Peoples. Asch, M. 2000, at 157.

[110] Initially, in *Milirrpum*, a case decided in 1970, the trial judge asserted that, notwithstanding any factual evidence that might be produced by Aborigines, in law Australia was a 'settled or peaceably occupied colony', and as such in law the territory had been a *terra nullius* prior to colonisation.*Milirrpum et al. v. Nabalco Pty. Ltd. and the Commonwealth of Australia*, 1971, FLR 141 (SCNT).

of indigenous inhabitants, their social organisation and customs.'[111] He continued, 'it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.'[112]

The principle of *terra nullius* has been rejected as a matter of fact as well. It is true that in 1919, when *Re: Southern Rhodesia*[113] was written, there was a presumption that there could be people so low on the scale of social organisation that their use and conceptions of rights and duties were not to be reconciled with the institutions or legal ideas of civilised society.[114] However, anthropological evidence had produced sufficient results on this topic that, by 1930, the pseudo-evolutionary view had been completely discredited. Rather, the evidence accumulated from that time on indicates that there were very few, if any, societies that existed at the time of colonisation that did not have concepts about jurisdiction reconcilable with 'rights arising under English law'.[115] As Mr Justice Hall pointed out in *Calder*: 'The assessment and interpretation of historical documents and enactments tendered in evidence must be approached in

[111] *Mabo v. Queensland* (1992), 107 A.L.R. 1 (Aust. H.C), 27, par. 39 <<http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>>.

[112] Ibid. at 41. The Court based its argumentation on the ICJ Advisory Opinion in *Western Sahara*, which can be seen as an example of increasing degrees of interaction between the international and national levels in the emerging globalised system of indigenous rights. The Court added that the common law does not necessarily conform to international law, but 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'. As pointed out by Genugten and Perez-Bustillo, referring to the above quotations, one might say that all the grievances brought by many indigenous representatives in as many international and national fora come together in the most fundamental form: basically they are victims of a power play. Not addressing that issue would be the same as denying the fundamental character of most of their problems. See Genugten, W.V. and Perez-Bustillo, The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimension', International Journal on Minority and Group Rights, Vol. 11, No. 4, 2004, pp. 379–409, at 394.

[113] *Re: Southern Rhodesia* (1919) A.C. 210 (P.C). *Re: Southern Rhodesia*, 233. The division between 'civilized' and 'primitive' found in Re: Southern Rhodesia has been adopted by the Canadian courts as the precedent upon which to determine the extent to which Canada is required in law to recognise Aboriginal rights and, in particular, to determine the original sovereignty and jurisdiction of the Aboriginal peoples who were present prior to the arrival of the first colonists. Specifically, the courts have held that, notwithstanding the existence of certain Aboriginal rights, the indigenous peoples who lived in Canada prior to colonisation were too primitive to have a form of sovereignty and underlying title that required recognition by colonial authorities. Therefore, despite the fact that people lived there and had certain rights, with respect to sovereignty and underlying title Canada had been a *terra nullius* prior to the arrival of the colonists. See Asch, M. 2000, p. 151.

[114] In the first contemporary application of the *Re: Southern Rhodesia* reasoning to reject Aboriginal rights assertions, Chief Justice Davey of the British Columbia Appeals Court stated that Indians were primitive people, whose claimed rights were of a kind that the Crown did not recognise when acquiring the territory by occupation. See footnote 57. However, in January 1973 the Supreme Court of Canada, while not describing the nature or extent of the rights of the Nisga'a and splitting 3–3 on whether those rights continued to exist, did agree that in law Aboriginal people lived in organised societies in the period prior to colonisation. Given that the Supreme Court recognised in 1973 that 'organized societies' existed prior to colonisation, Canada could not be considered an absolute *terra nullius*. Following the Supreme Court's decision in *Calder* (1993), the reasoning in *Re: Southern Rhodesia* has been applied to Aboriginal rights law in a number of judgments of Canadian courts, for instance, *Baker Lake v. Minister of Indian Affairs* (([1979) 107 D.L.R. (3d) 513)), *Apsassin et al v. Canada* (1988)((1 C.N.L.R. 73, 89)) and in Delgamuukw ([1997] 3 S.C.R. 1010).

[115] Asch, M. 2000, p. 157.

the light of present-day research and knowledge, disregarding ancient concepts formulated when understanding of the customs and cultures of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws, or culture, in effect a subhuman species.'[116] It is therefore inappropriate for Canada to rely on a principle that is factually incorrect.[117]

It is also important to note that Canada has played a significant role in the decolonisation process by supporting United Nations' declarations concerning decolonisation, by providing aid to newly decolonised countries, and by being ready to engage as a peacekeeper in situations where colonialism or its aftermath have caused significant problems for local populations. Therefore, at least by implication, Canada has rejected theories, such as *terra nullius*, that were used to justify continued colonial rule in such situations. As Asch points out, it is therefore an affront to its own self-understanding as a player internationally for Canada to justify its sovereignty and underlying title on the very same principle, *terra nullius*, used by colonial powers to legitimate their occupation of colonial territories.[118]

Finally, Canada's own Royal Commission on Aboriginal Peoples has abandoned the principle of *terra nullius*: '. . . we need to abandon outmoded doctrines such as *terra nullius* and discovery. We must reject the attitudes of racial and cultural superiority reflected in these concepts, which contributed to European nations' presumptions of sovereignty over Indigenous peoples and lands.'[119] The Commission continued: 'A [third] fundamental element is to recognise that Aboriginal nations were historically sovereign, self-governing peoples and that the time has come for other governments in Canada to make room for Aboriginal nations to reassume their historical self-governing powers. We are in the post-colonial era. The world has changed, and if Canada wants to retain a position of respect and influence in world affairs, Canada must change too. We cannot continue to advocate human rights to the third world while maintaining the remnants of a colonial system at home.'[120]

4.2. *The Problem with Canadian Extinguishment Policy*

In legal terminology, the word 'extinguishment' means 'the destruction or cancellation of a right.'[121] In Canadian law, the extinguishment of Aboriginal rights and title has occurred in two ways. The first involves extinguishment by unilateral government action, the second extinguishment with the alleged consent of an Aboriginal party.

The notion of extinguishment by unilateral action is based on the presumption that, prior to the passage of the Constitution Act, 1982, Parliamentary acts represented the

[116] Calder, 169, <<http://library.usask.ca/native/crnlc/vol07/091.html>>.

[117] Asch, M. 2000, p. 157.

[118] Asch, M. 2000, p. 157–168.

[119] The Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, 1996, Volume I, part three: Building the Foundation of a Renewed Relationship, Chapter 14: The Turning Point, at <<http://www.ainc-inac.gc.ca/ch/rcap/sg/sg51_e.html.>>.

[120] The Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, 1996, Volume I, part three: Building the Foundation of a Renewed Relationship, Chapter 14: The Turning Point, at <<http://www.ainc-inac.gc.ca/ch/rcap/sg/sg51_e.html.>>.

[121] Black's Law Dictionary, 6th ed., St. Paul, MN: West Publishing Company 1990, at 582.

supreme law of Canada. Therefore, any Aboriginal right derived from the common law could be extinguished unilaterally and without the consent of Aboriginal people where an Act of Parliament directly contradicted it. This view was accepted by Canadian courts prior to 1982, which found that extinguishment of Aboriginal title could occur both through legislation explicitly intended for that purpose and possibly through legislation merely inconsistent with the continued exercise of Aboriginal title.[122]

After the adoption of section 35(1) of the Constitution Act, 1982 recognising and affirming existing Aboriginal and treaty rights, extinguishment of Aboriginal title without the consent of Aboriginal people was no longer possible in Canadian law.[123]

Extinguishment by alleged consent of an Aboriginal party describes the effect of certain clauses in the written versions of many historical treaties and comprehensive claims settlements.[124] The typical wording is that the Aboriginal parties agree to 'cede, release and surrender to Her Majesty in Right of Canada . . . all their aboriginal claims, rights, titles and interest, if any, in and to lands and waters'[125] in return for specific benefits.[126] In this context, extinguishment is said to be based on an express agreement by Aboriginal people to 'cede' certain rights. Many Aboriginal peoples strongly deny that they freely agreed to such clauses. Many treaty peoples assert that the extin-

[122] In *Calder v Attorney General of British Columbia* ([1973] S.CR. 313, [1973] 4 W.W.R. 1), Justice Hall wrote: '[Aboriginal title] being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.' (208) He went on to state: 'It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.' (210). In contrast, Justice Judson rejected the requirement that specific legislation is required to extinguish Aboriginal title unilaterally. He wrote: 'In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.'(167). As mentioned above, in 1990 the Supreme Court of Canada adopted the 'clear and plain' intention test in *R v. Sparrow*.

[123] Asch, M. and Zlotkin, N. 1997, at 210. See generally also Isaac, T. Balancing Rights: The Supreme Court of Canada, R.v. Sparrow, and the Future of Aboriginal rights, at <<http://www.google.fi/search?hl=fi&q=Balancing+rights%3A+the+supreme+court+of+canada%2C+r.v.+sparrow%2C+and+the+future+of+Aboriginal+rights&meta=>> Asch and Zlotkin note on the other hand that despite the constitutional recognition now given to existing Aboriginal rights, the Supreme Court of Canada has stated that Parliament still has the authority to pass legislation restricting the exercise of Aboriginal rights, provided it can pass the justification test set out in *Sparrow*. In this sense, the Supreme Court of Canada has recognised the continued supremacy of Parliament over Aboriginal rights. See Asch, M. and Zlotkin, N. 1997, 213. See also Asch, M. and Maclem, P., 'Aboriginal Rights and Canadian Sovereignty: An Essay on R.v. Sparrow' (1991) 29 Alta Law Review. 498.

[124] According to the Federal Government of Canada, comprehensive land claims are based on the assertion of continuing title to land and resources. Aboriginal title to land derives from a group's traditional use and occupancy of the land. Comprehensive claims are negotiated under the Canadian Federal Government's Comprehensive Claims Policy, originally articulated in 1973 and subsequently amended in 1981 and 1986. The purpose of comprehensive claims settlements is to clearly define the rights of Aboriginal groups with respect to land and resources in such a way as to facilitate economic growth and self-sufficiency. The structure of settlements may recognise the interests of Aboriginal groups in resource management, development, and environmental protection. See Agreements Database Concept, atns, at <<http://www.atns.net.au/biogs/A001973b.htm>>.

[125] Dene-Métis Agreement in Principle, section 3.1.9.

[126] Similar wording is used in the written versions of all treaties signed between 1867 and 1982.

guishment clause does not represent their understanding of the essential nature of their treaties.[127] However, governments continue to approach comprehensive claims as fundamentally contractual matters, despite the fact that treaties and comprehensive claims agreements now have constitutional status and protection.

There are a few modern settlements in which the Aboriginal parties have agreed to terms that include an extinguishment provision. The most recent is that of the Inuit in Nunavut.[128] Even in such cases, the view of the Aboriginal signatories is that such an approach is not preferred and that extinguishment was accepted only to facilitate their goals.[129]

The Federal Government's insistence on this provision has led to internal division among Aboriginal peoples. Some are reluctantly prepared to accept the extinguishment requirement in order to obtain the perceived benefits of an immediate settlement. They believe they need an agreement in order to receive the much-needed economic benefits of settlement and the right to develop and co-manage lands and other resources.[130] Others are unwilling to agree to the extinguishment of their Aboriginal title, which they view as basic to their Aboriginal identity. In the case of the Dene-Métis, just such a split developed between those who agreed to the proposed settlement and those who rejected it.[131]

According to Indian and Northern Affairs Canada, the primary purpose of comprehensive land claims settlement is to conclude agreements with Aboriginal peoples that will resolve the legal ambiguities associated with the common law concept of Aboriginal rights. The objective is to negotiate modern treaties that provide certainty and clarity of rights of ownership and use of lands and resources for all parties.

[127] See, e.g., KAIRO's Brief to the UN Committee on the Elimination of Racial Discrimination, on the Occasion of the Examination of the 13th and 14th Periodic Reports Submitted by Canada, August 2002, at <<http://www.kairoscanada.org/e/Aboriginal/unbrief(0208-racdis).asp>>. See also Conseil Attikamek Montagnais, Council of Yukon Indians, Dene Nation, Métis Association of the N.W.T. Kaska-Dena, Labrador Inuit Association, Nishga Tribal Council, Taku River Tlingit, Tungavik Federation of Nunavut, 'Key Components of a New Federal Policy for Comprehensive Land Claims', at <<http://www.carc.org/pubs/v15no1/5.htm>>. See also Statement by Dr. Colin Samson, 'Canada's policies of extinguishment and the Innu of the Labrador-Quebec Peninsula', 21.7. 2004, at <<http://www.unpo.org/news_detail.php?arg=02&par=965>>.

[128] Nunavut Land Claims Agreement (1993).

[129] See Canadian Bar Association Nunavut Branch, Aboriginal Law Section, 'Trading Rights for Magic Beans?' at <<http://www.cba.org/nunavut/pdf/trading_rights.pdf>>. For further critique, see Bainbridge, J., 'Implementation of the Nunavut Land Claims Agreement', at <<http://www.cba.org/nunavut/pdf/newsletter_abor05.pdf.>>.

[130] See Canadian Bar Association Nunavut Branch, Aboriginal Law Section, 'Trading Rights for Magic Beans'.

[131] In 1976 and 1977, the Government of Canada accepted comprehensive claims from the Dene and Métis of the Mackenzie Valley in the N.W.T. Negotiation of a joint Dene/Métis claim began in 1981. An agreement was initialled by negotiators in April 1990. In July, the Dene and Métis at their assemblies voted not to proceed with ratification of the agreement. The Gwich'in and Sahtu Dene and Métis did not agree with this action and withdrew from the Dene/Métis negotiating group; they requested regional settlements. The Gwich'in Agreement came into effect in 1992 and Sahtu Dene and Métis Agreement 1994. The claims of the Dene and Métis in Treaties 8 and 11 within the Northwest Territories have been accepted by the Federal Government for negotiation on the basis that the land provisions of the treaties had not been implemented. See Indian and Northern Affairs Canada, Comprehensive Claims Policy and Status of Claims, February 2003, at <http://www.ainc-inac.gc.ca/ps/clm/brieft_e.html>>.

Through the negotiations, the Aboriginal party secures a clearly defined package of rights and benefits codified in constitutionally protected settlement agreements.[132]

Under the 'extinguishment model', Aboriginal peoples are required to 'cede, release and surrender' their undefined Aboriginal rights in exchange for a set of defined treaty rights.[133] In recent years, due to the resistance of Aboriginal peoples and the Canadian Royal Commission on Aboriginal Peoples[134] to the extinguishment policy, the Federal Government has tried to create new approaches, including the 'modified rights model' pioneered in the Nisga'a negotiations, and the 'non-assertion model'. Under the modified rights model, Aboriginal rights are not extinguished, but are modified into the rights articulated and defined in the treaty. Under the non-assertion model, Aboriginal rights are not extinguished, and the Aboriginal group agrees to exercise only those rights articulated and defined in the treaty and to assert no other Aboriginal rights.[135]

Despite the attempts of the Federal Government to establish alternatives to blanket extinguishment, many Canadian experts, as well as The United Nations' Human Rights Committee,[136] have come to the conclusion that even if the term 'extinguishment' is replaced with other wording, the agreement provisions proposed by the Federal Government will result in at least partial extinguishment of Aboriginal title.[137] In the opinion of Asch and Zlotkin, the consequence of an extinguishment provision is the replacement of legitimacy based on self-definition by legitimacy as construed by Canada. Whether the policy is described as 'extinguishment' or 'exchange' does not matter, for what is being required by a 'cession and surrender' provision is the voluntary relinquishment of the self-defined legitimacy of a people, community, or nation. The extinguishment requirement is seen, in effect, as a contemporary means of furthering what was a longstanding overt objective of federal policy: the assimilation of Aboriginal people into the Canadian mainstream.[138]

Most Aboriginal peoples view Aboriginal title as a very broad concept that encompasses much more than rights to use and occupy ancestral lands, for example, rights to self-government and jurisdictional rights to make laws.[139] Aboriginal people most

[132] Indian and Northern Affairs Canada, 'Resolving Aboriginal Claims, A Practical Guide to Canadian Experiences', published under the authority of the Minister of Indian Affairs and Northern Development Ottawa, 2003., pp. 8–9.

[133] Indian and Northern Affairs Canada, 2003, p. 24.

[134] See The Royal Commission on Aboriginal Peoples, 1996, vol. 2, Restructuring the Relationship, Chapter: Recommendation, 2.2.6. at http://www.ainc-inac.gc.ca/ch/rcap/sg/sg51_e.html.>>.

[135] Indian and Northern Affairs Canada, 2003, p. 24.

[136] The view of the Human Rights Committee will be dealt with in more detail in the following chapter.

[137] Asch, M. and Zlotkin, N. 1997, p. 213. Concerning the Nisga'a Final Agreement, some observers feel that essentially the same result flows from provisions that exhaustively define Nisga'a section 35 rights and that 'release' to Canada any Aboriginal right, including title, other than the section 35 rights set out in the Agreement. See Hurley, M.C. and Wherrett, J., Settling Land Claims, Library of Parliament, Parliamentary Information and Research Service, 1999 at <<http://www.parl.gc.ca/information/library/PRBpubs/prb9917-e.htm>>. See Nisga'a Final Agreement, Chapter 2 General provisions, modification 24., 25., release, 26., 27. at <<http://www.ainc-inac.gc.ca/pr/agr/nsga/index_e.html>>.

[138] Asch, M. and Zlotkin, N. 1997, at 217–218.

[139] See generally Ahenakew, D., 'Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition', in Bold, M. and Long, J.A. (eds.), The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press, 1985, pp. 24–30. See also the following articles in the above publication: Plain, P., 'A Treatise on the Rights of the Aboriginal Peoples

often speak of Aboriginal title as something given to them by the Creator and dependent on their relationship with the land.[140] As Aboriginal title flows from the Creator, it is inherent; it is not something granted to Aboriginal people by an alien legal system.[141] Aboriginal people see Aboriginal title as inextricably linked with their identity as Aboriginal people. In short, Aboriginal rights derive from the very existence of Aboriginal people, communities, and nations. It naturally follows that the requirement to extinguish Aboriginal rights and title would be considered incorrect. Michael Nadli, Grand Chief of Deh Cho First Nations, describes this very point is such an apposite way that it is worth citing his comment in its entirety:

> The Deh Cho First Nations have examined the existing comprehensive policy to determine whether our needs for self-determination could be met by entering a claims process. The defining relationship for the Dene of the Deh Cho is the relationship with the Creator and the Land. The Elders have clearly directed the leadership to maintain that relationship at all costs. The existing policy is premised on the extinguishment of that relationship with the Land. As we have noted it is inconceivable that the leadership of the Deh Cho would enter into any agreement that erodes the very nature of ourselves by extinguishing title. As the Declaration of Rights of the Deh Cho First Nations states: 'Our laws from the Creator do not allow us to cede, release, surrender or extinguish our inherent rights.' The existing Comprehensive Claims Policy denies the continuing existence of the Dene as people and violates our Aboriginal and Treaty Rights.[142]

of the Continent of North America' pp. 31–40, Snow, J., 'Identification and Definition of Our Treaty and Aboriginal Rights', pp. 41–46, Ittinuar, P., 'The Inuit Perspective on Aboriginal Rights', pp. 47–53, Chartier, C., 'Aboriginal Rights and Land Issues: The Métis Perspective, pp. 54–61, Wilson, B., 'Aboriginal Rights: The Non-status Indian Perspective', pp. 62–68.

[140] See Lyons, O., 'Traditional Native Philosophies Relating to Aboriginal Rights', in Bold, M. and Long, J.A. (eds.), The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press, 1985, pp. 19–23, particularly at 19–20.

[141] See McCormick, F., 'Inherent Aboriginal Rights in Theory and Practice: The Council for Yukon Indians Umbrella Final Agreement. Unpublished Ph.D. thesis. University of Alberta. 1997, pp. 50–72. As pointed out by McCormick, there is also some similarity between the language of inherent rights and the Western concept of natural right. The doctrine of natural rights has a long history in Western thought, though it has been subject to change. The ancient Greeks emphasised a natural law which took 'precedence over the particular laws embodied in political institutions.' (See Bowie, N.E. and Simon, R.L. The Individual and the Political Order: An Introduction to Social and Political Theory (second edition). Englewood Cliffs, NJ: Prentice-Hall Inc., 1986. p. 51.) In the Middle Ages, the concept of a rational moral order was put into the framework of Judeo-Christian theology. Once again a natural law was seen to take precedence over positive law. However this law was seen to be the work of a Christian God. (See Bowie & Simon, p. 52.) The 18th and 19th centuries saw the emergence of the idea that natural law and natural rights were deducible from reason. This conception was essentially formulated in defence of the individual against the state. (Ibid., 52–53.) Recent formulations see natural rights as morally fundamental concepts. They are natural in the sense that they are independent of any social or political order or the position one assumes in society. Furthermore they are seen as general rights which provide the foundation for more specific rights. (See Karmis, D., 'Cultures autochtones et libéralisme au Canada: les vertus médiatrices du communautarisme liberal de Charles Taylor', Canadian Journal of Political Science, XXVI:1, March 1993, pp. 69–96, at 89, as quoted by McCormick, 1997, p. 38.) Like the medieval conception of natural rights, inherent Aboriginal rights are said to derive from a supreme being, not human rationality. They also share the modern version's emphasis on being transcendent and general. See McCormick, at 38.

[142] Michael Nadli, Grand Chief, Deh Cho First Nations, The Deh Cho Proposal, Requirement for the Equitable Settlement of Deh Cho-Crown Relationships Through Dene Government in the Deh Cho, Presented to The Honorable Jane Stewart, Minister of Indian and Northern Affairs, January 21, 1998, In Yellowknife, Denendeh On the Occasion of The Government of Canada's Healing Initiative Announcement. Originally presented to the former Minister of Indian Affairs, The Honorable Ron Irwin, March 1994, at <http://www.dehchofirstnations.com/documents/deh_cho_process/deh_cho_proposal_1998.pdf>>.

Aboriginal peoples assert that comprehensive claims settlement should 'affirm' rather than extinguish their Aboriginal rights and must provide for an evolving relationship between Aboriginal peoples and Canada.[143] The 'affirmation approach' is also promoted by Asch and Zlotkin.[144] Underlying the approach is the thesis that the legitimacy of Canada's sovereignty and title derives from an acceptance by Canada of the continued legitimacy of the underlying title of indigenous peoples. Like the cession thesis[145] and prescription,[146] the approach concedes that underlying title and sovereignty

[143] Conseil Attikamek Montagnais, Council of Yukon Indians, Dene Nation, Métis Association of the N.W.T. Kaska-Dena, Labrador Inuit Association, Nishga Tribal Council, Taku River Tlingit, Tungavik Federation of Nunavut, 'Key Components of a New Federal Policy for Comprehensive Land Claims', chapter: Affirmation of Aboriginal Rights, at <<http://www.carc.org/pubs/v15no1/5.htm>>.

[144] See Asch, M. and Zlotkin, N., 'Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations', in Asch (ed): Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, 1997, at 208–229.

[145] One approach to resolving the sovereignty question rests on the 'cession' thesis or 'the formal transfer of territory from one independent political unit to another.' It presumes that one party, through a conscious act, such as a treaty, willingly agrees to cede its underlying title and sovereignty to another. Crucial to deciding on the appropriateness of the application of this thesis to the Canadian case is evidence that indigenous peoples willingly ceded territories to the Crown by means of treaty or other formal act. There does appear to be evidence that indigenous peoples willingly ceded territories to the Crown and various First Nations. For example, the text of Treaty 4 states: 'The Cree and Saulteaux Tribes of Indians, and all other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for Her Majesty the Queen, and Her successor forever, all their rights, titles and privileges whatsoever to the lands included within the following limits.' cited in Asch, M., Home and Native Land: Aboriginal Rights and the Canadian Constitution, Toronto; New York: Methuen, c. 1984., at 116. See Asch, M., 'First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology', at 161. There are two major problems, however, with the application of the cession thesis to the Canadian context. First, there are clearly large regions of Canada, of which British Columbia is now the primary example, where no treaties of any sort have yet been negotiated. Secondly, serious doubts have been raised about the legitimacy of the cession clauses themselves. First of all, a cession requires two willing parties. In the Canadian case there may be instances where the government party created conditions that coerced the indigenous party to agree to a cession that otherwise would not have achieved an agreement. Asch, M. 2000, at 161–162. The second problem is that the understanding of a treaty and a treaty relationship seems in many cases to be very different between the two parties, i.e., the Crown and Aboriginal Peoples. There is evidence in some cases that Aboriginal peoples did not understand or agree to a cession, even though the Crown has interpreted the treaties in question in that way. See Venne, S., 'Understanding Treaty 6: An Indigenous Perspective' in Asch, M. (ed.), Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, UBC Press, University of British Columbia, Vancouver, 1997, pp. 173–207, generally and particularly at 173. See also Snow, J. 'Identification and Definition of Our Treaty and Aboriginal Rights' in Bold, M. and Long, J.A. (eds.), The Quest for Justice, Aboriginal Peoples and Aboriginal Rights, University of Toronto Press, pp. 41–46.

[146] This thesis as to how a colonising population may legitimately acquire sovereignty and underlying title is described by Slattery as follows: 'It may be argued that for reasons associated with other basic values and principles of justice, territories illegitimately acquired may sometimes, by passage of time, be transformed into legitimate dominions – a process traditionally termed "prescription".' (Slattery, B., 'Aboriginal Sovereignty and Imperial Claims', Osgoode Hall Law Journal 29 (4), 699). This view is supported by the Royal Commission on Aboriginal Peoples. See generally Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution*, Ottawa, Minister of Supply and Services, 1993. Slattery has adopted the concept derived from prescription as a means to explain the acquisition of sovereignty and underlying title by the Crown in Canada. This approach raises critical questions, however, as pointed out also by Michael Asch. To make a convincing account, according to which Canada acquired its title through 'the passage of time', notwithstanding the import of long social inter-

were held by indigenous peoples prior to colonisation. It also accepts that in law their title continues in the present. It differs significantly from other approaches and, in particular, from the cession thesis in that it is premised on the view that Canada affirms that Aboriginal peoples will continue to hold underlying title in perpetuity. Therefore, the goal of negotiations with indigenous peoples is not to seek the cession of their underlying title as the basis for the origin of Canada's title; rather, the objective is to derive Canada's title from the ongoing underlying title.[147]

The affirmation thesis fits together well with the inherent rights approach. Since it is accepted that Aboriginal rights are inherent, pre-existing rights, originating outside Canadian legal system, they cannot be unilaterally extinguished by the Canadian state. Even completely voluntary extinguishment by the Aboriginal peoples does not seem to be totally unproblematic. Although inherent Aboriginal rights do not necessarily mean the same thing as 'inalienable' rights, legal provisions protecting Aboriginal rights should not have the effect of protecting these rights from Aboriginal peoples themselves as noted by Slattery.[148] The sovereign authority of Aboriginal leaders to give up these rights on behalf of the people concerning future generations has also been questioned, for example, by Wilson.[149] Even though truly voluntary surrender of inherent Aboriginal rights could be accepted, the inherent rights approach forbids the Federal Government from requiring Aboriginal peoples to extinguish their rights in order to settle land and self-government questions.

Extinguishment of Aboriginal rights is problematic in the light of the inherent rights approach: the theory cannot be accepted only partially without fundamental inconsistencies. As long as it is accepted that Aboriginal rights are inherent, that is, their original source is outside the Canadian legal system, any extinguishment, at least without the full consent of Aboriginal peoples, based on real willingness, should not be acceptable or even possible. The argument of the present author is that if the right is not granted by the Canadian state a premise accepted by the Supreme Court of Canada – there is no legal means for the state to extinguish it.

course as well as certain conscious acts of alliance, would require a detailed examination of the process by which it took place. It would also require confirmation by Aboriginal peoples that they accepted that the process was legitimate and that the result legitimately defines the full scope of their title and sovereignty today. The second fundamental question concerns the principle of prescription itself. As suggested, the case of prescription rests in particular on an appeal to 'basic vales and principles of justice' as an essential component to justify the legitimate acquisition of underlying title. In the Canadian case, it is certainly not clear whether an appeal to 'basic values and principles of justice' could be applied convincingly to legitimate the Crown's acquisition of underlying title in the Canadian situation. Asch, M., 2000, at 159–161.

[147] Asch, M., 2000, pp. 148–167, at 163.

[148] Slattery, B., 'The Hidden Constitution: Aboriginal Rights in Canada', 114–138, at 135.

[149] Wilson states that the Aboriginal rights that flow from Aboriginal title are inalienable because 'no generation or special group has the right to sign away the rights of any future generation.' See Wilson, B., 'Aboriginal Rights: The Non-status Indian Perspective', pp. 62–68, at 62. He goes further by stating that this does not mean, however, that the current generation cannot negotiate agreements. In fact, he acknowledges that 'the Aboriginal rights of all the original inhabitants of the land will be negotiated on the basis of the existence of Aboriginal title to that land.' (p. 67). However, 'even if land claims are resolved today, the future descendants of the original occupiers of the land will be entitled to negotiate their own bargain in regard to Aboriginal title and rights'. (p. 62).

5. Reflections of the Inherent Rights Debate in International Law

This chapter illustrates the reflections of the inherent rights debate that can be found in international law. The aim is to see whether, and to what extent, regulations of international law, including statements of the United Nations' Human Rights Committee (HRC), support the idea of inherent rights.

5.1. *The Concluding Observations of the HRC*

The Human Rights Committee is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights[150] by its state parties. All states parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests them to do so (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the state party in the form of what are known as concluding observations.[151]

Two sets of the HRC's concluding observations concerning Canada are of relevance for the purpose of this study in that they relate to the discussion of inherent Aboriginal rights, their extinguishment and peoples' right to self-determination.

In its concluding observations of 1999,[152] noting its principal areas of concern and its recommendations, the Committee regretted that Canada had not given any explanation of the elements making up the concept of self-determination that applies to its Aboriginal peoples. In addition, the Committee urged Canada to report adequately on implementation of Article 1 of the Covenant (peoples' right to self-determination) in its next periodic report.[153]

Subsequently, the Committee confirmed what Canada had already acknowledged, that the situation of the Aboriginal peoples remains 'the most pressing human rights issue facing Canadians'. In this connection, the Committee expressed that it was particularly concerned that Canada had not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP).[154] With reference to the conclusion put forward by RCAP that without a greater share of lands and resources, institutions of Aboriginal self-government will fail, the Committee emphasised that 'the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2 of CCPR)' Therefore, the Committee recommends

[150] UN Doc. A/6316 (1966) 999 UNTS 171.

[151] See the HRC web page at <<http://www.ohchr.org/english/bodies/hrc/>>. In addition to the reporting procedure, Article 41 of the Covenant instructs the Committee to consider inter-state complaints. Furthermore, the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by states parties to the Protocol.

[152] UN doc. CCPR/C/79/Add.105. The document can be found at <<http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.105.En?Opendocument>>.

[153] Item 7, at 2.

[154] The RCAP report can be found at http://www.ainc-inac.gc.ca/ch/rcap/index_e.html>>.

that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation.[155]

The most important and interesting recommendation for purposes of this article, however, was the one suggesting that the practice of extinguishing inherent Aboriginal rights be abandoned as incompatible with Article 1 of the Covenant.[156]

Even though the Committee did not further explain the reasoning behind its statement, it clearly affirmed the concept of 'inherent aboriginal rights', as recognised by Canada. Secondly, and perhaps even more importantly, the Committee clearly reaffirmed that extinguishment of these inherent rights was incompatible with Article 1 – peoples' right to self-determination. Thus the Committee was not only of the view that peoples' right to self-determination applies to Canadian Aboriginal peoples, but that the extinguishment of any inherent Aboriginal right violates this right, which is guaranteed to all peoples. What is not clear in the Committee's statement was whether it believed that the right to self-determination of Aboriginal peoples is itself an inherent Aboriginal right. However, by connecting the extinguishment of Aboriginal rights so closely to the violation of the right to self-determination, the Committee seemed to acknowledge the inherent nature of both Aboriginal rights and the right of peoples to self-determination.

The concluding observations of 1999 concerning Canada were historic, for it was the first time that the Committee applied Article 1 to indigenous peoples. Although this occurred a year after the Canada's own Supreme Court had first affirmed that several 'peoples' may exist within one state,[157] the Committee has followed the same approach in respect of other countries that have distinct indigenous peoples within their boundaries. Explicit references to either Article 1 or to the notions of self-determination have been made in the Committee's concluding observations on Mexico,[158] Norway,[159] Australia,[160] Denmark,[161] Sweden,[162] and Finland.[163]

In 2005, the Committee considered the reports submitted by Canada and made concluding observations on issues that are again important for the present discussion.[164]

[155] Item 8, at 2.

[156] Item 8, at 2.

[157] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. The Supreme Court of Canada stated the following: 'It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose'. Para. 124.

[158] Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999).

[159] Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999).

[160] Concluding Observations on Australia, UN doc. CCPR/CO/69/Aus (2000).

[161] Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000).

[162] Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002).

[163] Concluding Observations on Finland, UN doc. CCPR/CO/82/FIN (2004).

[164] UN doc. CCPR/C/CAN/CO/5 The document can be found at <<http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.CAN.CO.5.En?OpenDocument>>.

The Committee started by condemning Canada for not implementing the earlier recommendations made in 1999.[165] It then took up the issue of extinguishment of inherent Aboriginal rights. Although noting 'with interest' Canada's undertakings towards the establishment of alternative policies to extinguishment of inherent Aboriginal rights in modern treaties – an issue discussed earlier in section 4.2. – the Committee expressed its concern that these alternatives might in practice amount to extinguishment, thus violating Articles 1 and 27.[166] The Committee stated that Canada should re-examine its policy and practices to ensure that they do not result in extinguishment of inherent Aboriginal rights.[167]

Since its first concluding observations regarding Canada, the Committee has requested that governments report on the implementation of indigenous peoples' right to self-determination as a part of their international legal obligations. This sets a very important legal precedent, as in this way indigenous peoples' right to self-determination is included within the framework of core international human rights law.[168] The Committee's pronouncements in these relatively recent concluding observations on reports by countries with indigenous peoples reflect an understanding that at least certain indigenous groups qualify as 'peoples' under Article 1.[169]

[165] Item 6, at 2.

[166] Item 8, at 2. Article 27 states: 'In those countries in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.' This article has been actively used in HRC's complaint system by indigenous peoples, for the provision protects traditional livelihoods as an integral part of the peoples' culture. See UN Human Rights Committee: General Comments No. 50 (23) <<http://www.religlaw.org/interdocs/docs/gencc23aprl994.htm>>. Even though the Committee emphasises in General Comments No. 50(23) that the enjoyment of the rights to which Article 27 relates is to be distinguished from that set out in Article 1 (self-determination) and does not prejudice the sovereignty and territorial integrity of a state party, at the same time it recognises that there might be aspects of the rights of individuals protected under that article; for example, the right to enjoy a particular culture may consist in a way of life which is closely associated with territory and use of its resources. The Committee refers particularly to indigenous peoples in this respect (3.1. and 3.2.). Examples of cases brought by indigenous peoples under Article 27 are *Lubicon Lake Band v. Canada* (305/1990), *Länsman v. Finland* (511/1992), *J. Länsman et al v. Finland*, No. 167/1995, J. and *E. Länsman v. Finland* No. 1023/2001, *Apirana Mahuika et al v. New Zealand*, No 547/1993.

[167] at 2. The Committee also asked for more detailed information on the comprehensive land claims agreement that Canada is currently negotiating with the Innu people of Quebec and Labrador, in particular regarding its compliance with the Covenant. Furthermore, the Committee is concerned that land claim negotiations between the Government of Canada and the Lubicon Lake Band are currently at an impasse. The Committee also expressed its concern about information that the land of the Band continues to be compromised by logging and large-scale oil and gas extraction, and regretted that Canada had not provided information on this specific issue. The Committee referred to Articles 1 and 27 in this respect, and continued by stating very strictly that Canada should make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee (1 and 27). Here the Committee also emphasised that Canada has to consult with the Band before granting licences for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardises the rights recognised under the Covenant. Item 9 at 2–3.

[168] Henriksen, J., 'The Right of Self-Determination: Indigenous Peoples versus States' in Aikio, P. and Scheinin, M. (eds.), Operationalizing the Right of Indigenous Peoples to Self-Determination (2000), Institute for Human Rights Åbo Akademi University, Turku, Finland, pp. 131–141 at 136.

[169] Scheinin, M., 'Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights', Torkel Oppsahls minneseminar April 28, 2004, Norwegian Centre for Human Rights,

The recognition of inherent Aboriginal rights of Canadian Aboriginal peoples as well as the Committee's view that the extinguishment of these rights is incompatible with the peoples' right to self-determination adds weight to arguments for the recognition of inherent Aboriginal rights by the Canadian political and legal systems. The Committee showed that an inherent right is not merely a rhetorical term to be used for satisfying the demands of Aboriginal peoples but one that actually means what it says: rights that cannot be extinguished by a state, at least without the full and real consent of Aboriginal peoples.

5.2. *The Right to Self determination of Indigenous Peoples*

As discussed earlier in this article, the Canadian legal system does not believe that Aboriginal sovereignty and a right to self-determination – at least its external aspect – belong to the category of 'inherent aboriginal rights'. Moreover, the present author has criticised the basis (*terra nullius*) on which the limitation of inherent rights as way-of-life rights is grounded. The study will go on to determine how the right of peoples to self-determination is applied to indigenous peoples under international law, and, where appropriate, to criticise international law for its limitations.

Self-determination is defined as the right and the ability of a people or a group of peoples to choose their own destiny without external compulsion.[170] The principle of self-determination of peoples has been recognised since 1919, when the League of Nations, the precursor to the United Nations, was established. Following the creation of the United Nations in 1945, the 'principle' of peoples' self-determination evolved into a 'right' under international law and, some argue, even *jus cogens* – a peremptory norm.[171]

University of Oslo, pp. 10–11. As regards the reporting procedure under the CCPR, a careful reading of the concluding observations issued by the Human Rights Committee after consideration of state reports from countries where the right of self-determination is a burning issue indicates that in many cases the Committee seems – at least in earlier years – to have avoided entering into a discussion on Article 1, a discussion that often would have been not only politically sensitive but also juridically justified. One gets the impression that the Committee has been inclined not to address the right of self-determination in cases in which the issue is of high political relevance in the country itself. See Scheinin, M. 'The Right to Self-Determination Under the Covenant on Civil and Political Rights' in Aikio, P. and Scheinin, M., Operationalizing the Right of Indigenous Peoples to Self-Determination, Institute for Human Rights, Åbo Akademi University (2000), pp. 179–199, at 187–188. These recent examples of the consideration of periodic reports from countries that have indigenous peoples show that if there is active discussion on the right to self-determination in the country, and if indigenous groups bring the issues to the attention of the Committee, they may well be successful in getting the Committee's attention. Furthermore, the Committee can also take up the issue of self-determination if a country has only recognised a group of people as 'an indigenous people' in its constitution. See the Concluding Observations on Finland (2004): 'The Committee regrets that it has not received a clear answer concerning the rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of Article 1 of the Covenant.' C. Principal subjects of concern and recommendations, item 16. UN doc. CCPR/CO/82/FIN (2004).

[170] Cassidy, F., 'Self-Determination, Sovereignty, and Self-Government' in Cassidy, F. (ed.), Aboriginal Self-Determination, Proceedings of a conference held September 30–October 3, 1990, (1991), co-published by Oolichan Books and The Institute for Research on Public Policy, pp. 1–14, at 1.

[171] See, e.g., Hannikainen, L., Peremptory Norms (Jus Cogens) in International Law; Historical Development, Criteria, Present Status, Finnish Lawyers' Publishing Company, Helsinki 1988., pp. 421–424.

Self-government is the overarching political dimension of ongoing self-determination. Conceptions of the normative elements of self-government vary with political theory. It is possible, however, to identify a core of widely held convictions about the concept. This core consists of the idea that government is to function according to the will of the people governed. Self-government stands in opposition to institutions that disproportionately or unjustly concentrate power in the hands of government, whether the concentration is centred within the relevant community – as in cases of despotic or racially discriminatory rule – or outside of the community – as in cases of foreign domination.[172]

One of the earliest tensions in classical international law is that between the territorial sovereignty of governments and the status of individuals and groups as beneficiaries of human rights. As the emphasis on natural law rights had given way by the mid-nineteenth century to positivist law and a focus on the consent of governments, the tension tended to be resolved in favour of the state. For indigenous peoples, not qualifying as states, this meant that they were not able to participate in the shaping of international law, nor could they look to it to affirm the rights that had once been deemed to inhere in them by natural law. States, on the other hand, both made the rules of international law and enjoyed rights under it largely independently of natural law considerations. It followed that states could create practices to affirm their claims over indigenous territories as a matter of international law and treat indigenous inhabitants according to domestic policies, shielded from the customary norms of international law.[173]

According to Oppenheim's well-known textbook 'International Law', the basis for excluding indigenous peoples from among the subjects of international law was reduced to their subjective non-recognition by those within the 'Family of Nations.' Eliminating whatever ambiguity remained about the status of Indian tribes and similar indigenous peoples, Oppenheim's treatise added expressly that the law of nations does not apply 'to organized wandering tribes.'[174]

Even though international law today continues to be concerned primarily with states and their relations with one another, under the modern rubric of human rights it is also increasingly concerned with upholding rights that are deemed to inhere in human beings individually and collectively.[175] Self-determination can be seen to arise

[172] Anaya, S.J., Indigenous Peoples in International Law (2004), Oxford University Press, p. 150.

[173] Anaya, J. (2004), pp. 26–27. For the 'domestication' of indigenous nations, see Vega, P.G., 'The Municipalization of the Legal Status of Indigenous Nations by Modern (European) International Law', In International Yearbook for Legal Anthropology (edited by Kuppe, R, and Potz, R., on behalf of the Working Group on Legal Anthropology Vienna University Law School, Martin Nijhoff Publishers, Leiden, Boston), Volume 12, 2005, pp. 17–55.

[174] 1 Oppenheim, L.F.L., International Law (Ronald F. Roxburgh ed., 3d. ed. 1920), pp. 134–135 as quoted in Anaya (2004), pp. 28–29.

[175] The subjects doctrine as described in standard modern textbooks celebrates the fact that today international law contains an extensive number of obligations and rights that pertain to entities other than states, e.g., individuals, indigenous peoples, liberation movements, and companies. (See generally Malanczuk P. 1997. Akehurst's Modern Introduction to International Law. Routledge London, 7th edition, ch. 6.) What the textbooks often fail to reveal, however, is that while these actors may have legal rights and obligations in international law, e.g., where a treaty accords a human right to an individual, they cannot participate in

within the human rights frame of contemporary international law rather than the traditional context of states' rights. The right to self-determination is included in the common Article 1 of the widely ratified international human rights covenants (International Covenant on Civil and Political Rights, CCPR; and International Covenant on Economic, Social and Cultural Rights, CESCR),[176] and it is also featured in the African Charter on Human and Peoples' Rights.[177]

Both international covenants state in their first article:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

These human rights covenants and other international instruments declare that it is 'peoples' that have the right to self-determination.[178] This phraseology has led to endless debate about what constitutes a 'people'. Among those engaging in such debate, the general assumption has been that a 'people' is an entity that a priori has actual or putative attributes of sovereignty of statehood and that has a legal existence distinct from that of human beings who otherwise enjoy human rights.[179] This view has been most specifically discussed in the context of decolonisation and in relation to various disputes about the right to self-determination. With General Assembly Resolution 1514 it became obvious that self-determination, as understood in the United Nations, was restricted to apply to people under colonial rule and foreign domination only.[180]

General Assembly Resolution 1514 is an affirmation of the rights of peoples, albeit qualified by the fiction that a people and a state are virtually interchangeable ideas. Furthermore, the notion of self-determination itself is subordinated to an overriding

the making of legal norms. In this respect, not much has changed; it is primarily states that are capable of creating international legal norms.

[176] UN Doc A/6316 (1966) 993 U.N.T.S. 3.

[177] Article 20. Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 1520 UNTS 217.

[178] See CESCR, Article 1(1); CCPR, Article 1(1); African Charter on Human and Peoples' Rights, Article 20. See also UN Charter, Article 1(2); Final Act of the Conference on Security and Cooperation in Europe, 1 August 1975, 14 I.L.M. 1292 (1975), Principle VIII; Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24 October 1970, Principle V.

[179] See generally Jones, P. 'Human Rights, Group Rights, and Peoples' Rights', Human Rights Quarterly, Vol. 21, No.1, 1999, pp. 80–107, at 90,97–101, distinguishing between the conception of 'peoples' as corporate entities that hold rights as such and that can assert those rights even as against the groups' members, from the more flexible conception of 'peoples' under which rights are held collectively by the group's members themselves.

[180] General Assembly Resolution 1514 (XV), December 1960.

conception of the unity and integrity of the state. As pointed out by Falk, one of the most serious sources of injustice and denial of human rights today is that the apparatus of state power has been captured by one of those fragments of a people, defined as the totality of persons within a given state, while the other elements are subjugated to varying degrees. This situation exists in many territorial states where there are distinct peoples. In this sense the notion of human rights to be enjoyed by a particular national identity is subordinated to and administered through the organs of the state. This underscores the vulnerability of 'peoples', even if their status seems to be acknowledged in the basic instruments of the United Nations.[181]

As a result of the United Nations' strong focus in the 1960s on the question of decolonisation, the right of peoples to self-determination at that time was commonly considered applicable to people under colonial rule and foreign domination only. Through the adoption by the UN General Assembly in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples,[182] the 'principle' of self-determination in the Charter of the United Nations evolved into a 'right' of self-determination. The Declaration on Colonial Independence was followed in 1962 by a General Assembly resolution on the right of peoples and nations to permanent sovereignty over their natural resources.[183]

However, through its adoption in 1970 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations,[184] the UN General Assembly seems to have extended the right to self-determination beyond the context of decolonisation. The Declaration states that by virtue of the principle of equal rights and self-determination of peoples as enshrined in the Charter of the United Nations, all peoples have the right to self-determination. Although it offers no definition of a 'people', the Declaration clearly concerns *all* peoples, and is therefore not restricted to colonised peoples.[185]

Like the Declaration on Colonial Independence, the Friendly Relations Declaration also embodies a provision on the principles of territorial integrity and the political unity

[181] Falk, R., 'The Rights of Peoples (In Particular Indigenous Peoples)' in Crawford, J. (ed.), The Rights of Peoples (1988) Clarendon Press, Oxford, pp. 17–37, at 26.

[182] G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1961).

[183] G.A. Res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962).

[184] G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 123, Doc. A/802 (1970).

[185] As a General Assembly resolution, the Declaration is not a legally binding document but, as Crawford points out, it nevertheless remains indicative of widely held views on the subjects it deals with, and its formulations have been substantially followed, for example, in the 1993 Vienna Statement. (United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, 32 ILM (1993) 1661). See Crawford, J., 'The Right to Self-Determination in International Law: Its Development and Future' in Alston, P. (ed.), 'Peoples' Rights' Academy of European Law, European University Institute, Volume IX/2, Oxford University Press, 2005), pp. 10–67, at 30. As Crawford also mentions, by referring to the general language of Articles 1 and 55 of the United Nations' Charter two advisory opinions of the International Court – Namibia in 1971 (ICJ Reports [1971] 16) and Western Sahara in 1975 (ICJ Reports [1975] 12) – imply that the principle of self-determination is not limited to colonial territories. Although the Court has not had to confront the issue directly, what it has said is consistent with the general approach taken in the texts, especially Article 1 of the ICCPR: 'all peoples have the right of self-determination'. 'All peoples' are not only peoples under colonial rule.

of states. Consequently, the Friendly Relations Declaration is not primarily an instrument dealing with the right of peoples to secession or statehood. Its aim is not to promote separatism. Under the Declaration, a people has a right of secession and statehood only where the government does not comply with the principle of equal rights and self-determination of peoples. This principle is reaffirmed in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993.[185]

A common view among international law experts that in non-colonial territories a right to self-determination does not equal a right to secede[187] is expressed by the Supreme Court of Canada in proceedings arising from a reference (i.e. an advisory opinion) by the government of Canada relating to the secession of Quebec.[188] According to Shaw, 'in the case of independent states outside of the colonial context, such choice [arising from the exercise of self-determination] would not (save in a very exceptional situation) include sovereignty as such . . . State practice is clear in positing the application of the principle of self-determination within the defined territory of the state in question and in thus precluding secession as an option. This has been achieved by reference to the principle of territorial integrity in international instruments.'[189] To clarify 'exceptional situation', also mentioned by Shaw, Franck referred to situations in which a minority people may have a right to secession tenable in law and politics due to their demonstrable inability to achieve established rights of self-determination guaranteed by law.[190]

[186] World Conference on Human Rights, Vienna, 14–25 June 1993. Vienna Declaration and Programme of Action, UN doc. A/CONF. 157/23, 12 July 1993. The Supreme Court of Canada took a similar view in its decision concerning Quebec's unilateral secession [1998] 2 S.C.R. 217 by stating that neither the Canadian Constitution nor international law creates any right to secede unilaterally from a democratic country such as Canada. Where international law is concerned, the Court stated that a right to secession only arises under the principle of self-determination of a people in international law where 'a people' is governed as part of a colonial empire; where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. According to the Court, Quebec does not meet the criteria for a colonial people or an oppressed people, nor can it be suggested that Quebecers [the Quebecois] have been denied meaningful access to government to pursue their political, economic, cultural and social development. See the Report at <<http://www.lexum.umontreal.ca/csc-scc/en/>>, pp. 57–70.

[187] See generally Crawford (2005).

[188] Reference Re Secession of Quebec, Aug. 20, 1998, Reprinted in 37 I.L.M. 1340, 1373 (1998).

[189] Shaw Report, p. 20, paras 46,48 as quoted by Crawford (2005) at 48. This view was supported by other members of the expert group: Professors Georges Abi-Saab, Tom Franck, Alain Pellet and Malcolm Shaw (at 48). The Supreme Court concluded that 'the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development.' (Reference Re Secession of Quebec, Aug. 20 1998, 138.). Prof. James Crawford was one of two experts commissioned by the Minister of Justice for Canada in relation to the question, 'Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?' After reviewing modern state practice on secession he supported a negative answer to this question, as did the Supreme Court. See Crawford (2005), at 47.

[190] Franck Report, pp. 10, 11, para. 2.13. Clearly he did not regard the people of Quebec as having this right, p. 20, para. 3.8. as quoted by Crawford (2005) at 48.

On the other hand, as pointed out by Wiessner, the dispute over the political independence option of self-determination, the right to secede, has to take into account recent successful divorces of countries, particularly in Eastern Europe. Due to these incidents of intra-mainland secession, he sees that the salt-water doctrine of self-determination has been at least weakened, if not eliminated. In particular, the recent world community recognition of the unilateral secessions from the Socialist Federal Republic of Yugoslavia, as well as the establishment of Eritrea as an independent state, would appear to bolster a claim of peoples to break away from established nation-states outside and beyond the colonial context.[191]

Arguments for the extension to indigenous peoples of decolonisation as a justification for the right to self-determination presuppose, and recognise, the colonised status of those peoples. These arguments appeal to the logic of decolonisation and urge that this unfinished process be addressed. This approach has been reinforced by appeal to the principle of equality, which is explicitly associated with self-determination in the UN Charter principle of 'equal rights and self-determination of peoples'. If 'all peoples' have the legal right to self-determination, it is strongly argued that it is unjustifiable discrimination to treat indigenous peoples differently from other 'peoples'. This logic leads to the view that independence should be one of the options for an indigenous people exercising self-determination, even if it is an option rarely chosen in practice.[192]

The right to self-determination in the context of European colonisation was conceived primarily as an instrument for ending the colonial relationship by conferring freedom. The focus was on realisation of an end-state – usually independence but occasionally some other political arrangement. Most of the groups participating in the international indigenous peoples' movement, however, expect to continue in an enduring relationship with the state(s) in which they presently live. This does not, however, hinder them from invoking the full right to self-determination in international law; indigenous peoples want to become recognised as peoples and as they are equal to every other people, their right to self-determination cannot be considered to mean anything less than it means to other peoples.

Even though there seem to be developments urging extension of the application of the right to self-determination to indigenous peoples in international law,[193] these peoples are not as yet either fully recognised or treated as 'peoples' in the sense of the term as it is used in international law.

State practice in many of those countries where indigenous peoples live nevertheless expresses the readiness to accept that indigenous peoples do have a right to self-

[191] Wiessner, S., 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis', Harvard Human Rights Journal, vol. 12, 1999, reprinted in Anaya, J. (ed.), International Law and Indigenous Peoples, The Library of Essays in International Law, Ashgate/Dartmouth, Aldershot, England, Burlington USA (2003), pp. 257–128, at 118.

[192] Kingsbury, B., 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law' in Alston (ed.), Peoples' Rights (2005), pp. 69–110, at 89–90.

[193] Examples are the concluding observations of the Human Rights Committee and the UN Draft Declaration on the Rights of Indigenous Peoples.

determination, albeit not in the sense in which it was understood in the colonial context. Canada has supported the language of self-determination in the UN Draft Declaration on Indigenous Peoples, although it clearly restricted the scope of self-determination to its internal aspect:

> International law did not clearly define 'self-determination' or 'peoples'; it was traditionally understood as the right of colonized peoples to statehood. However, a survey of State practice and academic literature suggested it was an ongoing right which was expanding to include the concept of an internal right for groups living within existing States, and which respected the territorial and political integrity of the State . . . Canada accepted a right of self-determination for indigenous peoples which respected the political, constitutional and territorial integrity of democratic States and which was implemented through negotiations between States and indigenous peoples.[194]

Thus, according to many states and international law scholars, the right to self-determination is seen as granting indigenous peoples an internal self-determination – the right to determine their future within the existing nation-states, not the right to secede from them.[195] There is still disagreement as to which areas of policy are parts of the right to internal self-determination of indigenous peoples. At the moment, most international legal scholars are of the opinion that 'soft' areas of policy, such as cultural issues, are already part of the valid principle of internal self-determination, whereas 'hard' areas, such as land ownership and taxation, are not.[196]

The Draft Declaration acknowledges the right to self-determination of indigenous peoples. Article 3 states:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The wording of Article 3 suggests that the Draft does not make any distinction between the external and internal aspects of self-determination. On a literal reading, it seems to recognise both. External self-determination is not limited as it is for example in

[194] U.N. Doc./E/CN.4/1997/102, para. 332. For a statement of this view, see the Report of the 1999 Session, E/CN.4/2000/84, para. 50.

[195] Cassese was one of the first authors on international law to introduce the concepts of external and internal self-determination. See Cassese, A., 'Political Self-Determination: Old Concepts and New Developments', in Cassese, A. (ed.), UN Law/ Fundamental Rights: Two Topics in International Law (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979), pp. 137–173.

[196] On the other hand, there are examples of self-government agreements between a state and an indigenous people where the people in question has been granted quite extensive powers pertaining to taxation, e.g., many Yukon First Nations in Canada. The Yukon First Nations Umbrella Final Agreement and self-government agreements of individual First Nations can be found at <http://www.theyukon.ca/dbs/cyfn/dyncat.cfm?catid=76>. Environmental issues, on the other hand, can be seen as falling into the 'soft area of politics' and are dealt with in internal self-government agreements. Provisions concerning the use, management and protection of the environment mostly refer to particular lands where indigenous peoples have been granted certain rights. However, many important environmental questions are often managed by global or regional governance regimes. Participation by indigenous peoples in international negotiations can be seen as an external element of self-determination (See Henriksen, J.B. 2001: 7–21, at 10.) and as thus falling into the 'hard' area of politics. This important fact seems to have been almost totally forgotten in the discussion of self-government and it has not found a place in self-government agreements.

Article 1(3) of ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries.[197] Furthermore, the Draft makes references to 'colonialism'[198] and attributes of international legal personality (i.e. equal rights of indigenous peoples with other peoples[199] and the right to conduct external relations with states and other peoples.)[200]

The Draft also refers to the right to determine indigenous citizenship and institutional structures (arts 32 and 34) and 'to determine and develop priorities and strategies for the development or use of their lands and other resources'. (art. 30)

Furthermore, and interestingly in the context of this article, the Draft recognises the 'urgent need to respect and promote the *inherent* rights and characteristics of indigenous peoples, especially their *rights to their lands, territories and resources, which derive from their political, economic, social and cultural structures* and from their cultures, spiritual traditions, histories and philosophies' (emphasis added).[201] The Draft thus clearly acknowledges the concept of inherent rights that derive from the governing structures of indigenous peoples.

Nevertheless, the formulations used in affirming this decision-making power seem to indicate that what is recognised is not necessarily full sovereignty. This is why the Draft requires states to enable these peoples *to take part* (i.e. to share) in the exercise of the decision-making organs. For instance, in Article 4 reference is made to their right of participation 'if [the people] so choose[s], in the political, economic, social and cultural life *of the State*' (emphasis added). Article 19 talks about indigenous peoples' 'right to *participate fully*, if they so choose, at all levels of decision-making in matters affecting their lives' (emphasis added) and Article 20 mentions their right to *participate fully* 'in devising legislative or administrative measures that may affect them'.[202]

The right to be *consulted* is referred to in a much wider context than the right to decide or determine. In general, according to Article 37, states are required to give full effect to the provisions of the proposed Declaration 'in consultation with the indigenous peoples concerned.' In particular, states are obliged to consult the peoples before adopting and implementing legislative and administrative measures affecting them (art. 20), taking measures which concern the development or utilisation of their lands and resources (art. 30), displacing them therefrom (art. 10), whenever preserving

[197] 328 UNTS 247, Article 3(1) of the ILO Convention No. 169 states: The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

[198] The fifth preambular paragraph states: Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonisation and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

[199] First preambular paragraph.

[200] Twelfth preambular paragraph and Article 35.

[201] Draft declaration as agreed upon by the members of the working group at its eleventh session (E/CN.4/Sub.2/1993/29).

[202] Gayim, E., The UN Draft Declaration on Indigenous Peoples, Assessment of the Draft Prepared by the Working Group on Indigenous Populations (1994), University of Lapland, Northern Institute for Environmental and Minority Law, Finland, p. 11.

their sacred places (art. 13), and eliminating prejudice or discriminatory practices directed against them (art. 16).

The Draft Declaration regards the right to self-government as an essential component of the right to self-determination. Article 31 reads as follows:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

The meaning of 'autonomy' or 'self-government' is not further specified, but the political connotation is one of freedom, subject to restrictions as to matters not specifically included in the powers of the autonomous entity. In practice, the most conspicuous exclusions where autonomy is concerned lie in the area of foreign affairs and military security, but the article is even more guarded than this in not providing specifically for autonomy in matters such as policing, taxation, or judicial proceedings. The article does not expressly connect autonomy with a land base, leaving open the possibility of autonomy that is defined by personal affinity rather than territorial area.[203]

The right to self-determination has been the subject of extensive polemics at many stages in the life of the present version of the Draft. It has been obvious throughout the drafting process that states are reluctant to accept a right to self-determination in its external sense – despite the fact that international law, while clearly protecting the integrity of states, does not seem to equate a right to self-determination with the right to secede, except in extreme situations.[204]

To transcend this dispute and the prevailing dichotomy between internal and external self-determination in the context of indigenous peoples, Anaya has suggested a reconceptualisation of self-determination. He proposes a substantive concept of 'constitutive' self-determination, which requires minimum levels of participation in processes of creation, alteration or territorial expansion of governmental authority, coupled with 'ongoing' self-determination, mandating a governing order under which individuals and groups are able to make meaningful choices touching upon all spheres of life on a continuous basis. Since colonialism violated both of these principles, a 'remedial' aspect of the principle of self-determination would come into play, which he sees implemented by the UN process of decolonisation, allowing, *inter alia*, for the option of political independence. In the extra-colonial context, the remedies, in Anaya's view, need not entail the formation of new states, although secession may be an appropriate remedial option in limited contexts where substantive self-determination for a

[203] Kingsbury, B., 'Reconstructing Self-Determination: A Relational Approach' in Aikio, P. and Scheinin, M., Operationalizing the Right of Indigenous Peoples to Self-Determination,(2000) Institute for Human Rights Abo Akademi University, Turku, Finland, pp. 19–37, at 28.

[204] On 29 June 2006, the Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples and recommended its adoption by the General Assembly. Council resolution2006/2 of 29 June 2006. at http://www.ohchr.org/english/issues/indigenous/docs/declaration.doc>>. It should be noted that Canada and Russian Federation were only countries to be against the adoption.

particular group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned.[205]

The aim of Anaya's suggestion is constructive and justified but on the other hand it seems, at least to the present author, to be somewhat inconsistent. When indigenous peoples are seen as peoples equal to all other peoples who are victims of colonisation, as Anaya clearly maintains,[206] why should they not be granted the same rights as were given to other colonised peoples under the decolonisation regime, that is, a true right to freely determine and choose their political status, even if this means political independence in some rare cases? As an expert in international law and an advocate for indigenous peoples, Anaya is of course aware that international law does not support secession for a part of a population while protecting the integrity of nation-states. But as long as a right to self-determination for indigenous peoples is demanded on the basis of historical injustices and equality of peoples, not on the basis of international law as it is understood by the mainstream today, why can we not apply the same arguments – justice and equality – to justify the demand for the right to secede? As Wiessner maintains:

> History cannot be frozen. If any traditional criteria of 'people' exist, indigenous groupings may very well meet them . . . They might not want to choose political independence, but should they not at least be afforded the option? . . . Why should these peoples be denied what others enjoy when we are talking about peoples or nations with their own identities, territories, and political institutions, who used to exercise internal and external control until they were reduced to dependency? Why should they not be subject to decolonization as well as overseas peoples and countries? . . . These why-not questions are especially pertinent because the concepts and principles employed to justify the dependency status of many of these peoples have been discredited, such as the principle of *terra nullius*. The inequality and the injustice inherent in such terminology is too blatant for comfort.[207]

If indigenous peoples are recognised as 'peoples' in every social, cultural and ethnological meaning of this term, as expressed by the Chairperson of the UN Working Group on Indigenous Populations, Erica-Irene A. Daes,[208] it can justifiably be claimed that they should be recognised as 'peoples' in every sense of the term as it is used in international law as well. In the context of Canada and North America, as Tully notes, when Europeans arrived, the Aboriginal peoples were independent, self-governing nations equal in status to European nations. Their status as self-governing nations rested on exactly the same criteria in international law, then and now, as the status of European nations: the proven ability to govern themselves on a territory over time and to enter into international relations with other nations. These are universal criteria of the inherent right of self-government on which nationhood rests in the modern world.[209]

[205] Anaya, J. (2004), pp. 104–110.

[206] See generally Anaya, J., (2004), pp. 15–34.

[207] Wiessner, S. (2003), p. 319 (in reprinted version).

[208] E-I.A. Daes, 'The Rights of Indigenous Peoples to 'Self-Determination' in the Contemporary World Order', in D. Clark and R. Williamson (eds.), *op. cit.* (note 10), pp. 47–57, at 50–51.

[209] Tully, J., 'A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada' in Cook, C. and Lindau, J.D. (eds), Aboriginal Rights and Self-government, The Canadian and Mexican Experience in North American Perspective, McGill-Queen's University Press Montreal & Kingston, 2000, pp. 39–71, at 48.

6. Concluding Remarks

Canada's sovereignty and underlying title to the land based on the principle of *terra nullius* cannot be considered acceptable in the modern world. Given that Aboriginal peoples were there at the time of European contact and that their societies contained the same elements as those found in other societies, the only conclusion that can be drawn is that Aboriginal nations had rightful jurisdiction and ownership of the land when Europeans first arrived; these peoples were – and still are – holders of inherent Aboriginal rights. Reasonable doubt can be expressed as to whether and to what extent the sovereign powers of Aboriginal peoples have been extinguished by the assertion of the sovereignty of Great Britain and later Canada and, if so, whether the Canadian sovereignty can be justified and rooted in legality.

By defining and limiting inherent Aboriginal rights as way-of-life rights, the Supreme Court of Canada has tried to sweep under the carpet a fundamental question, that is, the unquestionable acceptance of Canadian sovereignty over its Aboriginal peoples based on the principle of *terra nullius*. By accepting Canada's sovereignty the Court at the same time excludes any possibility for the recognition of Aboriginal sovereignty. The contradiction which necessarily follows from the recognition of Aboriginal peoples as self-governing nations at the time of European arrival, on the one hand, and non-recognition of the self-government rights of Aboriginal peoples by the Canadian legal system, on the other, has yet to be resolved. The Federal Government has taken an important step by recognising an inherent right to self-government of Aboriginal peoples on the political level. But, by stating as a self-evident fact that the right to self-government is to be understood only as a right within the Canadian legal system, the Federal Government touches the surface of a fundamental question without digging any deeper. Going under the surface would reveal another aspect of the same contradiction: whereas the principle of *terra nullius* is discredited by the world community and Canada itself in relation to international decolonisation process, Canadian sovereignty and the extinguishment of Aboriginal sovereignty rely on the same principle.

This article maintains that even though this painful fact concerning *terra nullius* is an understandable reason for Canadian courts and federal policy to limit the inherent rights approach to being way-of-life rights or a right to self-government within Canadian legal system, this limitation serves neither legality nor justice. My argument is that by recognising inherent Aboriginal rights to traditional livelihoods and traditional use of land and at the same time accepting the fact that Aboriginal peoples were self-governing peoples at the time of European contact, the Supreme Court of Canada opens up a justification for a wider recognition of the inherent rights approach. The extension of the inherent rights approach could mean that Aboriginal peoples of Canada might have self-governing rights that are not solely subordinate to the Canadian legal system but perhaps comparable to or even above it. Instead of the extinguishment of Aboriginal rights, the inherent rights approach would require an affirmation of Aboriginal rights as a basis of the land claims and self-government negotiations between the Canadian state and Aboriginal peoples.

The inherent rights approach, when fully applied, would recognise indigenous peoples as peoples equal to all other peoples. This could be seen as a significant start for

the development of international law concerning the status of indigenous peoples. Canada's example could show the way to other countries that have indigenous peoples living under their sovereignty, at least those countries that have based their sovereignty on the same doctrine or similar circumstances.

Limitation of the definition of an Aboriginal right to being a pre-European-contact right is problematic, not only for the above-mentioned reasons but also because it means that Aboriginal peoples are denied the right to change and adapt to the new conditions which inevitably resulted from the process of colonisation.[210] This limitation can be problematic also in the light of many of the changes in the world today. For instance, as is widely known today, global environmental problems such as climate change threaten the whole basis of traditional livelihoods of many indigenous peoples, particularly in the Arctic areas.[211] Due to rapid changes in the land, many of the way-of-life rights are seriously at risk. Therefore, extending the way-of-life approach to make it one that recognises the right of indigenous peoples to determine or effectively influence the developments that shape their culture, status and lives would give those peoples a real opportunity to set the stage for a better future.

[210] See McNeil, K. *The Meaning of Aboriginal Title* in Asch, M. (ed.): Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference, UBC Press University of British Columbia, Vancouver, Canada 1997, pp. 135–154, at 151–154. For more discussion about the problems of tying the Aboriginal rights solely to the distinctiveness and pre-European contact, see Barsh, R.L. and Henderson, J.Y., 'The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand', Mc Gill Law Journal vol. 42/1997, pp. 994–1009, Borrows, J. 'Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia', Osgoode Hall Law Journal, vol. 37, n.3, 1999, pp. 538–597, at 567–574. <<http://www.yorku.ca/ohlj/archive/articles/37_3_borrows.pdf>>.

[211] See ACIA (Arctic Climate Impact Assessment) 2004, Cambridge University Press, chapter 3, pp. 62–95. The document can be found at <<http://www.acia.uaf.edu/pages/scientific.html>>.

INHERENT RIGHTS OF ABORIGINAL PEOPLES IN CANADA – REFLECTIONS OF THE DEBATE IN NATIONAL AND INTERNATIONAL LAW

International Community Law Review, Volume 8, No. 1. 2006: 155-202.

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International Community Law Review 11 (2009) 3–68

INTERNATIONAL COMMUNITY LAW REVIEW
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Protecting the Rights of Indigenous Peoples – Promoting the Sustainability of the Global Environment?

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Abstract
One predominant presumption in the present international legal discourse is that indigenous peoples, when allowed to participate, can make a valuable contribution to the sustainability of the global environment due to their traditional knowledge and practices relating to the environment. The aim of this article is to discuss whether and under which conditions the legal recognition of the special rights of indigenous peoples in relation to the environment can be seen as promoting the protection of the planet Earth.

Keywords
Indigenous peoples; environmental sustainability; cultural rights of indigenous peoples; traditional ecological knowledge

1. Introduction

The aim of this article is to discuss the linkage between environmental sustainability[1] and the rights of indigenous peoples, in particular their right to traditional livelihoods. In international law, traditional livelihoods such as hunting, fishing, gathering and reindeer herding are considered to be an integral part of the right to culture of indigenous peoples.[2]

One predominant presumption in the present international legal and political discourse is that indigenous peoples, when allowed to participate, can make a valuable contribution to the sustainability of the global environment due to their traditional knowledge and practices relating to the environment. The first part of this article introduces some prevailing views about indigenous peoples' special

[1] Environmental sustainability has been defined in great detail but generally and in this context it means the ability of the environment and each species to function properly and maintain the optimal balance in abundance. See also e.g. the Commissioner for Environmental Sustainability, Victoria, available at: <http://www.ces.vic.gov.au/CES/wcmn301.nsf/childdocs/-441BB07721D61152CA256F250028C5FB?open> (visited 22 February 2008).

[2] See for instance UN Human Rights Committee: General Comment No. 23(50), A/49/40, Vol. I (1994), Annex V (pp. 107–110); CCPR/C/21/Rev.1/Add.5; available at: <http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc1256887005 5fbbd/970e62bd99ec518cc125688700532c20?OpenDocument> (visited 1 January 2008).

DOI: 10.1163/187197309X401406

relationship to nature and their traditional ecological knowledge, and then takes a look at the international environmental instruments recognizing this inherent relationship.

The second part of the article aims to show how safeguarding the human rights of indigenous peoples can, in many places, have an important influence on the promotion of environmental sustainability. Even though some relevant human rights instruments and cases are introduced, the main emphasis in this part of the article is to show how international and national developments in the area of recognizing the human rights of indigenous peoples can quite significantly affect the policies of powerful international organizations that deal with indigenous peoples and the environment – the World Bank being one important example.

This part of the article undertakes to show how the commitment of the World Bank to respect the human rights of indigenous peoples, such as land rights and the right to their traditional way of life, can have a positive influence on the sustainability of the environments in which indigenous peoples live. The World Bank not only requires the effective participation of indigenous peoples in Bank-funded projects that take place on the lands indigenous peoples traditionally occupy, but also requires that the borrower pay particular attention to the need to protect those lands and resources as well as the cultural and spiritual values that indigenous peoples attach to the lands. The World Bank also advises borrowers to take into account indigenous peoples' natural resource management practices and the long-term sustainability of such practices.[3]

It is important to note, however, that although the rights of indigenous peoples often seem to go hand in hand with the question of environmental integrity, there may be situations where protection of the traditional rights of indigenous peoples does not necessarily advance the sustainability of all natural species. The third part of the article studies two particular regimes – the whaling and polar bear regimes – both of which, on one hand, seek to protect endangered species, thus prohibiting the harvesting of these species, while allowing traditional hunting for indigenous peoples, as part of protecting their culture. The aim of this part of the article is to reveal possible conflicts pertaining to this issue. In addition to taking up the question of sustainability, the aim is to discuss the ambiguous criteria for 'traditional hunting rights' laid down by the whaling and polar bear regimes.

The last part of the article asks whether indigenous peoples, when recognized as having special rights in relation to environmental use and the management of the environment, may also have duties towards the environment. The special status that indigenous peoples are now internationally accorded in relation to the environment as well as public statements and declarations made by indigenous peoples themselves describe the environmental responsibility that indigenous peoples have towards 'Mother Earth' and future generations. Therefore, the cul-

3) See Section 5 of this article.

tural practices of indigenous peoples should not be preserved and encouraged, even when necessary for their economic and social well-being, unless the sustainability of each and every species can be guaranteed.

2. Prevailing Views of Indigenous Peoples' Traditional Worldview and Ecological Knowledge

An internationally much cited description of indigenous peoples' traditional worldview is a letter from Chief Seattle to President Franklin Pierce in 1855, which states:

> This we know; the Earth does not belong to man; man belongs to the Earth. This we know; all things are connected, like the blood which unites one family. Whatever befalls the Earth, befalls the sons of the Earth. Man does not weave the thread of life; he is merely a strand in it. Whatever he does to the web he does to himself.[4]

Despite the large number of different indigenous cultures, a considerable number of studies show that indigenous peoples' traditional worldview and values have many common elements. These form a bond between the indigenous peoples and reflect, to variable degrees, their relationship to the natural environment even today, despite the fact that most indigenous communities are taking part in the processes of globalization and modernization.

Sahtouris, who has studied the traditional worldview of indigenous peoples, for instance, the Hopi Indians of North America and the Kogi of South America, describes the indigenous worldview of nature as fundamentally living and sacred, often represented by a circle. In her view, in many indigenous cultures the basic laws of nature were formulated in accordance with what we nowadays call sustainability: laws of balance, harmony, mutual sustenance, of returning in equal measure whatever one takes. The world is understood as a single, interconnected and interdependent living system.[5]

Regarding the Nenets in Northern Russia, Golovnev and Osherenko explain that people 'find' a rhythm in nature, instead of imposing one on the environment. Accordingly, reindeer graze best when they are given complete freedom to move about and find their own food.[6]

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[4] A letter from Chief Seattle, Patriarch of the Duwamish and Squamish Indians of Puget Sound to United States President Franklin Pierce (1855), cited in UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment: Final Report prepared by Mrs. Fatima Zohra Ksentini, Special Rapporteur, 1994, E/CW.4/Sub.2/1994/9, para. 74. The document can be found at: <http://www.austlii.edu.au/au/journals/AILR/1996/98.html#Heading6> (visited 10 July 2007).

[5] E. Sahtouris, Earthdance: Living Systems in Evolution, Chapter 19, The Indigenous Way, at <http://www.ratical.org/LifeWeb/Erthdnce/chapter19.html> (visited 29 May 2007).

[6] A.V. Golovnev and G. Osherenko, *Siberian Survival. The Nenets and Their Story*. Cornell University Press, Ithaca. 1999, at 41.

Spirituality forms an essential part of the traditional worldview of many indigenous peoples. Helander relates that culturally nature is seen as having a spirit and, consequently, is worthy of respect and worship. She maintains that this view comes quite close to the 'Gaia' principle as presented by Loveloc.[7] Helander maintains that spiritual aspects and practices are included in the logic of the traditional knowledge.

Jensen and Mclean also emphasize spirituality as well as the holistic worldview where everything is interconnected:

> First Nation people in the Yukon, like all North American Indigenous people, have a profound connection to the land, to the animals and to all aspects of the environment. This bond has endured through thousands and thousands of years and exists today among people who live out much of their lives in the wilderness. There is a powerful sense of spirituality related to the environment, as all aspects of life are interwoven into others. The spirits of the wind, the mountains, the water and the land are present and must be addressed following the proper protocols of the traditional law system. Every aspect of life is interwoven within another, you cannot separate the clan system from the potlatch and this cannot be seen [as] isolated from our spirituality. All is connected like and likened to a circle.[8]

Jensen and Mclean describe indigenous peoples' traditional view of the relationship between the human being and the natural world in the following way:

> The land and the environment is everything that we are; without it our survival would be destined to end. It is only at the mercy of the animals who decide if they want to be sacrificed and give themselves up for our food [that] we exist. Because of this we treat the land and the animals with the greatest and utmost respect, this is the way of the ancestors and it persists today exhibited in our worldviews and values today.[9]

UN Special Rapporteur Martínez Cobo also describes the importance of spirituality in indigenous peoples' relationship to land:

> It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and the lands as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.[10]

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7) E. Helander, Global Change – Climate Change Observations Among the Sámi, in E. Helander and T. Mustonen (eds.), *Snowscapes, Dreamscapes, Snowchange Book on Community Voices of Change*, Tampere Polytechnic Publications. Ser. C, Study Materials 12, 2004, pp. 302–309, at 303.

8) M. Jensen and D. Mclean, SnowChange 2002 Conference, Yukon First Nation Observation of Climate Change, in E. Helander and T. Mustonen (eds.), *ibid.*, pp. 75–76, at 75.

9) *Ibid.*

10) UN Special Rapporteur José R. Martínez Cobo, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of Discrimination against Indigenous Populations, 1986, E/CN.4/SUB.2/1986/7/ADD.4., paras. 196–197.

A few years later, Special Rapporteur Erica-Irene A. Daes continues by describing the holistic worldview of indigenous peoples:

> In order to understand the profound relationship that indigenous peoples have with their lands, territories and resources, there is a need for recognition of the cultural differences that exist between them and non-indigenous people, particularly in the countries in which they live. Indigenous peoples have urged the world community to attach positive value to this distinct relationship. It must be noted that, as indigenous peoples have explained, it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies.[11]

Victoria Tauli-Corpuz, Chairperson of the Permanent Forum on Indigenous Issues, has emphasized the fundamental importance of the lands and territories to indigenous peoples as the crux of the livelihood and identity of indigenous peoples:

> Land, territories and related resource rights are of fundamental importance to indigenous peoples since they constitute the basis of their economic livelihood and are the sources of their spiritual, cultural and social identity. Land is the foundation for the lives and cultures of indigenous peoples all over the world. Without access to, and respect of their rights over their lands, territories and natural resources, indigenous peoples' distinct cultures, and the possibility of determining their own development and future, become eroded.[12]

The Kari-oca Declaration affirms the words of Tauli-Corpuz by maintaining that 'We [indigenous peoples] cannot be removed from our lands. We, the Indigenous Peoples are connected by the circle of life to our lands and environments.'[13]

Indigenous peoples' close relationship to nature, which contains various social, cultural, spiritual, economic and political aspects,[14] is described in many declarations that indigenous peoples have produced in different international forums. These declarations not only describe the special relationship that indigenous peoples have to nature but also demand the right to participate in environmental protection. Indigenous peoples declare that they have a valuable contribution to make in environmental management because of their philosophies and traditional

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11) UN Special Rapporteur, Mrs. Erica-Irene A. Daes, Sub-Commission on the Promotion and Protection of Human Rights, Indigenous peoples and their relationship to land, Final working paper, 2001, E/CN.4/Sub.2/2001/21, paras. 12–13. The document can be found at: <http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/78D418C307FAA00BC1256A9900496F2B/$File/G0114179.doc?OpenElement> (visited 10 July 2007).

12) Victoria Tauli-Corpuz, Chairperson of the Permanent Forum on Indigenous Issues, Address to the opening of sixth session of the Permanent Forum on Indigenous Issues, New York, 14 May 2007; available at: <http://www.un.org/esa/socdev/unpfii/en/session_sixth.html> (visited 29 May 2007).

13) Kari-oca Declaration, Brazil, May 30, 1992, signed at Kari-oca, Brazil on the 30th Day of May, 1992; available at: <http://www.tebtebba.org/tebtebba_files/finance/susdev/karioca.html> (visited 23 May 2007).

14) Mrs. Erica-Irene A. Daes (2001), *supra* note 11, para. 20.

practices. In the Conference of the Parties to the International Framework Convention on Climate Change, indigenous organizations declared:

> We, the representatives of the Indigenous Peoples and Local Communities [...] are profoundly convinced of the sacred character of Mother Earth. We also continue to be gravely concerned about the effects of climate change in our territories. [...] We reiterate our decision to continue contributing to the debates of the UNFCCC. We demand a full compliance of said instrument and at the same time we demand full participation in all the debates. [...] We are convinced that our philosophies and traditional practices are the most appropriate for the management of the ecosystems of our territories.[15]

Attributing even more importance to the spiritual aspects of environmental protection, another declaration, produced in the International Climate Change Conference, continues in a similar vein:

> Indigenous Peoples represent approximately 350 million people in the world. For our Indigenous Peoples who live in the most fragile and vulnerable ecosystems of the world, Mother Earth is sacred and must be honoured, protected and loved. This particular relationship has allowed us to conserve biodiversity for the survival of the present and future generations. Our territories and natural and spiritual resources are the fundamental basis for our physical and cultural existence. In our territories, we establish our sacred relationship with Mother Earth.[16]

The importance of the role of indigenous peoples in sustainable development countering the 'unsustainable models' of industrialized countries becomes evident in many of the declarations issued by indigenous peoples.[17] The political aspect of indigenous peoples' nature-relationship becomes evident in the two following statements:

> The right to self-determination of Indigenous Peoples is essential to development that is sustainable. Sustainability and conservation rest on Indigenous People's knowledge of, and stewardship over, the larger part of the world's most diverse ecosystems. Self-determination consists of a bundle of rights which Indigenous Peoples regard [primarily] as their responsibilities (rather than rights) to be exercised in their territories.[18]

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15) 'The Bonn Declaration at the Third International Forum of Indigenous Peoples and Local Communities on Climate Change July 14–15, 2001, Bonn, Germany, available at: <http://www.tebtebba.org/tebtebba_files/susdev/cc_energy/bonndeclaration.htm> (visited 23 May 2007).

16) Indigenous Peoples and Local Communities Caucus, Seventh Session of the Conference of the Parties, United Nations Framework Convention on Climate Change, Marrakech, Kingdom of Morocco, October 29 to November 9, 2001, Item 1; available at: <http://www.treatycouncil.org/new_page_5231311.htm> (visited 23 May 2007).

17) 'We, the Indigenous Peoples, have historically played an active role in the conservation of eco-systems crucial to the prevention of climate change such as forests, wetlands and coastal and marine areas. Long ago, our sciences foretold of the severe impacts of Western 'development' models based on indiscriminate clear-cutting, oil exploitation, mining, carbon-emitting industries, permanent organic pollutants and the insatiable consumption of the industrialized countries. Today, these unsustainable models threaten the very life of Mother Earth and the lives of all of us who are her children.' Declaration of the first international forum of indigenous peoples on climate change, Lyon, France, September 4–6, 2000, Introduction, available at: <http://www.treatycouncil.org/new_page_5211.htm> (visited 23 May 2007).

18) P. Havemann and H. Whall, Commonwealth Policy Studies Unit, 'The Miner's Canary: Indigenous

> Indigenous Peoples have consistently called for international recognition of our rights as a pre-condition for our empowerment for sustainable development. We reaffirm that self-determination and sustainable development are two sides of the same coin.[19]

One essential component closely related to indigenous peoples' traditional world-view and relationship to nature is the knowledge that they have pertaining to their lands and the environmental conditions on these lands. The following statement describes the necessary interconnections between these elements:

> Indigenous traditional knowledge is a way of life. Traditional knowledge is a process of acquiring and passing on knowledge and understanding. It contains information collected over time. It is values, stories, language and social relations. It is experience-based relationship with family, animals, places, spirits, and the land. It is a world view.[20]

The 'traditional knowledge, innovations and practices' of 'indigenous and local communities embodying traditional lifestyles' are often referred to by scientists as Traditional Ecological Knowledge (TEK). Traditional ecological knowledge has also been given other names, in particular, environmental knowledge or indigenous ecological knowledge.[21]

This knowledge has been defined as, for instance, 'a cumulative body of knowledge and beliefs handed down through generations by cultural transmission about the relationship of living beings (including humans) with one another and with their environment.'[22] According to another definition, the traditional knowledge of indigenous peoples is:

> [A] body of knowledge built up by a group of people through generations of living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use. The quantity and quality

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Peoples and Sustainable Development in the Commonwealth. A Commonwealth Policy Studies Unit Memorandum to Commonwealth Heads of Government attending the World Summit on Sustainable Development (WSSD), August 26–September 4, Johannesburg, South Africa, 200216-17, available at: <http://www.cpsu.org.uk/downloads/CPSU_MEM.pdf> (visited 23 May 2007).

19) Indigenous Peoples' Political Declaration, Prep. Com. IV, Bali, Indonesia, 6 June 2002; available at: <http://www.tebtebba.org/tebtebba_files/summit/wssd/poldec.html> (visited 19 February 2008).

20) A.R. Emery, *Integrating Indigenous Knowledge in Project Planning and Implementation*, A Partnership Publication (The International Labor Organization, The World Bank, The Canadian International Development Agency, and KIVU Nature Inc.), 2000, published by The World Bank and The Canadian International Development Agency, p. 16. The document is available at: <http://siteresources.worldbank.org/EXTINDKNOWLEDGE/Resources/prelims2.pdf> (visited 28 June 2007).

21) Other terms that are used include 'indigenous technical knowledge', traditional knowledge', 'people's science' or 'rural people's knowledge'. On definitions, see generally F. Berkes, Traditional ecological knowledge in perspective. Winnipeg, Natural Resource Institute, 1992; M. Johnson, (ed.), Lore: capturing traditional environmental knowledge, Ottawa, Dene Cultural Institution, International Development Research Centre, 1992, at 4; D. Warren, L. Michael, J. Slikkerveer, and D. Brokensha (eds.), *The cultural dimension of development: Indigenous knowledge systems.* London: Intermediate Technology Publications, 1995.

22) M. Gadgil, F. Berkes and C. Folke, Indigenous knowledge and biodiversity conservation. *Ambio* 22/2–3, 1993, 151–156, at 151.

> of the traditional environmental knowledge varies among community members, depending upon gender, age, social status, intellectual capability and profession (hunter, spiritual leader, healer, etc.). With its roots firmly in the past, traditional environmental knowledge is both cumulative and dynamic, building upon the experience of earlier generations and adapting to the new technologies and socioeconomic changes of the present.[23]

Posey points out that traditional ecological knowledge is much more than a simple compilation of facts: it is the basis for local-level decision-making in areas of contemporary life, including natural resource management.[24] Indigenous knowledge has been shown to be extraordinarily successful in the sustainable utilization of natural resources, and the concept of sustainability is embodied in indigenous and traditional livelihoods systems.[25]

Indigenous peoples' knowledge concerning their environment is naturally based on their traditional, nature-based way of life. Indigenous communities often live in environments marked by great vulnerability. For instance, indigenous peoples in the Arctic have adapted to great environmental variability, cold, extended winter darkness, and fluctuations in animal populations, among many other challenges posed by geography and climate.[26] According to the Arctic Climate Impact Assessment (ACIA), indigenous peoples' knowledge of their surroundings is a rich source of information for others who wish to understand the arctic ecosystem.[27] The ACIA includes a separate chapter on indigenous peoples' observations regarding climate change in the Arctic.[28]

Similarly to the ACIA, the report of the Working Group on Article 8 (j) of the Convention on Biological Diversity has emphasized the valuable contribution that indigenous peoples can make by sharing their knowledge and understanding

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23) M. Johnson (ed.), LORE: Capturing Traditional Environmental Knowledge. *Supra* note 21 at 4. See also United Nations Economic and Social Council, E/C. 19/2007/10, Permanent Forum on Indigenous Issues, sixth session, New York, 14–25 May 2007, Item 4 of the provisional agenda, Implementation of recommendations on the six mandated areas of the Forum and on the Millennium Development Goals, Report of the Secretariat on Indigenous traditional knowledge, 1. Introduction, item 2, available at: <http://www.un.org/esa/socdev/unpfii/en/session_sixth.html> (visited 29 May 2007). See also C. Rattray, Talhtan Traditional Ecological Knowledge in C. Rattray and T. Mustonen (eds.), Dispatches from the Cold Seas, Indigenous views on Selfgovernance, ecology and identity, Tampere Polytechnic, Finland in cooperation with Tahltan Research Institute on Biological Ecosystems (TRIBE) Indigenous Governance Program at the University of Victoria, British Columbia, Canada, 2001, pp. 138–147, at 138.

24) D.A. Posey, Ethnobiology and ethnoecology in the context of national laws and international agreements affecting indigenous and local knowledge, traditional resources and intellectual property rights, in R. Ellen, P. Parkes and A. Bicker, *Indigenous Environmental Knowledge and its Transformations, Critical Anthropological Perspectives*, Gordon and Bread Publishing Group, Routledge, London and New York, 2000, Reprinted 2003, pp. 35–54, at 36.

25) *Ibid.*, p. 35.

26) See ACIA, *Arctic Climate Impact Assessment* (Cambridge University Press, 2005), particularly chapter 3: Changing Arctic: Indigenous Perspectives, pp. 61–97, at 62. This document is available at: <http://www.acia.uaf.edu/pages/scientific.html> (visited 30 March 2007).

27) *Ibid.*

28) *Ibid.*

of the environment.[29] For this reason, according to the Report, states should involve indigenous groups in planning and decision-making in order to ensure that indigenous knowledge is activated.[30]

Yet indigenous traditional knowledge is not merely information concerning the physical environment. Helander, for instance, maintains that spiritual elements and practices are included in the logic of traditional knowledge.[31] Likewise, Posey notes that knowledge of the environment depends not only on the relationship between humans and nature, but also on that between the visible world and the invisible spirit world.[32]

Similarly, hunting as an integral part of the traditional way of life of many indigenous peoples is not only about killing an animal for food but contains spiritual aspects as well. According to Ridington, Naskapi hunters 'experience a powerful transformation in their contact with animals.'[33] There is evidence that many indigenous hunters and fishers have dreams that contain information relevant to the hunt.[34] Among many indigenous groups there is also a belief that supernatural beings may have useful information for their subsistence activities.[35]

Many indigenous peoples are concerned about the misappropriation and misuse of their traditional knowledge by outsiders without their permission and without respect for their customary laws. In many cases, indigenous knowledge and resources have been appropriated by others through intellectual property rights and used in ways that run counter to indigenous worldviews and do not benefit the ancestral rights-holders.[36]

Traditional knowledge is rapidly disappearing, with growing pressures of globalisation undermining indigenous cultures and lifestyles and taking over their traditional lands and resources to make way for commercial ventures (mining,

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29) Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8 (j) and Related Provisions of the Convention on Biological Diversity, Biological Diversity in the Arctic, Final Report: September 2005, Composite report on status and trends regarding the knowledge, innovations and practices of Indigenous and local communities, Region: Arctic, Consultant: Elina Helander-Renvall, UNEP/CBD/WG8J/4/INF/3, 21 December 2005.

30) *Ibid.*, p. 6.

31) E. Helander, Sámi knowledge – subjective opinion or science? in Diehtogiisá. Newsletter, Nordic Saami Institute. English edition. 1/ 1992, pp. 3–4.

32) D.A. Posey (ed.), *Cultural and Spiritual Values of Biodiversity*. United Nations Environment Programme, 1999, p. 2.

33) R. Ridington, Knowledge, Power, and Individual in Subarctic Societies, *American Anthropologist* 90, 1988, 98–110, at 99.

34) See for instance generally E. Helander, and T. Mustonen (eds.) (2004), *supra* note 7.

35) See generally J. Pentikäinen, *Saamelaiset. Pohjoisen Kansan Mytologia* (The Sámi people. Mythology of a Northern People), SKS. Helsinki, 1995; T. Ingold, *The Perception of the Environment. Essays in Livelihood, Dwelling and Skill*. Routledge, London, 2000.

36) K. Swiderska (IIED) and A. Argumendo, (Andes/COE), Towards a Holistic Approach to Indigenous Knowledge Protection: UN Activities, 'Collective Bio-Cultural Heritage' and the UNPFII, Fifth Session of the UN Permanent Forum on Indigenous Issues, 15–26 May 2006, New York., pp. 1–2; available at: <http://www.earthcall.org/files/2006/COE_side_event_UNPFII_2006.pdf> (visited 24 May 2007).

plantations, etc.), and with protected areas alienating indigenous lands. Loss of lands is a key factor causing the loss of cultural diversity and traditional knowledge.[37]

The Working Group on Article 8 (j) has produced important standards, for example, the Akwé: Kon Guidelines on sacred sites and indigenous lands and waters for an ethical code on ecological knowledge and customary norms of indigenous peoples relating to biodiversity, innovations and practices. The code will serve to guide the impact-assessment processes and promote the use of appropriate technologies.[38] The name of these voluntary guidelines is a Mohawk term meaning 'everything in creation', so as to emphasize the holistic nature of the instrument. The guidelines are intended to provide a framework ensuring the full involvement of indigenous and local communities in the assessment of cultural, environmental and social concerns and interests of indigenous and local communities of proposed developments.[39]

In their search for alternatives to the crumbling scientific paradigm, people in the industrialized world are increasingly looking elsewhere for explanations for and solutions to environmental problems. For instance, environmental organizations have turned to indigenous peoples, who are pictured as 'savage ecologists' living in harmony with nature. This interest has given international legitimacy to indigenous perceptions of nature and improved opportunities for some indigenous peoples to make their voices heard both in national and international forums.[40]

International recognition of the traditional knowledge of indigenous peoples dates back to the World Commission on Environment and Development, which completed a report entitled 'Our Common Future' in 1987. The report has been seen as signalling the beginning of a wider acceptance of 'non-scientific knowledge' in promoting sustainable development and biodiversity enhancement.[41]

Whereas Western scientific knowledge has been the only accepted path of knowledge since colonization, new developments opening the dialogue and negotiations between indigenous knowledge and Western science can be seen. In attempts to solve many difficult ecological problems, such as the loss of biodiversity, there is a need to develop new strategies to understand the complex nature of biodiversity and to apply relevant scientific findings in an effective way.[42] It has been recognised that traditional knowledge and ways of managing natural

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37) *Ibid.*, p. 2.

38) See Akwé: Kon Guidelines, Secretariat of the Convention on Biological Diversity, 2004; available at: <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf> (visited 24 May 2007).

39) *Ibid.*, pp. 1–2.

40) A. Kalland, *Indigenous knowledge: prospects and limitations*. In; R. Ellen, P. Parkes and A. Bicker, (eds.), (2000), pp. 319–335, at 319.

41) P. Burgess, *Traditional Knowledg*e. A report prepared for the Arctic Council Indigenous Peoples' Secretariat, Copenhagen 1999, p. 5.

42) See J. de Rosnay, Biodiversity in the twenty-first century. In F. di Castri and T. Younes (eds.), *Biodiversity, Science and Development*. Cab International. Wallingford, 1996, p. 596.

resources provide valid information for sustainable development.[43] Traditional systems of management have been seen as the main means by which the societies have managed natural resources for millennia.[44]

When one dissects traditional ecological knowledge, limitations on its value may be found. One limitation is the interrelationship between ideology and practice. Kalland, for instance, has rightfully asked whether we can, *a priori*, assume that people's perceptions and norms are mirrored in their actual behaviour.[45] A number of specific examples in different parts of the world can be found where use of the environment by indigenous peoples has not met the requirements of sustainability and has, in fact, worked against the idea of nature conservation.[46] There seems to be a clear contradiction if indigenous representatives declare their harmonious and sacred relationship to nature in international forums but this philosophy is not reflected in the practical human-nature relationships at the local level.

On the other hand, the philosophy itself has a certain important value in global environmental management. By declaring the intrinsic and sacred value of nature, indigenous peoples, along with some environmental organizations,[47] introduce a new approach to global environmental governance and help bring forth a new environmental ethic that leaves behind the Judaeo-Christian cosmology of 'man's mastery over nature' and at the same time acknowledges the idea that humans are not above nature, but an integrated part of it.

Importantly, Taylor points out that if the developed world can begin to understand the importance of the earth to indigenous peoples, then we may also come to better understand our own relationship with the earth.[48] Finally, as pointed out by Sahtouris, the point should not be to romanticize indigenous people, who

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43) Helander-Renvall, *Biological Diversity in the Arctic*, Final Report (2005), *supra* note 9, p. 8.

44) F. Berkes, and C. Folge (eds.), Linking Social and Ecological Systems: Management Practices and Social Mechanisms for Building Resilience. Cambridge University Press: Cambridge 1998, p. 99.

45) A. Kalland, (2000), *supra* note 40, at 320.

46) See for instance R.F. Ellen, What Black Elk left unsaid: on the illusory images of green primitivism. *Anthropoloy Today* 2/6, 1986, 8–12, at 11; R. Keesing, *Cultural anthropology: A contemporary perspective*. New York: Holt, Rinehart and Winston, 1976, p. 116; B. Maragia, The Indigenous Sustainability Paradox and the Quest for Sustainability in Post-Colonial Societies: Is Indigenous Knowledge all that is Needed?, 18 *Georgetown International Environmental Law Review* 197, Winter 2006, 197–246, particularly at 219–227; F. Stammler, Reindeer Nomads Meet the Market, Culture, Property and Globalisation at the 'End of the Land', *Max Planck Institute for Social Anthropology, Halle Studies in the Anthropology of Eurasia*, 6, 2005, 241–252.

47) Environmental organizations have played an active role for instance in the creation of the World Charter for Nature that recognizes the intrinsic value of nature (World Charter for Nature, A/Res/37/7, United Nations General Assembly, 48th Plenary Meeting, 28 October 1982; available at: <http://www.un.org/documents/ga/res/37/a37r007.htm> (visited 18 February 2008). Also Earth Charter, produced as an initiative by a big group of non-governmental organizations and individuals and completed in 2000, recognizes the inherent value of the Earth; the document is available at: <http://www.earthcharter.org/> (visited 18 February 2008).

48) P.E. Taylor, From Environmental to Ecological Human Rights: A New Dynamic in International Law?, 10 *Georgetown International Environmental Law Review*, 1998, 309–397, at 372.

have been and are as human as all others, but to acknowledge and learn from their traditional best – from their spiritual respect for and knowledge of nature.[49] This is not to say that indigenous peoples are not to be bound to a sustainable way of life; rather it is to say that even though the ideal relationship with nature might not always prevail in practice, indigenous peoples' traditional concepts of nature have a valuable contribution to make to worldwide environmental knowledge and awareness, which no doubt can have a positive influence on international environmental policy and thus the state of the global environment.

3. Environmental Instruments and Indigenous Peoples' Contribution to the Environment

In 1990, UN Special Rapporteur Ksentini noted that indigenous peoples are at the same time 'victims of environmental degradation and protectors of vulnerable ecosystems.'[50] This idea has been kept alive and enforced in international discourse throughout the years. In 2007, the president of the United Nations General Assembly, H.E. Sheikha Haya Rashed Al Khalifa, stated, 'However, we should not cast indigenous peoples as victims. They are a dynamic collection of communities. Indigenous peoples continue to be a source of inspiration to us all. Their knowledge, culture and environmentalism offer lessons that all of us can learn from.'[51]

As maintained by Daes, the international community has begun to respond to indigenous peoples in the context of a new philosophy and world perspective with respect to land, territory and resources. New standards are being formulated based more and more upon values which have been expressed by indigenous peoples and which are believed to be consistent with indigenous peoples' perspective on their relationship to their lands.[52]

Thus, at the heart of the cultural integrity of indigenous peoples lies a presumptive connection between indigenous culture and sustainable environmental practices. Along with this idea, the cultural protection of indigenous peoples involves providing environmental guarantees that allow them to maintain the harmonious relationship with the earth that is central to their cultural survival.[53] The maintenance of the cultural integrity of indigenous peoples thus requires

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[49] E. Sahtouris, *Earthdance: Living Systems in Evolution*, Chapter 19, The Indigenous Way. Available at: <http://www.ratical.org/LifeWeb/Erthdnce/chapter19.html> (visited 29 May 2007).

[50] Special Repporteur Ksentini, Preliminary Report, Human Rights and the Environment, E/CN.4/Sub.2/1991/8 (1991), Para. 23.

[51] Sixth Session of the UN Permanent Forum on Indigenous Issues, United Nations, Headquarters, New York, available at: <http://www.un.org/esa/socdev/unpfii/en/session_sixth.html> (visited 18.1.2008).

[52] E-I. A. Daes, (2001), *supra* note 11.

[53] C. Metcalf, Indigenous Rights and the Environment: Evolving International Law, 35 *Ottawa L. Rev.* 101, 2003–2004, 101–140, at 107.

environmental protection and sustainable environmental use, because environmental conditions are crucial for the continuity of the nature-based cultural practices of indigenous peoples.

This view is, however, only the first component of the two-fold idea that can be found in some relevant norms protecting the cultural integrity of indigenous peoples, especially in relation to sustainable environmental management. The second part of the protection of indigenous cultural integrity relates to the valuable contribution that indigenous peoples can make to environmental protection and the sustainable use of the environment because of their cultural practices and traditional knowledge relating to the environment. According to this second component, indigenous cultural practices need to be protected, because of their significance for the sustainability of the environment.

This idea is brought out for instance in the Report of the World Commission on Environment and Development, which states:

> [Indigenous] communities are the repositories of vast accumulations of traditional knowledge and experience that link humanity with its ancient origins. Their disappearance is a loss for the larger society which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems. [...] The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and other resources that sustain their way of life.[54]

The aim of this section is to show how this two-fold idea of cultural protection is reflected in instruments of international law acknowledging the rights of indigenous peoples. Although the idea of indigenous peoples as contributors to the sustainability of the environment has found its place in human rights instruments concerning indigenous peoples, its breakthrough occurred at the UN Conference on Environment and Development held in Rio de Janeiro 1992. Most of the instruments created in Rio which refer to indigenous peoples emphasize the special importance of the environment to indigenous peoples and, perhaps even more, the unique contribution that indigenous peoples can make to environmental protection and sustainable development.

The key provision of the Rio Declaration on Environment and Development for indigenous peoples is Principle 22, which states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[55]

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54) Gro Bruntland, *Our Common Future, World Commission on Environment and Development*, Oxford, Oxford University Press, 1987, pp. 114–115.

55) Rio Declaration on the Environment and Development, United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/Conf.151/26/Rev.1 (vol. 1) (1993) at 3, I.L.M 876 [Rio Declaration cited as UN Doc. A/Conf.151/26/Rev.1 (vol. 1)].

As Metcalf maintains, this provision clearly constructs the rationale for state support of indigenous peoples' rights based on the assumption that protection of indigenous culture will be conducive to achieving sustainable development. It implicitly defines indigenous culture, knowledge and traditional practices worthy of state protection as being those consistent with sustainable environmental policy.[56] Thus Principle 22 emphasizes the second component of the two-fold idea of protecting cultural integrity according to which the cultural practices of indigenous peoples need to be protected because of their value for the achievement of sustainable development.

Agenda 21,[57] which is closely related to the Rio Declaration, clearly recognizes both above-mentioned components of the two-fold protection of cultural integrity. Chapter 26 of Agenda 21, which focuses on strengthening the role of indigenous peoples, recognizes the historical relationship of indigenous peoples to their lands and the environments. It maintains that governments should, in partnership with indigenous peoples, establish measures that include the recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate.[58] In addition, measures should be established which recognize that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.[59]

According to Chapter 26.1, 'Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.'[60] Chapter 26 further recognizes that the ability of indigenous peoples to participate fully in sustainable development practices on their lands has tended to be limited because of economic, social and historical factors. Agenda 21 refers to the interrelationship between the natural environment and its sustainable development, on the one hand, and the cultural, social, economic and physical well-being of indigenous peoples on the other; it maintains that states, when endeavouring to implement environmentally sound and sustainable development, should recognize, accommodate, promote and strengthen the role of indigenous peoples and their communities.

Chapter 26 also acknowledges that some indigenous peoples may require greater control over their lands, and self-management of their resources. It further

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56) C. Metcalf, (2003–2004), *supra* note 53, at 108.

57) Agenda 21, United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/conf.151/26/Rev.1 (vol. 1) (1993) at 9 [Agenda 21].

58) 26.3.a) ii.

59) 26.3.a)iv.

60) 26.2. states: 'Some of the goals inherent in the objectives and activities of this programme area are already contained in such international legal instruments as the ILO Indigenous and Tribal Peoples Convention (No. 169) and are being incorporated into the draft universal declaration on indigenous rights.'

declares: 'Governments should incorporate the rights and responsibilities of indigenous people into national legislation. Countries could also adopt laws and policies to preserve customary practices, and protect indigenous property, including ideas and knowledge.'

Agenda 21 acknowledges that indigenous peoples have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment[61] and states that governments should establish means for the recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development.[62]

Both Principle 22 of the Rio Declaration and Agenda 21 provide explicit international recognition of the symbiotic aspects of indigenous peoples' relationship with nature. Both documents recognize that the cultural significance of this relationship supports according rights to indigenous peoples in connection with environmental management. These rights are framed as obligations on the state party to provide a minimal level of environmental protection so that indigenous peoples are able to maintain their culture as an element of sustainable development policy.[63]

The Forest Principles adopted at the Rio Conference make several references to the situation and right of indigenous people in relation to the management and conservation of the world's forests. The document states that national forest policies should 'recognize and duly support the identity, culture and the rights of indigenous people, their communities and other communities and forest dwellers.'[64] The Principles also encourage states to promote appropriate conditions for these groups 'to enable them to have an economic stake in forest use, perform economic activities, and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being, through, *inter alia*, those land tenure arrangements which serve as incentives for the sustainable management of forests.'[65]

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61) 26.1.

62) 26.3.a)iii.

63) C. Metcalf, (2003–2004), *supra* note 53, at 109.

64) Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, A/CONF. 151/26 (Vol. III) (1992), Annex III, Para. 5 (a).

65) *Ibid.* It should be noted that the follow-up to the Rio Conference, the World Summit on Sustainable Development, recognized the important role of indigenous peoples in sustainable development. Paragraph 25 states: 'We reaffirm the vital role of the indigenous peoples in sustainable development.' The two-fold idea of the protection of the cultural integrity of indigenous peoples is expressed explicitly in the document prepared by representatives of indigenous peoples, under the auspices of the UN Commission on Sustainable Development, on the commitments and priorities that the WSSD should pursue. See the Commission on Sustainable Development acting as the preparatory committee for the World Summit on Sustainable Development, Note by the Secretary-General, Appendum: Dialogue paper by indigenous

One weakness of all the above-mentioned instruments is, of course, that, despite the explicit recognition of environmental aspects in the protection of the cultural integrity of indigenous peoples, they are not legally binding. By contrast, the Convention on Biological Diversity (CBD),[66] which was also adopted at the Rio Conference, sets out legally binding rights for indigenous peoples and requirements that states must respect. Article 8(j) states:

> Subject to [their] national legislation, [states shall] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.

Article 8(j) makes a direct link between the traditional lifestyle, including traditional environmental knowledge, and sustainable use and the conservation of bio-diversity, and sees this interconnection between the two as the basis for extending protection to indigenous peoples under the CBD.[67] The cultural integrity and traditional way of life of indigenous peoples is thus protected because it contributes to the protection of biodiversity.

In addition to the obligations imposed by Article 8 (j), in Article 10 (c), the states parties agree to 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.' These principles were confirmed in paragraph 42 (j) of the Johannesburg Plan of Implementation, which requires governments to share the benefits of traditional or local knowledge with indige-

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peoples, A/CONF.199/PC/…./Add.3 (2002), Para. 7. Para. 17, which contains a provision concerning water rights, may be taken as an example; it states: '[States should] [r]ecognize the spiritual relationships and inherent rights of indigenous peoples to water and to promote legal recognition of indigenous structures and their important role in integrated land, watershed and river basin management, and decision-making at all levels on water policy, programmes and projects'.

66) The Convention on Biological Diversity, adopted 5 June 1992, 1760 UNTS 79; 31 ILM 818 (1992).

67) Article 8(j) of the Bio-diversity Convention attempts to address indigenous intellectual property rights by requiring the states parties to respect, preserve and maintain the knowledge, innovations and practices of indigenous peoples. This attempt seems rather modest, however, because of the clause 'subject to national legislation', given that most states' legislation precludes the recognition of indigenous intellectual property rights. Furthermore, where the sharing of benefits derived from indigenous knowledge and culture is concerned, the article talks about 'encouraging equitable sharing'. See Fergus MacKay, *From Concept to Design: Creating an International Environmental Ombudsperson, The Rights of Indigenous Peoples in International Law* (A project of the Earth Council, San José, Costa Rica, Project Director: The Nautilus Institute for Security and Sustainable Development, Berkley, California, March 1998), p. 23. The U.N. Working Group on Biological Diversity and Indigenous Knowledge bases its work on Article 8(j). The Working Group promotes public awareness of the importance of traditional knowledge and biological diversity to global sustainability, the role of indigenous peoples and local communities in the maintenance of biological diversity, and the international and national agreements for their protection and strengthening. (For information about the Convention on Biological Diversity and Artide 8 (j); available at: <http://www.cbd.int/programmes/socio-eco/traditional/> (visited 20 February 2008).

nous peoples on 'mutually agreed terms'. Furthermore, paragraph 41(b) emphasizes the applicability of this norm to traditional medicine.

The CBD is the only legally binding instrument that protects the intellectual property of indigenous peoples explicitly, albeit the protection is 'subject to national legislation', which allows states some leeway to adopt divergent national standards. If a state has ratified multiple instruments, the presumption is that the highest standard of protection for indigenous peoples is the one that will be applied.[68] The protection of intellectual property rights can be seen as having been strengthened by the recent adoption of the United Nations Declaration on the Rights of Indigenous Peoples,[69] which recognizes and protects the intellectual property of indigenous peoples in very clear terms.[70]

The language used in the CBD clearly reaffirms that states have sovereign rights over their own biological resources. Qualifications such as 'as far as possible' and 'as appropriate' might be vulnerable to being used by states as an excuse for non-action because of shortages in resources.[71] What is problematic from the viewpoint of indigenous peoples is that the CBD does not contain any explicit non-derogable requirement for the consent or participation of indigenous peoples in gaining access to resources or knowledge.[72]

In any event, indigenous peoples have been able to participate in inter-governmental meetings and conferences of the parties to the CBD in an attempt to improve the understanding and implementation of provisions of the Convention that are relevant to their livelihood. The traditional focus on land rights and

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[68] R.L. Barsh, Indigenous Peoples. In: D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford, 2006, pp. 830–852, at 848.

[69] After preparations lasting more than a decade, the UN Declaration on the Rights of Indigenous Peoples was adopted by the UN General Assembly on 7 September 2007. UN Declaration on the Rights of Indigenous Peoples, 7 September 2007, Sixty-first Session, A/61/L.67; available at: <http://www.iwgia.org/sw248.asp> (visited 5 January 2008).

[70] Intellectual property rights are protected in clear terms in Articles 11 and 31, of which the first states: '1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.' Furthermore, Article 31 states: '1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.'

[71] B.J. Richardson, Indigenous Peoples, International Law and Sustainability, *RECIEL* 10(1), 2001, 1–12, at 9.

[72] *Ibid.*

possibilities to participate in government policy-making is being strengthened, and intellectual property rights are now being considered as another possible mechanism for broadening the control of indigenous communities over traditional knowledge and practices.[73] The CBD did not address how indigenous traditional knowledge would be protected, but did suggest that the wider application of traditional knowledge should occur 'with the approval and involvement of the holders of such knowledge, innovations and practice'.[74] At a conference of the parties to the CBD it was agreed that studies should be established to consider the development of intellectual property rights such as *sui generis* systems/approaches, or alternative forms of protection that could promote achievement of the Convention's objectives, consistent with the parties' international obligations.[75]

Articles 8 (j) and 10 (c) of the CBD, when read together, recognize the right of indigenous peoples to continue to use biological resources in accordance with traditional, sustainable practices as well as to own, control and maintain their traditional ecological knowledge systems with the assistance of the state and to market their ecological knowledge and know-how if they so choose.[76] These articles clearly extend only to practices that can be directly linked to traditional lifestyles which maintain the appropriate connection to the sustainable use of biodiversity.[77] This is a very important statement recognizing that these special rights are granted to indigenous peoples only when their practices are in line with the sustainability requirement.[78]

The CBD clearly also addresses land rights within a human-ecological framework; that is to say, it aims to protect cultural systems of land use and conservation. In addition, for instance, the UN Human Rights Committee – a monitoring body of the International Covenant on Civil and Political Rights – has, in its comments on the identity and rights of indigenous peoples, emphasized a connection between cultural distinctiveness, distinctive ways of earning a livelihood, and rights to land and living resources. This emphasis implies that indigenous peoples' claims to territory and territorial authority are strongest

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73) *Ibid.* Intellectual property rights (IPRs), such as copyright and patents, are a primary means by which rights over knowledge are allocated. An IPR bestows on its holder the right to exclude others from commercial exploitation during the term of the right, although it can be transferred to another by sale or gift. Currently, there are no international legal instruments or standards that adequately recognize indigenous peoples' rights to their knowledge, innovations and practices. There are, however, many attempts to apply existing general market-based IPR standards to indigenous knowledge as well as to create new, more suitable ones. See generally Downes, D.R., How Intellectual Property Could Be a Tool to Protect Traditional Knowledge, 25 *Columbia Journal of Environmental Law* (2000): 253–281.

74) Article 8(j). See B.J. Richardson (2001), *supra* note 71, at 9.

75) Conference of the Parties to the Convention on Biological Diversity, 'Intellectual Property Rights', UNEP/CBD/COP/3, 38, p. 99.

76) See R.L. Barsh, (2006), *supra* note 68, at 848.

77) See C. Metcalf, (2003–2004), *supra* note 53, at 10.

78) See also B.J. Richardson, (2001), *supra* note 71, at 11.

where they can demonstrate significant, albeit sustainable, human utilization of the environment.[79]

In addition to the above-mentioned instruments, there is a quite unique regional environmental soft-law arrangement that is important in this context. In the operation of the Arctic Council, a regional organization of Arctic states that aims to protect the Arctic environment, the Arctic indigenous peoples have gained a powerful status based on their assumed valuable contribution to the environment and sustainable development. The Declaration on the Establishment of the Arctic Council, issued in 1996, affirms in its preamble 'the commitment [of Arctic states] to the well-being of the inhabitants of the Arctic, including recognition of the special relationship and unique contributions to the Arctic of indigenous people and their communities.' Furthermore, it recognizes 'the traditional knowledge of the indigenous people of the Arctic and their communities, and taking note of its importance and that of Arctic science and research to the collective understanding of the circumpolar Arctic.' Additionally, the preamble acknowledges 'the valuable contribution and support of the Inuit Circumpolar Conference, Saami Council, and the Association of the Indigenous Minorities of the North, Siberia, and the Far East of the Russian Federation in the development of the Arctic Council.'[80]

Thus, even though the eight Arctic states are the members proper of the Council, framework organizations of the Arctic indigenous peoples have been given an unprecedented status in its work: they are permanent participants who negotiate at the same table with the Arctic states and may table proposals for decisions.[81]

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[79] R.L. Barsh, (2006), *supra* note 71, at 848. It should be mentioned that the Vienna Declaration (adopted in World Conference on Human Rights, Vienna, 14–25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993)), acknowledges the two-fold idea of protecting cultural integrity. It recognizes 'the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development.' The Declaration further states: 'States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them.' Finally the Declaration states that 'states should, in accordance with international law, take concrete positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization.' (Part I, Para. 20).

[80] According to the Declaration, 'the Arctic Council is established as a high level forum to provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.' (Para. 1).

[81] 'The Declaration created the new category of permanent participant. Paragraph 2 states: "The Inuit Circumpolar Conference, the Saami Council and the Association of Indigenous Minorities in the Far North, Siberia, the Far East of the Russian Federation are Permanent Participants in the Arctic Council. Permanent participation equally is open to other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency.' More specific rules are laid out that define the selection criteria for the indigenous peoples' organisation referred to in paragraph 2. In order to be eligible to become a permanent participant, an organization must represent: a. single indigenous people resident in more than one Arctic State; or b. more than one Arctic indigenous people resident in a single Arctic State. In

Even though final decisions are made by the Arctic states in consensus, the permanent participants must, according to the Declaration, be fully consulted, which is close to a *de facto* power of veto should they all reject a particular proposal.[82]

From the very outset, indigenous peoples were not satisfied being only representatives but wanted to contribute to the environmental process. This led to ideas of using 'indigenous knowledge' in the development of the Arctic Environmental Protection Strategy (AEPS)[83] and its programmes.[84] Indigenous peoples' traditional knowledge has been included in most of the programmes and working groups that operate under the Arctic Council.[85] It is remarkable that, for instance, the Arctic Climate Impact Assessment, an extensive scientific climate change report having a strong global significance, takes into account and includes a separate chapter containing traditional knowledge and indigenous peoples' observations on climate change.[86]

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addition, according to the same paragraph, the determination that such an organisation has met this criterion is to be made by a decision of the Council. At any given time, the number of permanent participants should be fewer than the number of members in the Council, that is, eight. Currently, there are six framework organisations of Arctic indigenous peoples that have the status of permanent participant. See the official webpage of the Arctic Council at: <http://www.arctic-council.org/> (visited 16 October 2007). For indigenous peoples, it was very important that the category of permanent participant was distinguished from that of observer, defined in paragraph 3 of the Declaration, and that it was created 'to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.' (Para. 2).

82) See T. Koivurova and L. Heinämäki, 'The participation of indigenous peoples in international norm-making in the Arctic, 42 *Polar Record* (2) 2006, 101–109, at 104.

83) Inter-governmental environmental co-operation between Arctic states was, in fact, started years before the establishment of the Arctic Council. In 1991 Norway, Denmark, Iceland, Sweden, Finland, Russia, Canada and the United States of America signed the Arctic Environmental Protection Strategy (AEPS). Importantly, indigenous peoples' organizations were involved in this cooperation from the very beginning. In the first consultative meeting of the eight Arctic states in Rovaniemi in 1989, it was considered that 'indigenous peoples should be involved in future work, since they bear the burdens of environmental degradation directly.' See Consultative Meeting on the Protection of the Arctic Environment. Rovaniemi, 20–26 September 1989. Report and Annex I:1 (Helsinki: 1989), p. 6. In the preparatory meeting in Yellowknife the following year, the Inuit Circumpolar Council (then Conference) (ICC) stated the importance of direct participation of indigenous peoples in Arctic environmental co-operation 'so that indigenous perspectives, values and practices can be fully accommodated.' M. Simon, 'Proposed Objectives for an Arctic Sustainable and Equitable Development Strategy', in Protecting the Arctic Environment. Report on the Yellowknife Preparatory Meeting. Yellowknife NWT, Canada, April 18–23, 1990. Annex II: 15, Ottawa, 1990, p. 183.

84) See M. Tennberg, *Indigenous Peoples' Involvement in the Arctic Council, Northern Notes*, IV: 21–32, December 1996. Indigenous peoples' traditional knowledge has also been extensively discussed and collected within the individual Arctic states. See, for instance, one Canadian example available at <http://www.ainc-inac.gc.ca/pr/pub/indigen/ipsdca_e.html> (visited 17 October 2007).

85) See <http://www.arctic-council.org/> (visited 17 October 2007).

86) ACIA, *Impacts of a Warming Arctic: Arctic Climate Impact Assessment*, Cambridge University Press, 2004; available at: <http://www.acia.uaf.edu/pages/scientific.html> (visited 1 October 2007). Chapter 3, Changing the Arctic: Indigenous Perspectives, pp. 61–98.

4. Human Rights of Indigenous Peoples and the Environment

Indigenous peoples' contribution to environmental sustainability has also been recognized in the field of human rights. ILO Convention No. 169,[87] which is the only modern legally binding treaty dedicated to indigenous peoples,[88] clearly links the cultural identity of indigenous peoples with environmental protection. In its preamble, the Convention calls 'attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding.'

According to Article 4, special measures are to be adopted to safeguard the environment of indigenous peoples.[89] Furthermore, Article 7 states: 'Governments shall ensure that, wherever appropriate, studies are carried out in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.'[90] Article 7 further continues that 'governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.'[91] Additionally, Article 23 obliges governments to promote the subsistence economy of indigenous peoples, taking into account the importance of sustainable and equitable development.

The UN Declaration on the Rights of Indigenous Peoples[92] also recognizes that 'respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.'[93] The Declaration does not content itself only with the idea that indigenous peoples' traditional way of life is inherently linked with and contributes to environmental conservation, but sees environmental protection as a right and indeed a duty of indigenous peoples. According to Article 25:

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

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87) International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, concluded on 27 June 1989, entered into force on 5 September 1991, reprinted in 28 ILM 1382 (1989).

88) ILO Convention No. 169 replaces the earlier Convention No. 107 (26 June 1957, 328 UNTS 247), which remains in force until the country has ratified the later convention.

89) Article 4.1: 'Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.'

90) Article 7.3.

91) Article 7.4.

92) UN Declaration on the Rights of Indigenous Peoples, 7 September 2007, Sixty-first Session, A/61/L.67; available at: <www.iwgia.org/sw248.asp> (visited 5 January 2008).

93) 10th preamble.

In this respect, Article 29 further states:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

At the regional level, it is noteworthy that the Proposed American Declaration on the Rights of Indigenous Peoples[94] also recognizes the important interconnection between indigenous peoples and environmental protection. The preamble acknowledges the special relationship of indigenous peoples and the environment and the lands in which they live. Additionally, Article XIII quite comprehensively sets out the different elements for the right of indigenous peoples to environmental protection. Article XIII states, for instance, that the right to a safe and healthy environment is an essential condition for enjoyment of the right to life and collective well-being.[95] It also highlights the procedural considerations such as the right to be informed of measures that could affect the environment of indigenous peoples and the right to effective participation in acts and policies which might affect the environment.[96]

In a similar vein, human rights monitoring bodies have acknowledged the interconnection between the environment and several human rights of indigenous peoples, such as the rights to culture, life, health and property. Concerning the right to culture of indigenous peoples under Article 27 of the International Covenant on Civil and Political Rights (CCPR), The UN Human Rights Committee acknowledges that 'in the case of indigenous peoples, a right to culture under article 27 may consist of a way of life which is closely associated with a territory and its use of resources. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the *effective* participation of members of minority communities in decisions which affect them.'[97] The Committee concluded that 'article 27 relates to rights whose protection imposes *specific obligations* on States parties. The pro-

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94) Proposed American Declaration on the Rights of Indigenous Peoples, Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 95th regular session. OEA/Ser/L/V/.II.95, Doc. 6.

95) Article XIII, para. 1.

96) Article XIII, para. 2.

97) See UN Human Rights Committee. General Comment No. 23(50), A/49/40, Vol. I (1994), Annex V (pp. 107–110), para. 7; CCPR/C/21/Rev.1/Add.5; available at: <sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/970e62bd99ec518cc125688700532c20?OpenDocument> (visited 1 January 2008).

tection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.'[98] It should be noted that the right to culture of indigenous peoples is also recognized by other widely ratified international human rights instruments such as the International Covenant on Economic, Social and Cultural Rights (CESCR),[99] the UN Convention on the Rights of the Child,[100] and the Convention on the Elimination of Racial Discrimination (CERD).[101]

There have been several cases in human rights monitoring bodies that deal with the interference of a state or third parties in the lands of indigenous peoples, leading to a violation of human rights of the members of indigenous peoples.[102] In addition to the UN Human Rights Committee, both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have repeatedly emphasized the need to take into account the particular cultural context of indigenous peoples when applying the rights contained in the American human rights instruments, such as the right to property. In this regard, for instance, in the *Awas Tingni* case,[103] the Inter-American Court, acknowledged the

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98) *Ibid.* Emphasis added. The UN Committee on Economic, Social and Cultural Rights has also paid particular attention to the cultural and environmental integrity of indigenous peoples on many occasions. See, for instance, Finland's fourth periodic report 09/12/99, E/C.12/4/Add.1; available at: <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.4.Add.1.En?Opendocument> (visited 18 January 2007). See also Concluding Observations of the Committee on Economic, Social and Cultural Rights: Panama. 24/09/2001. UN Doc. E/C.12/1/Add.64, at para. 12; available at: <http://www1.umn.edu/humanrts/esc/panama2001.html> (visited 22 January 2007).

99) International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, adopted 16 December 1966, entered into force January 3, 1976. Status of ratification: 155, artide 15(1).

100) The Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), adopted 20 November 1989, entered into force September 2, 1990, Article 30.

101) International Convention on the Elimination of All Forms of Racial Discrimination., 660 U.N.T.S. 195, adopted 7 March 1966, entered into force January 4, 1969. Status of ratification: 193, articles 1(1), 1(4), 2(2), 5 e VI.

102) UN Human Rights Committee: see *Lubicon Lake Band* v. *Canada*, Communication No. 167/1984: Canada.10/05/90, CCPR/C/38/D/167/1984; available at: <www.unhchr.ch/tbs/doc.nsf/(Symbol)/c316bb134879a76fc125696f0053d379?Opendocument> (visited 21 January 2007), *Hopu and Bessert* v. *France* (Communication No. 549/1993), views of the Human Rights Committee, 29 July 1997, UN Doc. CCPR/C/60/D/549/1993; available at: <www1.umn.edu/humanrts/undocs/549-1993.html> (visited 16 March 2007). Inter-American Court of Human Rights: see *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. HR., (Ser.C), No. 79 (2001); available at: <www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (visited 4 January 2008), Inter-American Commission on Human Rights: see *Case of Yanomami Indians*, Case 7615 (Brazil), Inter-Am. C.H.R., OEA/Ser.L/V/II.66 doc. 10 rev. 1 (1985); available at www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (visited 15 March 2007), *Maya Indigenous Communities of the Tolero Distric (Belize Maya),* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004); available at: <www1.umn.edu/humanrts/cases/40-04.html> (visited 22 January 2007).

103) *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua,* (*ibid.*)

link between cultural integrity and indigenous communities' lands by maintaining that the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures.[104]

One interesting case worth noting in this context has quite recently been brought before the Inter-American Commission on Human Rights by Sheila Watt-Cloutier, the former president of the Inuit Circumpolar Council (ICC), an organization representing Inuit people in four Arctic states,[105] together with other Inuits, against the United States. According to the petition, the impacts of climate change, caused by acts and omissions by the United States, violate the Inuits' right to culture and other fundamental human rights protected by the American Declaration of the Rights and Duties of Man.[106]

The Inter-American Commission on Human Rights has not as yet made a final decision whether it will consider the case, but the petition is a unique example of how the human rights of indigenous peoples can often go hand in hand with the integrity of the global environment.[107] In many cases environmental protection is thus a precondition for the peaceful enjoyment of human rights by indigenous peoples. Human rights law as applied by the human rights monitoring bodies protects the environmental integrity of indigenous peoples. Therefore, it can be argued that there are many cases where the effective protection of the rights of indigenous peoples directly or indirectly promotes the sustainability of the global environment. With regard to the Inuit Petition, Sheila Watt-Cloutier illustrates this point by saying:

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104) *Ibid.*, para. 149. 'The Court expressed in very clear terms that the right to property must be read and understood in the context of indigenous peoples' specific culture and lifestyle, to which they have a right. It stated: 'Indigenous groups, by the fact of their very existence, have a right to live freely in their own territory; the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.' (*Ibid.*).

105) Alaska (USA), Canada, Greenland (Denmark) and Russia.

106) 'These include their rights to the benefits of culture, property, the preservation of health, life, physical integrity, security, and a means of subsistence, and to residence, movement, and inviolability of the home. American Declaration of the Rights and Duties of Man ('American Declaration'), Organization of American States (O.A.S.), adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992). Inuit Petition to the Inter-American Commission on Human Rights seeking relief from violations resulting from global warming caused by the acts and omissions of the United States, 7 December 2005, p. 5. The document is available at <www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> (visited 29 March 2007).

107) 'There is no generally accepted definition of this widely used concept. However, generally and also in this context 'environmental integrity' refers to the sustenance of important biophysical processes which support life and which must be allowed to continue without significant change in order to maintain the balance and health of life support systems of nature. See generally L. Westra, *Environmental Justice & The Rights of Indigenous Peoples, International & Domestic Legal Perspectives*, Earthscan, London, Sterling, VA, 2008, pp. 3–22.

> We do not invoke our human rights in an adversarial spirit. That is not the Inuit way. The Arctic states account for 40 percent of the world's greenhouse gas emissions, so it is appropriate to use our human rights to prompt a dialogue with Arctic states, particularly the United States of America. It is our intent to educate not criticize, and to inform, not complain. By defending our human rights we will help the world achieve the unity and clarity of purpose it needs to tackle global climate change.[108]

5. Indigenous Peoples' Rights Challenge the World Bank to Adopt a More Respectful Relationship with the Environment

The World Bank and other multilateral development banks have traditionally and often justifiably been criticized for having an adverse impact upon the environment and the indigenous peoples living in the affected environments. The aim of this section is to look at the World Bank as an example of an international organization that has made positive progress towards the recognition of the rights of indigenous peoples. While committing itself to the preservation of the traditional, nature-based way of life of indigenous peoples, the World Bank has accepted an additional obligation to promote environmental conservation. This is not to say that the World Bank has solved all the conflicts and problems related to its funding operations, indigenous peoples and the environment; this does not as yet seem to be the case.[109] The aim here is to show how strong an influence the rights of indigenous peoples can have on the officially recognized policies and practices of the World Bank, and it will be concluded that positive progress has also occurred on the practical level.

Reflecting the current international approach to the rights of indigenous peoples, the World Bank has incorporated the rights of indigenous peoples into its internal loan review policy as well as into the environmental assessments that are a precondition for a state to submit a loan application; states are thus bound to a variety of policy directives related to indigenous peoples and the environment when applying for public projects loans.[110] More particularly, the World Bank has decided to address the needs of indigenous peoples after disastrous experiences with many development projects that the Bank financed, particularly in Central America.[111]

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[108] Press Release: Climate Change in the Arctic: Human Rights of Inuit Interconnected with the World, December 10, 2003, Milan, Italy; available at: <http://www.inuitcircumpolar.com/index.php?ID=253&Lang=En> (visited 5 January 2008).

[109] See, for instance, a report by Environmental Defense, Friends of the Earth, International Rivers Network, Gambling with People's Lives, What the World Bank's New "High-Risk/High Reward" Strategy Means for the Poor and the Environment, September 2003, available at: <http://www.foe.org/camps/intl/worldbank/gambling/Gambling.pdf> (visited 15 October 2007).

[110] L. Hammer, Indigenous Peoples as a Catalyst for Applying the Human Right to Water, 10 *International Journal on Minority and Group Rights*, 2003, 131–161, at 152.

[111] See B. Kingsbury, Operational Policies of International Institutions as Part of the Law Making Process: The World Bank and Indigenous Peoples, in G. Goodwin-Gil & S. Talmon, (eds.), *The Reality of*

The World Bank has acknowledged that indigenous peoples require special attention, as they are especially vulnerable to negative effects caused by Bank-funded operations.[112] To account for this, the Bank has adopted a number of policy statements that attempt to provide safeguards for indigenous peoples.

Importantly, the World Bank was the first multilateral institution to introduce a special policy for the treatment of indigenous or tribal peoples in development projects. The Bank's first policy directive concerning indigenous peoples, 'Tribal people in Bank-financed projects', was issued in 1982. The directive recognized the need to adopt special measures to safeguard the interests of tribal people in World Bank-financed projects which affected the environmental or social situation of tribal communities.[113]

Regarding the definition of indigenous peoples, the World Bank policy maintains a broad understanding of the concept. It has considered it beneficial to leave the definition open-ended since some countries could claim that all of their population is indigenous. In order to avoid this problem, the World Bank adopted a more local-oriented standard to designate a group as indigenous and decided to take into account local legislation, as well as ILO Conventions (where ratified), opinions of local governments and non-governmental organizations, and other individuals who are familiar with the group in question. It is crucial that the group maintain a close connection with the land and natural resources; other relevant factors are language, self-identity, customary institutions and vulnerability to discriminatory practices.[114]

Therefore, when drafting an environmental assessment for a proposed project, a state needs to take into account the cultural values of the affected indigenous group, their individual and communal rights, their customary use of the land and the natural resources, as well as proper management and long-term sustain-

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International Law – Essays in Honour of Ian Brownlie, Clarendon Press, Oxford, 1999, pp. 323–343. See also *A Report by Environmental Defense, Friends of the Earth*, International Rivers Network, *supra* note 109, at 1. See examples of the World Bank's funded projects at: <http://www.wrm.org.uy/actors/WB/IPreport2.html> (visited 15 October 2007).

112) World Bank Operational Manual, Operational Directive 4.20 on Indigenous Peoples, para. 3 (Mar. 2001) (defining 'indigenous peoples' as those people whose minority status puts them at significant risk in the development process). The World Bank, in defining indigenous peoples, does not emphasize historical continuity and colonial aspects but instead views indigenous people as being 'groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged.' See The World Bank Operational Manual: Operational Directive Indigenous Peoples, IWGIA Newsletter, No. 3, Nov/Dec 1991, p. 19.

113) United Nations Economic and Social Council, E/CN,19/2002/2/Add.12, 19 April 2002, Permanent Forum on Indigenous Issues, first session, New York, 13–24 May 2002, Item 6 of the provisional agenda, review of activities of the United Nations system relating to indigenous peoples: an interactive discussion, Information received from the United Nations system, The World Bank and indigenous peoples, para. 7; available at: <http://www.un.org/esa/socdev/unpfii/en/session_first.html> (visited 29 May 2007).

114) S. Davies, S. Salman & E. Bermudez (2001), Approach Paper on Revision of O.D. 4.20 on Indigenous Peoples, pp. 2–3. The document can be found at: <http://lnweb18.worldbank.org/ESSD/sdvext.

ability.[115] This broad approach to the identification of indigenous peoples reflects the importance of a local-based understanding of their situation as well as the inherent link between indigenous peoples and the environment and natural resources.[116]

In 1991, the World Bank adopted Operational Directive (OD) 4.20 on Indigenous Peoples.[117] OD 4.20's broad objective is 'to ensure that the development process fosters full respect for [indigenous peoples'] dignity, human rights and cultural uniqueness.'[118] While OD 4.20 maintained the protective measures of the earlier directive, the new policy specifically promoted the rights of indigenous peoples to participate in, and benefit from, the development process. On May 10, 2005, the Executive Directors of the Bank approved a Revised Policy on Indigenous Peoples.

The updated policy, as reflected in the OP/BP 4.10 on Indigenous Peoples,[119] replaces the earlier policy (OD 4.20, Indigenous Peoples). OP/BP 4.10 applies to all investment projects for which a Project Concept Review took place on or after July 1, 2005.[120]

Paragraph 1 of OP 4.10 recognizes the importance of ensuring that 'the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples.' It states furthermore that '[f]or all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior and informed consultation

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nsf/63ByDocName/ApproachPaperonRevisonofOD420onIndigenousPeoplesTheWorldBank1998/$FILE/ApproachPaperOnRevisionofOD410.pdf> (visited 21 June 2007).

115) See O.P. 4.10., para. 16, at: <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> (visited 21 June 2007).

116) L. Hammer, (2003), *supra* note 110, at 153.

117) OD 4.20 on Indigenous Peoples; available at: <http://hei.unige.ch/~clapham/hrdoc/docs/WBOD4.20.htm> (visited 21 June 2007).

118) *Ibid.*, para. 6.

119) OP/BP 4.10 (Operational Policy and Bank Procedures) on Indigenous Peoples can be found at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html> (visited 15 January 2007). It should be noted that Operational Policy and Bank Procedures together have replaced the earlier OP 4.20.

120) The World Bank's website available at: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html> (visited 15 January 2007). According to the World Bank, the OP/BP 4.10 strengthens the mandatory provisions in comparison to the OD 4.20 by '1. Providing clearer provisions for early and meaningful consultation and informed participation of affected groups. The borrower and the Bank must take into account the results of consultations when deciding whether to proceed with project processing, 2. Mandating mechanisms not only to avoid adverse impacts, but also to tailor benefits to indigenous peoples, 3. Adding new mandatory requirements regarding the commercial use of natural resources (including forest, mineral and hydro-carbon resources) on lands owned, or customarily used, by indigenous groups; and 4. Adding new mandatory requirements regarding the commercial use of cultural resources (including indigenous knowledge).' See United Nations Economic and Social Council, E/CN,19/2002/2/Add.12, *supra* note 113, para. 13.

results in broad community support to the project by the affected Indigenous Peoples.'

According to OP 4.10, 'free, prior and informed consultation with the affected Indigenous Peoples' communities' refers to a culturally appropriate and collective decision-making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project. It does not constitute a right of *veto* for individuals or groups.[121] The requirement of consultation and participation requires that the borrower 'provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.'[122]

Paragraph 2 recognizes that 'the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease.' The Bank further recognizes 'the vital role that Indigenous Peoples play in sustainable development and that their rights are increasingly being addressed under both domestic and international law.'

Land and resource rights of indigenous peoples are also covered by the OP 4.10, which recognizes the customary rights of indigenous peoples and acknowledges the collective dimension of these rights.[123] The borrower is advised to pay particular attention to the need to protect such lands and resources against illegal intrusion or encroachment and to the cultural and spiritual values that the indig-

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121) See footnote 4 of the OP 4.10. Bank Procedures BP 4.10 clarifies what is meant by 'free, prior, and informed consultation'. 'It is consultation that occurs freely and voluntarily, without any external manipulation, interference, or coercion, for which the parties consulted have prior access to information on the intent and scope of the proposed project in a culturally appropriate manner, form, and language.' Furthermore, consultation approaches must recognize existing Indigenous Peoples Organizations (IPO's). Finally, 'the consultation process starts early, and there is a need for adequate lead time to fully understand and incorporate concerns and recommendations of indigenous peoples into the project design.' BP 4.10, para. 2.

122) OP 4.10, para. 10(c). Free, prior, and informed consultation is required also in projects involving the commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water, or hunting/fishing grounds) on lands or territories that Indigenous Peoples traditionally owned, or customarily used or occupied. (Para. 18.) Consultation should be carried out also in projects involving the commercial development of indigenous peoples' cultural resources and knowledge (for example, pharmacological or artistic). (Para. 19.) The Bank may, at a member country's request, support the country in its development planning and poverty reduction strategies by providing financial assistance for a variety of initiatives designed for example to protecting indigenous knowledge, including by the strengthening of intellectual property rights. (Para. 22.)

123) OP 4.10 defines 'customary rights' to lands and resources as referring to patterns of long-standing community land and resource usage in accordance with indigenous peoples' customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State. (Para. 16(a), footnote 17.)

enous peoples attribute to such lands and resources. Indigenous peoples' natural resource management practices and the long-term sustainability of such practices should be considered as well, as mentioned in the introduction of this article.[124]

The World Bank then imposes as a precondition 'meaningful consultation' with indigenous peoples when preparing an environmental assessment, as well as the disclosure of information. This reflects the unique relationship between indigenous peoples and natural resources. The World Bank recognizes the centrality of land and natural resources to indigenous peoples and attempts to apply a more holistic approach to project decisions and the strive for development efforts by forcing states to account for indigenous peoples and their relationship to the land.[125]

In 1993, a massive campaign for greater accountability of the World Bank led the Board of Executive Directors to authorize the creation of the Inspection Panel.[126] The Inspection Panel is a permanent body that receives complaints about violations of Bank policies directly from local people affected by Bank-financed projects. The Panel provides a forum to which affected people can bring their concerns at the highest level of the institution.[127] The Inspection Panel process

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124) Para. 16. In addition to the Operational Policy on Indigenous Peoples, Operational Policy 4.12 on Involuntary Resettlement is important to indigenous peoples. In the case of physical relocation of indigenous peoples, besides a consultation requirement, the borrower is required to prepare a resettlement plan that is compatible with the indigenous peoples' cultural preferences and includes a land-based resettlement strategy. Physical relocation should happen only in exceptional circumstances, when it is not feasible to avoid relocation and when possible, the resettlement plan should allow the affected indigenous peoples to return to the lands and territories they traditionally owned, or customarily used or occupied, if the reasons for their relocation cease to exist. See para. 20 of OP 4.10. OP 4.12 is available at: <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/CA2D01A4D1BDF58085256B19008197F6?OpenDocument> (visited 15 January 2007). Furthermore, OP 4.10 should be read together with other relevant Bank policies, including Environmental Assessment (OP 4.01), Natural Habitats (OP 4.04), Best Management (OP 4.09), Physical Cultural Resources (OP 4.11), Forests (OP 4.36) and Safety of Dams (OP 4.37) See OP 4.10, footnote 1.

125) L. Hammer, (2003), *supra* note 110, at 154.

126) In 1993, the Board of Executive Directors passed a resolution authorizing the creation of the Inspection Panel, which came into existence in 1994. World Bank, IBRD Resolution No. 93–10/IDA Resolution No. 93–6 (1993); available at: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/ResolutionMarch2005.pdf> (visited 12 January 2007). As the result of a broad local and international campaign against the Sardar Sarovar dam on the Narmada river in India, the Bank commissioned an independent review of its role in the project. This review became known as the Morse Commission, which published its findings in 1992. The Morse Commission report documented clear violations of Bank policies and the devastating human and environmental consequences of those policy violations. In practice, the social and environmental policies that had been developed during the late 1980s and early 1990s were in many cases ignored by the Bank. Prior to the creation of the Inspection Panel, people affected by projects had no real avenue of redress and no way to make the Bank accountable for these policy violations. This lack of accountability was strongly highlighted in the Morse Commission's report. See D.L. Clark, *A Citizen's Guide to the World Bank Inspection Panel*, Center for International Environmental Law, (1999); available at: <http://www.ciel.org/Publications/citizensguide.pdf> (visited 16 January 2007). Similar mechanisms have also been established by the Inter-American and Asian Development Banks.

127) For information about the Inspection Panel, see <http://web.worldbank.org/WBSITE/EXTERNAL/

allows two or more local people to request an independent investigation into the Bank's role in a project.[128] To be eligible for review, the claim must focus on the actions or omissions of the Bank and allege that those actions have caused – or are threatening to cause – material harm in violation of the Bank's policies and procedures. The jurisdiction of the Panel is defined by the Bank's policy framework, which means that the Panel evaluates the extent to which a project is in compliance with Bank policies, and the harm, if any, suffered by the claimants as a result of policy violations.[129]

If the claim is deemed to be eligible, the Panel evaluates the claim, the Bank Management's response and other available evidence and then makes a recommendation as to whether the claim merits a full investigation.[130] If an investigation takes place, the Panel presents its findings to the Board in a report, and the Board asks the Bank Management to provide recommendations for how to respond. The Board then announces an action plan for resolving any policy violations.[131]

The Inspection Panel neither has authority over the implementation of the remedial measures nor is able to provide the Board with an assessment of whether the Bank Management's proposed remedial measures will satisfy the concerns of the claimants. Neither can the Panel require the Management to bring the project into compliance with Bank policy. The result of this has been that remedial action plans do not always lead to satisfactory remedies or action.[132]

The Panel has evaluated several cases concerning local people, often indigenous groups. Even though the results have not always been satisfactory, the Panel's considerations have at least in some cases succeeded in improving the conditions

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EXTINSPECTIONPANEL/0,,menuPK:64132057~pagePK:64130364~piPK:64132056~theSitePK:380794,00.html> (visited 1.2.2007). See also Clark, D.L. (1999), *ibid.*

128) A request can be filed by any two or more adversely affected people living in the project area, an appointed local representative acting as agent for the affected people, or, in exceptional circumstances, a non-local representative acting as agent for the affected people. In special cases, an Executive Director of the World Bank may file the request. See World Bank Inspection Panel, Operating Procedures, para. 4 (1994); available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20175161~menuPK:64129254~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (visited 2 February 2007).

129) See Operating Procedures, Introduction. The Panel is a last-resort forum and local people must first exhaust other remedies before filing a claim. Management is given an opportunity to respond in writing to allegations made in the claim, and the Panel evaluates the merits of the case. See section IV Management's Respond.

130) The Board of Executive Directors must approve the Panel recommendation for an investigation before the Panel can proceed. According to a recent agreement, the Board should approve the Panel's recommendation unless it questions specific technical eligibility criteria. See Conclusions of the Board's Second Review of the Inspection Panel; available at: <http://www.worldbank.org/html/extdr/ipwg/secondreview.htm>. See D.L. Clark, (1999), *supra* note 126, at 9.

131) Operating Procedures, X Board Decision and Public Release. See also D.L. Clark, (1999), *supra* note 126, at 9.

132) See D.L. Clark, The World Bank and Human Rights: The Need for Greater Accountability, 15 *Harvard Human Rights Journal*, Spring, 2002, 205–223, at 218–219. See also generally G. Alfredsson, & R. Ring, (eds.), *The Inspection Panel of the World Bank. A Different Complaints Procedure*. Leiden, Martinus Nijhoff, 2000.

of the affected people in the form of improved participation for claimants in cases that have not reached the final stage.

The Arun III Hydroelectric Project in Nepal was the first case involving indigenous peoples to be investigated by the Inspection Panel.[133] The complaint concerned violations in the project design of the International Development Association's (IDA) policies on environmental assessment, involuntary resettlement and indigenous peoples. After the Inspection Panel submitted its report, validating most of the complaints submitted by the local people, the Bank Management reassessed the project as proposed and decided to withdraw its financing support in June 1995.[134]

Another case involving indigenous peoples that reached the final Review of Problems and Assessment of Action Plans was the Argentina/Paraguay Yacyretá hydroelectric project.[135] The claim asserted that local indigenous people had suffered serious impacts on their standards of living, their economic well-being and their health as a direct result of the partial filling of the Yacyretá Reservoir and violations of Bank policies.[136] In its findings, The Inspection Panel highlighted three areas in particular where staff performance could or should have better followed operational guidelines 'rather than prepare an encyclopaedic review of all possible violations.'[137] These areas were participation of affected groups and local NGO's, supervision, and institutional strengthening. Concerning participation, the Panel stated:

> Both OD 4.01 on Environmental Assessment (previously OD 4.00 Annex A) and 4.30 on Involuntary Resettlement provide policy and procedural rules on the participation of affected people and local NGOs in the design and implementation of the different aspects of environmental assessment and resettlement and environmental protection and management plans. The lack of appropriate local participation is evidenced by not only the submission of the original Request for inspection and subsequent additional Request but also by the inadequacies of the assessment and plans noted elsewhere in this Report. This is indeed one of the major flaws in the operational handling of the project by Bank staff noted by the Panel.[138]

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133) Arun III Hydroelectric Project Request No R Q 94/1, Nepal. See the webpage of the Inspection Panel: Requests for Inspection, available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20232532~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (visited 16 January 2007).

134) D.L. Clark, (1999), *supra* note 126, at15.

135) Yacyretá Hydroelectric Project Request No RQ 96/2 Argentina/Paragyay; available at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20230192~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (visited 16 January 2007).

136) See Additional Request for Inspection, p. 1. at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/AdditionalRequestforInspection.pdf> (visited 16 January 2007). The claimant was an NGO called Sobrevivencia, dedicated to protecting the environment and the quality of life of indigenous, peasant and marginalized urban communities.

137) The Inspection Panel Office Memorandum, Panel Review and Assessment, p. 56, para. 248; available at: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/PanelReviewandAssessment.pdf> (visited 15 January 2007).

138) Panel Review Assessment, pp. 56–57, para. 249.

The World Bank, as a subject of international law and a specialized agency of the UN, has clear obligations concerning human rights.[139] These obligations are separate from and in addition to those of its members and apply to its internal and external operations.[140] As a subject of international law, the Bank is bound to respect norms of customary law, the general principles of international law and peremptory norms, including those pertaining to human rights.[141] These obligations are generally negative and neutral, requiring that the Bank refrain from violating human rights norms and respect the present level of international legal protection accorded to human rights.[142] The Bank is obligated not to undermine

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139) See F. MacKay, (2002), Universal Rights or a Universe Unto Itself? Indigenous Peoples' Human Rights and the World Bank's Draft Operational Policy on Indigenous Peoples, 17 *American University International Law Review* (2002) 527–624 generally and particularly at p. 580. It should be noted that the World Bank has no formal, written policy on human rights. OP 4.20 on Indigenous Peoples remains the only operational policy that explicitly mentions human rights. However, the World Bank has clearly acknowledged its role in the promotion and protection of human rights. See, for instance, Development and Human Rights: The Role of the World Bank, the International Bank for Reconstruction/ the World Bank 1998, Washington, D.C. The document is available at: <http://www.worldbank.org/html/extdr/rights/hrtext.pdf> (visited 29 May 2007).

140) See C.F. Amerasighe, *Principles of the Institutional Law of International Organizations*, Cambridge, Cambridge University Press, 1996, p. 229. Due to the fact that the World Bank has no formal, written policy on human rights. Consequently, attitudes toward human rights must be deduced from the statements of Bank officials, its publications, and practices. From these one can see that the Bank has made progress from rejection of human rights in the 1960s to cautious engagement in a few, defined areas. However, this engagement is still qualified by an arbitrary distinction between rights of a political nature and rights related to economic or social well being. See MacKay, F. (2002), *supra* note 139, at 539. In the words of MacKay: '[A]part from contradicting the accepted position that all human rights are indivisible and interdependent, a position accepted by the Bank itself, this classificatory scheme is justly characterized as ambiguous, ad hoc, arbitrary, and at times self-serving insofar as it appears that the Bank readily justifies reinterpreting its mandate to cover areas that it wishes to operate, while arguing that it is prohibited by its Articles from those areas it wishes to avoid.' See F. MacKay, (2002), *ibid*., p. 548. MacKay also points out that, especially in the case of indigenous peoples, economic, social and cultural rights are not easily separated from political rights. These rights are often fundamentally related to and intertwined with ownership and control of land, which is widely accepted as the basis of indigenous political, social, spiritual and cultural organization. F. MacKay, (2002), *Ibid*., p. 556. The World Bank differentiates between human rights that are considered civil and political rights and those that are considered economic, social, and cultural rights. The Bank has described its approach as follows: 'Except in situations where the violation of human rights has created conditions hostile to effective implementation of projects or has other adverse economic consequences, or where there are international obligations relevant to the Bank, such as those mandated by binding decisions of the U.N. Security Council, the World Bank does not take into account the political dimensions of human rights in its lending decisions. [. . .] Consistent with the Articles [of Agreement], the focus of the Bank's efforts in the area of human rights is on those rights that are economic and social in nature.' World Bank, Governance: the World Bank's Experience 53 (1994). The relevant section of the Articles of Agreement reads: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article 1.' World Bank Articles of Agreement, art. IV, sec. 10 (as amended Feb. 16, 1989); available at: <http://www.worldbank.org/html/extdr/backrd/ibrd/art4.html#I11> (visited 22 June 2007).

141) C.F. Amerasighe, (1996), *supra* note 140, at 240–247.

142) See S.I. Skogly, *The Human Rights Obligations of the World Bank and International Monetary Fund*, Cavendish Publishing Ltd., 2001, pp. 43–62.

the ability of its members to faithfully fulfil their international obligations or to facilitate or assist with violations of those obligations.[143]

The World Bank is an example of how the rights of indigenous peoples, particularly their right to culture and traditional way of life, can also have a positive impact on the state of the environment in cases where lands are occupied by indigenous peoples and are to be safeguarded from disastrous effects for the traditional way of life of indigenous peoples. Interestingly, the World Bank has also played an active role relating to the famous *Awas Tingni v. Nicaragua* case in the Inter-American Human Rights Court,[144] where Nicaragua was found to have violated the rights of the Mayagna community of Awas Tingni by granting a logging concession within the community's traditional territory without its consent. Significantly, the World Bank conditioned a financial aid package set for Nicaragua on the development by the government of a specific plan to demarcate the traditional lands of the Miskito and Mayagna communities.[145]

The fact that the World Bank has an obligation to respect and take into account the present level of international legal protection where the rights of indigenous peoples are concerned means that the Bank is also under an obligation to respect the environmental integrity that goes hand in hand with the cultural integrity of indigenous peoples. The right to culture of indigenous peoples is a widely recognized right in international law,[146] comprising, for example, the right to be protected from the harmful effects of economic or development-related projects of the states or third parties in the lands of indigenous peoples.[147]

Additionally and importantly, the right to culture of indigenous peoples, as applied by the UN Human Rights Committee, for instance, comprises the right to effective participation and meaningful consultation in decisions that affect indigenous communities.[148] This participation does not seem to signify a *veto*

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143) See G. Handl, 'The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development, 92 *American Journal of International Law* 642, 1998, 624–665, at 662.

144) *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment of August 31, 2001, *supra* note 102.

145) S.J. Anaya and R.A. Williams, 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System, 14 *Harv. Hum. Rts. J.*, 2001, 33–86, at 38.

146) Along with many other international instruments, two major human rights conventions recognize the right to culture. The International Convention on Civil and Political Rights (CCPR) (art. 27), which has been ratified by most of the global community. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 *United Nations Treaty Series* 171, adopted 16 December 1966, entered into force March 23, 1976. Status of ratification: 153; International Covenant on Economic, Social and Cultural Rights (CESCR) (art. 15.1.), res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 *United Nations Treaty Series* 3, adopted 16 December 1966, entered into force January 3, 1976. Status of ratification: 155.

147) See *supra* note 102.

148) Human Rights Committee, General Comment No. 23(50) concerning ethnic, religious and linguistic minorities, 6 April 1994, CCPR/C/21/Rev.1/Add.5 (1994) para. 7, *I. Länsman et al.* v. *Finland*, Communication No. 511/1992, views of 26 October 1994, paras. 9.5 and 9.6; available at: <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument> (visited 21 January 2007).

right for indigenous peoples in the decisions that affect their right to culture. 'Meaningful consultation' should, however, indicate a discussion in good faith so that the indigenous community in question has a real say in the matter. In this light the *free prior and informed consultation* recognized by the World Bank would seem to indicate at least the same level of participation as guaranteed by Article 27 of the CCPR. Free, prior and informed consultation, although not indicating a right of *veto*, should, according to the World Bank, result in broad community support for the project by the affected indigenous peoples, as maintained earlier in this section.

The Inter-American Commission on Human Rights seems to have gone even further than this. In finding a violation of the right to property, the Commission recognized that the State of Belize violated the right of the Maya people to property 'by granting logging and oil concessions to third parties to utilize the property and resources [...] in the absence of *effective consultations* with and the *informed consent* of the Maya people.'[149] Since the World Bank is committed to respect the rights of indigenous peoples by adhering to local legislation and international norms that a borrower state is bound to, the Bank-financed projects in the OAS[150] countries need to respect the rules of the American Declaration on the Rights and Duties of Man[151] and the American Convention on Human Rights,[152] when ratified. According to the rules and case practice of the Inter-American Human Rights system, informed consent is needed for third parties to establish economic or development-related projects on the lands of indigenous peoples.[153] Additionally, the World Bank is committed to the norms of ILO Conventions when ratified by the borrower country,[154] as mentioned. ILO Convention 169 also guarantees an extensive right to participation,[155] although not indicating a right of *veto*.

In this light, it can be seen how the human rights of indigenous peoples direct the operations and official policies of international organizations such as the World Bank towards a more respectful relationship not only with indigenous

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149) *Maya Indigenous Communities of the Tolero Distric (Belize Maya)*, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para. 194, emphasis added; available at: <http://www1.umn.edu/humanrts/cases/40-04.html> (visited 22 January 2007).

150) Organization of American States.

151) American Declaration of the Rights and Duties of Man ('American Declaration'), Organization of American States (O.A.S.), adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82 doc.6 rev.1 at 17 (1992).

152) American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, adopted 22 November 1969, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

153) See also *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua, supra* note 102.

154) As mentioned earlier, ILO Convention No. 169 replaces the earlier Convention No. 107 (26 June 1957, 328 UNTS 247), which is still in force until the country ratifies the later convention.

155) See articles 6 and 7.

peoples but the environment as well. As mentioned, the Bank has indeed recognized 'the vital role that Indigenous peoples play in sustainable development and that their rights are increasingly being addressed under both domestic and international law.'[156]

6. Possible Contradictions between the Protection of the Rights of Indigenous Peoples and the Conservation of Vulnerable Animal Species

While indigenous peoples have often been viewed as ideal nature conservationists, it is important to recognize that not all indigenous lifestyles are necessarily compatible with environmental conservation. Indigenous communities have certainly actively used and developed nature for subsistence and cultural purposes, yet practices such as hunting, religious ceremonies and harvesting of natural resources may conflict with environmental legislation, especially that concerning protection of endangered wildlife. Additionally, there are examples where indigenous peoples resist the establishment of national parks and other conservation initiatives. The integrity and relevance of indigenous peoples' environmental values are also affected by the fact that many no longer reside in tribal structures or subsist directly off the land, a circumstance often but not always due to their historical displacement from their traditional lands.[157] As pointed out by Richardson, the environmental practices of indigenous peoples vary greatly across communities and regions, and 'just as we need to reject offensive stereotyped assessments of historically colonized populations, so today we must eschew romantic generalizations of indigenous peoples that overlook areas of ambivalence.'[158]

The following sections look at two international legal regimes that show how environmental sustainability and the protection of the rights of indigenous peoples do not necessarily always go hand in hand, or, at least, without seeds of conflict. Both the International Whaling Regime and the Polar Bear Regime have as their main purpose to protect animal species that are in danger due to overharvesting and other factors. Both of these regimes, while protecting the natural environment, guarantee the rights of indigenous people to harvest these species on a cultural basis.

6.1. *The International Whaling Regime*

The first Convention for the Regulation of Whaling[159] was established in 1931 after the collapse of what had been an over-exploitative whaling industry. The

156) OP 4.10, para. 2.
157) B.J. Richardson, (2001), *supra* note 71, at 3–4.
158) *Ibid.*
159) 'The Convention for the Regulation of Whaling was signed at Geneva, 24 September 1931, entered

protective measures in this Convention were, however, very limited, only prohibiting extreme waste, for instance, taking nursing females and their calves of specific species and banning outright the killing of specific species.[160]

The Convention contained the first formal recognition of aboriginal subsistence whaling in article 3, stating that the Convention does not apply to coastal dwelling aborigines, provided that they used canoes, pirogues or other exclusively native craft propelled by oars or sail; they did not carry firearms, and the products were for their own use.[161]

The 1931 Convention was superseded in 1937 by the Agreement for the Regulation of Whaling and then in 1946 by the International Convention for the Regulation of Whaling,[162] which was established for the purpose of protecting whale populations from excessive whaling.[163]

Aboriginal subsistence whaling was recognized in the first Schedule to the 1946 Convention by a specific exception to the general ban on the commercial catching of grey and right whales when the meat and products are to be used exclusively for 'local consumption by the aboriginal people'.[164] Over the next decades, subsequent requests for aboriginal subsistence whaling for other whale species or stocks have been handled in a similar way.[165]

The purpose of the latest treaty, which superseded previous agreements, was to manage sustainable whale stocks, an aim similar to that found in the previous instruments. However, it is worth noting that this was the first time that an international whaling agreement gave priority to the conservation of whales over the interests of industry.[166]

The 1946 Convention established the International Whaling Commission (IWC) to regulate whaling. The primary authority of the IWC is the power to set a whaling schedule. The main duty of the IWC is 'to keep under review and revise as necessary the measures laid down in the Schedule to the Convention which governs the conduct of whaling throughout the world.'[167] In addition to the fact

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into force, 16 January 1935, L.N.T.S. CLU. No. 3586; available at: <http://www.wdcs.org/dan/publishing.nsf/allweb/0AF25C30FC2DD768802569EC004B79D5> (visited 1 July 2007).

160) L. Watters, and C. Dugger, The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling, 22 *Columbia Journal of Environmental Law* (1997): 319–352, at 326.

161) The Convention for the Regulation of Whaling, Article 3.

162) International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

163) J. Paul, Cultural Resistance to Global Governance, 22 *Michigan Journal of International Law* 1, 2000, 1–84, at 58.

164) Para. 13 of the Schedule, at: <http://www.iwcoffice.org/commission/schedule.htm> (visited 30 May 2007).

165) See A. Gillespie, Aboriginal Subsistence Whaling: A Critique of the Inter-relationship between International Law and the International Whaling Commission, 12 *Colorado Journal of International Environmental Law and Policy*, 2001, 77–139, at 80.

166) See L.Watters and C. Dugger, (1997), *supra* note 160, at 327.

167) 'These measures, among other things, provide for the complete protection of certain species; designate specified areas as whale sanctuaries; set limits on the numbers and size of whales which may be taken;

that for almost thirty years, a strong majority of IWC members have been non-whaling countries,[168] the IWC's approach to whaling began to change in the 1970's due to the growing awareness of the decline of whales.[169] Some member nations that had originally been strong proponents of whaling started to emphasize conservation.[170] In 1981, IWC membership increased 30 %.[171] New members generally favoured preservation, and therefore the decisions of the IWC started reflecting conservationist concerns instead of economic maximization.[172] The addition of more non-whaling members eventually collected enough votes for a moratorium on commercial whaling in 1982.[173]

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prescribe open and closed seasons and areas for whaling; and prohibit the capture of suckling calves and female whales accompanied by calves. The compilation of catch reports and other statistical and biological records is also required. In addition, the Commission encourages, co-ordinates and funds whale research, publishes the results of scientific research and promotes studies in related matters such as the humaneness of the killing operations. See IWC home page at: <http://www.iwcoffice.org/commission/iwcmain.htm> (visited 6 September 2007). The IWC is composed of one representative from each member nation. The representatives are entitled to participate in IWC decision-making. See also L. Watters and C. Dugger, (1997), *supra* note 160, at 327. In 1946, most of the members were from commercial whaling countries. See W.T. Burge, *The New International Law of Fisheries,* Clarendon Press, Oxford, 1994, p. 285. In the beginning, the whaling regulation was thus rather ineffective, because pressure to increase whaling quotas led to a situation where the IWC disregarded scientific evidence concerning whale populations. (*Ibid.*, p. 298.)

168) W.T. Burge. (1994), *ibid.*, p. 285.

169) A. D'Amato, and S. Chopra, Whales: Their Emerging Right to Life, 85 *American Journal of International Law*, 1991, 21–62, at 38. This change has come along with new developments in international environmental law, including an increasing recognition that marine natural resources are the common heritage of mankind. See P.W. Birnie & A.E. Boyle, *International Law and the Environment*. New York, Oxford University Press, 1992 p. 424. To consider whales as the common heritage of mankind has been also criticized from the perspective of Aboriginal whaling. Doubleday states that 'to take whales and to declare that they are the "common heritage of mankind" and therefore would not be hunted by people who have depended on them and whose culture is based on that hunt, is a kind of intellectual imperialism closely related to the historical imperialism to which indigenous peoples have already lost so much.' (See N.C. Doubleday, Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law, 17 *Denver Journal of International Law and Policy*, 1989, 373–393, at 392.

170) A. D'Amato and S. Chopra, (1991), *supra* note 169, at 44.

171) *Ibid.*, referring to the IWC/33d Mtg./1981, Chairman's Report, pp. 17–42.

172) C.T. Bright, The Future of the International Whaling Commission: Can We Save the Whales? 5 *Georgetown International Environmental Law Review*, 1993, 815–854 , at 820.

173) See International Whaling Commission at: <http://www.iwcoffice.org/conservation/catches.htm> See also A. D'Amato, and S. Chopra, (1991), *supra* note 169, at 46. Over the last four centuries whaling has reduced the populations of different sub-species of whales to the point where many sub-species are now endangered. Britain, France, Germany, Japan, the United States, and Russia have all contributed to the dramatic reduction of whale stocks. (See generally H.N. Scheiber, Historical Memory, Cultural Claims and Environmental Ethics, in H.N. Scheiber, (ed.), *The Law of the Sea*, Kluwer 2000, pp. 127–166.) During the last century, Norway has been the leading whaling nation. (See J.R. Paul, (2000), *supra* note 163, at 57.) The moratorium on Whaling was pushed by Britain, France, the Netherlands and the Seychelles. Japan, Peru, Norway, Iceland, and the Soviet Union opposed the ban, which passed with large support. See Thirty-fourth Report of the International Whaling Commission, IWC, 34th meeting 1982.

6.1.1. *Aboriginal Subsistence Whaling*

Since the moratorium, there have been two exceptions when whaling has been allowed. The first is the scientific research exemption, and the second is the aboriginal subsistence exemption. The scientific research exemption allows a member nation to grant itself a 'scientific research' permit authorizing a whale kill regardless of IWC regulations. Additionally, the Convention allows each country to exercise its own discretion when issuing such permits. Some countries, such as Iceland, Japan and Norway have used this exemption to continue their commercial whaling activities.[174]

In contrast, in order to obtain a quota under the aboriginal subsistence exemption, a member nation must petition the IWC for an exception to the ban for indigenous communities that hunt certain species. According to the IWC, it is the responsibility of national governments to provide the Commission with evidence of the cultural and subsistence needs of their people.[175]

The IWC has recognized that the nature of aboriginal subsistence whaling is different to that of commercial whaling. This is reflected in the different objectives of the two. According to the IWC, the objectives of aboriginal whaling are to 'ensure that risks of extinction are not seriously increased (highest priority); enable harvests in perpetuity appropriate to cultural and nutritional requirements; maintain stocks at highest net recruitment level and if below that ensure they move towards it.'[176]

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174) See P.W. Birnie and A.E. Boyle (1992), *supra* note 169, at 455. The ICRW provided that any government that files a timely objection to an amendment to the whaling schedule is exempted from the amendment. (Article V of the ICRW) Norway, Japan and the Soviet Union all objected to the moratorium and were therefore not legally bound by it. (See J. Paul, (2000), *supra* note 163, at 58.) In addition, the ICRW provided that notwithstanding any restriction on whaling, a party could authorize its nationals to engage in whaling for the purposes of 'scientific research' subject to limits imposed by the state party (Article VIII of ICRW). Since then, each year the pro-whaling countries have disregarded the moratorium while fighting unsuccessfully to overturn it within the IWC. (See J. Paul, (2000), *supra* note 163, at 58.) Iceland withdrew from the IWC in 1992 and has refused to comply with the moratorium. (See W.C. Burns, The International Whaling Commission and the Future of Cetaceans: Problems and Prospects, 8 *Colorado Journal of International Environmental Law and Policy*, 1997, 31–88, at 48.) Despite worldwide condemnation, economic sanctions, and diplomatic pressure, Norway and Japan have continued commercial whaling operations at approximately the same rate as before the worldwide moratorium. (See J.Paul, (2000), *supra* note 163, at 60.)

175) See International Whaling Commission, Aboriginal Subsistence Whaling, at: <http://www.iwcoffice.org/conservation/aboriginal.htm> (visited 6 October 2007).

176) International Whaling Commission, Aboriginal Subsistence Whaling, at: <http://www.iwcoffice.org/conservation/aboriginal.htm> (visited 2 July 2007). The catch limits to satisfy aboriginal subsistence need are established in accordance with certain principles. For stocks above the maximum sustainable yield (MSY) level, aboriginal subsistence catches are permitted up to 90 % of MSY; for stocks below the MSY level, catch levels are set so as to permit the stocks to rebuild to the MSY level; and the Scientific Committee was asked to advise on both a rate of increase towards the MSY level and a minimum stock level below which whales should not be taken from each stock. See R. Gambell, (Secretary to the International Whaling Commission), *Whaling in the North Atlantic – Economic and Political Perspectives*, University of Iceland, 1997, ISBN 9979-54-213-6. Proceedings of a conference held in Reykjavik on March 1st, 1997,

The IWC has recognized that the full participation and co-operation of the affected aboriginal peoples is essential for effective whale management.[177] Under current IWC regulations, aboriginal subsistence whaling is permitted for Denmark (Greenland, fin and minke whales), the Russian Federation (Siberia, grey and bowhead whales), St. Vincent and the Grenadines (Bequia, humpback whales) and the United States (bowhead and grey whales).[178] It should be noted, however, that there are also ongoing aboriginal subsistence hunts not subject to IWC management. Examples can be found in Guinea, Indonesia, the Philippines and Canada.[179]

The IWC is currently developing an Aboriginal Whaling Management Scheme (AWMS). The AWMS has two components: the quota-setting mechanism, which has now been developed for almost all the stocks concerned, and a supervision and control scheme to establish how aboriginal subsistence whaling will be managed in the future.[180] The IWC has been criticized for not making enough progress on the latter, including solutions as to how to document and evaluate needs and ensure compliance with catch limits and reporting requirements.[181] Until the AWMP is completed the Committee will provide advice on a mere *ad hoc* basis, carrying out major reviews according to the needs of the Commission in terms of establishing catch limits and the availability of data. It also carries out brief annual reviews of each stock.[182]

6.1.1.1. Criteria for Aboriginal Subsistence Whaling

Aboriginal subsistence whaling was defined in 1981 by the IWC as whaling 'for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.' Additionally and importantly, it was noted that the IWC considered 'local aboriginal consumption to embrace the use of whale products for nutritional, subsistence and cultural requirements' as well as trade in 'by-products of subsistence catches'.[183]

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organized by the Fisheries Research Institute and the High North Alliance, p. 2. The article is available at: <http://www.highnorth.no/library/Publications/iceland/re-de-in.htm> (visited 18 October 2007).

177) R. Gambell, *ibid.*

178) International Whaling Commission, Aboriginal Subsistence Whaling, available at: <http://www.iwcoffice.org/conservation/aboriginal.htm> (visited 2 July 2007).

179) See R.R. Reeves, 'The origins and character of 'aboriginal subsistence' whaling: a global review', *Mammal Rev.* 32 (2002), 2, 71–106, at 86–96. Canada withdrew from the IWC in 1982 but continues to allow aboriginal subsistence whaling for bowhead whales. See R.R. Reeves, (2002) and IWC (1997), Chairman's report of the forty-eighth annual meeting. Reports of the International Whaling Commission, 47, pp. 17–55.

180) See IWC, available at: <http://www.iwcoffice.org/conservation/aboriginal.htm> (visited 15 September 2007).

181) Whale and Dolphin Conservation Society (WDCS), Aboriginal subsistence Whaling, available at: <http://www.wdcs.org/> (visited 21 February 2008).

182) *Ibid.*

183) G.P. Donovan, 'The International Whaling Commission and aboriginal/subsistence whaling: April

The Aboriginal Subsistence Whaling (ASW) Sub-Committee of the IWC was established to consider documentation on nutritional, subsistence and cultural needs relating to aboriginal subsistence whaling and the uses of whales taken for such purposes, and to provide advice to the Technical Committee for its consideration and determination of appropriate management measures.[184] 'Subsistence' has been defined by the IWC's Cultural Anthropology Panel as including whale hunts conducted to support 'the personal consumption of whale products for food, fuel, shelter, clothing, tools, or transportation by participants in the whale harvest.'[185] This definition has been interpreted to mean firstly that ASW hunts must be non-commercial[186] and, secondly, that the hunts must be local in nature.[187]

1979 to July 1981. Reports of the International Whaling Commission, 4 (Special Issue), pp. 79–86, part. 83. After consideration of the many biological, nutritional and social aspects involved, the 1982 Annual Meeting of the IWC adopted a Resolution agreeing to implement an aboriginal subsistence whaling regime. See IWC 1983, Chairman's Report of the Thirty-Fourth Annual Meeting, Report of the International Whaling Commission 33: 20–42, at 28–29, 38. The definition can be found also at: <http://www.highnorth.no/library/Culture/de-of-ab.htm> (visited 9 July 2007). The IWC still remains implicitly committed to these working definitions. See R.R.Reeves, , *supra* note 179, at 76.

184) International Whaling Commission. 1983. Chairman's Report of the Thirty-Fourth Annual Meeting. Report of the International Whaling Commission, pp. 28–29, 38, 40.

185) R. Cambell, The Bowhead Whale Problem and the International Whaling Commission, Report of the International Whaling Commission, Special Issue No 4, at 49, Office of the Commission (1982).

186) Already in the 1931 Convention for the Regulation of Whaling, Aboriginal hunts were allowed only if 'they are not in the employment of persons other than aborigines [… and] they are not under contract to deliver the products of their whaling to any third person' (art. 3). More recently, the requirement of IWC concerning the non-commercial nature of Aboriginal whaling has been emphasized due to continued concern over threatened stocks and the possibility that the current moratorium may be eroded if a commercial element is introduced into ASW. Accordingly, most ASW applications have sought to exclude commercial elements from their request to hunt. See A. Gillespie (2001), *supra* note 165, at 106–107.

187) See A. Gillespie, (2001), *supra* note 165, at 106. According to the ASW requirements, the utilization of whales has to be done on a local scale as expressed in the first Schedule to the 1946 Convention. This restriction was put forward and emphasized when countries that allowed the hunting of fully protected grey and right whales were asked to make sure that they were being consumed only locally by aborigines. See Sixteenth Meeting of the IWC, Office of the Commission (1964), at §16. The Cultural Anthropology Panel has given a definition of local use. According to the Panel, local use includes 'the barter, trade, or sharing of whale products in their harvested form with relatives of the participants in the harvest, with others in the local community or with persons in locations other than the local community with whom local residents share familiar, social, cultural, or economic ties.' R. Gambell, (1982), *supra* note 185, at 49. Despite this clear definition, evidence has emerged that whale meat has not been used exclusively locally but in some cases has been distributed regionally, nationally or even internationally. A.Gillespie (2001), *supra* note 165, at 109–110. Gillespie refers to evidence that has emerged suggesting that the local quota of humpback whales in St. Vincent and the Grenadines has formed part of the island's international trade. The islands were the object of a rebuke from the IWC. In the Forty-First Meeting of the IWC, Australia brought to the IWC's attention that 'St. Vincent and the Grenadines had entered a specific reservation in CITES which would allow it to engage in international trade in humpback whale products.' The Report of the Forty-First Meeting of the IWC, Office of the Council (1989), p. 26. In Greenland and in Alaska, whale meat is not used exclusively locally either. See A. Gillespie, (2001), *supra* note 165, at 109–110.

In order to get support for claims based solely on 'nutritional need', indigenous peoples often have had to prove that there are few practical nutritional alternatives to whale meat for their population.[188] This idea of alternatives was formulated during the proceedings of the 1979 Nutritional Panel, which examined the Eskimo request to hunt the bowhead whales. The Panel focused upon two considerations, of which the first was the importance of the bowhead in the traditional diet and the second the possible adverse effects of shifts to non-native food and the acceptability of other food sources.[189]

When basing their claim on 'nutritional need', applicants under the ASW category have been required to demonstrate nutritional need using either biological criteria (hunger and lack of nutritional alternatives) or social and psychological criteria (culture and poverty),[190] of which the first has been successful only in two cases: the Greenlandic Inuits and the Chukotka people in the Russian Federation.[191] The key issue in both of these cases was that hunger would result if these ASW claims were not approved. However, at least in the Chukotka case, the legitimacy of the pure biological need was questionable, since it soon turned out that the former Soviet Union manipulated the ASW system by taking large portions of the ASW harvest as feed for foxes on state-owned fur farms.[192]

ASW claims have also been based on both nutritional and cultural needs at the same time. For instance the Makah people of Washington State built their request for an ASW exception on both bases. Sones, a member of the Makah tribe, for instance, argues that 'since we [Makah people] started to buy much of our food in the grocery stores, illnesses like heart diseases, cancer and diabetes have been introduced to our society.'[193] The Needs Statement for the Makah's whale hunting

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188) *Ibid.* For more on the nutritional requirement see Gillespie, A, (2001), *supra* note 165, at 99–105.

189) See Report of the Thirty-First Meeting of the International Commission on Whaling, Office of the Commission, (1979), app. 4. See also A. Gillespie, (2001), *supra* note 165, at 101.

190) A. Gillespie, (2001), *supra* note 165, at 101.

191) In Thirty-Third Meeting of IWC, Greenland argued that although a multi-species hunting strategy had been adopted, the nutritional needs of the indigenous people did not easily permit the substitution of other species. (See Report of the Thirty-Third Meeting of the International Commission on Whaling, Office of the Commission (1981), at § 12.5.) The second example of a nutrition claim related to biological need comes from the hunt of the Chukotka aboriginal people. There, the extreme natural conditions of the Asian far north dictate specific food needs of the aboriginal people. In this case, the lack of an alternative food source was a clear and justified claim based on biological need. (See The Report of the Forty-Eighth Meeting of IWC, Office of the Commission (1996), at 157.)

192) See E. Sander, *Whales for Foxes in the Arctic Circle, Inuit Whaling*, published by the Inuit Circumpolar Conference, June 1992. The article is available at: <http://www.highnorth.no/Library/Hunts/Other/wh-fo-fo.htm> (visited 19 October 2007). This issue came up in the Forty-Eighth Meeting of the IWC. See the Report of the Forty-Eighth Meeting of IWC 21, Office of the Commission (1996), p. 26. The Russian Federation, however, assured, that by the late 1990s it had stopped this practice. See the Report of the Forty-Ninth Meeting of the IWC, Office of the Commission (1997), p. 28.

193) D. Sones, *The Makah Indians: Keeping Their Culture Alive*, The International Harpoon, No. 4, The High North Publication, 1995, published during the 1995 Annual Meeting of the International Whaling Commission. This quotation can be found in the summary of the article, pp. 1–2, available at: <http://www.highnorth.no/Library/Hunts/Makah/th-ma-in.htm> (visited 20 September 2007).

tries to illustrate many interconnections between genetics, physiological processes and nutrition-related diseases.[194] The nutritional needs of the Makah have also been linked to the issue of poverty, the argument being that the whale meat will help the nutrition of the Makah tribe.[195]

In a similar vein, for example in the case of St. Vincent and Grenadines, despite the fact that the applicants originally suggested that their hunt was cultural rather than nutritional in character,[196] they later claimed that whale meat is a significant contribution to the diet of St. Vincent and the Grenadines due to general poverty.[197]

The wider recognition of the cultural value of whaling to indigenous peoples started to emerge with the debate concerning the protection of the bowhead whale in the late 1970s.[198] The IWC requested the Cultural Panel to analyze the cultural activities and cultural identity of the aboriginal people and the relationship of this harvest to their well being.[199] In response, the Cultural Panel, stressing the high significance of the whaling activities to the culture of the Inuits of Alaska, stated:

> [W]haling and associated activities [a]re perhaps the most important single element in the culture and society of north Alaskan whale hunting communities. It provides a focus for the ordering of social integration, political leadership, ceremonial activity, traditional education, personality values, and Eskimo identity [...] [T]he position of whaling as a pivotal, cultural activity and the extremely high valuation placed on bowhead whale products as food makes such replacement impossible.[200]

Other indigenous groups applying for ASW status have also started to increasingly highlight the 'cultural need' of whaling activities instead of their nutritional importance. In the case of the Greenlandic Inuit, for instance, it has been claimed that the exchange of whale products reinforces the Inuit identity and that whale meat is central to kin-based practices of whaling, and it binds hunters, families

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194) See A.M. Renker, Whale Hunting and the Makah Tribe: A Needs Statement, IWC/59/ASW9, Agenda item 6. The document is available at: <http://www.iwcoffice.org/_documents/commission/IWC59docs/59-ASW%209.pdf> (visited 20 October 2007).

195) See the Report of the Forty-Ninth Meeting of the IWC, Office of the Commission (1997), p. 29.

196) See the Report of the Forty-Second Meeting of the IWC, Office of the Commission (1990), p. 31.

197) See the Report of the Fifty-First Meeting of the IWC, Office of the Commission (1999) at § 11.2.2. For the discussion of the poverty requirement, see A. Gillespie (2001), *supra* note 165, pp. 103–105. Gillespie finds the justification of nutrition in terms of social, psychological or cultural importance troublesome, since '[t]he social need approach may provide an open door for claims from almost any group occupying a lower socio-economic position. Moreover, given that the IWC does not have a mechanism by which all the signatories can evaluate the economic status of applicant groups, psychological, social and cultural need-based claim evaluation could become a very arbitrary process.' See A. Gillespie (2001), *supra* note 165, at 105.

198) A. Gillespie (2001), *supra* note 165, at 114.

199) R. Gambell, Recent Developments in the IWC Aboriginal Subsistence Whaling Category, in: G. Petursdottir, (ed.), *Whaling in the North Atlantic: Economic and Political Perspectives*, University of Iceland, 1997, p. 4.

200) R. Gambell, (1982), *supra* note 185, at 35.

and communities together.[201] This reflects the general development of international law concerning the rights of indigenous peoples, where the right to culture is nowadays widely recognized.

There are thus seemingly three separate elements that form the basis of 'aboriginal need' under the IWC category: subsistence, nutritional, and cultural needs. In practice, however, the 'subsistence requirement' seems to be a kind of main category, including 'food' by definition, whereas nutritional and cultural needs are subcategories to 'Aboriginal Subsistence Whaling', which are closely connected to each other. Interestingly, and going against the UN Human Rights Committee in interpreting Article 27 of the International Covenant on Civil and Political Rights (CCPR), ratified by most of the world's states, the IWC seems to somewhat artificially distinguish cultural from subsistence and nutritional issues. Traditional livelihoods, means of subsistence – including traditional diet – are seen as an integral part of indigenous culture under Article 27. The UN Human Rights Committee does not exclude commercial elements; on the contrary, it emphasizes the economical viability of a livelihood as a material criterion of the fulfilment of article 27.[202]

On a first reading of the statements of the IWC, it seems as if the cultural value of whaling to indigenous peoples would not seem to be enough; the whaling must also be justified on nutritional or subsistence grounds. This division seems to be only an artificial one, however, since in the practice of the IWC nutritional issues can be linked with cultural need, and subsistence includes both aspects. The cultural need seems to have received weight along with the growing international recognition of the cultural rights of indigenous peoples. Therefore, at present, Aboriginal subsistence whaling can be regarded as a cultural claim of indigenous peoples. It is an exemption granted solely to indigenous peoples, not to other groups, despite the fact that other groups, as will be pointed out in the next chapter, have tried to prove that whaling has a particular cultural, subsistence and nutritional significance for them. The fact that the IWC has started increasingly to recognize and emphasize the cultural value of whaling, instead of nutritional need, reflects the present rules of international law, according to which

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201) See R. Caulfield, *Greenlanders, Whales and Whaling: Sustainability and Self-Determination in the Arctic*, Dartmouth College, 1997, pp. 1–3. In the similar vein, for instance concerning communities in St. Vincent and the Grenadines or the Makah in Washington State, the cultural significance of whaling is much emphasized. See for instance A. Gillespie (2001), *supra* note 165, pp. 115–116.

202) See for instance *I. Länsman* v. *Finland*, Communication No. 511/1992, views of 26 October 1994; available at: <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument> (visited 21January 2007). The Committee 'recalls that the economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community.' (Para. 10.2.) For the same thing, see also *J. and E. Länsman et al.* v. *Finland,* Communication No. 1023/2001. U.N.Doc. CCPR/C/83/D/1023/2001 (2005), para. 10.1.-10.3.; available at: <http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fa24fc7cd513751bc1256fe900525608?Opendocument> (visited 21 January 2007).

the right to culture and traditional livelihoods of indigenous peoples have a well-established and profound status.

6.1.1.2. The Complexity of the Cultural Exemption – The Case of the Makah

The case of the Makah people is an interesting example of the complexity of the cultural exception for Aboriginal whaling, which has attracted a powerful resistance from many directions.[203] The Makah are an indigenous people living in Neah Bay, Washington State.[204] The Makah hunted grey whales for centuries, and in 1855 ceded certain lands to the US Federal Government and agreed to relocate to a reservation in exchange for a treaty that acknowledged their right to fish and hunt whales and seals.[205] Around the turn of the century, the Makah voluntarily ceased whaling as a result of the radical decline of the grey whale population due to extensive commercial whaling.[206]

The decline of whaling left the tribe with few other economic possibilities. Even in recent days, the Makah tribe has faced problems related to unemployment, including many social problems.[207] Since the grey whale population has recovered after the international whaling moratorium and is no longer listed as an endangered species, many members of the Makah people have wanted to return to whaling to restore a part of their culture, which they feel was taken from them.[208] Besides its cultural value, Makah believe in the nutritional importance of whale meat as mentioned in the previous section.

The Makah's plan to revitalize the tradition that was broken almost one hundred years ago has faced fierce opposition from many quarters. In the IWC's annual meeting of 1996, when the United States put forward a proposal on behalf of the Makah Tribal Council to kill five grey whales off the coast of Washington state, both conservation organizations and conservation-minded countries immediately called on the United States to withdraw its proposal; one of the main arguments was that Makah whaling did not fulfil the aboriginal subsistence criteria, which requires not only subsistence needs but also continuing traditional dependence on whaling. Resistance came not only from the US itself – in the form of a congressional resolution passed by the House Committee on Resources – and environmental organizations, but also from two active members of the Makah community participating in the annual meeting of the IWC as observers who

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203) J.R. Paul, (2000), *supra* note 163, pp. 67–73.

204) See the website of the Makah people at: <http://www.makah.com/> (visited 24 October 2007).

205) See Treaty of Neah Bay, Jan. 31, 1855 at <http://explorenorth.com/library/weekly/more/blMakahTreaty.htm> (visited 15 October 2007).

206) Makah whaling declined in 1915, when the large scale commercial practices of others brought the grey whale to the brink of extinction. See L.Watters, & C. Dugger, (1997), *supra* note 160, at 323.

207) *Ibid.*

208) K. Johnson, *An Open letter To The Public From The President Of The Makah Whaling Commission*, August 6th, 1998, available at: <http://cnie.org/NAE/docs/makaheditorial.html> (visited 15 September 2007).

publicly opposed the Makah's whaling plan, declaring that the hunt was not overwhelmingly supported by the tribe itself.[209]

In 1997, the Makah case was brought back to IWC annual meeting. The United States used a different tactic in which the United States and the Russian Federation agreed to submit a joint request for a five-year quota of 620 grey whales on behalf of their aboriginal peoples, with the understanding that the average annual harvest of the Chukotka people would be 120, while the Makah would be limited to an average of four whales per year.[210] The joint request was facilitated by a decision of the United States to side with Russia in its desire to gain an annual aboriginal subsistence quota of bowhead whales for its Chukotka people, a quota that had previously been allocated only to Inuit in Alaska. What actually took place was a trade between the United States and Russia of their existing quotas, and accordingly, no decision was made on the legitimacy of the specific Makah application.[211] As pointed out by Gillespie, this is problematic given the amendments to the schedule of the Whaling Convention for grey whales in 1997, which were granted to 'aborigines whose traditional aboriginal subsistence and cultural needs have been recognised.'[212]

One major reason for some environmental organizations to resist the revitalization of Makah whaling has been a continuous worry that the Makah tribe is planning to sell whale meat to Japanese markets. They oppose a commercial hunt because of the precedent it would set for other whaling nations. Sea Shepherd[213] cites a statement and two documents from 1995 to support this assertion. Hubert Markishtum of the Makah Tribal Council wrote in 1995 that '[The Makah] continue to strongly believe that we have a right under the Treaty of Neah Bay to harvest whales not only for ceremonial and subsistence purposes but also for commercial purposes.'

Sea Shepherd also cites two memoranda from 1995, the first an acknowledgment from the Makah's lawyer that the Japanese had spoken to the Makah about

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209) Cetacean Society International, Whales Alive! Vol. V, No. 3, July 1996, at: http://csiwhalesalive.org/csi96301.html> (visited 16 September 2007). See also Watters, L. & Dugger, C. (1997), *supra* note 160, at 334.

210) J. Firestone and J. Lilley, Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs, *Journal of International Wildlife Law and Policy*, 8, 2005, 177–219, pp. 198–199.

211) See A. Gillespie (2001), *supra* note 165, at 88–89.

212) See The Report of the Forty-Ninth Meeting of the International Commission on Whaling, 55, Office of the Commission (1997), p. 50. See A. Gillespie (2001), *supra* note 165, at 89. Gillespie points out that this 'usurpation' of the Aboriginal Subsistence Whaling Sub-Committee's power and obligation to examine the merits of individual ASW applications may be regarded as the first major difficulty arising from the ASW category. *Ibid.*, at 89.

213) Sea Shepherd is an environmental NGO with a mandate to protect marine mammals and conservation with the immediate goal of shutting down illegal whaling and sealing operations, but also including the protection of other marine wildlife. See at: <http://www.seashepherd.org/about-sscs.html> (visited 16 October 2007).

purchasing whale meat, and the second a discussion of Makah plans to build an international business selling sea mammal meat (a processing plant was proposed along with hunts of grey and minke whales, seals, sea lions, porpoises and sea otters).[214] Despite possible preliminary plans, the Makah have so far agreed not to sell the meat from their hunt, but have not exclusively abandoned their right to commercial hunting.[215] An open letter to the public from the president of the Makah Whaling Commission in 1998 nevertheless strongly affirms that Makah people will not sell any whale meat.[216]

Besides the fears of commercial purposes, the opponents of Makah whaling have had difficulty accepting the premise that a Makah whale hunt is a necessary 'subsistence' activity since the Makah have already lived without whale meat for so long.[217] The cultural revitalization has been seen as problematic also for those who do not necessarily oppose Makah whaling but examine the issue critically. It has for instance been pointed out that cultural revitalization is not considered sufficient justification under the original ASW applications, because the IWC requires a continuous tradition.[218] On the other hand, there are scholars who argue that cultures in other contexts have been revived and, accordingly, it is unfair to deny the Makah the right to revive their subsistence when that practice was cut short in large part because widespread commercial whaling had reduced the population of grey whales almost to extinction.[219]

Interestingly, for the United States, the Makah whaling issue has seemed to be primarily a question of the traditional treaty rights of the Makah. In the 1997 annual meeting of the IWC, a US commissioner to the IWC said, 'The United States has fulfilled its moral and legal obligation to honour the Makah's treaty rights. The right to conduct whaling was specifically reserved in the 1855 U.S.-Makah Treaty of Neah Bay.'[220] Therefore, the Makah exemption distinguishes

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214) Letter from Hubert Markishtum (Chair, Makah Tribal Council) to National Marine Fisheries Service, 5 May, 1995, as quoted on the website of the National Council for Science and the Environment, Native Americans and the Environment, The Makah Whaling Conflict, Arguments against the Hunt, at: <http://www.cnie.org/NAE/cases/makah/m5.html.> (visited 16 October 2007). The same quotations can be found in J. Firestone, and J. Lilley, (2005), *supra* note 210, at 208.

215) National Council for Science and the Environment, Native Americans and the Environment, The Makah Whaling Conflict, Arguments against the Hunt, available at: <http://www.cnie.org/NAE/cases/makah/m5.html.> (visited 16 October 2007).

216) An Open Letter To The Public From The President Of The Makah Whaling Commission, August 6th, 1998, available at: <http://cnie.org/NAE/docs/makaheditoral.html> (visited 24 October 2007).

217) J. Firestone and J. Lilley (2005), *supra* note 210, at 209–210.

218) A. Gillespie, (2001), *supra* note 165, at 122. Gillespie points out, however, that the Chukotka people have also revived their whaling culture after first being curtailed by policies of the former Soviet Union. Furthermore, he points to the fact that the St. Vincent and the Grenadines' whaling tradition has a history of only about 100 years. (*Ibid.*, pp. 121–122.)

219) *Ibid.*

220) U.S. Delegation News Release, 10/23/97, at: <http://www.publicaffairs.noaa.gov/pr97/oct97/iwc2.html> (visited 16 October 2007).

itself from other ASW applications and prompts the question whether its legitimacy has a legal rather than a cultural basis.[221] Instead of providing the IWC with evidence of the cultural and subsistence needs of Makah, as should have been done according to the rules of practice of the IWC,[222] the United States traded off quotas with the Russian Federation and publicly argued the Makah exemption as the fulfilment of their treaty rights that the United States needed to honour.

The Makah exemption has also met with resistance due to the fear that it broadens the aboriginal subsistence exemption. For instance, since the Makah plan, thirteen Canadian tribes have claimed a similar treaty right to hunt grey whales.[223]

In addition, some opponents of Makah whaling have also argued that Japan and Norway will be able to use Makah whaling to return to their own 'whaling traditions.' The Makah have essentially expanded the IWC definition of a 'subsistence' hunt by returning to whaling after seventy years without it. Japan and Norway might thus attempt to expand the definition further.[224] When the Makah plan was introduced by the US for the first time in 1996, the Japanese, in fact, turned the proposal for the Makah exception to their own advantage, for their own request to take whales for the 'cultural and socioeconomic relief' of four whaling communities.[225] In 2004 again, Japan persuaded the IWC to adopt a resolution affirming the IWC's commitment to 'work expeditiously to alleviate the continued difficulties caused by the cessation of minke whaling to the communities of Abashiri, Ayukawa, Wadaura and Taiji.'[226] Japan has continuously tried to overturn the moratorium on commercial whaling and sought permission to hunt marine mammals. Unable to get support from the IWC, Japan has threatened to withdraw from the organization.[227]

In the case of Japanese whaling, the need for whale meat has been argued for in a very similar vein to Aboriginal whaling. It has been recognized that eating whale meat in Japan is a function of dietary customs, religious beliefs, cultural

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221) This issue is discussed in J.R. Paul, (2000), *supra* note 163, at 70–73.

222) See International Whaling Commission, Aboriginal Subsistence Whaling, <http://www.iwcoffice.org/conservation/aboriginal.htm> (visited 6 October 2007).

223) See L. Watters and C. Dugger, (1997), *supra* note 160, at 337.

224) A. Dark, *The Makah Whale Hunt*, 1999, available at: <http://cnie.org/NAE/cases/makah/index.html> (visited 1 October 2007). The Treaty of Neah Bay 1855 between Makah and the United States contains a Right of Makah to harvest whales. Available at: <http://explorenorth.com/library/weekly/more/bl-MakahTreaty.htm> (visited 2 October).

225) Cetacean Society International, Whales Alive! Vol. V, No. 3, July 1996, available at: <http://csiwhalesalive.org/csi96301.html> (visited 16 October 2007).

226) IWC, Resolution on Japanese Community-Based Whaling, Res. 2004–2 (2004); available at: <http://www.iwcoffice.org/meeting/resolution2004.htm#2.> (visited 27 October 2007).

227) IUCN, The World Conservation Union, International Whaling Commission Reaffirms Anti-Whaling Stance, Japan Threatens to Withdraw, The 59th annual meeting of IWC, Anchorage, Alaska 28–31 May 2007, at: <http://www.ictsd.org/biores/07-06-08/story2.htm> (visited 15 October 2007).

backgrounds and emotional sensibilities and that, for Japanese people, the whale is not only a food source, but also a basis of culture.[228]

Despite the IWC's formal recognition of the difficulties of small Japanese coastal communities, the present policy of the IWC is nevertheless one of general support for aboriginal whaling but at the same time hesitancy and resistance with regard to other 'small type coastal whaling', strongly advocated especially by Japan.[229]

A clear difference between ASW and small-scale coastal whaling is that the Japanese proposals in particular have been open about the fact that their hunts have for hundreds of years contained – and still contain – commercial elements. They admit that whaling was important for both cultural and economic reasons.[230] Due to resistance within the IWC to commercial aims, Japan has increasingly emphasized the subsistence and cultural aspects of whaling and assured the Commission that the commercial aspects will be eliminated.[231]

Nevertheless, the action plans introduced to the IWC by Japan have not been approved because of continuing concern that not all commercial elements have been eliminated. This has been the approach of the IWC despite the fact that it has recognized Japanese concerns by noting that 'the cessation of minke whaling in these communities has affected individuals economically, socially, spiritually and culturally, in a manner that threatens the vitality and viability of the communities.'[232]

In response to Japanese demands, a working group was established to examine the problem.[233] The working group subsequently acknowledged that some of the

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228) K. Sumi, The "Whale War" Between Japan and the United States: Problems and Prospects, 17 *Denver Journal of International Law and Policy*, 1989, 317–372, at 318.

229) Since 1985, Japan has constantly tried to suggest that the IWC should recognize an exemption for aboriginal subsistence whaling for Japan's coastal whaling. Japan considers that its small-type coastal whaling has very many similar characteristics to aboriginal subsistence whaling, including the nature and size of the operations, the history and the need to meet the nutritional and cultural needs of the local people. See Report of the Thirty-Seventh Meeting of the International Commission on Whaling 19, Office of the Commission (1985). Norway has expressed support for the Japanese claim and argued that a distinction should be made between large-scale industrial operations and family enterprises in small communities. See, for instance, Report of the Thirty-Ninth Meeting of the International Commission on Whaling 19, Office of the Commission (1987), p. 21. Norway has also emphasized the importance of whaling for its own local communities. See Report of the Forty-Third Meeting of the International Commission on Whaling 32, Office of the Commission (1991). Iceland has practiced small-type whaling since 1914. See The Report of the Forty-First Meeting of the International Commission on Whaling 19, Office of the Commission (1989), p. 26. Iceland has also argued that the distinction between aboriginal and commercial whaling is one of a 'dubious legal format.' See The Report of the Forty-Third Meeting of IWC (*supra* this note), p. 29.

230) See the Report of the Forty-Ninth Meeting, Office of the Commission (1997), p. 11.

231) See Summary Statement, Action Plan for Japanese Community Based Whaling, The Government of Japan, 1995, available at: <http://luna.pos.to/whale/gen_act95_sum.html> (visited 21 October 2007).

232) Resolution on Japanese Community-Based Minke Whaling, in Forty-Fourth Meeting of the IWC, Office of the Commission, (1992), p. 31.

233) See the Report of the Thirty-Seventh Meeting of the IWC, Office of the Commission (1985), p. 11.

socio-economic effects were serious.[234] However, it concluded that there are times when governments have to take painful actions that affect their citizens, and that it is the responsibility of the government to take mitigating measures. Although governments can successfully take some actions, there might be conditions that cannot be remedied; for instance, some changes to certain cultural, traditional and religious systems cannot necessarily be prevented.[235]

Accordingly, the IWC has generally favoured a narrow definition of the issue of subsistence under the provisions of the ASW exception.[236] Even though this has been the present practice of the IWC, there are concerns that the situation may change in the future, since the ASW exemption contains many loopholes. Questions such as why the Makah's cultural claim should be considered more authentic than Japan's or Norway's have already been raised.[237] For this reason, many scholars and environmental organizations have criticized the IWC for not providing a clear definition of 'aboriginal subsistence whaling'.[238] Paul, for instance, points out that the cultural exception for indigenous peoples to hunt whales is a very complicated issue, since it is difficult to really know whether a claim by indigenous peoples for the right to hunt whales derives from cultural, legal or economic considerations.[239]

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234) Thirty-Seventh Meeting, at § 6.1.

235) See the Report of the Forty-First Meeting of the IWC, Office of the Commission (1989), p. 13.

236) See A. Gillespie, (2001), *supra* note 165, at 108.

237) J.R. Paul, (2000), *supra* note 163, at 69. Additionally, Chris Stroud makes the following observation: 'Anthropologists have pointed to the fact that the Alaskan North Slope Eskimos are economically very different to the peoples who hunted whales a century ago. Oil exploitation has brought pollution, disruption and a host of new people to Alaska. It has also brought enormous amounts of money to the local people. To the casual observer, the continued hunting of these leviathans from modern skidoos and helicopters is straining the definition of what is aboriginal. […] Many commentators are wary of this debate as it takes them into the grey world of questions of identity and what actually constitutes a people.' C. Stroud, When Cultures Clash with International Pressure. Continued Hunting by Aboriginals is Becoming Less Acceptable in the Modern World, *The Scotsman*, 18 June 1996, at 17. The article is available at: <http://www.highnorth.no/library/movements/WDCS/wh-cu-cl.htm> (visited 25 October 2007). Interestingly, anti-whaling groups such as Greenpeace and the Whale and Dolphin Conservation Society have remained neutral, for instance on the Greenlandic hunt. Greenpeace says, '[We do not] oppose (but nor do we support) aboriginal subsistence whaling.' This has led nations in favour of commercial hunting, such as Japan and members of the High North Alliance, to accuse anti-whaling bodies of hypocrisy. Much of the Greenlandic hunt is carried out using modern explosive harpoons and substantial boats rather than single-man canoes and spears as in the past. Moreover the Greenlandic hunt has a commercial aspect: whale meat can be purchased in shops in northern Greenlandic towns such as Ilulissat. Japan has said that it regards this tacit approval of the commercial Greenlandic hunt by the IWC but continued opposition to coastal hunting in Japan as 'racist' and reeking of 'cultural imperialism', particularly because the Japanese plans indicated that the local catch would be consumed locally. This apparent double standard has caused even more fury amongst the Japanese public than the prohibition of commercial whaling. See <http://en.wikipedia.org/w/index.php?title=Aboriginal_whaling&action=edit&section=1> (visited 15 October 2007).

238) WDCS, Aboriginal Subsistence Whaling, available at: <http://www.stopbloodywhaling.org/docs/aboriginal.pdf> (visited 15 October 2007).

239) J.R. Paul, (2000), *supra* note 163 p. 66.

Additionally, Johansen claims that by accepting Aboriginal whaling and refusing other traditional small-scale coastal whaling (in Norway), the practice of the IWC is 'artificial, illogical, and morally wrong.'[240] In his words: 'This is a kind of cultural imperialism, or even racism, which I don't find ethically acceptable.'[241]

6.1.1.3. The Sustainability Question

As has become evident, the definition of Aboriginal subsistence whaling itself is already a difficult issue containing many challenges and unanswered questions. Despite the accepted legitimacy of ASW within the IWC, there are many who either totally oppose ASW or have at least a cautious attitude towards it, mainly on two grounds of which the first one has to do with the question of sustainability. The second critical component relates to the welfare of the whales – for example the hunters' killing methods and animal rights questions[242] – but these fall outside the scope of this article.[243]

The claim regarding sustainability is in line with the objectives of the International Convention for the Regulation of Whaling, which was established because 'increases in the size of whale stocks will permit increases in the number of whales that may be captured without endangering these natural resources.'[244]

Many scientists claim that whale stocks are still dangerously low, and certain whales are endangered.[245] The estimation of whale populations and growth is

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240) H.P. Johansen, Deputy Director General – Department of Marine Resources and Environment, Opposition to Whaling – Arguments and Ethics, 2nd Symposium on Whaling and History, September 8th–10th, 2005, The Whaling Museum Sandefjord. The document is available at: <http://www.regjeringen.no/nb/dokumentarkiv/Regjeringen-Bondevik-II/Fiskeri--og-kystdepartementet/265716/269165/opposition_to_whaling_arguments.html?id=269786> (visited 27 October 2007).

241) *Ibid.*

242) See, for instance, A. D'Amato, S.K. Chopra, (1991), *supra* note 169.

243) Importantly, since the mid-1970s, animal welfare issues – particularly the question of humane killing methods – have become prominent within the IWC, and from 1980 on, the issue of humane killing has been regularly discussed at the Commission. See International Whaling Commission, Welfare Issues, Information and research on whale killing methods and associated animal welfare issues, at: <http://www.iwcoffice,org/conservation/welfare.htm> (visited 2 July 2007). See the latest Report of the Working Group on Whale Killing Methods and Associated Welfare Issues, 22 May 2007, at: <http://www.iwcoffice.org/_documents/commission/IWC59docs/59-Rep6.pdf> (visited 2 July 2007). Many scientists, as well as the IWC, have expressed concern about the traditional killing methods used by indigenous communities which are less accurate and less efficient than those used in commercial whaling operations. See, for instance, P. Brakes, A. Butterworth, M. Simmonds and P. Lymbery (eds.), *Troubled Waters, A Review of the Welfare Implications of Modern Whaling Activities*, World Society for the Protection of Animals, (WSPA), 2004, pp. 44–50. IWC has urged indigenous peoples to adapt modern, less painful technology. See at: <http://www.iwcoffice.org/conservation/welfare.htm> (visited 2 July 2007).

244) ICRW, preamble.

245) J. Paul, (2000), *supra* note 165, at 60. Among the most critically endangered seem to be the North Pacific and North Atlantic northern right whales, bowhead whales of the eastern Arctic, western Pacific grey whales and most blue whale populations. In addition, some local populations appear to have been almost entirely extirpated; examples include the humpbacks and blue whales that once occupied the sea areas around South Georgia, New Zealand humpback whales, Spitsbergen bowheads, Gibraltar fin whales, North Atlantic right whales, and blue whales off Japan. See C.S. Baker and P.J. Clapham, Marine Mammal Exploitation: Whales and Whaling, Volume 3, Causes and consequences of global environmen-

considered difficult and estimates unreliable since they are based upon very rough data in which only a small number of species are actually counted.[246] There is a scientific understanding that particularly some whale species – at least the bowhead whale, humpback and fin whales[247] – are all among the endangered species still being hunted by Aboriginal people.[248]

In the late 1990s, it was realized that the bowhead whale was 'the most endangered of all whale species despite its protection from commercial harvesting for 40 years.'[249] It was suggested that given the small numbers of Bering Sea bowhead, the chances of survival of the species were highly questionable.[250] Therefore, the Scientific Committee concluded that there was a clear scientific case to be

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tal change in I. Douglas (ed.), *Encyclopedia of Global Environmental Change*, John Wiley & Sons, Ltd, Chichester, 2002, pp. 446–450.

246) W.C. Burns, International Whaling Commission and the Future of Cetaceans: Problems and Prospects, 8 *Colorado Journal of International Environmental Law and Policy*, 1997, 31–88, at 54–64. On 12–13 April 2007, the Symposium on the State of the Conservation of Whales was organized at UN Headquarters with participants within the IWC community as well as experts in conservation, law and other relevant fields. Michael Tillman, Research Associate in the Center for Marine Biodiversity and Conservation, Scripps Institution of Oceanography, provided a perspective within the IWC. Addressing the scientific underpinnings of the current whaling controversy, he noted problems related to uncertainties in stock assessments, including: large information requirements to determine maximum sustainable yield; significant gaps in critical data; the inability to ascertain the status of many stocks; mixing of stocks on whaling grounds; lack of knowledge on the potential recovery of depleted stock; and absence of accounting for the effects of environmental change. Tillman also addressed enforcement issues, including inspections, as well as illegal, unregulated and unreported catches. See A Report of the Symposium on the State of the Conservation of Whales in the 21st Century: 12–13 April 2007, available at: <http://www.seaaroundus.org/OtherWebsites/2007/EarthNegotiations_WhaleSymposiumBulletin.pdf> (visited 15 October 2007).

247) Concerning the West Greenlandic stocks of humpback and fin whales, by the early 1980s, the Scientific Committee concluded that the humpback stock had been substantially depleted and recommended that every effort be made to reduce the number of removals. (See the Report of the Thirty-Third Meeting of the IWC, Office of the Commission, 1981, at § 12.5.) Accordingly, the following year, the Scientific Committee recommended that the Greenland exception for ten humpback whales per year was to be eliminated. (See the Report of the Thirty-Fourth Meeting, Office of the Commission, 1982, at § 14.3.3.) This recommendation, however, was never accepted by the Commission. (See the Report of the Thirty-Fifth Meeting of the IWC, Office of the Commission, 1983, § 14.1.) In 1982 new evidence suggested that the situation was not as serious as previously believed. (Thirty-Fourth Meeting, p. 30.) Nevertheless, in the face of the uncertainties, the Scientific Committee once more recommended that the Greenland exemption be removed. (*Ibid*). Gillespie has studied this issue in A. Gillespie (2001), *supra* note 165, pp. 133–134. During the same period, the number of fin whales taken increased to a total of ten per year among the West Greenland stock. This quota was taken from a population that scientists had been unable to measure with any certainty. (A. Gillespie (2001), *supra* note 165, at 134.) This uncertainty in measuring was expressed many times by the Scientific Committee. (*Ibid.*) For instance in 1988 the Scientific Committee noted that it had never been able to provide satisfactory advice on those stocks due to the lack of requisite data, particularly on stock identity and abundance. (See the Report of the Fiftieth Meeting of the IWC, Office of the Commission, 1988, p. 12.) A similar uncertainty with regard to stock numbers has also emerged regarding West Greenland minke. See A. Gillespie (2001), *supra* note 163, at 134–135.

248) See A. Gillespie (2001), *supra* note 165, at 129–135.

249) R. Gambell, (1997), *supra* note 176, at 2.

250) R. Gambell, *supra* note 185, at 160.

made for a moratorium on hunting this species even without further takes.[251] The IWC responded to this information in 1977 by deleting the exemption clause which had previously allowed Aboriginal hunting, but due to fierce resistance from Alaska's indigenous whaling communities the United States was unsuccessful in implementing the ban internally.[252] The Alaska Eskimo Whaling Commission was established to fight the ban, organize the whaling communities, and manage the hunt themselves.[253] Accordingly, the United States proposed that the IWC allow a 'modest take' of bowheads (fifteen killed or thirty struck) in order to satisfy the subsistence and cultural needs of the Alaskan Inuits.[254] The Scientific Committee responded to this proposal by asserting that even a kill of fifteen whales per year could lead to extinction of the species and, consequently, the Commission could not accept the US's proposal.[255] However, after new estimates indicated the existence of around 2000 individuals, the IWC accepted eighteen whales landed or twenty-seven struck for the 1979 hunting season.[256] The Inuit hunters were of the opinion, however, that this quota was not enough for their subsistence needs.[257]

The decision of the IWC to place a moratorium on bowhead whale hunting was immediately questioned by the Inupiat people of the North Slope, Alaska. According to the Inuit whaling captains, the bowhead whale population was around 6000 or 7000, whereas the IWC had estimated it to be only about 1000.[258] Whalers also took issue with assumptions underlying scientists' population estimates (e.g., that whales only migrated in open water leads, were incapable of swimming under the ice offshore and did not feed during migration). On the contrary, Inuit hunters believed that whales migrate hundreds of miles offshore under the ice and therefore cannot be counted by visual means alone. On the basis of their methodological criticisms, a sophisticated survey technique was developed, incorporating Inuit assumptions that were later verified.[259] New scien-

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251) R. Gambell, (1997), *supra* note 176, at 2.

252) A. Gillespie (2001), *supra* note 165, at 130–131.

253) H. Huntington, *Alaska Eskimo Whaling, Inuit Whaling*, Published by Inuit Circumpolar Conference, June 1992, Special issue; available at: <http://www.highnorth.no/Library/Hunts/Other/al-es-wh.htm> (visited 18 January 2008). See also Overview of the Alaska Eskimo Whaling Commission at: <http://www.uark.edu/misc/jcdixon/Historic_Whaling/AEWC/AEWC.htm> (visited 18 January 2008).

254) G.P. Donovan, The International Whaling Commission and Aboriginal Subsistence Whaling: April 1979 to July 1981, Report of the International Whaling Commission, Special Issue No. 4, pp. 79, 82–83.

255) *Ibid.*

256) *Ibid.* The issue of endangered species and aboriginal whaling is studied by Gillespie in A. Gillespie (2001), *supra* note 165, pp. 129–135.

257) H. Huntington, (1992), p. 1.

258) A. Bailey, Traditional knowledge is finding its place, The knowledge of the Native people of the North Slope is playing an increasingly important role in energy decision making, *Petroleum News*, Vol. 12, No. 51, December 23, 2007.

259) M.R. Freeman, *The Nature and Utility of Traditional Ecological Knowledge, Northern Perspectives*, Published by Canadian Arctic Resource Committee, Vol. 20, No. 1, Summer 1992, p. 4; available at: <http://www.carc.org/pubs/v20no1/index.html> (visited 18 January 2008).

tific studies in 1991 then estimated that the bowhead whale population was closer to 8000.[260]

Significantly, this case shows that there might be instances where indigenous peoples' observations and traditional knowledge conflict with scientific estimates and that science can indeed learn from the experiences and knowledge of indigenous peoples. In Alaska, indigenous whalers are nowadays actively involved in the management of whaling. Since 1981, the US government and the Alaska Eskimo Whaling Commission have jointly managed the traditional subsistence harvest of bowhead whales under a co-operative agreement.[261] Moreover, as already mentioned, the IWC has recognized that the full participation and co-operation of the affected aboriginal peoples are essential for effective whale management.[262]

Despite the fact that the Alaska bowhead population turned out to be larger than first estimated, scientific uncertainty about the sustainability level of this species still exists. Both the World Conservation Union (IUCN)[263] and the United States have classified bowhead whales as endangered.[264] A very recently released environmental impact statement by the US NOAA Fisheries Service nevertheless supports the continuation of limited Aboriginal subsistence hunting that is in line with the international whaling regulations.[265]

In the 59th annual meeting of the IWC in 2007, member nations agreed by consensus to extensions of whaling quotas for Alaskan and Russian Inuit, several Caribbean communities, and the Makah Indian Tribe in the US state of Washington. The Commission also approved Greenland's request to allow Aboriginal hunting of fin and bowhead whales and to increase its quota of minke whales. Greenland's request for permission to hunt humpbacks was denied.[266]

The International Whaling Regime is an example of how a cultural claim by indigenous peoples may factually supersede international norms protecting

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260) A. Bailey, (2007), *supra* note 258. See also M.M. Freeman, The Alaska Eskimo Whaling Commission: successful co-management under extreme conditions, in: E. Pinkerton (ed.), *Co-operative Management of Local Fisheries*, Vancouver, University of British Columbia Press, pp. 137–153.

261) NOAA Fisheries, National Marine Fisheries Service, at: <http://www.fakr.noaa.gov/protectedresources/whales/bowhead/> (visited 18 January 2008).

262) R. Gambell, *supra* note 176.

263) IUCN 2007. *2007 IUCN Red List of Threatened Species.* <www.iucnredlist.org> (visited 18 January 2008).

264) US Code Collection, available at: <http://www4.law.cornell.edu/uscode/html/uscode16/usc_sup_01_16_10_35.html> (visited 18 January 2008).

265) Final Environmental Impact Statement for Issuing Annual Quotas to the Alaska Eskimo Whaling Commission for a Subsistence Hunt on Bowhead Whales for the Years 2008 Through 2012, January 2008, Prepared by U.S. Department of Commerce National Oceanic and Atmospheric Administration National Marine Fisheries Service; available at: <http://www.fakr.noaa.gov/protectedresources/whales/bowhead/eis0108/bowheadEISall.pdf> (visited 19 February 2008).

266) IUCN, at: <http://www.ictsd.org/biores/07-06-08/story2.htm> (visited 15 October 2007). See also International Whaling Commission, 2007 Meeting, Details for The International Whaling Commission's 59th annual meeting in Anchorage, USA 2007, at: <http://www.iwcoffice.org/meetings/meetings2007.htm> (visited 15 October 2007).

endangered species.[267] Even though in the case of the Alaska bowhead whales the population has increased slightly,[268] it is important to discuss the justification of the cultural claim of indigenous peoples if it involves risks concerning sustainability. No Aboriginal exemption should be granted unless the sustainability of each and every whale species can be guaranteed. One tricky question one might raise here is which body of knowledge, 'Western' science or indigenous traditional knowledge, should prevail when conflicting views emerge. One possibility in cases where indigenous hunters have a strong argument that a certain population is much larger than first estimated by scientific methods would be to undertake new scientific studies together with indigenous whalers. In this kind of research, both methods – scientific and indigenous knowledge – could supplement each other. This would be in line with the approach of the IWC to support the active participation of indigenous peoples as being essential for effective whaling management. Additionally, this would reflect the growing international recognition of the traditional ecological knowledge of indigenous peoples.

As has been pointed out, defining and limiting subsistence whaling to Aboriginal people is not unproblematic, and it can rightfully be asked why other small-scale community whaling, for instance in Japan and Norway, containing similar elements to Aboriginal whaling, should not be allowed if commercial elements are excluded and sustainability criteria are fulfilled. On the other hand the first Schedule to the Convention for the Regulation of Whaling clearly reserves this exemption to Aboriginal people. The large majority of the states parties to the Convention accept Aboriginal whaling while resisting Japanese or Norwegian attempts to enlarge the scope of subsistence whaling, primarily because there is a good reason to believe that Japan and Norway would use this exemption for commercial purposes, too.

Additionally, international law concerning indigenous peoples gives another legal basis for accepting special rights – positive discrimination – for indigenous peoples. Article 27 of the CCPR, for instance, does not protect the traditional livelihoods of everybody, but particularly of members of indigenous peoples as minorities. As discussed earlier, the right to culture of indigenous peoples – and traditional livelihood as an integral part of it – is recognized in many other widely ratified international instruments. Positive discrimination for indigenous peoples is a generally accepted principle with the aim, firstly, of compensating for the past exploitation of their rights and resources by states and, secondly, compensating their overall weaker status in relation to the general population.[269]

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267) J.R. Paul, (2000), *supra* note 163, pp. 66–67.

268) IUCN, at: <http://www.iucnredlist.org/search/details.php/2467/summ> (visited 19 February 2008).

269) See, for instance, UN Human Rights Committee: General Comment No 23(50), A/49/40, Vol. I (1994), Annex V (p. 107–110); CCPR/C/21/Rev.1/Add.5; available at: <http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/970e62bd99ec518cc125688700532c20?OpenDocument> (visited 1 January 2008). See also *Maya Indigenous Communities of the Toledo Distric (Belize Maya),* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5

In this light, it can be argued that the special whaling right of indigenous communities is in line with the rules and principles of international law, as long as it meets the criteria set by the International Whaling Commission and as long as the sustainability of each and every whale species can be ensured. The cultural exemption for indigenous peoples can, however, sometimes be anything but a clear issue, as illustrated by the example of Makah whaling. Similarly, ensuring sustainability does not by any means seem to be an easy task in all cases. There are many unknown factors that influence the balance of each species. For instance, it has been estimated that global climate change may possibly become a real threat to whales. According to scientists, whale species could be particularly affected, as some of the greatest oceanographic effects of climate change may be felt in the polar seas.[270] Dramatic environmental changes might increase the pressure for indigenous peoples to give up entirely their right to hunt whales in order to save these species from extinction. This would be a necessary sacrifice, although the tragic paradox is that indigenous communities are not the ones that have contributed much to the problem of global warming.

6.2. *The Agreement on the Conservation of Polar Bears and Indigenous Peoples' Traditional Right to Hunt*

In the 1960s, a general concern was raised that the annual killing of polar bears (1300–1500) was unsustainable given a world population variously estimated at the time to range between 5000 and 19,000 animals.[271] As a consequence, many US and Russian scientists and conservationists believed that polar bear sanctuaries or a total ban on hunting should be imposed if the bears were to be saved from extinction. However, countries such as Canada and Greenland, with apparently healthy bear populations and large annual kills, did not share the view that all hunting should be banned, arguing that the prohibition on utilizing polar bears as resources would cause hardship to the people who hunt them.[272]

The Agreement on the Conservation of Polar Bears was concluded between the countries in which polar bears are found – Canada, Denmark, Norway, the USSR and the USA – in 1973 and entered into force in 1976. In addition to this 'main'

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rev. 1 at 727 (2004), para. 166; available at: <http://www1.umn.edu/humanrts/cases/40-04.html> (visited 22 January 2007).

270) See generally J. Pernetta, R. Leemans, D. Elder and S. Humphrey, *Impacts of Climate Change on Ecosystems and Species: Marine and Coastal Ecosystems*, IUCN, Cambridge, UK, and Gland, Switzerland, 1994.

271) A. Fikkan, G. Osherenko and A. Arikainen, Polar bears: The importance of simplicity, in: O.R. Young, and G. Osherenko, (eds.), *Polar Politics: Creating International Environmental Regimes*. Cornell University Press, Ithaca, NY, 1993, pp. 96–151.

272) M.M.R Freeman, *Polar Bears and Whales: Contrasts in International Wildlife Regimes*, Issues in the North, Volume 1, Occasional Publication Number 40, Edmonton: Canadian Circumpolar Institute, University of Alberta, 1996. A summary of the article can be found at: <http://www.highnorth.no/Library/Management_Regimes/IWC/po-be-an.htm> (visited 10 September 2007). The citation can be found in the summary, p. 3.

agreement, there is the quite recent bilateral Agreement Between the Government of the United States of America and the Government of the Russian Federation on the Conservation and Management of the Alaska-Chukotka Polar Bear Population.[273] Furthermore, there is the Agreement between the Inupiat of Alaska and the Inuvialuit of Canada dealing with the southern Beaufort population.[274] In all these agreements, indigenous peoples' traditional rights to hunt polar bears are recognized. This article focuses only on the major polar bear regime – the Agreement on the Conservation of Polar Bears.

The Agreement on the Conservation of Polar Bears sets out a general prohibition on the hunting, capture, and killing of polar bears. However, to accommodate the needs of some parties who favour continued hunting, specific exemptions were made to the general prohibition against killing.[275]

Article III sets out exemptions to the overall prohibition against taking polar bears. The taking of polar bears is allowed for scientific purposes, for conservation purposes, in order to prevent serious disturbances in the management of other living resources, as well as by local people using traditional methods in the exercise of their traditional rights, and in accordance with the laws of the relevant state party or wherever polar bears have or may have been subject to taking by traditional means by its nationals.[276] 'Local people' has been interpreted to mean indigenous communities living in the territories of the state parties. The commercial element is not excluded from the traditional rights concept; indigenous peoples have the right to trade in skins and other items of value.[277]

The Agreement emphasizes the need for coordinated national measures to protect, conserve and manage polar bears[278] yet does not provide any implementation mechanisms, thus leaving it to the responsibility of the states. Article IX of the Agreement, however, provides for continuing consultation between the parties in order to give further protection to polar bears. The World Conservation Union's (IUCN) Polar Bear Specialist Group provides scientific and technical guidance in relation to polar bear protection.

The IUCN Polar Bear Specialist Group (PBSG) was formed in the first international Scientific Meeting on the Polar Bear already before the Agreement (1965) to co-ordinate international research and management of polar bears after wide-

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273) Washington, DC, 16 October 2000; available at: <http://www.glin.gov/view.action?glinID=112513> (visited 1 September 2007).

274) Agreement between the Inupiat of Alaska and the Inuvialuit of Canada in relation to the southern Beaufort population, 4th of March 2000 (superseding the previous Agreement between the Inuvialuit and the Inupiat on Polar Bear Management in the southern Beaufort Sea signed in January 1998); available at: <http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/I-I%20Agreemnt%20signed%20March%202000.pdf> (visited 1 September 2007).

275) M.M.R. Freeman, (1996), *supra* note 272, at 3.

276) Article III of the International Agreement on Conservation of Polar Bears of 1973.

277) See Article IV.

278) See the Preamble of the Agreement.

spread public concern over the hunting of polar bears and other human activities had been raised.[279] The PBSG has no regulatory function but is a technical group consisting of government-appointed specialists, with equal representation of the five nations that have polar bear populations. The PBSG membership consists of up to three government-appointed members from each of the five nations, as well as five members appointed by the Chair. The members are all specialists in the fields of polar bear biology, population dynamics, or wildlife management. The primary role of the PBSG is to promote co-operation between jurisdictions that share polar bear populations, to facilitate communication on current research and management and to monitor compliance with the International Polar Bear Agreement.[280]

Indigenous peoples are also welcome to participate in meetings of the PBSG, which importantly recognizes 'the value and importance of traditional knowledge to the accumulation of scientific knowledge and management of polar bears.'[281] Indigenous communities also have an active role in the local management systems of polar bears, where traditional knowledge of indigenous peoples plays a role along with science.[282]

Although according to the PBSG much of the traditional harvesting of polar bears from local communities has been sustainable, the PBSG documents that, both historically and currently, the main threat to polar bears is overharvesting in particular areas. The PBSG has expressed concerns particularly about East Greenland, which has deficiencies in its quota system, and Russia, which lacks monitoring altogether.[283] Based on the PBSG's recent research, WWF-Canada points out that the hunting of polar bears has also placed significant pressure on some populations in Canada.[284] The problem often seems to be that there is limited information on population sizes, making it difficult to know where to set hunting limits.[285] On the other hand, Inuit hunters in Canada assert that polar bear hunting is sustainable.[286] In Nunavut, for instance, there have been

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279) S. Norris, L. Rosentrater and P.M. Eid, *Polar Bears at Risk*, A WWF Status Report, 2002, at 19. See also P. Prestrud, and I. Stirling The International Polar Bear Agreement and the current status of polar bear conservation. 20 *Aquatic Mammals*, 1994, 1–12.

280) *Ibid.*, p. 19. See also the official webpage of PBSG, available at: <http://pbsg.npolar.no/> (visited 11 September 2007).

281) Resolution from the 11th meeting of the PBSG in Copenhagen 1993; available at: <http://pbsg.npolar.no/Meetings/resolutions/11-resolutions.htm> (visited 19 February 2008).

282) See, for instance, Nunavut Tunngavik Incorporated, available at: <http://www.tunngavik.com/english/dpt-wildlife.php> (visited 20 February 2008).

283) S. Norris et al., (2002), *supra* note 279, at 14.

284) See WWF-Canada Statement on Polar Bears, January 9, 2007, at: <http://wwf.ca/NewsAndFacts/NewsRoom/RESOURCES/PDF/WWF-Canada_Statement_PolarBears.pdf> (visited 23 October 2007).

285) Natural Resource Defence Council, Climate Facts, Polar Bears on Thin Ice, referring to PBSG's report of 2001; available at: <http://www.nrdc.org/globalWarming/thinice.pdf> (visited 3 November 2007).

286) See for instance '*Polar Bears are The Wrong Target Say Inuit*' by Clive Tesar, available at: <http://www.arcticpeoples.org/2008/01/17/polar-bears-are-the-wrong-target-say-inuit/> (visited 20 February 2008).

conflicting views between the local and territorial environmental authorities concerning the sustainable quota of polar bear hunting. Both authorities, however, claim that they take into account traditional knowledge of indigenous peoples concerning the size of the population.[287]

Although the overharvesting of certain populations is currently the most urgent threat to polar bears in some areas, the PBSG considers climate change to be one of the major conservation challenges for the overall polar bear population.[288] According to the recent Report of the Arctic Climate Assessment Programme (ACIA), polar bears are threatened with extinction in the worst case due to predicted climatic changes.[289] Evidence has been found that climate change is already affecting the condition of polar bears in the Hudson Bay area of Canada.[290] WWF-Canada points out that although the current co-management system for polar bears has been well monitored and enforced, recent IUCN data indicate that reductions in quotas may be necessary, due to accelerating stress on polar bears caused by global warming.[291] WWF-Canada emphasizes that the organisation recognizes the traditional and current need, and rights, of Inuit to sustainably harvest polar bears. WWF-Canada states, however, that the modern world now poses major threats to the survival of polar bears, primarily through the melting of Arctic sea ice due to global warming, and that any annual hunting quotas must be set at levels that allow bears to cope effectively with the cumulative stress of global warming and other pressures.[292]

Already in 2005, the Center for Biological Diversity filed a scientific petition with the US Fish and Wildlife Service to list the polar bear as a threatened species under the Endangered Species Act.[293] According to the organization, polar bears are at risk of extinction because global warming is causing catastrophic environmental change in the Arctic, including the rapid melting of sea ice.[294]

The US Fish and Wildlife Service issued a 12-month finding on December 27, 2006, proposing to list the polar bear as threatened under the Endangered Species Act. After extensive research, the polar bears were listed as threatened on May 15,

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287) CBC News, Last Updated: Tuesday, October 30, 2007, 'Nunavut environment minister blasted over polar bear quota cut'; available at: < http://www.cbc.ca/canada/north/story/2007/10/30/nu-pbear.html> (visited 20 February 2008).

288) S. Norris et al., (2002), *supra* note 279, at 22.

289) See ACIA, *Arctic Climate Impact Assessment* (Cambridge University Press, 2005), particularly chapters 11 and 12. This document is available at: <http://www.acia.uaf.edu/pages/scientific.html> (visited 30 March 2007).

290) S. Norris et al., (2002), *supra* note 279, at 22.

291) WWF-Canada Statement on Polar Bears, *supra* note 284, at 2.

292) *Ibid.*

293) The Endangered Species Act requires the US federal government to identify species threatened with extinction, identify the habitat they need to survive, and help protect both. See the US Endangered Species Act of 1973; available at: <http://www.fws.gov/endangered/esa.html> (visited 12 September 2007).

294) See <http://www.biologicaldiversity.org/swcbd/species/polarbear/index.html> (visited 12 September 2007).

2008.[295] Likewise, the IUCN added the polar bear to its Red List of the world's most imperilled animals, originally compiled in 1996, predicting a 30 per cent reduction in the polar bear population in the next 45 years.[296] Besides the stress they face from climate change, it is becoming increasingly evident that polar bears are exposed to, and in some cases heavily impacted by, other kinds of contaminants such as persistent organic pollutants.[297]

Inuit peoples' organizations, particularly in the Canadian North, strongly opposed the US proposal to list polar bears as threatened under its legislation, which has negative impacts on the Inuits' sport hunting business, in which so-called 'trophy hunters' from the United States have brought significant income to some communities that often live with economical challenges.[298] By the US decision to list the polar bears as threatened, importation of sport hunted trophies is now prohibited. This kind of legal hunting of polar bears by non-indigenous sport hunters is recognized and practiced in Canada. Greenland, too, has shown an interest in sport hunting of polar bears and a cross-ministerial working group is looking into possibilities for and constraints on introducing sport hunting in Greenland.[299] In Canada, part of the accepted subsistence hunting quotas under the Polar Bear Agreement can be used for outside sport hunters, guided by indigenous communities.[300]

Trophy hunting has been criticized by many environmental organizations and animal rights movements that generally do not oppose traditional hunting practiced by Inuits when it is sustainable.[301] Interestingly, although the Nunavut government, for instance, clearly supports trophy hunting, Sheila Watt-Cloutier, the former president of the Inuit Circumpolar Council (ICC), affirmed to the media at the climate change conference: 'We don't hunt for sport or recreation. Hunters put food on the table.'[302]

Despite the fact that trophy hunting has been done within the accepted hunting quota system and includes conservation measures,[303] this recreational hunting

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295) <http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm> (visited 1 July 2008).

296) IUCN 2007. *2007 IUCN Red List of Threatened Species* <www.iucnredlist.org> (visited 18 January 2008).

297) See AMAP, 2004. AMAP Assessment 2002: Persistent Organic Pollutants in the Arctic. Arctic Monitoring and Assessment Programme (AMAP), Oslo, Norway, particularly pp. 115–120.

298) See also <http://alaska.fws.gov/fisheries/mmm/polarbear/issues.htm> (visited 1 July 2008).

299) Polar bear management in Greenland by Deputy Minister, Amalie Jessen, 26–28 June 2007 – Polar Bear Range State's Meeting, Shepherdstown, West Virginia, USA (NCTC), p. 16; available at: <http://www.fws.gov/international/animals/polarbears/final/Greenland%20Presentation-final.pdf> (visited 19 February 2008).

300) S. Norris et al., (2002), *supra* note 279, at 14.

301) See, for instance, <http://www.cbc.ca/canada/north/story/2007/05/24/north-polar.html> (visited 4 October 2007).

302) Speech Notes for Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference (presently Council), Conference of Parties to the United Nations Framework Convention on Climate Change, Milan, Italy, December 10, 2003; available at: <http://www.inuitcircumpolar.com/index.php?ID=253&Lang=En> (visited 6 February 2008).

303) See Conservation Hunting in the North available at <http://www.ualberta.ca/~ccinst/CH/index.htm> (visited 9 October 2007).

is not easily seen as fitting into the category of the traditional, culture-based livelihood of indigenous peoples. Apart from the fact that trophy hunting is guided by Aboriginal persons, thus leaving the option open for an Aboriginal community to share with outsiders some of their cultural components, such as the rituals, beliefs or stories concerning polar bears, hunting for pleasure inevitably raises questions about the concept of a cultural right.

Taking the Agreement on the Conservation of Polar Bears in itself, it is not entirely clear whether trophy hunting fits within the literal interpretation of the text, where the exemption to kill polar bears is allocated to local people 'in the exercise of their traditional rights' or wherever polar bears have been subject to taking by 'traditional means' by its nationals. The concept of 'traditional right' is not defined in any way by the Polar Bear Agreement. 'Traditional means' is not been defined either, but it may refer to traditional killing methods, not necessarily traditional subsistence purposes. The Agreement prohibits the use of aircraft and large motorized vessels for the purpose of taking polar bears.[304]

In clarifying the concept of 'traditional right' some assistance may be found, for instance, in the content of the legally recognized concept of 'inherent rights of aboriginal peoples' in Canada, where 'inherent rights' include traditional livelihoods and cultural practices manifested before the European Contact, thus explicitly excluding livelihoods that have emerged only after the process of colonization.[305] According to the Supreme Court of Canada, in order for any practice, tradition or custom to be regarded as an aboriginal right, it must be 'distinctive': that is, central and integral to a particular Aboriginal culture.[306] Modern livelihoods are not protected as part of the inherent rights concept.

Even though trophy hunting of polar bears could in some ways be seen as an extension of traditional subsistence hunting, perhaps even more easily it can be linked to tourism, which is clearly a modern livelihood. In a similar way, when Scandinavian Saami people bring outsiders to a salmon river as one means of livelihood, the practice is not the exercise of 'a traditional fishing right' but one form of tourism.

On the international level, Article 27 of the CCPR protects the traditional way of life of indigenous peoples. It does not protect modern livelihoods, even though the UN Human Rights Committee has stated, as already mentioned, that Article 27 not only protects traditional means of livelihood but also allows

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304) Article IV.

305) See *Van der Peet* v. *The Queen* (1996) 137 DLR (4th) 289 (SCC), paras. 59–61; available at: <http://scc.lexum.umontreal.ca/en/1996/1996rcs2-507/1996rcs2-507.html> (visited 9 October 2007).

306) *Ibid.*, para. 46. For more about the concept of inherent rights, see L. Heinämäki, Inherent Rights of Aboriginal Peoples in Canada – Reflections of the Debate in National and International Law, 8 *International Community Law Review*, 2006, 155–202. See also M. Asch and P. Maclem, Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow. 29 *Alberta Law Review*, 1991, 2, 498–517.

indigenous peoples to use modern technology in carrying out their traditional livelihoods.[307]

Limiting the concept of the 'traditional rights to traditional cultural practices, and thus excluding the more modern livelihoods, has often been criticized because this limitation means that indigenous peoples and their cultures are denied the right to change and adapt to new conditions that are at least partly a result of the processes of colonization and modernization.[308] This limitation can without doubt be problematic in the light of many of the changes taking place today. For instance, as shown in relation to the Inuit petition against the United States, climate change threatens the whole basis of traditional livelihoods of many indigenous peoples, particularly in the Arctic areas. For indigenous peoples, it may become a genuine problem in the future if only traditional livelihoods are protected as part of their culture, as seems to be the case under Article 27 of the CCPR.

On the other hand, it is precisely the traditional way of life that makes indigenous peoples a special group in relation to environmental matters. It is the traditional way of life alone that is protected with traditional rights. Modern livelihoods can and should be equally valued and protected, but by other means and concepts. The definition of 'traditional rights' becomes significant when the livelihood in question relates to species that are generally protected from being killed by people other than those who are allowed to do it in order to protect their 'traditional rights'.

Generally speaking, the most serious threat to polar bears at the moment does not seem to be either subsistence hunting or trophy hunting alone. Predictions relating to polar bears and global warming sound so alarming that the question can be asked how long it will be reasonable to continue any human killing of this species on any grounds. As opposing the killing of animals itself can be seen as cultural imperialism, space and respect for indigenous peoples' hunting culture must be found, but keeping two important factors in mind: that the sustainability of every protected animal species must be assured and that the way of hunting must be compatible with the purpose of protecting a traditional cultural right that comprises the kind of relationship with nature emphasized in indigenous peoples' declarations in international forums: a deep spiritual and practical respect for the sacredness of all living beings.

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307) *I. Länsman et al.* v. *Finland, supra* note 202, para. 9.3.

308) For this discussion in the context of Canadian Aboriginal rights, see K. McNeil, The Meaning of Aboriginal Title, in: M. Asch (ed.), *Aboriginal and Treaty Rights in Canada, Essays on Law, Equality, and Respect for Difference*, UBC Press University of British Columbia, Vancouver, Canada, 1997, pp. 135–154, at 151–154; R.L. Barsh and J.Y. Henderson, The Supreme Court's Van der Peet Trilogy: Naïve Imperialism and Ropes of Sand, 42 *McGill Law Journal*, (1997). 994–1009; J. Borrows, Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia, 37 *Osgoode Hall Law Journal*, 1999, 3, 538–597, at 567–574.

7. Indigenous Peoples' Responsibilities Towards Nature

It has been a general assumption that because the land is a central part of the lives and culture of indigenous peoples, resource development would likely be more responsible and environmentally sustainable if indigenous communities had control over these lands.[309] Another assumption is that because indigenous people have relied on these resources for so many years, they possess valuable knowledge about how to develop the land's resources sustainably. The lessons indigenous peoples could teach, in conjunction with current advanced technology, could help protect and preserve the world's greatest resources for future generations.[310]

Indigenous peoples themselves have been active particularly in the biodiversity discourse, which indicates the great importance of the biodiversity question to them. A study of the cultural and spiritual values of biodiversity concluded that there was a direct relation between cultural diversity, linguistic diversity and biological diversity and that the quickening pace of loss of traditional knowledge was having a correspondingly devastating impact on all biological diversity.[311] Although this may often be the case, some commentators have maintained that the discussion concerning indigenous peoples and biodiversity has a tendency to be overly generalized and in some parts perhaps more rhetorical than practical.[312]

Indigenous peoples can be seen as a distinctive legal category that has been accorded special rights in relation to environmental management. The basis for this additional protection relies on the international recognition of their right to culture and a special way of life that is closely connected to nature. Indigenous peoples have been granted special rights in relation to the environment on three somewhat different bases of which the first two are overlapping. Firstly, as previously discussed, in environmental instruments indigenous peoples have been granted special rights in relation to environmental management, because indigenous peoples are recognized as having a valuable contribution to make to environmental conservation and sustainable development. This 'environmental norms category' includes procedural rights as well as substantive protection of the traditional knowledge and intellectual property rights of indigenous peoples. Secondly, according to the 'human rights approach', indigenous peoples have a right to be protected from environmental interference, since environmental degradation infringes their right to culture and other human rights. Human rights also contain both substantial and procedural aspects. Participation in environmental deci-

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309) See for instance B. Ganz, Indigenous Peoples and Land Tenure: An Issue of Human Rights and Environmental Protection, 9 *Georgetown International Environmental Law Review*, Fall 1996,173–193, at 173.
310) *Ibid.*, pp. 176–177.
311) The Workshop on Traditional Knowledge and Biological Diversity (TKBD), Report of the Workshop, UNEP/CBD/TKBD/1/3, 1997, p. 2.
312) B.J. Richardson, (2001), *supra* note 73, at 3.

sion-making in decisions that affect indigenous peoples is included in both of these categories. Thirdly, 'cultural exemption norms' grant indigenous peoples a special right to hunt certain species that are otherwise protected from general harvesting.

As pointed out by Barsh, even though the legal status of indigenous peoples continues to evolve, they already enjoy a privileged position as quasi-state actors, and not merely as part of the wider trend towards NGO participation in policy discussions and programme implementation.[313] To this extent, Barsh argues that the organizations and authorities of indigenous peoples bear the same responsibility to respect internationally recognized rights and principles as the states in which they reside.[314] As with the adoption of the UN Declaration on the Rights of Indigenous Peoples, the international community of states is increasingly ready to recognize indigenous peoples' right to self-determination.[315] Importantly, moving in the same direction, the UN Human Rights Committee started already a while ago to address indigenous peoples under Article 1 of the CCPR, which affirms the right of peoples to self-determination.[316]

Despite the fact that state practice still varies as to what the status of indigenous peoples is in international law,[317] the emergent view is that indigenous peoples do have the right to self-determination but not in the sense in which that concept was understood in the colonial context. The right to self-determination is seen as granting indigenous peoples internal self-determination, the right to determine their future within the existing nation-states, not the right to secede from existing nation-states.[318] When viewing the recent developments in international law concerning the status of indigenous peoples, one realizes that the door of international law subjectivity is opening, cautiously but surprisingly consistently, to indigenous peoples. In international law, the doctrine of subjects (or legal persons) determines who may bear rights and obligations. It should be clear that if

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313) R.L. Barsh, Indigenous Peoples, in: D. Bodansky, J. Brunnée and E. Hey, (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, Chapter 36, pp. 830–851, at 850.

314) Barsh, for instance, claims this, although namely emphasizing human rights; see Barsh, *ibid.*

315) The right to self-determination of indigenous peoples is guaranteed in Article 3 of the Declaration.

316) See Concluding Observation of the Human Rights Committee on Canada UN Doc. CCPR/C/79/Add.105 (1999). Explicit references to either Article 1 or to the notions of self-determination have also been made in the Committee's Concluding Observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999), Norway, UN Doc. CCPR/C/79/Add.112 (1999), Australia, UN Doc. CCPR/CO/69/Aus (2000), Denmark, UN Doc. CCPR/CO/70/DNK (2000), Sweden, UN Doc. CCPR/CO/74/SWE (2002), Finland, UN Doc. CCPR/CO/82/FIN, (2004) Canada again, UN Doc. CCPR/C/CAN/CO/5, (2005), Concluding Observation on the United States, UN Doc. CCPR/C/USA/CO/3 (2006).

317) See S. Wiessner, Rights and status of indigenous peoples: a global comparative and international legal analysis, *12 Harv. Human Rights J.*, 1999, 57-128, at 57. S.J. Anaya, *International Law and Indigenous Peoples*. OUP, New York, 1996, pp. 257–328.

318) See T. Koivurova and L. Heinämäki, The participation of indigenous peoples in international norm-making in the Arctic, 42 *Polar Record*, 2006, (221)101–109 at 103.

indigenous peoples are to be regarded as subjects of international law, they not only enjoy rights but also bear responsibilities.

The right to self-determination, when extended to indigenous peoples, means that indigenous peoples should be free to decide on the development of their culture. This should not, however, under any circumstances mean that indigenous peoples are free to engage in environmentally unsustainable practices. If they are to be subjects of international law, they must necessarily be bound by the same environmental principles – such as the sustainability requirement – as states. As pointed out by Richardson, the right to self-determination must be understood in the context of common responsibilities for maintaining the health of our ecological systems, which know no jurisdictional boundaries.[319] In the end, Richardson adds, significantly, that indigenous peoples' commitment to ecologically sustainable living is not simply a trade-off to be made in return for self-determination: it is a precondition for their own future well being.[320] Additionally, whereas indigenous peoples are already given special rights in relation to the environment, and whereas many indigenous peoples themselves want to be seen as the guardians of nature, emphasizing in many instruments they have produced in international forums the responsibility that they have for 'Mother Earth', they should have a legal responsibility and an active role in promoting environmental protection. As stated in the indigenous peoples' political declaration in Bali, '[The] self-determination [of indigenous peoples] and sustainable development are two sides of the same coin.'[321] Or as indigenous peoples themselves affirmed in the International Covenant on the Rights of Indigenous Nations, an instrument produced by indigenous peoples, 'respect for Indigenous Nations' cultures, knowledge and practices contributes to the sustainability of the natural environment and continuity of biological and cultural diversity.'[322]

Also Barsh maintains – rightfully – that indigenous peoples' reliance on arguments derived from their 'special relationship with the land' implies an obligation to continue to use the biosphere sustainably.[323] This should, according to him, not constitute a bar to cultural change or improvements in the material standards of living, provided that change is achieved without sacrificing the biological diversity or productivity of traditional territories.[324] It does, however, suggest that indigenous peoples, as subjects of international law, not only enjoy collective rights to be recognized and protected by the international community, but spe-

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319) B.J. Richardson (2001), *supra* note 73, at 11.
320) *Ibid.*
321) Indigenous Peoples' Political Declaration, Prep. Com. IV, Bali, Indonesia, 6 June 2002, *supra* note 19.
322) International Covenant on the Rights of Indigenous Nations, authorized version initialed July 28, 1994 Geneva, Switzerland. The document can be found at: <http://www.halcyon.com/pub/FWDP/International/icrin-94.txt> (visited 22 October 2007).
323) R.L. Barsh, (2007), *supra* note 316, at 850.
324) *Ibid.*

cific obligations to the international community with respect to the objects of international environmental law.[325]

Respect for international legal norms can be viewed as a negative burden limiting sovereignty or self-determination. Barsh's words, 'As they emerge from the shadows of colonialism into a growing role as non-state actors on the multilateral stage, indigenous peoples may also owe the international community positive duties such as contributing expertise and resources to worldwide challenges such as climate change [...] and the destruction of life in the oceans – in other worlds, a duty of international cooperation'.[326] Barsh argues that a case can be made for holding indigenous peoples accountable for the stewardship of their territories in international bodies such as the Conference of the Parties of the CBD, in much the same way as if they were state parties. To do so would naturally raise the question of whether indigenous peoples are adequately represented in the governance structure of the CBD treaty system through their current consultative status as non-governmental observers without a vote.[327]

International environmental law affirms the need for effective participation of indigenous peoples in determining how to achieve sustainability. Enduring solutions to this challenge are unlikely to be found if policy reform is framed solely in terms of enunciating indigenous rights to the use of plants and animals. Rather, as maintained by Richardson, the focus should be broadened to require the establishment of institutional processes that secure indigenous peoples' involvement in environmental decision-making systems in an integrated and proactive manner.[328] There the positive challenge would be the harmonious interplay between 'Western' science and indigenous peoples' traditional knowledge.

If indigenous peoples commit themselves to the sustainable use of the environment and accept their responsibilities towards nature, which, no doubt, in many cases reflects their traditional and still prevailing ideology and behaviour, environmental protection would certainly benefit from the effective protection of the rights of indigenous peoples. Not only would extended participatory rights be important in this respect, but also the substantive protection of indigenous peoples' rights may in many places require strengthened environmental protection, as the case of the World Bank illustrates.

The sustainable relationship to nature of indigenous peoples is well documented in many places and can perhaps be accepted as the prevailing general situation.[329] The special status that indigenous peoples have in relation to environmental

325) *Ibid.*
326) *Ibid.*, p. 851.
327) *Ibid.*
328) B.J. Richardson (2001), *supra* note 71, at 11.
329) See, for instance, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment: Preliminary Report, U.N. Doc. E/CN4./Sub.2/1991/8 (1991); United Nations Subcommission on Prevention of Discrimination and Protection of Minorities, Human Rights and the Environment: Second Progress Report, U.N. Doc. E/CN.4/Sub.2/1993/7 (1993); See generally Section 2 of this article.

management and use should never indicate that indigenous peoples are free to engage in unsustainable use of the environment, albeit in the name of the economic and social development. On the contrary, if indigenous peoples accept the responsibility that their status as 'guardians of nature' entails, the Earth and humankind could truly benefit from the traditional way of perceiving and interacting with the natural environment.

PROTECTING THE RIGHTS OF INDIGENOUS PEOPLES – PROMOTING THE SUSTAINABILITY OF THE GLOBAL ENVIRONMENT?

International Community Law Review, vol. 11, no. 1 (March 2009): 3-68.

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Chapter 9
Rethinking the Status of Indigenous Peoples in International Environmental Decision-Making: Pondering the Role of Arctic Indigenous Peoples and the Challenge of Climate Change

Leena Heinämäki

Abstract Global environmental problems – climate change being a major one – pose challenges to state-controlled international governance in many ways. One of the inherent limitations of present international law – particularly from the viewpoint of indigenous peoples – relates to international decision-making concerning the environment. The focus of this article is the rights and role of indigenous peoples in this context.

The problem of climate change, particularly in relation to Arctic indigenous peoples has been taken as a special case. The aim of this article is to show how impacts of climate change threaten many fundamental human rights of indigenous peoples, particularly in the Arctic area. However, as will be discussed, traditional human rights mechanisms are not necessarily capable of offering effective protection of the rights of indigenous peoples against global environmental interference such as climate change. For this reason, the aim of this article is to examine the possibilities for indigenous peoples to participate in international environmental decision-making.

One interesting and a unique exception to the general NGO model is found in the structure of the Arctic Council. The model of Arctic Council in relation to indigenous peoples will be studied in this article, keeping in mind the possibilities of also using this model also in other international environmental regimes.

9.1 Introduction

Thus far, global climate change has been felt most intensively in the Arctic area. The average Arctic temperature has risen twice as much as the average global temperature in the past few decades (Arctic Climate Impact Assessment [ACIA], 2005). The United Nations Intergovernmental Panel on Climate Change ([IPCC],

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T. Koivurova et al. (eds.), *Climate Governance in the Arctic*, Environment & Policy 50,
DOI 10.1007/978-1-4020-9542-9_9,

2007) has predicted that temperatures will increase in the Arctic by 5–7 degrees by 2099, whereas the predicted temperature rise for the Earth as a whole is 2–4.5 degrees.

The Arctic Climate Impact Assessment (ACIA) – a comprehensive international evaluation of Arctic climate change and its impact undertaken by hundreds of scientists – points to dramatic changes in the Arctic environment and nature-based way of life of Arctic indigenous peoples due to the impact of global climate change. According to the ACIA, over the next 100 years, climate change is expected to accelerate, contributing to major physical, ecological, social and economic changes, many of which have already begun.

Many of the environmental changes studied and predicted by the ACIA are already having a direct impact on the traditional way of life of Arctic indigenous peoples. Indigenous peoples throughout the Arctic area depend on the land and the sea for food and income, and traditional activities such as hunting, fishing, gathering and reindeer herding are vitally important for indigenous society and culture (ACIA, 2005, p. 4). Particularly in danger is the hunting culture of many Arctic indigenous peoples, but climate change will also affect other traditional livelihoods.

For Arctic indigenous peoples, global climate change is an important human rights issue due to their traditional, nature-based way of life, which is often considered to be the crux of the culture of indigenous peoples.[1] For this reason Sheila Watt-Cloutier, the former president of the Inuit Circumpolar Council (ICC), an organization representing Inuit people in four Arctic states,[2] has filed a petition against the United States in the Inter-American Commission on Human Rights for the damage that global climate change is causing to the Inuit and their rights. The Inuit petition is the first – and so far the only – human rights case involving climate change to be brought before an international human rights body. The first part of this article explores the petition with the aim of showing how the present impacts of climate change are already making Arctic indigenous peoples particularly vulnerable by infringing many of their important human rights.

However, as will be discussed in the first part of this article, human rights monitoring bodies are hardly able to cope with the issue of global climate change, which contains many uncertain factors with respect to issues of causality and responsibility. This article views the Inuit petition, more than anything else, as a powerful attempt to make an indigenous Arctic voice be heard. As will be shown in the article, the official Inuit policy behind the petition has been to bring their case to the consciousness of decision-makers and the general public with the idea of influencing the international decision-making concerning climate change. The petition can thus

[1] Indigenous peoples often live in the most vulnerable ecosystems, such as in areas of high biological diversity or in the stark Arctic regions. According to estimates made in 1990, around 200 million of the world's 300 million indigenous people live in vulnerable ecosystems. See Report of the Commission on Human Rights at its forty-sixth session (Commission on Human Rights [CHR], 1990. p. 8).

[2] Alaska (USA), Canada, Greenland (Denmark) and the Russian Federation.

be seen as an attempt on the part of Arctic indigenous peoples to mitigate global climate change.

However, besides the fact that climate change, while fundamentally different from local environmental problems, seems to be too challenging for human rights monitoring bodies to cope with, another problem of climate change is that its consequences are often irreversible. Therefore, the participation of Arctic indigenous peoples in international decision-making concerning climate change (and other global environmental problems) is crucial.

The second part of the article attempts to show that already established international human rights, as well as recent developments concerning the right to self-determination of indigenous peoples, clearly recognize the right of indigenous peoples to participate effectively in all decisions that directly affect them. This does not, however, hold true in international decision-making concerning the environment. The question of who can participate in the making of international law is traditionally seen as rather clear. Whereas states, as the primary subjects of international law, create international legal rules and principles, indigenous peoples are able to participate in international norm-making concerning the environment with the status of non-governmental organizations (NGOs). Along with other NGO groups participating in the international policy-making process, organizations of indigenous peoples, however, have only limited possibilities to influence the process and make their voices heard.

This article, however, claims that states, insofar as they have committed themselves to international human rights guaranteeing the effective participation of indigenous peoples, are under a legal obligation to strengthen the participatory status of indigenous peoples in international environmental decision-making. There can be many ways for states to realize this commitment. The main focus of the third part of the article is to introduce one interesting and quite unique model that can be found in the structure of the Arctic Council, which is a soft-law organization of the eight Arctic states the aim of which is to protect the Arctic environment. In the Arctic Council, Arctic indigenous peoples have the status of 'permanent participants', which means that they are participating at the ministerial level and are allowed to make proposals and suggestions for the final decisions.

This article suggests that the model of the Arctic Council could be used in other international environmental regimes in order to find a way to strengthen the role of indigenous peoples in international environmental decision-making. The article also considers the possibilities of the UN Permanent Forum on Indigenous Issues to be engaged in international environmental regimes through the permanent participation model in order to represent the views of indigenous peoples. Since the consequences of climate change are being felt at present most severely in the Arctic area, Arctic indigenous peoples should be strongly represented through the permanent participant model in order to have an influence on the mitigation of climate change, as well as to improve their adaptive capacities against the dramatic changes their way of life is facing.

Despite the specific Arctic focus, the article will study the possibilities to strengthen the participatory rights and status of all indigenous peoples since it is

only by influencing the general participatory rights of all indigenous peoples that the Arctic indigenous peoples can have an influence on climate change mitigation and adaptation policies at various levels of governance. If Arctic indigenous peoples are to influence global environmental processes, they need to act in concert with other indigenous peoples to push for this change of status in indigenous peoples' participatory rights. The Arctic indigenous peoples have been at the forefront not only because climate change already threatens their basic human rights, but also because they have gained strong participatory rights in the Arctic Council as permanent participants. This article suggests that because of this experience, Arctic indigenous peoples will be crucial actors in pushing for stronger participatory rights in climate regime and other international environmental processes and, in this way, increasing their own possibilities to mitigate and adapt to climate change.

9.2 The Inuit Petition Against the United States

According to the Inuit petition against the United States filed with the Inter-American Commission on Human Rights on December 7, 2005, the impact of climate change caused by acts and omissions of the United States violates the Inuit's fundamental human rights, which are protected by the American Declaration of the Rights and Duties of Man and other international instruments. The petition reminds the Commission that the United States is the world's largest contributor to global warming, which is having a damaging effect on the Inuit. As the world's largest consumer of energy, both historically and at present, the United States consumes the most fossil fuels and is responsible for the largest amount of cumulative emissions of any nation on Earth (*Petition to the Inter American* [Inuit petition], 2005, p. 103).

On November 16, 2006, the Commission rejected the Inuit petition, stating that 'the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration (The Inter-American Commission on Human Rights [IACHR], 2006). Following a request of the petitioners (*Request for Hearing,* 2007), the Inter-American Commission decided to hold a public hearing to gather more evidence on the link between global warming and human rights (*The Response of the Inter-American,* 2007). The request of the petitioner, however, modestly states, 'We are aware that the Commission has dismissed that petition and do not seek here to reopen that decision' (*Request for Hearing,* 2007). At the time of writing of this article, the Commission has not published its present intentions concerning the case. Granting a hearing does not mean that it will allow the petition to be considered. Consideration of the petition is doubtful especially since the Commission rejected the case in the first place. On the other hand, new evidence may convince the Commission to consider the case, which again does not mean that the case will be regarded as

meritorious.[3] Taking into account the exceptional circumstances of the petition, one possible option for the Commission would be to find the case manifestly ill-founded (IACHR, 2000, art. 34b).

The idea of the first part of this section is to discuss how the petitioner has articulated the violations of specific human rights in relation to the implications of climate change. This importantly shows how climate change has direct and dramatic impacts on many important human rights of Arctic indigenous peoples.[4] The second part of the section discusses the Inuit policy behind the petition to illustrate how the petition seeks the very goal that has been emphasized in this article: extended participatory rights for the Inuit and other indigenous peoples in international environmental decision-making.

The Inuit petition relies greatly on the ACIA and uses the assessment as a scientific basis for the petition. The petition points out that because average annual Arctic temperatures are increasing more than twice as fast as temperatures in the rest of the world, climate change has already had serious impacts in the Arctic, including the deterioration of ice conditions, a decrease in the quantity and quality of snow, changes in the weather and weather patterns, and a transfigured landscape as permafrost melts at an alarming rate, causing slumping, landslides, and severe erosion in some coastal areas (*Petition to the Inter-American*, 2005, p. 2). For instance in the village of Shishmaref in Alaska, many of the houses owned by local Inuit have been badly damaged and partly fallen into the sea due to erosion and a rise in sea-level (Willis, 2004). Inuit observations and scientific studies consistently document many kinds of environmental changes. Importantly, the ACIA contains a chapter related to

[3] For more details concerning the rules of procedure, see Doelle (2005, pp. 231–235). One important procedural question in this case relates to the requirement for the exhaustion of domestic remedies. Article 31.1 of the Commission's rules of procedure state: 'In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.' Furthermore, Article 31.2(a) continues, saying that the exhaustion requirement 'shall not apply when [. . .] the domestic legislation of the State concerned does not afford due process of law for protection of the rights that have allegedly been violated.' The Inuit petition argues that there are no remedies 'suitable to address [the] infringement' of the rights the petitioner alleges to have been violated in this case. Therefore, according to the petition, the requirement that domestic remedies be exhausted does not apply in this case and the petition is admissible under the rules of procedure of the Commission (Inuit petition, at p. 112). The petition then goes through possible available domestic remedies, such as the U.S. Constitution, U.S. tort laws and environmental laws, trying to show that they are not adequate as far as the rights alleged to have been violated in the petition are concerned. It investigates how the U.S. Constitution is not able to protect the rights to life, residence and movement, property, the inviolability of the home, or culture in the case of global climate change (Inuit petition, pp. 112–116). According to Article 31 of the rules of procedure, it is up to a state to demonstrate to the Commission that the suitable remedies under domestic law have not been previously exhausted (IACHR, 2000, art. 31.3).

[4] Climate change also dramatically affects the lives and rights of other indigenous peoples besides those in the Arctic. For instance, indigenous peoples in tropical rainforests or on islands are particularly in danger (Salick & Byg, 2007).

indigenous traditional knowledge and indigenous peoples' observations of climate change (ACIA, 2005, pp. 61–98).

The Inuit petition was submitted by Sheila Watt-Cloutier, the president of the ICC at the time, 'with the support of the Inuit Circumpolar Conference',[5] on behalf of all the Inuit of the Arctic regions of the United States and Canada; it is signed by 62 people in addition to Watt-Cloutier (Inuit petition, 2005, p. 1).[6]

According to the petition, several principles of international law guide the application of the human rights issues in this case. Most directly, the United States is obligated by its membership in the Organization of American States and its acceptance of the American Declaration of the Rights and Duties of Man to protect the rights of the Inuit (Ibid., p. 5). The United States is not a party to the American Convention on Human Rights (1969), so the Convention cannot be applied to this case.[7] The American Declaration is nevertheless regarded as having become a legally binding instrument through so-called double-incorporation. This means in practice first of all that the Declaration became part of the Statute of the Inter-American Commission on Human Rights in 1960 when the legal status of the Commission was unclear. Secondly, the Inter-American Commission itself became part of the OAS Charter in 1970.[8] Additionally, the Inter-American Commission

[5] The present name of the organization is 'Inuit Circumpolar Council'.

[6] According to the rules of procedure of the Commission, any person, group of persons or non-governmental entity may submit a petition as long as the petition involves an alleged violation of a human right recognized under the IAHR regime (IACHR, 2000). Although there is no explicit territorial limitation in the Declaration, the Inter-American Commission on Human Rights infers a limitation similar to the one spelled out in Article 1(1) of the Convention: 'The State Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free exercise of those rights and freedoms.' (Inter-American Commission on Human Rights [IACHR], para. 17). Generally, human rights provisions appear to be primarily directed at State action against their own citizens (Donnelly, 1998, p. 1). On the contrary, as maintained by Doelle (2005, p. 232), there may be cases – transboundary or global environmental problems, for instance – where there is no reason to limit the application of international human rights law only to violations by a State against its own citizens, especially if there are no means for the citizens' own State to protect its citizens from the harm, or the State does not exert the means to protect its citizens. The Inter-American Commission has also importantly stated that it '[d]oes not believe [. . .] that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory.' (IACHR, 1998). Therefore it seems that the Commission recognizes that in certain circumstances states must protect the rights of peoples outside their territory from the effects of acts or omissions by their agents (Wagner & Goldberg, 2004, p. 2). It can thus be cautiously assumed that the Commission could, if other criteria are fulfilled, study the Inuit petition in relation to the Inuit in Canada.

[7] If the accused state is party to the American Convention on Human Rights, that document, the Statute of the IACHR, and its rules of procedure establish jurisdiction and procedure.

[8] The Protocol of Buenos Aires, which revised the Charter of the Organization of American States (OAS), entered into force in 1970. It was signed on February 27, 1967 (See also Buergenthal, 1975, p. 828).

has regarded the Inter-American Declaration as legally binding in its case practice (Cassel, 2000, p. 397).

The aim of this section is to discuss the main legal basis of the Inuit petition – the American Declaration on Human Rights and its relevant provisions – to show how the diverse impacts of climate change can be seen as violating several individual human rights, such as the rights to the benefits of culture, to property, to the preservation of health, life, physical integrity, security and a means of subsistence, and to residence, movement, and inviolability of the home (Inuit petition, 2005, p. 5).

The legal starting point of the petition is that the human rights of indigenous peoples should be interpreted in the context of indigenous culture, which requires protection of their land and environment (Ibid., p. 70). The petition points out that in applying the rights contained in the American Declaration to indigenous peoples, both the Inter-American Human Rights Court and the Commission have repeatedly emphasized the need to take into account the unique context of indigenous culture (Ibid.).[9] The Commission has stated that by interpreting the American Declaration as safeguarding the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration, which, as expressed in the preamble, include recognition that 'it is the duty of man to preserve, practice and foster culture by every means within his power' (IACHR, 2002, para. 131, citing *American Declaration,* 1948). Furthermore, the Commission has stated that 'indigenous peoples maintain special ties with their traditional lands, and a close dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival' (IACHR, 1997, Chapter IX).

According to the petition, the lives and culture of the Inuit demonstrate that indigenous peoples' human rights are inseparable from their environment. Therefore, the preservation of the Arctic environment is 'one of the distinct protections required for the Inuit to fully enjoy their human rights on an equal basis with all peoples' (Inuit petition, 2005, p. 72). The petition claims that States thus have an international obligation not to degrade the environment to such an extent that it threatens the culture, health, life, property, or ecological security of indigenous peoples (Ibid.).

The petition reminds the Commission that the Inuit and their culture have developed over thousands of years in relationship with, and in response to, the physical environment of the Arctic.[10] The Inuit have thus developed an intimate relationship with their surroundings, using their understanding of the Arctic environment to develop tools, techniques and knowledge that have enabled them to subsist on the scarce resources of their environment.[11] All aspects of Inuit life depend on ice, snow, land and weather conditions in the Arctic. The petition even goes so far as to

[9] The petition refers to many cases that will be dealt with in this section.

[10] The Inuit petition refers to Gibson and Schullinger (1998, p. 6).

[11] The Inuit petition (p. 74) refers to the ACIA (2004, p. 16).

argue that 'the subsistence harvest is essential to the continued existence of the Inuit as a people.'[12]

Because the subsistence way of life – a central point of Inuit cultural identity – has been damaged by, and may even cease to exist because of, climate change, the petition regards that the United States is violating the right of the Inuit to the benefits of culture, as guaranteed in Article XIII of the American Declaration, through its failure to take effective action to reduce greenhouse gas emissions (Ibid., p. 76).

The petition reminds the Commission that both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have long recognized that environmental degradation caused by a State's action or inaction can violate the human right to the benefits of culture, especially in the context of indigenous cultures (Ibid., p. 75). In the *Awas Tingni* case (*The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2001), the Inter-American Court, in discussing the right to property, acknowledged the link between indigenous culture and the land by stating that 'the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival' (Ibid., para. 149). The essential connection between the right to culture and interference with the lands of indigenous peoples was also acknowledged by the Inter-American Commission in the *Belize Maya* case (IACHR, 2004, paras. 154–156).[13]

Another right that the petition claims to have been violated is the right to property, which is protected in Article XXIII of the American Declaration. The petition reminds the Commission that the Inter-American Commission and the Court have long recognized that indigenous peoples have a fundamental international human right to use and enjoy the lands they have traditionally occupied, independent of domestic title (Inuit petition, 2005, p. 79).[14] In *Awas Tingni*, the Inter-American Court expansively defined property as including 'those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements

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[12] The petition (p. 74) refers to the ACIA (2004, p. 94).

[13] Additionally, in the *Yanomami* case, the Commission made a statement recognizing the cultural integrity of the Yanomami people by noting that the Brazilian state had failed to protect their rights by failing to establish a park for the protection of the cultural heritage of the Yanomami and in proceeding to displace the Yanomami from their ancestral lands, which had negative consequences for their culture and traditions. In this case, the Commission found a violation of the right to life, liberty, and personal security (Art. I), the right to residence and movement (Art. VIII), and the right to the preservation of health and well-being (Art. XI) of the American Declaration of the Rights and Duties of Man (IACHR, 1985). The Commission recognized that the protection of ancestral lands is an essential component of indigenous peoples' right to culture also in its Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (IACHR, 1983, para. II.B.15).

[14] The petition also refers to the *Case of Mary and Carrie Dann*, where the Commission notes that general international law supports indigenous peoples' property rights in their ancestral land and that the Proposed American Declaration on the Rights of Indigenous Peoples reflects general principles of international human rights law (IACHR, 2002, para. 129).

and any other intangible object capable of having value' (IACtHR, 2001, para. 144). In that case, the Court held that the government of Nicaragua violated the rights of the Awas Tingni to property protection when it granted concessions to a foreign company for logging on their traditional lands (Ibid., para. 173).

The Inuit petition claims that the Inter-American Court's definition of the right to property includes not only personal property, but also intellectual property and intangible rights of access (Inuit petition, 2005, p. 83). The petition points out that environmental degradation caused by development can affect the existence, value, use or enjoyment of personal property (Ibid.). In this case, climate change diminishes the value of the personal property of the Inuit. For instance, disappearing ice roads and disappearing snow cause damage to sled and skidoo runners, as well as sled dogs' paws. The petition refers to the case of the small community of Pangnirtung in Nunavut, where an Inuit commercial fishery that employed many people has diminished in value due to the fact that during recent years the ice often has not formed properly or has broken up early, with ensuing losses of vital equipment. The petition claims that 'the United States government has an obligation not to interfere with the Inuit's use and enjoyment of their property through its failure to take effective action to reduce greenhouse gas emissions' (Ibid., p. 84).

Furthermore, the petition argues that the Inuit, both individually and collectively possess property rights in 'movable' as well as 'intangible object[s] capable of having a value.' The personal possessions of the Inuit, such as equipment, clothing, and hides, fall within the category of protected property. Additionally, the intellectual property of the Inuit, in the form of their traditional knowledge, is an 'intangible object capable of having a value.' Besides this, the Inuit, according to the petition, possess intangible property rights of access to the harvest of resources (Ibid., p. 84).

According to the petition, the unprecedented rapid climate change has made much of the traditional knowledge and valuable education system of the Inuit inaccurate and less valuable, affecting their ability to 'use, share, market and bequeath that [knowledge] to future generations.'[15] Furthermore, the Inuit's property interest in access to lands is now less valuable because climate change has substantially diminished the fruit of the harvest from those lands. For example, the disappearance of travel routes and healthy game due to climate change has made access for the Inuit more difficult and less valuable. In these ways, according to the petition, global warming is reducing the 'existence, value, use and enjoyment' of the property of the Inuit (Ibid., p. 85).

In addition to the rights to culture and property, the Inuit petition claims that the effects of global warming violate the right of the Inuit to the preservation of health as guaranteed in Article XI of the American Declaration.[16] The Inuit petition reminds

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[15] This is the wording used in the Proposed American Declaration on the Rights of Indigenous Peoples (American Declaration, proposed, 1997, art. 20.1.).

[16] The Inuit petition points out that this guarantee is interpreted in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) as ensuring 'the enjoyment of the highest level of physical, mental and social well-being' (Article 10). The petition furthermore recalls that other major international human rights instruments also safeguard the right to health. See the Inuit petition, p. 85.

the Commission that it has acknowledged the close relationship between environmental degradation and the right to health, especially in the context of indigenous peoples (Inuit petition, 2005, p. 85). The petition refers to the *Yanomami* case, where the Commission has recognized the link between environmental degradation and the right to health provided in Article XI of the American Declaration (Ibid.; IACHR, 1985).

The Inuit petition argues that climate change caused by the US government's regulatory actions and inactions is harmful to the health and well-being of the Inuit. The petition refers to diminished populations, accessibility, and quality of fish and game upon which the Inuit rely for nutrition. In addition to physical health issues, the mental health of the Inuit has been damaged by 'the transformation of the once familiar landscape and the resultant cultural destruction' (Inuit petition, 2005, pp. 87–88).

The petition also claims that the United States' acts and omissions regarding global climate change violate the right of the Inuit to life, physical security and integrity. Changes in ice and snow threaten individuals' lives and place food sources at risk, and unpredictable weather makes travel dangerous at all times of the year (Ibid., p. 90). Additionally, the damage to homes and infrastructure from increased coastal erosion, land slumping, and flooding result in displacement, dislocation, and associated psychological impacts, thus leading to a violation of Article 1 of the American Declaration (Ibid., p. 91).[17]

Under the American Declaration, 'Every human being has the right to life, liberty, and the security of his person' (*American Declaration,* 1948, art. 1). The petition reminds the Commission that the right to life is the most fundamental right, and is included in all major international human rights conventions.[18] The petition claims that the United States has repeatedly bound itself to protect this right by ratifying the OAS Charter and the International Covenant on Civil and Political Rights (CCPR), adopting the American Declaration, and signing the American Convention on Human Rights (Inuit petition, 2005, p. 89).

The petition refers to the *Yanomami* case, where the Commission established a link between environmental interference and the right to life by finding that the government of Brazil's failure to protect the integrity of Yanomami lands violated the right of the Yanomami to life, liberty and personal security as guaranteed by Article 1 of the American Declaration (IACHR, 1985).

Additionally, in its Report on the Situation of Human Rights in Ecuador, the Commission has stated, 'The right to have one's life respected is not [. . .] limited to protection against arbitrary killing' (IACHR, 1997, Chapter VIII). The report further states, 'The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment.

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[17] The petition refers to the ACIA Overview report (2004, p. 111).

[18] The right to life is included in Article 6 of the CCPR, Article 3 of the Universal Declaration of Human Rights (1948), Article 4.1 of the American Convention on Human Rights (1969), and Article 2.1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (1950).

Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated' (Ibid.).

The petition also claims that the rights of the Inuit to residence and movement and inviolability of the home, as protected under Articles VIII and IX of the American Declaration have been violated (Inuit petition, 2005, p. 94). The petition refers to the Commission's statement in the *Yanomami* case, where it found a violation of the right to residence and movement where some Yanomami people had to leave their traditional lands because of a series of adverse changes caused by government development projects (IACHR, 1985, para. 1, section: 'The Inter-American Commission on Human Rights, resolves').

According to the petition, the United States' acts and omissions contributing to global warming violate the right of the Inuit to residence and movement because climate change threatens their ability to reside in their communities (Inuit petition, 2005, p. 95). Additionally, the right of the Inuit to inviolability of the home is violated because the effects of climate change adversely affect private and family life. This means in practice that coastal erosion caused by increasingly severe storms threatens entire coastal communities and melting permafrost causes building foundations to shift, damaging Inuit homes and community structures, leading in the worst cases to relocation of communities and homes farther inland (Ibid.).

The last right that the petition claims has been violated is the right to means of subsistence. The petition argues that the right of the Inuit to their own means of subsistence is inherent in and a necessary component of the American Declaration's right to property, health, life, and culture in the context of indigenous peoples. The petition refers to the practice of the UN Human Rights Committee of using the words 'means of subsistence' when protecting the livelihoods of indigenous peoples under Article 27 of the International Covenant on Civil and Political Rights (CCPR) (Ibid., p. 92). The petition furthermore refers to other instruments such as ILO Convention No. 169 that protect the right of indigenous peoples to their own means of subsistence.[19]

The petition argues that Arctic climate change is making the subsistence harvest of the Inuit more dangerous and difficult and indeed gradually destroying their means of subsistence. According to the petition, the United States has an international obligation not to deprive the Inuit of their own means of subsistence. The United States' acts and omissions with regard to climate change violate the Inuit's human rights to their own means of subsistence (Ibid., p. 94).[20]

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[19] ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Articles 14.1 and 23.1.

[20] If the admissibility criteria are fulfilled, a petition to the Inter-American Commission is opened to consider the merits of the case. The report of the decision on the merits clarifies whether or not there have been violations by a Member State. The decision is to be based both on the information provided and any other information that is a matter of public knowledge (Articles 42(1) and 43). If violations are identified, the Commission prepares a preliminary report proposing how to address the violations; the State which is alleged to have committed the violation is expected to respond to this report. The State has the opportunity to report on efforts to comply with the recommendations

The Inter-American Commission on Human Rights has clearly recognized that environmental interference with the lands of indigenous peoples can lead to infringement of their human rights.[21] So in principle it could be assumed that the consequences of climate change could be considered as an issue of human rights in the Commission. Besides that, the Commission has recognized that it also takes into account new developments in human rights law that emerge in other human rights systems than just the field of Inter-American human rights law (IACHR, 1985). Therefore, the practice of the UN Human Rights Committee, for instance, may also be relevant for decisions of the Inter-American Commission.

It is, however, important to note that although there have been successful cases in the Inter-American Commission and Court where the human rights of indigenous peoples have been considered to have been violated because of interference with their lands, the crucial difference between these earlier cases and the Inuit case is that the Inuit petition is the first case involving global environmental interference, where it is certainly not easy, first of all, to find and understand all the connections between environmental impacts and human rights, on one hand, as is already evident in the original rejection of the petition by the Commission, but secondly – and perhaps more importantly – it might be extremely difficult, if not impossible, for the Commission to point to one particular state as being responsible for a clearly global environmental problem, even though it is a well-known fact that the United States has been the biggest single producer of greenhouse gases.[22]

Additionally, despite the fact that the petition clarifies quite convincingly the connections between the implications of climate change and each article of the American Declaration, the whole phenomenon of global climate change still has so many unknown factors that it is not easy to be totally sure that it is precisely the actions or omissions of the United States that are the main cause of each of these environmental changes, which would have to be proved in order for the United States to be

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before a final report of the Commission is issued. (If the violating State has accepted the jurisdiction of the Court, the Commission will provide the petitioner with an opportunity at this stage of the process to consider the response of the violating State to the recommendations of the Commission and to comment on whether the case should be referred to the Court.) In the absence of a referral to the Court, the Commission is free to publish its final report within three months of completing its preliminary report (Doelle, 2005, p. 234).

[21] In the planning state of the petition, the ICC was trying to determine whether there might be other suitable bodies for the petition. In the beginning of 2003, the Executive Council of the ICC issued a resolution pondering the issue. The resolution mentions in particular two states, the Russian Federation and the United States, which had not at that time ratified the Kyoto Protocol (Inuit Circumpolar Conference [ICC], 2003). Russia, unlike the United States, has ratified the Optional Protocol to the CCPR, so in principle the Russian Inuit could have brought an individual communication to the UN Human Rights Committee. Importantly, however, the Russian Federation ratified the Kyoto Protocol before the Inuit took the legal action against the United States, so a claim against the Russian Federation was no longer so topical. (The Russian Federation ratified the Kyoto Protocol on November 5, 2004.)

[22] However, according to recent news, China has overtaken the United States as the leading emitter of carbon dioxide, and its emissions are now increasing about ten times faster than those of the United States (Harris, 2008).

regarded as responsible for the rights violation. By this token, it does not seem, at least to my mind, very realistic to expect the Inuit petition to be successful or even to be reopened by the Inter-American Commission.[23]

Even if it is found to be meritorious, this petition could not perhaps achieve what it aims at: the effective protection of the rights of the Inuit. It is difficult to see how the Commission could affect the climate change policy of the United States so dramatically that the major climatic changes that are already starting to take place in the Arctic would not threaten the traditional livelihoods of the Inuit. By this token, it can be seen that the traditional human rights mechanisms cannot effectively be used to protect the rights of indigenous peoples from global environmental interference such as climate change.

Although it is doubtful that the human rights of indigenous peoples can be effectively protected against the impacts of climate change through traditional human rights monitoring mechanisms, cases such as the Inuit petition importantly challenge the monitoring bodies to open up new ways of thinking and interpreting the articles of the human rights instruments that were not originally created to handle the complex impacts of global climate change.

The Inuit petition is certainly important, even if it is not found to be meritorious, for it exposes clearly the core deficiencies of international law in relation to indigenous peoples. The petition is, perhaps more than anything, an attempt to allow an indigenous voice to be heard. It is also a reflection of the fact that indigenous peoples have not been able to participate effectively in the global governance of climate change.

It has indeed been a conscious choice of the ICC to make its intentions concerning the petition public from the very beginning. In the 9th Conference of the Parties to the Framework Convention on Climate Change, in Milan 2003, Sheila Watt-Cloutier (2003), then president of the ICC, stated to the media, NGOs and attending states:

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[23] Should the Commission, however, find the petition meritorious, along with the proceedings the Commission would prepare a preliminary report proposing how the United States should address the violations. If the United States had accepted the jurisdiction of the Court, the Commission would provide the petitioner an opportunity at this stage of the process to consider the response of the violating State to the recommendations of the Commission and to comment on whether the case should be referred to the Court. The United States then would have an opportunity to report on efforts to comply with the recommendations before a final report of the Commission would be issued. The Commission could then publish its final report if the recommendations had not been complied with by the United States. See Rules of Procedures of the Commission, Articles 43, 45 and 46 (See also Meinhard, 2005, p. 234). Additionally, the Commission could decide to include the petition in its annual report to the General Assembly of the OAS, in order to call attention to the case (Articles 56 and 57). The OAS General Assembly can also make a resolution if a state does not follow the recommendations of the Commission. According to Article 42, there is also an option of pursuing a friendly settlement process. It is difficult, however, to see how the parties in this case could reach a mutually satisfactory agreement.

> Our rights – our human rights that we share with all of you – to live as we do and to enjoy our unique culture – part of the globe's cultural heritage – [are] at issue. The Arctic dimension and Inuit perspectives on global climate change need to be heard in the corridors of powers.

The Inuit want to participate in order to contribute to international climate change policy. This is evident in the following statement of Watt-Cloutier (2003), also made in the 9th Conference of the Parties:

> We do not suggest this route lightly, or in an adversarial spirit. The Arctic states account for 40 percent of the world's greenhouse gas emissions, so it is appropriate for us to use our human rights to prompt a dialogue with them, particularly the United States of America. It is our intent to educate not criticize, and to inform not complain. We hope that the language of human rights will bridge perspectives, not lead to more barricades and protest. After all, if we protect the Arctic we will save the world.

The reason for bringing the action is thus not only to point to the United States as 'guilty' of the problem of climate change and responsible for the infringement of the rights of the Inuit, but also to convince the whole community of states to take effective action to combat climate change, and to make sure everyone understands that the problem of climate change is dramatically impacting the rights of the Inuit. In this light it can be argued that although the Inuit petition may not be able to protect the substantive rights of the Inuit, it may put pressure on states to take indigenous peoples' views into consideration in decision-making concerning climate change. Watt-Cloutier affirmed this view by stating in 2003 in Milan that 'we engage in the politics of influence not the politics of protest. Our fate and yours are one and the same. We hope all heed our: 'Voice from the North' (Climate change, 2003).

Furthermore, the ICC Executive Council Resolution, which explains the purpose of the petition, states, 'In order to protect Inuit human rights and interests in the Arctic region, focus should be necessarily directed to international forums since many related issues are increasingly regulated at this level' (ICC, 2003). It instructs the ICC to work in partnership with Arctic and other governments and appropriate NGOs to develop global initiatives to combat climate change (Ibid.). It directs the Office of the Chair to:

1. Develop and implement a political, legal, and media climate change strategy to bring Inuit concerns about global climate change and the threat that this poses to Inuit human rights to the attention of international agencies and decision-makers with the aim of strengthening international arrangements to combat global climate change.
2. Bring Arctic/Inuit perspectives on climate change to the attention of decision-makers in North America, western Europe, United Nations agencies, and to governments that participate in the Conferences of Parties to the UN Framework Convention on Climate Change with the aim of positioning Inuit to influence international discussions and decisions, particularly related to the post-Kyoto Protocol commitment period – after 2008. (Ibid.)

Not only the Inuit of the Arctic, but also other indigenous peoples worldwide have been pushing for special status and recognition in international climate change governance. Several organizations of indigenous peoples have been participating in the Conference of the Parties to the UNFCCC. 'Indigenous Peoples Organizations' have been recognized as one of the constituencies of observers at the UNFCCC. Indigenous peoples, however, have not been satisfied with their present status in the process, but have been constantly demanding the establishment of a Working Group of Indigenous Peoples on Climate Change as a means of guaranteeing their 'full and effective participation' (Indigenous Caucus, 2003).

The Inuit petition can be seen as an important attempt to improve the status of indigenous peoples in international climate change governance. From the viewpoint of the general status of indigenous peoples in international environmental decision-making, these kinds of formal openings are certainly significant. In this respect it can be seen that the Inuit petition and similar cases which may be inspired by this case can put pressure on states to truly 'hear' the indigenous voice and take it into account in decision-making concerning the global environment.

9.3 The Right to Participate – State Sovereignty vs. The Human Rights of Indigenous Peoples

This section aims to discuss the inherent contradiction between the basic structure of international law relating to the doctrine of state sovereignty and the doctrine of subjects on one hand, and the human rights of indigenous peoples on the other hand. This contradiction arises from the basic fact that whereas the human rights of indigenous peoples, as will be shown, include the right to effective participation of indigenous peoples in all matters that affect their rights, the doctrine of subjects (or legal persons) prevents their effective participation in international norm-making concerning the environment, which, from the viewpoint of traditional livelihoods, is one of the most crucial fields of interest for indigenous peoples.

The doctrine of subjects (or legal persons) determines who may bear rights and obligations. Traditionally, the doctrine has been rather clear: states are the primary subjects of international law.[24] The doctrine of subjects, as described in standard modern textbooks, repeats the fact that current international law contains an extensive number of obligations and rights that pertain to entities other than states: e.g., individuals, indigenous peoples, liberation movements, and companies.[25] What these textbooks often do not emphasize, however, is that while these actors may have legal rights and obligations in international law, e.g., where a treaty accords a

[24] Yet, for example, organisations of states (inter-governmental organisations, IGOs) can acquire the status of a legal person in international law (International Court of Justice, 1949).

[25] See generally Malanczuk (1997, Chapter 6).

human right to an individual, they cannot participate in the making of legal norms. In this respect, not much has changed. States are still the ones who create international legal norms.

It has been argued that the doctrine of state sovereignty is in decline, the argument being that nation-states cannot exercise their freedom with the host of legal obligations that constrain their actions in most policy areas (Koivurova & Heinämäki, 2006, p. 102). The basic premise of state sovereignty is, however, still valid: since states are sovereign, they can only be legally bound by norms to which they voluntarily consent, either implicitly (customary law) or explicitly (treaties).

Taking the battle against climate change as an example, one barrier to the effective reduction of greenhouse gases is the fact that there is no external power that can force states – for instance, the United States, as the largest contributor to global warming – to ratify the Kyoto Protocol to the Framework Convention on Climate Change. The freedom of contract of states, which is a direct emanation of their sovereignty, can be problematic if there are states that contribute strongly to a certain environmental problem, but are not willing to commit themselves to international treaties that try to solve the problem in question. What makes the freedom of contract of states problematic, besides the fact that our common global environment is in danger, is the fact that environmental issues often have direct implications for human rights, particularly those of indigenous peoples.[26]

The doctrine of states' sovereignty and legal subjectivity restricts, however, the ability of indigenous peoples to participate in the creation of international law concerning the environment. One of the earliest tensions in classical international law is that between the territorial sovereignty of governments and the status of individuals and groups as beneficiaries of human rights. As the emphasis on natural law had given way by the mid-nineteenth century to positivist law and a focus on the consent of governments, the tension tended to be resolved in favour of the state. For indigenous peoples, who did not qualify as states, this meant that they were not able to participate in the shaping of international law (Anaya, 2004, p. 150). According to Oppenheim's well-known textbook on international Law, the basis for excluding indigenous peoples from among the subjects of international law was reduced to their subjective non-recognition by those within the 'Family of Nations.' Eliminating whatever ambiguity remained about the status of Indian tribes and similar indigenous peoples, Oppenheim's treatise added expressly that the law of nations does not apply to 'organized wandering tribes' (Oppenheim, L.F.L. (1920).

[26] It should be noted that the concept of common concern, although not implying a specific rule for the conduct of states, yet signals that states' freedom of action may be subject to limits even where other states' sovereign rights are not affected in the direct transboundary sense envisaged by the no-harm principle, in areas or resources beyond the limits of national jurisdiction, and even resources physically located within the territory of individual states which are of general concern. In such cases, according to Brunnée, the concept of common concern entitles and perhaps even requires all states to cooperate internationally to address the concern (Brunnée, 2007, p. 566).

International Law. R. F. Roxburgh (Ed.), p. 134–135, as quoted in Anaya (2004 pp. 28–29)).

Even though international law today continues to be concerned primarily with states and their relations with one another, under the modern rubric of human rights it is also increasingly concerned with upholding rights that are deemed to inhere in human beings individually and collectively. The right to self-determination, which is included in human rights documents, arises within the human rights framework of contemporary international law rather than the traditional context of states' rights. The question of self-determination will be dealt with in the following section.

Despite the fact that indigenous peoples are often nowadays regarded as a distinct legal category between minorities and states – some kind of quasi-state actors with special rights and status within many individual states (Barsh, 2007, 850)[27] – this does not reflect their position in international norm-making. Indigenous peoples do not constitute states and have not, in most cases, ambitions of statehood, with most working to establish some form of self-governance within existing nation states. Without state status, however, indigenous peoples are excluded from the process of international law-making in matters that directly affect their interests and rights, such as global environmental issues.

In international law-making, indigenous peoples are regularly categorised as non-governmental organisations (NGOs) along with other groups participating in the international policy-making process; thus they have very limited rights to participate in that process. This binary structure of representation leads to a situation where indigenous peoples are put on the same footing as industrial and environmental associations.

It could be argued that the intermediate position of indigenous peoples, representing peoples within states, not interest-based constituencies, should be reflected in their status in international treaty-making.[28] The implications of the recognized right to self-determination and self-government will be dealt with in the following section. This section aims to show that despite their freedom of contract, states have already voluntarily committed themselves to the human rights of indigenous peoples; these rights protect their traditional way of life from environmental interference and, importantly, guarantee their effective participation in all matters that directly affect their rights and interests. This means, according to the present author, that states are not only under a legal obligation to protect the environment effectively but also to guarantee the effective participation of indigenous peoples in international environmental decision-making.

The right of indigenous peoples to participate *effectively* indeed forms an integral part of their right to culture – perhaps the crux of indigenous rights – as recognized by several widely ratified human rights instruments such as both International

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[27] In fact, indigenous peoples are the only general category of people that have demanded self-determination and to whom certain distinct collective rights have been accorded in international law (Kingsbury, 2003; International Labour Organisation Convention No. 169, 1989).

[28] I have argued this earlier with Timo Koivurova in Koivurova and Heinämäki (2006, p. 102).

Human Rights Covenants[29] and the International Convention on the Elimination of all Forms of Racial Discrimination (1965).

Starting with Article 27 of the CCPR – which can be seen as perhaps the basic legal treaty recognizing the culture of members of indigenous peoples as minorities – the UN Human Rights Committee, a monitoring body of the CCPR,[30] has interpreted this article as including 'the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong' (Human Rights Committee [HRC], 1984a). In reaching this conclusion, the Committee recognizes that indigenous peoples' subsistence and other traditional economic and social activities are an integral part of their culture, and interference with those activities can be detrimental to their cultural integrity and survival.[31] The impacts of climate change, as illustrated by the Inuit petition, are good examples of an interference that can have devastating effects on the cultural integrity of indigenous peoples within and outside the Arctic.

Even though Article 27 primarily sets out the negative obligation of states not to deny members of minorities the right to enjoy their culture, to profess and practice their religion or to use their own language, in the legal literature and in the work of the UN Human Rights Committee, positive obligations have been derived from the provision (Hanski & Scheinin, 2003, p. 375). The Committee's famous General Comment No. 23 (50) (HRC, 1994a, pp. 147–150), adopted in 1994, explicitly states that a State party has an obligation to ensure that the existence and the exercise of this right are protected against denial or violation, and that positive measures of protection are required against the acts of the State party or other persons within the State party.[32] The Committee furthermore importantly maintained that in the case of indigenous peoples, the right to culture under Article 27 may consist of 'a way of life which is closely associated with territory and use of its resources. [...] That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law' (HRC, 1994a, p. 3).

The Committee then emphasized, 'The enjoyment of those rights may require *positive legal measures of protection and measures* to ensure the *effective* participation of members of minority communities in decisions which affect them.' The

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[29] The International Covenant on Civil and Political Rights ([CCPR], 1966) and the International Covenant on Economic, Social and Cultural Rights ([CESCR], 1966).

[30] The HRC was established under Article 28 of the CCPR. It is composed of 18 independent experts in the field of human rights, elected by the state parties to the CCPR (CCPR, 1996, arts. 28–34). Although they are nominated and elected by the states parties to the CCPR, the members of the HRC 'serve in their personal capacity', meaning that they are independent and do not represent the states that nominated them (CCPR, 1996, art. 28(3),).

[31] See also *Kitok v. Sweden*, Report of the Human Rights Committee (HRC, p. 221).

[32] The UN Secretary-General has also stated, in discussing Article 27 of the CCPR, that 'the protection of minorities [...] requires a positive action: a concrete service is offered to a minority group, such as the establishment of schools in which education is given in the native language of the members of the group. The protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question [...] wish to maintain their distinction of language and culture' (United Nations Secretary-General, 1949, paras. 6–7).

Committee concluded that 'article 27 relates to rights whose protection imposes *specific obligations* on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole' (Ibid., emphasis added).

The Committee recognizes requirements for positive legal measures of protection and effective participation separately, but in the case of global environmental issues such as climate change, it can be seen that the effective participation of indigenous peoples in international environmental processes would be an important part of the positive legal measures of protection.

In the case *I. Länsman et al v. Finland* (HRC, 1994b), the UN Human Rights Committee referred to its General Comment on Article 27, according to which measures must be taken to ensure the *effective* participation of members of minority communities in decisions that affect them (HRC, 1994a, para. 7; 1994b, para. 9.6).[33] The Committee noted that the members of the Saami people had been consulted during the proceedings and that the quarrying that had taken place thus far had had only 'a certain limited impact'; thus it had not adversely affected reindeer herding in the area too much (HRC, 1994b, paras. 9.5, 9.6).[34] In later cases – for example in the *J. Länsman* case (HRC, 1995), as well as in the case of *Apirana Mahuika et al v. New Zealand* (HRC, 1993/2000, para. 9.5) – the Committee has come to similar conclusions with regard to the criteria of the combined test of consultation and sustainability (HRC, 1993/2000, paras. 7.8, 7.9, 8.3, 9.3 and 10.5).[35]

Even though these cases concern local environmental issues, it can be argued that indigenous peoples should also be consulted in global environmental matters that may affect their right to traditional livelihoods in dramatic ways. The right to

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[33] The Committee thus applies a two-part test of consultation and economic sustainability. The Committee noted that the local Saami had been consulted during the proceedings and that the quarrying that had so far occurred did not appear to have adversely affected reindeer herding in the area (HRC, 1994b, para. 9.6). The test of effective participation is also reflected in para. 7 of the Committee's General Comment (HRC, 1994a).

[34] For the analysis of the two-part test, see Scheinin (2000a, p. 168). In the *I. Länsman* case, the Committee emphasized that Article 27 does not protect only the traditional means of livelihood of minorities, and the fact that the Saami have 'adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking Article 27 of the Covenant' (para. 9.3).

[35] For the 'test' see footnotes 33 and 34. In any case, no violation was found in *J. Länsman*. A similar case concerning environmental issues and the right to culture of the Saami people of Finland is *A. Äärelä and J. Näkkäläjärvi v. Finland* (HRC, 1997), where the Committee found that the requirements of consultation and sustainability had been met, thus finding no violation (paras. 7.5 and 7.6). In this case, however, the Committee did find a violation of Article 14.1 (the right to be equal before the court) in conjunction with Article 2 (the right to effective remedies) because of the failure of the Finnish Court of Appeal to allow the authors the opportunity to challenge one of the submissions of the state during the proceedings therein (para.7.4) and because Finnish law requires the loser in court proceedings to pay the costs of the winner without allowing the judge any discretion to lower the amount of costs awarded (para. 7.2). *J. and E. Länsman et al. v. Finland* (HRC, 2001) is another case in which no violation was found.

be consulted must necessarily entail a more influential status than that of regular NGO participation. As the Inuit petition shows, the impacts of climate change can in many places certainly go beyond 'a certain limited impact', adversely affecting the traditional livelihoods of indigenous peoples, which are protected in Article 27. The Committee supported this view by stating in the *I. Länsman* case (HRC, 1994b) that if mining activities in the Angeli area were to be significantly expanded, this might constitute a violation of the authors' rights under Article 27. The committee noted that economic activities, in order to comply with Article 27, had to be carried out in such a way that the authors could continue to benefit from reindeer husbandry (Ibid., para. 9.8).

Based on the jurisprudence and General Comments of the Human Rights Committee, it can be concluded that the right to culture under Article 27 entails positive obligations for states in two important ways. First, states are under an obligation to make sure that their actions do not harm the sustainability of the traditional livelihoods of indigenous peoples. With regard to environmental issues this is a very relevant obligation meaning that states have a duty to protect the culture of indigenous peoples from environmental interference falling within their responsibility. Therefore, states are under an obligation to protect the environment of indigenous peoples. When it comes to global environmental problems such as climate change, however, it is not enough that states protect the lands of indigenous peoples locally, since, as has become obvious, the lands and traditional livelihoods of indigenous peoples are affected by global environmental changes. This should indicate that states have a legal obligation to engage in effective measures and international cooperation to protect the global environment.

Additionally, the second requirement of the UN Human Rights Committee is of importance where it states that Article 27 requires the 'effective participation' or 'meaningful consultation' with indigenous peoples in cases related to the enjoyment of their culture. Whereas the impact of climate change can dramatically threaten the traditional livelihoods of indigenous peoples, the Arctic Inuit being but one example, states are under an obligation to guarantee the effective participation of indigenous peoples in global climate change governance.

The Committee on the Elimination of Racial Discrimination of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) has recognized in a General Recommendation adopted in 1997 that the situation of indigenous peoples has always been a matter of close attention and concern for it (Committee on the Elimination, 1997).[36] The CERD urged states to ensure freedom

[36] Article 1(1) of the Convention on the Elimination of Racial Discrimination (1965) defines racial discrimination as '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' (emphasis added). Articles 1(4) and 2(2) contemplate affirmative action, or a state's taking 'special and concrete measure' to redress current or historical inequities, particularly in the social, economic and cultural realms. Article 5eVI guarantees the right to 'equal participation in cultural activities.'

from discrimination, to provide conditions 'allowing for a sustainable economic and social development compatible with [indigenous peoples'] cultural characteristics' (Ibid., para. 4(c)). The CERD also highlighted the effective participation of indigenous peoples by requiring of states that 'no decisions directly relating to their rights and interests are taken without their *informed consent*' (Ibid., para. 4(d), emphasis added).

The right to culture of indigenous peoples is also recognized by the International Covenant on Economic, Social and Cultural Rights ([CESCR], 2000).[37] With regard to cultural protection, the CESCR provides that states must take steps to achieve the full realization of the right to culture (CESCR, 1966, art. 15(2)).

The Committee on Economic, Social and Cultural Rights has recognized the right of indigenous peoples to culture, lands and resources on many occasions.[38] Interestingly and importantly, the Committee has also started to address the rights of indigenous peoples in the light of Article 1 (self-determination) of the Covenant, which will be discussed in the following section.

The Inter-American Human Rights system also guarantees effective participatory rights for indigenous peoples concerning the use of their lands. These rights are included particularly within the right to property (*American Declaration,* 1948, art. XXIII),[39] as the two following cases show. The Inter-American Commission on Human Rights has taken this approach in the *Belize Maya* case, in requiring the *informed consent* of the Maya people in relation to the use of their lands, which were seen as property (IACHR, 2004, para.194).

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[37] Article 15(1) recognizes the right of everyone 'to take part in cultural life' and to benefit from the 'moral and material interests of any scientific, literary or artistic production' authored by them. The CESCR held a Day of Discussion on 27 November 2000, during which members stated that traditional knowledge and intellectual and cultural heritage, both as individual and collective rights, could be addressed in relation to Article 15(1)(c) (ComESCR, 2000b, paras. 578–635). See also MacKay (2005, p. 83). Very similar to the CESCR in language, the Universal Declaration on Human Rights (1948) recognizes that everyone has the right 'to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and benefits and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author' (Article. 27, paras. 1 and 2).

[38] Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fourth session, Item 8 of the provisional agenda, 3 July 1992, The Realization of Economic, Social and Cultural Rights, Final Report submitted by Mr. Danilo Türk, Special Rapporteur (ComESCR, 1992, para. 198). See also Concluding Observations of the Committee on Economic, Social and Cultural Rights on Finland (ComESCR, 2000a, para. 25). The CESCR has recognized the importance of cultural rights for individual and collective identity, the relationship between cultural rights and other rights such as land and resource rights in other Concluding Observations as well. See for instance CESCR Concluding Observations on Panama (ComESCR, 2001b, para. 12); Colombia (ComESCR, 2001a, para. 12); Ecuador (ComESCR, 2004, para. 58).

[39] The Inter-American Commission on Human Rights acknowledges the fundamental nature of this right by stating that 'various international human rights instruments, both universal and regional in nature, have recognized the right to property as featuring among the fundamental rights of man' (IACHR, 1994, Chapter 6, p. 464; *American Convention,* 1969, art. 21).

In a similar vein, in the *Awas Tingni* case (IACtHR, 2001), the Inter-American Court concluded that Nicaragua had violated the rights of the Mayagna community of Awas Tingni by granting a logging concession within the community's traditional territory without its consent and by ignoring the consistent complaints and requests of the Awas Tingni community urging demarcation of the territory. In ruling on the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, the Inter-American Court of Human Rights importantly stated that this had to be done 'with *full participation* by the Community and taking into account its customary law, values, customs and mores' (Ibid., para. 164, emphasis added).[40]

In a recent *Saramaka* case, (IACtHR, 2007), the Inter-American Court explained more closely what it means by 'consultation' and 'prior consent'. In relation to logging and mining activities that took place in the territory of the Saramaka community,[41] the Court made a special reference to Article 32 of the UN Declaration on the Rights of Indigenous Peoples, which requires from states consultation and cooperation with indigenous peoples in order to obtain their *free and informed consent* prior to the approval of any project affecting their lands or territories and other resources (Ibid., para. 131, emphasis added).

The Court stated that the right to property (Article 21) of the American Convention has to be understood in the light of the rights recognized under the common Article 1 of CCPR and CESCR (self-determination), and Article 27 of the CCPR to the effect of calling for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied (Ibid., para. 95).

The Court explained then what the duty of the State to consult indigenous and tribal peoples mean. According to the Court, the consultations must be carried out 'in good faith', through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Court continued that the Saramakas must be consulted in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community. This is because the early notice provides time for internal discussion

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[40] The Court also stated that Nicaragua must adopt 'the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their common law, values, customs and mores', and that until the delimitation, demarcation, and titling of the lands of the members of the community had been carried out, Nicaragua 'must abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to "impair the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live"' (IACtHR, 2001).

[41] As observed by the Inter-American Court, Saramaka people are not indigenous to the region they inhabit; they were instead brought to what is now known as Suriname during the colonization period (para.79–80). The Court recognized Saramaka people as a tribal community and held that its jurisprudence regarding indigenous peoples' right to property is also applicable to tribal peoples because both share distinct social, cultural and economic characteristics (paras 84 and 86).

within communities and for proper feedback to the State. The Court further stated that the state must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntary (Ibid., para.133).

Finally, the Court considered that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions (Ibid., para 134).[42] The Court ruled that the State shall adopt legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted (Ibid, para 8 of the Operative Paragraphs).

Saramaka case sets an important legal precedent in relation to participatory rights of indigenous peoples. Although it does not recognize the right of indigenous peoples to have an absolute control over their natural resources, the Court in *Saramaka* acknowledges that the collective right to property has to be understood in the light of the right to self-determination, taking into account also Article 32 of the UN Declaration, which requires the commitment of the State to obtain free and informed prior to the approval of any project affecting their lands or territories and other resources.

Again, even though these cases concern the local use of the traditional lands of indigenous peoples, there is no reason why the requirements of positive protection and effective participation could not and should not be applied in relation to global environmental management.

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which is – besides the former ILO Convention (*International Labour Organization [ILO] Convention No. 107, 1957*)[43] – the only legally binding international instrument concerning the rights of indigenous peoples, guarantees the right to effective participation in matters which affect them. Article 6.1

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[42] The Court referred to the notion of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, according to which 'free, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects' (Para. 135 of the Saramaka Case). See UN Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session), U.N. Doc. E/CN.4/2003/90, January 21, 2003, para 66. The Court also referred to UNCERD that has observed that '[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources fall short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought'. UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Ecuador (62nd session, 2003), U.N. Doc. CERD/C/62/CO/2, June 2, 2003, para 16.

[43] ILO Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 5 June 1957. This Convention is still in force for those countries that have ratified it and but have not ratified the replacing Convention No. 169.

states: 'Governments *shall* [...] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly' (*ILO Convention No. 169, 1989*, art. 6.1(a), emphasis added).' Furthermore, states must 'establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them' (Ibid., art. 6.1(b)). Additionally, states must 'establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose' (Ibid., art. 6.1(c)).

Importantly, Paragraph 2 of Article 6 maintains that the consultations '*shall* be undertaken, in good faith and in a form appropriate to the circumstance, with the objective of achieving agreement or consent to the proposed measures' (emphasis added). Paragraph 2 strengthens the right of indigenous people to participate in issues that concern them. Even though it does not give indigenous peoples a right of *veto*, it certainly requires discussions in good faith (Swepston, 1998, p. 42). In this respect, according to the Guide to ILO Convention No. 169, consultation is a fundamental principle of the convention, as it offers indigenous and tribal peoples 'the opportunity to participate in decision-making processes and to influence their outcome. It provides the space for indigenous and tribal peoples to negotiate to protect their rights' (ILO, 1993, p. 17).

Article 6.1 addresses the obligation of states to consult indigenous peoples in matters which affect them. Global environmental matters, such as climate change, can easily be seen as fitting into this category. According to Article 6.1, states must establish means for indigenous peoples to participate '*at all levels of decision-making* in bodies responsible for policies concerning them' (emphasis added). This statement can be interpreted as including international environmental decision-making. 'The bodies responsible for policies concerning them' can be interpreted to mean the organizations representing indigenous peoples. The wording 'at least to the same extent as other sectors of the population' indicates an opening for special treatment, where merited, in brief affirmative action (Swepston, 1998, p. 42).

When it comes to dramatic environmental consequences such as the impact of climate change, it can be argued that since indigenous peoples are particularly vulnerable to environmental interference and represent such a small percentage of the population of states, representation through ordinary democratic means does not allow them to achieve the level of effective participation suggested by the phrase 'to the same extent as other sectors of the population'.

The ILO Guide to Convention No. 169 affirms that equality can require special treatment for groups who are at a disadvantage (Tomei & Swepston, 2000, p. 11). Support for this idea may be found in Article 4, which says that states must adopt special measures as appropriate to safeguard the persons, institutions, property, labour, culture and environment of indigenous peoples. Extended participatory rights in international processes which directly affect indigenous peoples' rights could be one important special measure.

Additionally, Article 7 gives extra weight to the applicability of Article 6 to participation in international environmental processes. It guarantees indigenous peoples 'the right to decide their own priorities for the process of development as it affects their lives, beliefs, institution and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural developments.' Additionally, indigenous peoples '*shall* participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly' (*ILO Convention No. 169*, 1989, art. 7.2, emphasis added). Furthermore, governments '*shall* ensure that [...] studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities' and that the results of these studies 'shall be considered as fundamental criteria for the implementation of these activities' (Ibid., art. 7, emphasis added).

Even though the ILO Convention does not recognize the right of indigenous peoples to self-determination, Article 7 has been formulated using a similar kind of language to self-determination, asserting that indigenous peoples have a right 'to decide their own priorities.' When indigenous peoples have no say in international environmental policies, they certainly lack the possibility to decide their own priorities concerning their lands and traditional livelihoods.

Land rights provisions are often regarded as the crux of ILO Convention No. 169.[44] Importantly, the rights of indigenous peoples with respect to the natural resources of their lands must be specially safeguarded. According to Article 15, these rights include the right of these peoples to participate in the use, management and conservation of these resources and the right to be consulted when these natural resources are being used by the State or third parties.

Here again, environmental protection and the effective participation of indigenous peoples in international environmental processes can be seen as a means of safeguarding their rights to natural resources. Even though the ILO Convention does not explicitly guarantee the right to self-determination, it clearly recognizes *de facto* at least an internal aspect of this right: the right to self-government.[45]

As has been shown, the right of indigenous peoples to participate effectively in matters that directly affect their lives and rights are guaranteed in present human rights law. The right to participate effectively should also be reflected in international environmental decision-making, such as climate change governance. This view seems to be shared by Tahvanainen, who concludes that the right to effective

[44] Land rights are set down in Articles 14–19 (*ILO Convention No. 169*, 1989). Article 14 recognizes the ownership, possession and usufruct of the traditional lands of indigenous peoples.

[45] In the context of the ILO Convention, Myntti talks about the 'ethno political self-government' of indigenous peoples. In his view, particularly Articles 14 and 15, when read together with Article 6, include the right of indigenous peoples to govern their traditional lands (Myntti, 1996, p. 24). Regarding the right to participation under the ILO Convention No. 169, see Ulfstein (2005, pp. 13–31). For the rights of Arctic Saami people under the ILO Convention 169, see generally Joona (2005).

participation opens up some avenues that can affect indigenous peoples' treaty-making capacity (Tahvanainen, 2005a, p. 415).

Recent developments concerning the right of indigenous peoples to self-determination, such as the recent adoption of the UN Declaration on the Rights of Indigenous Peoples, bring additional weight to the question of participation. Before this matter is investigated more closely in the following section, it should be mentioned that in the field of international environmental law as well, indigenous peoples' participatory rights have been developed particularly since the Rio Conference on Environment and Development in 1992.

Principle 22 of the Rio Declaration on Environment and Development states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their *effective participation* in the achievement of sustainable development. (*Rio Declaration,* 1992, principle 22, emphasis added)

The Convention on Biological Diversity ([CBD], 1992), which was also adopted in the Rio Conference, sets legally binding rights for indigenous peoples and requirements for the state in that respect. Article 8(j) states:

> [States shall] Subject to [their] national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application *with the approval and involvement* of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices. (CBD, 1992, art. 8(j), emphasis added)

The consensus of the Rio Conference concerning indigenous peoples reflects the idea that indigenous peoples should not be protected only for their own sake, but that indigenous peoples can make a valuable contribution to environmental protection and sustainable development.[46] In the case of climate change, when able to participate more profoundly, indigenous peoples could put a significant pressure on states to commit themselves to the reduction of greenhouse gas emissions.

Finally, it should be mentioned that the Vienna Declaration and Programme of Action, adopted in the World Conference on Human Rights in 1993 (*Vienna Declaration,* 1993), also highlights 'the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them' (Ibid., Principle 20). Furthermore, according to the Declaration, states should take concerted positive

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[46] This idea is repeated in the Vienna Declaration and Programme of Action adopted in 1993, Paragraph 20 of Part I, in which the Conference 'recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in particular matters of concern to them' (*Vienna Declaration*, 1993).

steps to ensure the human rights of indigenous peoples, on the basis of equality and non-discrimination, and recognize the value of their distinct identities and cultures (Ibid.).

9.3.1 The Right to Self-Determination of Indigenous Peoples: Recent Developments

The aim of this section is to examine recent developments concerning the right of indigenous peoples to self-determination and to consider what this right means or should mean from the viewpoint of the effective participation of indigenous peoples in international environmental decision-making.

Self-determination is defined as the right and ability of a people or a group of peoples to choose their own destiny without external compulsion (Cassidy, 1991, p. 1).[47] It has been stressed that in order to protect their human rights, indigenous peoples need to exercise fully their right to self-determination and their collective rights to have control over their territories and natural resources, as well as over their environmental security and their own development (Sands & Fabra, 2002, p. 11).

Developments which recognize the right of indigenous peoples to self-determination are emerging in international law. Besides the fact that the UN Declaration on the Rights of Indigenous Peoples, which was adopted by the Human Rights Council in June 2006 and by the UN General Assembly in September 2007,[48] recognizes the right of indigenous peoples to self-determination, the UN Human Rights Committee has issued interesting and important views to the effect that Article 1 of the CCPR (right to self-determination) can be applied to indigenous peoples.

The right to self-determination is included in the common Article 1 of the widely ratified international human rights covenants (CCPR and CESCR),[49] and it is also featured in the African Charter on Human and Peoples' Rights (1981, art. 20). These human rights covenants and other international instruments declare that it is

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[47] The principle of self-determination of peoples has been recognized since 1919, when the League of Nations, the precursor to the United Nations, was established. Following the creation of the United Nations in 1945, the 'principle' of peoples' self-determination evolved into an *erga omnes* right under international law. The International Court of Justice (ICJ) has recognized that the right to self-determination has an *erga omnes* character (*Case Concerning East Timor*, 1995; *Case Concerning the Barcelona Traction*, 1970). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Requested for Advisory Opinion) (2003). Some scholars argue that the right to self-determination is even *jus cogens* – a peremptory norm. See, e.g., Hannikainen (1998, pp. 421–424).

[48] The Declaration on the Rights of Indigenous Peoples was adopted with 143 states voting in favour, 4 against (New Zealand, Australia, the USA and Canada), and 11 abstaining (including Russia) (United Nations General Assembly [UNGA], 2006).

[49] CCPR, Status of ratification: 161; CESCR, Status of ratification: 157 (6 May 2008).

'peoples' that have the right to self-determination.[50] This phraseology has led to fierce and endless debate about what constitutes a 'people'.[51] The general assumption among those engaging in this debate has been that a 'people' is an entity that a priori has actual or putative attributes of sovereignty of statehood and has a legal existence distinct from that of human beings, who otherwise enjoy human rights.[52]

One emerging trend among legal experts has been to distinguish between an internal and an external aspect of the right to self-determination,[53] with 'peoples within states,' such as indigenous peoples, having the internal right to self-determination in matters relating to their internal affairs and the protection of their cultural integrity (see, e.g., Tahvanainen, 2005a, p. 412; Crawford, 1997, para. 67(e)). According to the Supreme Court of Canada in the *Reference Re Secession of Quebec* (1998), for instance, internal self-determination means 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state' (Ibid., para. 126).[54]

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[50] See CESCR (1966, art. 1(1)); CCPR (1966, art. 1); African Charter on Human and Peoples' Rights (1981, art. 20). See also UN Charter, Article 1(2); Final Act of the Conference on Security and Cooperation in Europe (1975, Principle VIII); and Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (1970, Principle V).

[51] Although there is no accepted definition of what a 'people' is – i.e., who are the ones who exercise the rights – there are some working definitions available: for instance, the so-called Kirby definition, which was used by the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27–30, 1989. According to the Kirby definition, a people is '(1) a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life; (2). the group must be of a certain number which need not be large but which must be more than a mere association of individuals within a State; (3) the group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of such groups, though sharing the forgoing characteristics, may not have that will or consciousness; and possibly; (4) the group must have institutions or other means of expressing its common characteristics and will for identity.'

[52] See generally Jones (1999, pp. 90, 97–101), who distinguishes between the conception of 'peoples' as corporate entities that hold rights as such and can assert those rights even against the groups' members, and the more flexible conception of 'peoples' under which rights are held collectively by the group's members themselves,

[53] Cassese was one of the first authors in international law to introduce the concepts of external and internal self-determination, albeit not in particular relation to indigenous peoples (Cassese, 1995).

[54] SCC continues in the same paragraph, 'the right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the *Declaration on Friendly Relations* as '[t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute models of implementing the right of self-determination by that people.' Similarly to the SCC, the Committee on the Elimination of Racial Discrimination ([CERD], 1996, para. 4), states, concerning the right to internal self-determination: 'The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.'

Different self-government arrangements which many countries have established together with indigenous peoples and which guarantee specific rights for indigenous peoples concerning their local affairs fall within the category of 'internal' self-determination. To the right to freely pursue their economic, social and cultural development is connected the prohibition that a people must not be deprived of its own means of subsistence. As far as indigenous peoples are concerned, this dimension of self-determination is strongly connected to questions related to land and territories which they traditionally occupy or otherwise use and to the natural resources in these areas (Tahvanainen, 2005a, p. 412).

9.3.1.1 The UN Declaration on the Rights of Indigenous Peoples

After a decade of work, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) adopted the Draft Declaration prepared by the Working Group on Indigenous Populations (WGIP) in 1994,[55] and sent it to the Commission on Human Rights (now called the Human Rights Council) for its consideration. The Draft Declaration stated, leaning on the wording of Article 1 of both International Human Rights Covenants:[56]

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (*Draft United Nations Declaration*, 1994)

Additionally, Article 31 of the Draft declared that the right to self-government is 'a specific form of exercising the right to self-determination' in matters relating to the internal and local affairs of indigenous peoples. The culture, land and resource management, and the environment are among the 'internal and local affairs' listed in this article.

In 1995, the Commission on Human Rights considered the Draft and established an Inter-Sessional Working Group (Commission on Human Rights, 1995) with the mandate to consider the text and draw up a draft Declaration for the consideration of the Commission and eventually for adoption by the UN General Assembly. The process was supposed to be finished during the International Decade of the World's Indigenous People (1995–2004). Even though this goal was not quite achieved, the new UN Human Rights Council adopted the Declaration in June 2006,[57] recommending that the UN General Assembly adopt it.

The same wording as in the earlier Draft was used in Article 3 regarding the right to self-determination. However, the text dealing with self-government was moved

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[55] The WGIP is a subsidiary organ to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, established with the endorsement of ECOSOC on May 7, 1982. UN Doc. E/Res/1982/34.

[56] The CCPR (1966) and the CESCR (1966).

[57] The Declaration was not adopted without opposition. There were 30 votes in favour, 2 against, and 12 abstentions. See the version adopted by the Human Rights Council: A/HRC/1/L.10, 30 June 2006 (*Draft United Nations Declaration,* 2006).

to Article 4. Additionally, the formulation in Article 31 'as a specific form of exercising their right to self-determination' was replaced by 'in exercising their right to self-determination.' After these changes, it has been argued that Articles 3 and 4 were intended to be read together, meaning that indigenous peoples' right to self-determination is limited to internal self-determination: the right to autonomy or self-government (Koivurova, 2008, p. 10).

In September 2007, the Declaration was adopted with some important changes regarding the right to self-determination from the version adopted by the Human Rights Council. The final version adopted by the UN General Assembly states in Article 46(1):

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.[58]

This statement reflects a common view among international lawyers that in non-colonial territories the right to self-determination does not amount to the right for a part of the population to secede from existing states.[59] In relation to this view, an additional argument has been raised, as expressed by the Supreme Court of Canada in proceedings arising from the secession of Quebec (*Reference Re,* 1998), according to which there might be exceptional circumstances in which a group may have a legally and politically tenable right to secession due to their demonstrable inability to achieve the established rights of self-determination guaranteed by law.[60]

What does the right to self-determination of indigenous peoples then comprise according to the UN Declaration? It seems clear that, the statements in Article

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[58] The latest version adopted by the UN General Assembly (*United Nations Declaration*, 2007). The earlier Article 46(1) adopted by the Human Rights Council was much more modest in formulation: 'Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations' (Human Rights Council, 2006.

[59] See generally Crawford (1997; 2005).

[60] In relation to the question of the unilateral secession of Quebec, the Supreme Court of Canada stated: 'In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada' (Ibid., para. 138). According to Professor Wildhaber, there may be developments that point to a broadening of the principle of self-determination to allow for a right to unilateral secession not only for colonies but also where there are flagrant violations of human rights or undemocratic, discriminatory regimes (Department of Justice Canada, 1997).

3 notwithstanding, indigenous peoples are not, at least in normal circumstances, totally free to determine their political status. Article 3, however, continues by saying that indigenous peoples are free to pursue their economic, social and cultural development. Additionally, Article 4 guarantees the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means of financing their autonomous functions. Article 4 does not specify 'local or internal affairs' as did the Draft of 1994. Environmental matters are not thus explicitly mentioned as falling in this category. Article 29 of the UN Declaration, however, explicitly states that indigenous peoples have the right to protect the environment and the productive capacity of their lands or territories and resources and to get assistance for that from states. Whereas the given articles of the Declaration are meant to be read together, this should indicate that environmental protection falls within the scope of Article 4.

Whereas, according to the UN Declaration, it seems to be clear that indigenous peoples have a right to self-determination concerning their local affairs, for the purposes of this study one needs to consider the participation of indigenous peoples in international inter-state affairs in matters that directly affect their internal affairs such as culture and the environment. The Declaration does not make a direct connection between the right to self-determination and the international representation of indigenous peoples.

Interestingly and importantly, this issue has been taken into account in the Draft Nordic Saami Convention,[61] which states in Article 19 that 'the Saami parliament shall represent the Saami in intergovernmental matters. The states shall promote Saami representation in international institutions and Saami participation in international meetings.' The Expert Committee of the Draft Nordic Saami Convention sees indigenous peoples as being entitled to exercise their external self-determination via representation in inter-state affairs in international relations (Henriksen, Scheinin, & Åhren, 2005).[62] In the Draft Nordic Saami Convention, it is affirmed that Saami is an indigenous people of Finland, Norway and Sweden that, according to Article 3, as a people, has the right of self-determination 'in accordance with the rules and provisions of international law and of this Convention.' Article 3 continues by stating that '[i]n so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources.'

Article 19 of the Draft Nordic Saami Convention is significant, since many important environmental questions are managed by global or regional governance

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[61] The expert group was set up in November 2002 with a mandate extending until the end of 2005. It is composed of six members, three of whom represent the Governments of Finland, Sweden and Norway and three of whom represent the national Saami Parliaments. The Nordic Draft Saami Convention was released in 27 October 2005. The treaty negotiations are expected to begin in November 2008.

[62] Henriksen argued already in 2001 that the participation of indigenous peoples in international negotiations between states can be seen as an external element of self-determination as it relates to inter-state relations (Henriksen, 2001, p. 10).

regimes. Environmental problems such as climate change, even though governed globally, have direct implications for the lands of indigenous peoples locally. What is important here is not whether the representation of indigenous peoples in interstate affairs is considered to be an internal or external element of the right to self-determination. If this question needs to be asked, however, it can be construed that if indigenous peoples are participating as part of national delegations, they are exercising their internal self-determination. On the contrary, if indigenous peoples have a formal position outside national delegations, the participation could be viewed as an external dimension of self-determination. What is more important than considering this division, however, is that the question of international representation seems to be almost forgotten in the discussion concerning self-government in internal and local affairs.[63]

In the Arctic states, there is a strong movement towards internal self-determination: indigenous peoples in the region are primarily striving for some sort of self-governance within existing states rather than attempting to secede from them (Koivurova & Heinämäki, 2006, p. 103). The only self-governance arrangement in which an indigenous people has occasionally expressed a desire for independence is that of the Inuit in Greenland. Two basic internal self-governance models that have been used in the Arctic are public government models, which give all the residents of the region in question a degree of self-government (for example, Nunavut and Greenland, where indigenous peoples form a majority), and self-government based on indigenous membership only (for example, native tribal governments in Alaska) (*Arctic Human Development Report* [AHDR], 2004, Chapters 5 and 6). However, even the most ambitious internal self-governance structures in the Arctic – for example, Nunavut in Canada – cannot overcome the threat posed by global climate change: while an Arctic indigenous people may control local policy, it does not have competence in international affairs, as illustrated by the example of the Inuit petition.

With regard to Nunavut, it should be noted, however, that the Nunavut Agreement contains a provision giving the Inuit at least a limited role in international environmental issues. It prescribes: 'The Government of Canada shall include Inuit representation in discussions leading to the formulation of government position in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area, which discussions shall extend beyond those discussions generally available to non-governmental organizations' (Nunavut Land Claims Final, 1993).[64]

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[63] See Heinämäki (2004).

[64] Nunavut Agreement, 1992, Part 9: 54–55 (5.9.2), from http://npc.nunavut.ca/eng/nunavut/nlca.pdf (visited 9 March 2008). The Tlicho Land Claims and Self-Government Agreement also provides that 'Prior to consenting to be bound by an international treaty that may affect a right of the Tlicho First Nation or a Tlicho Citizen, flowing from the Agreement, the Government of Canada shall provide an opportunity for the Tlicho Government to make its views known with respect to the international treaty either separately or through a forum.' Para. 7.13.2, from http://www.ainc-inac.gr.ca/pr/arg/nwts/tliagr2_e.pdf (visited 9 March 2008).

It can be argued that the internal right to self-determination within an existing state should reflect the international personality question and representation of indigenous peoples in international norm-making. The right to self-government or autonomy is an inherent part of sovereignty, and self-government means that the holder of that right has discretion to act in a certain field in accordance with its own needs and will and without interference by another entity. Or, in terms of gradation, as argued by Meijknecht, the extent to which an entity is sovereign, autonomous, or self-governing is relative to the extent of its capacity to make decisions and take actions concerning its own existence. This, in turn, is an indication of the probability of the existence of legal capacity (Meijknecht, 2001, pp. 36–37).

According to Tahvanainen, even though indigenous peoples do not have an international treaty-making capacity equal with that of states, based on the right to self-determination of indigenous peoples, they should be granted a possibility to effectively participate in actual treaty-making, by being given a more suitable position than a 'party' (Tahvanainen, 2005b, Annex 1).[65] To give one interesting national example, the Finnish Government Bill states that the Finnish Parliament has an obligation to negotiate with the Saami parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Saami as an indigenous people, including the participation of Saami people in drafting international agreements.[66]

Even though the UN Declaration on the Rights of Indigenous Peoples does not directly spell out the right of indigenous peoples to participate in international environmental decision-making, besides the articles concerning self-determination and self-governance, the participation of indigenous peoples has been guaranteed in 'matters which would affect their rights.' Article 18 states:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Interpreted in the international decision-making context, this should mean that indigenous peoples have the right to choose their representatives in forums where important decisions are made.

Article 19 continues in a similar vein:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them. (emphasis added).

Environmental matters certainly fall within this category, as decisions concerning environmental matters often directly affect the land and rights to land and traditional

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65 Tahvanainen sees the international participation of indigenous peoples as an external element of the right to self-determination (Tahvanainen, 2005, p. 416).

66 Government Bill No 248/1994 on the inclusion of the provisions on Sami cultural autonomy in the Finnish Constitution and other domestic legislation.

livelihoods of indigenous peoples, as pointed out, for instance, in the Inuit petition against the United States.

Concerning land rights, Article 26 of the UN Declaration guarantees the right of indigenous peoples to their lands, territories and resources, confirming that indigenous peoples have the right to own, use, develop and control their lands, territories and resources. Additionally, the preamble of the Declaration confirms that the UN General Assembly is 'convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.'

Article 32 continues in a similar vein, maintaining that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. According to this article, as noted before, states must again consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their *free and informed consent* prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (emphasis added).

Even though Article 32 refers specifically to 'projects' affecting the lands of indigenous peoples, the consequences of global environmental interference such as climate change, for which states are responsible, should be seen in a similar vein, and the full representation of indigenous peoples in international environmental decision-making should be guaranteed.

Articles 19, 26 and 32 complete Articles 3 and 4 of the UN Declaration (the right to self-determination and self-governance), in which the right to natural resources is not explicitly mentioned. This is contrary to the common Article 1 of the International Human Rights Covenants,[67] which states that the right to natural resources and means of subsistence is an essential part of the right to self-determination.[68]

The International Indian Treaty Council stated in the seventh session of the Permanent Forum on Indigenous Issues: 'For indigenous Peoples, the Right of Free, Prior and Informed Consent (FPIC) is a requirement, prerequisite and manifestation of the exercise of their fundamental right to Self-determination as defined in international law' (United Nations Permanent Forum [UNPFII], 2008b). The significance of the language of Articles 19 and 32 (the requirement of consent) led Canada, which was one of the states voting against the Declaration, to cite these articles as the most objectionable (Ibid., p. 7). New Zealand interpreted Articles 19 and 32(2) regarding free, prior and informed consent as implying that 'indigenous peoples have a right of veto over the democratic legislature and natural resource management' and concluded that New Zealand 'must disassociate itself from this text'(Oldham & Frank, 2008).[69]

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[67] CCPR (1966) and CESCR (1966).

[68] See the further section of this article.

[69] New Zealand's view can be heard on the webcast of the 61st session of the General Assembly dated 13 September 2007 (UNGA, 2007).

Even though it is not clear whether Article 19 does necessarily indicate a right of *veto,* it certainly sets a strict duty for states to make every effort to obtain the free, prior and informed consent of indigenous peoples for legislative and administrative measures that may affect them. In international norm-making processes concerning the environment, this should indicate a more profound status for indigenous peoples than that of an NGO.

9.3.1.2 The UN Human Rights Committee

Even though Article 27 of the CCPR has been the main legal basis for the considerations of the UN Human Rights Committee in relation to indigenous peoples, as already discussed, the Committee has made important statements concerning the right to self-determination (Article 1 of the CCPR) and its application to indigenous peoples. Interestingly, a rather consistent development can be seen in the approach of the Committee, particularly during recent years, wherein it has started to recognize that the right to self-determination applies to indigenous peoples.

In 1984, in the case of *Bernard Omiayak & The Lubicon Lake Band v. Canada* (HRC, 1984a), the claimants based their claim on the argument that their right to self-determination had been violated by the acts of the state party. The Committee considered the matter and dismissed the applicability of Article 1 of the claim, stating:

> While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a 'people' is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights (HRC, 1984a, para. 32.1.).[70]

During the next decade, however, in *Apirana Mahuika et al v. New Zealand*, (HRC, 1993/2000) the Committee made important statements concerning the possible application of the right to self-determination. For instance, it stated: 'When declaring the authors' remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1 [(self-determination)], the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors' claims under

[70] The Committee's position, according to which an individual cannot be a victim of a violation of a people's collective right to self-determination, meaning that in individual complaints the HRC is ready to examine only individual rights, has been criticized as formalistic, and there are cautious estimations and strong hopes that one day the Human Rights Committee will develop its position concerning the procedural issue of whether the Optional Protocol can be used to submit communications related to Article 1 of the CCPR (Scheinin, 2000b, p. 180). The right to self-determination is secured to 'all peoples' in identical terms in Article 1 of both the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR).

article 27' (Ibid., para. 3). The Committee then stated that the provisions of Article 1 might be relevant in the interpretation of other rights protected by the Covenant, in particular that set out in Article 27 (Ibid., para. 9.2). This is a very important comment reflecting the Committee's change from an earlier 'distinction approach' to an 'interdependence approach'.[71]

Significantly, in state reporting procedure from 1999 on, the Committee has started to apply Article 1 (self-determination) to indigenous peoples.[72] Its first Concluding Observations applying the right to self-determination to indigenous peoples were issued in response to Canada's state report (HRC, 1999a). The Committee regretted that Canada had not given any explanation of the elements making up the concept of self-determination that applies to its Aboriginal peoples. In addition, the Committee urged Canada to report adequately on the implementation of Article 1 of the Covenant (peoples' right to self-determination) in its next periodic report (Ibid., para. 7).

The Committee emphasized that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Article 1.2) (Ibid., para. 8).

Much as it did in individual complaints relating to Article 27 (the right to culture), the Committee emphasized the right of indigenous peoples to participate in decision-making concerning issues which are relevant to them, including matters concerning their environment. In its Concluding Observations on Australia, the Committee stated: 'The State Party should take the necessary steps in order to secure

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[71] According to the distinction approach, if something is covered by provision A, then it can be logically inferred that the same thing or right cannot be covered by another provision B. In general, the distinction approach emphasizes the separate and even exclusive nature of rights, legal concepts or provisions in laws or international treaties. On the contrary, the interdependence approach holds that all provisions in law or in an international treaty must be read and interpreted in their context, as being informed and enriched by every other provision in the same legal instrument and possibly by other instruments as well, at least when a common origin or common system of values can be identified behind the two instruments. Under the interdependence approach, the fact that a certain issue or right is explicitly covered by a specific provision does not mean that other provisions cannot be relevant to the same right (Scheinin, 2000b, p. 181). The language of General Comment No. 23 (50) of the HRC (1994a), relied on the distinction approach by stating that the right recognized in Article 27 'is distinct from, and additional to, all other rights' in the CCPR' (para. 1). 'The Covenant draws a distinction between the right to self-determination and the rights protected under article 27' (para. 3.1). The Committee has, in its General Comment No. 12 (1984), stated that the right of self-determination 'is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights' (para. 1) (HRC, 1984b).

[72] Article 40 of the CCPR requires states parties to submit reports on measures taken to give effect to the rights defined therein. An initial report is required, which is submitted one year after the state ratifies the CCPR, as well as periodic reports (normally every five years) thereafter. State reports and Concluding Observations of the HRC, from http://www.unhchr.ch/html/menu2/6/hrc/hrcs.htm. Retrieved March 5, 2007.

for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources' (Article 1.2) (HRC, 2000a, para. 9).

In the Concluding Observations on Sweden (HRC, 2002), the Committee expressed its concern at the limited role of the Saami Parliament in the decision-making process in issues affecting the traditional lands and economic activities of the indigenous Saami people, explicitly mentioning projects in the fields of hydro-electricity, mining and forestry, as well as the privatization of land (Ibid., para. 15.).[73] The Committee required the State party to 'take steps to involve the Saami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence' (Ibid.).

Furthermore, in its recent Concluding Observation on the United States (HRC, 2006b), the Committee required that the State party 'take further steps to secure the rights of all indigenous peoples, under Articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture' (Ibid., para. 37.).[74]

In the Concluding Observations of the Committee, the resource dimension[75] is emphasized strongly,[76] even though it is important to note that the Committee does not confine itself to the recognition of this particular dimension of the right to self-determination. In the environmental context, Paragraph 2 contains two significant elements: the right of all peoples to freely dispose of their natural wealth and resources, and the prohibition against depriving a people in any case of its own means of subsistence.[77] In the context of climate change, Paragraph 2 is significant, since the consequences of climate change can dramatically affect natural resources and means of subsistence. Therefore, effective participation in matters concerning natural resources is of great importance.

The participatory aspect is much emphasized not only in the Concluding Observations, but also in individual communications, as noted above. In environmental issues the right to effective participation of indigenous peoples, as already mentioned, is perhaps the most important aspect in the application of either Article 27 or Article 1.

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[73] The Committee referred to Articles 1, 25 (the right to political participation), and 27.

[74] Explicit references to either Article 1 or to the notion of self-determination have also been made in the Committee's Concluding Observations on Mexico (HRC, 1999d), Norway (HRC, 1999e), Australia (HRC, 2000a), Denmark (HRC, 2000b), Finland (HRC, 2004), and Canada again (HRC, 2006a).

[75] For the division of the right to self-determination into different dimensions see Scheinin (2000b, pp. 188–189).

[76] See also, for instance, Concluding Observations on Norway (HRC, 1999e), where the Committee stated: 'the Committee expects Norway to report on the Sami people's right to self-determination under article 1 of the Covenant, including Paragraph 2 of that article' (para. 17).

[77] Paragraph 1.2. (HRC, 2006a) states: 'All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived its own means of subsistence.'

In Concluding Observations where the right to self-determination is not explicitly mentioned, besides the sustainability requirement, which was discussed in the previous section, the right to participate is also highlighted. The Committee's 1999 Concluding Observations on Chile (HRC, 1999b), for instance, stated:

> The Committee is concerned by hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities. Relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant. Therefore: When planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them. (Ibid., para. 22.)

In reading the comments of the Human Rights Committee, it can be seen that Articles 27 and 1 indeed contain very similar elements that are relevant in the environmental context. Concerning individual communications, the protection of cultural integrity consists of two significant factors: protection of the sustainability of the particular livelihood on one hand, and consultation or effective participation of members of a minority on the other. The same elements can be found in Article 1: cultural protection – the right to freely pursue economic, social, spiritual and cultural development (CCPR, 1966, art. 1.1), the right to natural resources, the protection of the means of subsistence, and the right to participate in decision-making concerning the lands, natural resources and traditional livelihoods of indigenous peoples.[78]

One can ask what the recognition of Article 1 adds to Article 27 in relation to international environmental decision-making. It has become clear that Article 27, although expressed in negative terms, does not merely provide the right to be protected against unlawful interference by a state; rather positive measures of protection are required not only against the acts of the state party itself, but also against the acts of other persons within the state party. Furthermore, the Committee has stated clearly that the economic well-being of the majority is not a legitimate justification for interfering in the right to culture of minorities, even though it has also stated that not every interference amounts to a violation of this right; certain limited impacts on the traditional way of life of indigenous peoples are allowed as long as the livelihood remains sustainable. So far there has been only one environmental case – *Lubicon Lake Band* – brought by members of an indigenous community where the Committee has found a violation of Article 27. This is not, however, to say that when impacts to the culture are serious, such as they might be in the case of climate change, a violation of Article 27 may be found.

As regards the requirement of meaningful consultations – another prerequisite for the fulfilment of Article 27 – the Committee has found that it is met when

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[78] Scheinin also acknowledges this fact, although not in the environmental context, by noting that the requirements of consultation and sustainability (see the earlier section concerning individual communications) in relation to Article 27 can be seen as constitutive elements of the right to self-determination, whereas the criterion of meaningful consultation can be linked to the political dimension of self-determination, and the sustainability test to the economic or resource dimension (Scheinin, 2000b, p. 193).

indigenous peoples are directly consulted about projects that might affect their culture, and when they have had the possibility to express their concerns. When it comes to international environmental decision-making, this means that indigenous peoples – through bodies representing them – should be involved in the actual decision-making, with a more profound status than that of an NGO.

In this light it can be argued that the right to self-determination under Article 1 strengthens a legal justification for the right to participate. If it is additionally recognized that indigenous peoples have the right to determine the issues that are the most significant to them, such as land and natural resources,[79] it should give a strong legal basis for the extended participatory rights of indigenous peoples in international environmental decision-making in matters that involve their interests directly.

In analysing the pronouncements of the Human Rights Committee in relation to individual communications and concluding observations within state reports, the question concerning the legal status of the case practice of the Committee with respect to the interpretation of Articles 27 and 1 of the CCPR emerges. In this regard, some guidance may be found in the Vienna Convention on the Law of Treaties (1969). According to Paragraph 1(b) of Article 31 of the Vienna Convention, in the application of the treaty, any subsequent practice which establishes the agreement of the parties regarding its interpretation is important. Even though the paragraph discusses the practice of states parties, thus not expressly mentioning monitoring bodies of treaties, some experts on international law have argued that the practice of monitoring bodies should be regarded similarly, particularly in cases where the states have not opposed the pronouncements of the monitoring body (Henriksen et al., 2005, p, 289). According to the Committee of the International Law Association, treaty interpretations by monitoring bodies become authoritative only if states do not oppose them.[80]

If one embraces this view, the interpretations of the Human Rights Committee regarding Articles 27 and 1 in relation to indigenous peoples have legal relevance, at least when not opposed by states.[81] At a minimum, some kind of authoritative position must be given to the body of the treaty, which has been ratified by the majority of states and which was established particularly for the purpose of monitoring

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[79] As argued by Scheinin, the *Lubicon Lake Band* case stands as a demonstration of the fact that allowing the exploitation of the natural resources in a territory traditionally used by an indigenous community may constitute a violation of a State Party's obligations under Article 27. Furthermore, Scheinin maintains that the case in question demonstrates how the cumulative effect of a step-by-step development with adverse consequences for the life of the indigenous inhabitants ultimately constitutes a violation of Article 27(Scheinin, 2000b, p. 194).

[80] For an analysis of this issue, see the International Human Rights Law and Practice – Committee of the International Law Association (ILA) (2004), and their study 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies'.

[81] In addition, when interpreting Article 1 of the CCPR, according to Article 31.1 of the Vienna Convention, the general rule of treaty interpretation is that ordinary meaning should be given to the term 'people'. According to the Kirby definition, it could be argued that indigenous peoples often fit well within this definition, thus constituting a people also in the meaning of Article 1 of the CCPR.

whether state parties are fulfilling their obligations, and has the task of interpreting the given articles when applying them to individual cases.

Moreover, as mentioned earlier, the Committee on Economic, Social and Cultural Rights, has also recently started to apply the right to self-determination to indigenous peoples in its state reporting system. For instance in its Concluding Observations on the Russian Federation, the Committee expressed its concern about 'the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant' (Committee on Economic, Social and Cultural Rights (ComESCR), 2002, para. 7; 2003, paras. 11 and 39). The Committee furthermore urges the implementation of national legislation providing for the demarcation of indigenous territories and the protection of indigenous land rights (ComESCR, 2003, paras. 11 and 39). Additionally, the Committee, recalling the right to self-determination, requests the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence (Ibid., para. 39).

Taking into account also the recent adoption of the UN Declaration on the Rights of Indigenous Peoples, added with the Draft Nordic Saami Convention, as well as the views of the Committee on Economic, Social and Cultural Rights and the Inter-American Court of Human Rights, according to which the common Article 1 of CCPR and CESCR is applicable to indigenous peoples, it can be argued that strong developments are emerging in international law towards the recognition of the right to self-determination of indigenous peoples. In the view of the present author, this should be reflected in the position of indigenous peoples in international norm-making concerning the issues that are crucial to them, environmental issues, such as climate change, being one important example.

9.4 Considerations of the Arctic Council Participatory Model and the Possibilities of the Permanent Forum on Indigenous Issues

The Arctic-wide co-operation process that started with the signing in 1991 of the Declaration on the Protection of the Arctic Environment and the Arctic Environmental Protection Strategy (AEPS) (*Declaration*, 1991) by the eight states of the region (the five Nordic states, Canada, the United States and the Russian Federation)[82] is an interesting example of international environmental decision-making in which Arctic indigenous peoples have a stronger influence in decisions concerning the Arctic environment and sustainable development than in regular international regimes, where indigenous peoples can participate only as NGOs.

[82] The Strategy (AEPS, 1991), as well as all the other founding documents of both AEPS co-operation and the Arctic Council, can be found on the Arctic Council home page, from http://www.arctic-council.org/ (visited 26 November 2007). For Arctic environmental co-operation see generally Rothwell (1996, pp. 221–257) and Koivurova (2002, pp. 69–94).

In this first phase of co-operation – generally referred to as AEPS co-operation – the framework organisations of the Arctic indigenous peoples were entitled to the position of observers, as provided in the Arctic Environmental Protection Strategy:

> In order to facilitate the participation of Arctic indigenous peoples the following organizations will be invited as observers: the Inuit Circumpolar Conference, the Nordic Saami Council and the U.S.S.R. Association of Small Peoples of the North (AEPS, 1991, p. 42).[83]

Yet, it was the establishment of the Arctic Council in 1996 that enhanced the status of Arctic indigenous peoples. The first paragraph of the founding declaration of the Council, which was created to continue AEPS co-operation, provides:

> The Arctic Council is established as a high level forum to: provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.

In contrast to earlier policy, in which indigenous peoples' organisations participated as observers, the Declaration created the new category of permanent participant. Paragraph 2 provides:

> The Inuit Circumpolar Conference, the Saami Council and the Association of Indigenous Minorities in the Far North, Siberia, the Far East of the Russian Federation are Permanent Participants in the Arctic Council. Permanent participation is equally open to other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency.[84]

It was also very important that the category of permanent participant was distinguished from that of observer,[85] as defined in Paragraph 3 of the Declaration, and that it was created 'to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council'.[86]

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[83] Three organisations in addition to the ones mentioned in this paragraph have since been accepted as permanent participants in the work of the Arctic Council: the Aleut International Association, the Gwich' in Council International and the Arctic Athabascan Council.

[84] More specific rules are laid out that define the selection criteria for the indigenous peoples' organisations referred to in Paragraph 2. In order to be eligible to become a permanent participant, an organisation must be 'representing: (a) single indigenous people resident in more than one Arctic State; or (b) more than one Arctic indigenous people resident in a single Arctic State'. In addition, according to the same paragraph, the determination that such an organisation has met this criterion is to be made by a decision of the Council. At any given time, the number of permanent participants must be fewer than the number of members of the Council, that is, eight. Currently, there are six framework organisations of Arctic indigenous peoples that have the status of permanent participant.

[85] Paragraph 3 of the Declaration states: 'Observer status in the Arctic Council is open to: (a) Non-arctic states; (b) inter-governmental and inter-parliamentary organizations, global and regional; and (c) non-governmental organizations'.

[86] Paragraph 2 of the Declaration. In a footnote to the Declaration, the concerns of some Arctic states found expression in the following phrase: 'The use of the term "peoples" in this declaration shall not be construed as having any implications as regard the rights which may attach to the term under international law'.

Hence, even though the eight Arctic states are the members proper of the Council, framework organisations of Arctic indigenous peoples have been given an unprecedented status in its work: they are permanent participants who negotiate at the same table with the Arctic states and may table proposals for decision (Arctic Council, 1998, part II). Even though final decisions are made by the Arctic states in consensus, the permanent participants must, according to the Declaration, be fully consulted, which is close to a *de facto* power of veto should they all reject a particular proposal (Koivurova & Heinämäki, 2006, p. 104).

Even though they became permanent participants in the Arctic Council only from 1996 on, indigenous peoples' organizations were involved in Arctic environmental co-operation from the very beginning (Tennberg, 1996). In the first consultative meeting of the eight Arctic states in Rovaniemi in 1989, it was considered that 'indigenous peoples should be involved in future work, since they bear the burdens of environmental degradation directly' (*Consultative meeting, 1989*). In the preparatory meeting in Yellowknife the following year, the Inuit Circumpolar Conference (ICC)[87] proclaimed the importance of direct participation of indigenous peoples in Arctic environmental co-operation 'so that indigenous perspectives, values and practices can be fully accommodated' (Simon, 1990, p. 183).

Already from the beginning, indigenous peoples were not satisfied with being only representatives, but wanted to contribute to the environmental process. This led to the development of the idea of using 'indigenous knowledge' in the development of the AEPS and its programmes (Tennberg, 1996, p. 2).[88] Importantly, indigenous peoples' traditional knowledge is now included in most of the programmes and working groups that operate under the Arctic Council (Arctic Council website).

From its inception, Arctic-wide co-operation has not formalized its operation through an international treaty. AEPS co-operation began with the signing of the Declaration and Strategy, and the Arctic Council was established through a signed declaration. Various views have been presented concerning the legal status of the Arctic Council, the most common being that it is a soft-law organisation which cannot create a legally binding outcome (e.g., Bloom, 1999).[89]

Most probably, if a treaty had been concluded, indigenous peoples could not have gained as influential a status as they now have in the Arctic Council.[90] It

[87] Now called the Inuit Circumpolar Council.

[88] Indigenous peoples' traditional knowledge has been largely developed within the individual Arctic states as well. See one Canadian example, from Indian and Northern Affairs Canada (2000).

[89] Even though no one seems to be able to determine what it means in practical terms that the Council is a soft-law organisation, it appears that the current consensus among both scholars and the participants in the co-operation is to treat the Council as such an organisation. For an account of the various views, see Koivurova (2002, pp. 69–94).

[90] Well into the final moments of the negotiations on the future form of the Arctic Council, the status of indigenous peoples as permanent participants was threatened, particularly by the United States. As Scrivener (1999, p. 54) observes, 'Concern about the potential emasculation of the permanent participant category was heightened by the request of the Northern Forum and SCPAR that their future observer roles in the Council be given an element of "permanency". It was also fuelled by a US suggestion that a special category of observers might be appropriate for certain non-Arctic

should be emphasised, however, that this is not due to constraints laid down by the customary law of treaties. According to that body of law, the states would have been perfectly free to create a treaty permitting the participation of indigenous peoples as permanent participants who must be consulted before actual decision-making by the member states.[91] Actually, even if indigenous peoples were accorded the status of permanent participants in a legally binding regime, states would still retain their full legal personality and the final decision-making power. The Arctic Council, with its unique model of participation, could well serve as a new model enabling indigenous peoples to find a more reasonable status than that of an NGO. This would reflect the current commitment of states to the human rights of indigenous peoples that guarantee their effective participation in matters that directly affect them.

The indigenous peoples' movement has, in fact, explicitly referred to the Arctic Council as a model that could be used in other regions of the world. In preparation for the 2002 World Summit on Sustainable Development (WSSD), the Indigenous Peoples' Caucus Statement for the Multi-Stakeholder Dialogue on Governance, Partnership and Capacity-Building promoted sustainable development governance at all levels, in particular:

> Models for Environmental and Sustainable Development Governance, such as the Arctic Council, which incorporate principles of genuine partnership between States and Indigenous Peoples, ecosystem approaches, collaboration between scientific and traditional knowledge, and local, national and regional implementation plans (Indigenous Peoples' Caucus Statement, 2002, para. 4).

Should indigenous peoples be given a stronger position in international environmental decision-making, using for instance a 'permanent participant' model, the question then necessarily arises of who would represent indigenous peoples. It seems impossible that, since they are so numerous, all indigenous peoples of the world could represent themselves. One interesting possibility would be for the United

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states active in the region – for example, the UK – distinct from other observers, such as international organisations and nongovernmental groups. The permanent participant issue was partially resolved in the Council Declaration by confirming the status of the three existing IPO's. However, during the subsequent debate over the Council's rules of procedure there were signs that the US still preferred to equate the permanent participants with observers.' He continues at 56 (Scrivener, 1999): 'Canada and the ICC were quick to notice the extent to which the early US drafts of the rules of procedure, while correctly emphasising the intergovernmental nature of the Council, intentionally clawed back the advantages of the permanent participants relative to the status in the Council of Observers, in essence equating the former with the latter. With the exception of Russia, the other Arctic states supported Canada in re-asserting the "specialness" of the permanent participants and their right to be fully consulted before the member governments reach collective decisions'.

[91] The biggest obstacle to establishing participatory rights for indigenous peoples in a treaty would have arisen from the factual setting. When an international treaty is concluded, different officials are involved than when a soft-law instrument is created. Foreign ministries and their legal offices would have been involved, and their views would in all likelihood have resulted in indigenous peoples' being given the status they normally have in international treaties, that of NGOs. Another possible obstacle would have been the involvement of national parliaments, which might also have challenged the position of indigenous peoples (Koivurova and Heinämäki, 2006, endnote 14).

Nations Permanent Forum on Indigenous Issues[92] to act as this representative body, bringing 'the indigenous voice' to decision-making. This task would be suitable for the Permanent Forum, which is an advisory body to the Economic and Social Council with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights (United Nations Permanent Forum on Indigenous Issues [UNPFII]).

The Permanent Forum is comprised of 16 independent experts, functioning in their personal capacity, who serve for a term of three years as Members and may be re-elected or re-appointed for one additional term. Eight of the Members are nominated by governments, and eight are nominated directly by indigenous organizations in their regions (UNPFII).

The Members nominated by governments are elected by ECOSOC based on the five regional groupings of States normally used in the United Nations (Africa, Asia, Eastern Europe, Latin America and the Caribbean, and Western Europe and Other States). The Members nominated by indigenous organizations are appointed by the President of ECOSOC and represent the seven socio-cultural regions determined to give broad representation to the world's indigenous peoples. The regions are Africa; Asia; Central and South America and the Caribbean; the Arctic; Central and Eastern Europe, the Russian Federation, Central Asia and Transcaucasia; North America; and the Pacific – with one additional rotating seat among the first three listed above. The rotating seat was taken by Asia during the 2005–2007 term (Ibid.).

One possibility would be for the Members of the Permanent Forum to have a seat in a certain environmental regime, using the model of the 'permanent participant'. Or the Forum itself could make proposals and statements concerning certain environmental issues in its official meetings, and then choose its representatives for the meetings of the parties to the environmental regime in question.

Importantly, it should be noted that climate change was a special theme of the seventh session of the Permanent Forum in 2008 (UNPFII, n.d.c). Already a year earlier, at its sixth session, the Permanent Forum appointed special rapporteurs to prepare a report on the impact of climate change mitigation measures on indigenous peoples. The recommendations of the Report highlight the importance of the meaningful participation of indigenous peoples, making a special reference to the Arctic, stating that due to the special vulnerability of the Arctic, United Nations Member States and agencies should designate the Arctic region as a special climate change focal point (Tauli-Corpuz & Lynge, 2008).

Arctic indigenous peoples' organizations, especially the ICC and Saami Council, have participated actively in the work of the Permanent Forum (Lindroth, 2006, p. 246). The visibility and active participation of Arctic indigenous peoples, particularly the Saami, were enhanced by the fact that the first chair of the Permanent Forum was a Saami, Ole-Henrik Magga (Ibid.). The ICC and Saami Council together form the Arctic Caucus, which made important statements concerning cli-

[92] The Permanent Forum was established by United Nations Economic and Social Council (ECOSOC) Resolution 2000/22 on 28 July 2000.

mate change in the Seventh Session of the Permanent Forum (UNPFII, 2008a). The Arctic Caucus recommended that the UNFCCC should develop a seat at the negotiating table specifically reserved for indigenous people, through which they would have direct access to decision-makers and would be able to offer their knowledge in constructive ways (Ibid. Item 1). This suggestion comes close to the idea of permanent participation, where representatives of indigenous peoples could participate at the level at which the decisions are made.

Whereas the Permanent Forum has already actively engaged itself in environmental issues such as climate change, formal participatory status in international environmental negotiations dealing with such issues that directly concern indigenous peoples would seem to fall naturally within the mandate of the Forum and could strengthen the rights and status of indigenous peoples around the world in a meaningful way.

So far, besides participation through NGOs, indigenous peoples have been able to participate through national delegations in some states that have voluntarily allowed it. For instance, in the negotiation process on the Stockholm Convention on Persistent Organic Pollutants (2001), representatives of some Arctic indigenous peoples participated in the national delegations of Canada and the United States (Flöjt, 2003).[93] The Stockholm Convention importantly recognizes in its preamble that 'Arctic ecosystems and indigenous communities are particularly at risk because of the biomagnification of persistent organic pollutants and that contamination of their traditional foods is a public health issue' (*The Stockholm Convention,* 2001, Preamble).

In the climate change regime, however, Arctic indigenous peoples have not been able to organize themselves in the same way as in the Stockholm process on persistent organic pollutants to get their message across.[94] All in all, compared to the participation of indigenous peoples in environmental decision-making through national delegations, the 'permanent participation' model would seem to offer a more transparent mechanism, since it would not be up to individual governments how deeply their indigenous peoples could truly be involved in the actual decision-making. In that way, it could be expected that the message of indigenous peoples would not so easily be drowned in the extensive climate change agenda. The UN Permanent Forum, as a high level UN organ at the same level as the UN Human Rights Council, could have the necessary credibility to represent indigenous peoples in the environmental processes in order to protect their interests in matters that are crucial for them – climate change being one major example.

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[93] One reason for Arctic indigenous peoples not being effectively involved in the climate change regime, as they had been in the POPs process, was that the Arctic Climate Impact Assessment (ACIA), which produced essential information on Arctic climate change and its impact on indigenous peoples, was published only in 2004, whereas the Framework Convention on Climate Change was signed already in 2002 and the Kyoto Protocol in 1997.

[94] For the Stockholm process on persistent organic pollutants, see generally Downey and Fenge (2003).

Although the Arctic Caucus, in its Statement established in the Seventh Session of the Permanent Forum, requires special attention to Arctic indigenous peoples in relation to climate change, it also highlights its solidarity with other indigenous peoples and reminds us that what we see more visibly in the Arctic today will be experienced by other peoples around the world. (UNPFII, 2008a). Therefore, the effective participation of indigenous peoples should not be limited to Arctic indigenous peoples, although they are the ones who are experiencing the strongest consequences of climate change at present (Tauli-Corpuz & Lynge, 2008).

9.5 Concluding Remarks

Global environmental problems such as climate change can have dramatic implications for the human rights of indigenous peoples, as illustrated by the Inuit petition against the United States. Since, on one hand, the traditional human rights monitoring mechanisms are not necessarily useful tools to deal with global environmental interference, and whereas, on the other hand, the consequences of global environmental problems such as the impacts of climate change are often irreversible, the most important issue from the viewpoint of indigenous peoples is the possibility to influence the shaping of international environmental policies and law.

The human rights of indigenous peoples guarantee their effective participation in all matters that directly concern their rights and interests as indigenous peoples. Additionally, at present, indigenous peoples are increasingly seen as the only distinct category of peoples other than nation-states that are entitled to self-determination. However, as mentioned above, this right does not extend to a full right to secede from existing states; rather, indigenous peoples are entitled to govern their own affairs within states. The right to self-determination, however, cannot be limited to participation in local affairs since perhaps the most crucial issues for indigenous peoples are being governed globally. Self-determination should be interpreted as what it truly is: the ability and the right of a people to choose its own destiny. Even though in the case of indigenous peoples this must be done within the framework of existing states, self-determination should grant indigenous peoples a better status in international policy-making, given that they have no control over global problems via national and local self-governance structures.

Climate change poses challenges to state-controlled international governance in many ways. The dramatic and global implications of climate change necessarily reveal the inherent limitations of the present structures and means of international law to cope with these new kinds of environmental problems that do not affect only individual states or neighbouring states but the whole international community of states.[95] (Taylor,1998, p. 2), Taylor, in discussing the deficiencies of international law regarding the problem of climate change, argues that it has been clear from the outset that the challenge of climate change cannot be met without changes in the

[95] See generally Taylor (1998).

design of international law. She refers to the 1989 Hague Declaration on the environment, which called for 'a new approach, through the development of new principles of international law, including new and more effective decision-making and enforcement mechanisms' (*Hague Declaration on Environment*, 1989). Indigenous peoples' participation in environmental decision-making concerning global environmental problems would be beneficial not only for indigenous peoples but for the global environment as well. This would give weight to the rights-based approach and broaden the scope of the present state-controlled global governance.[96]

Even though international law typically develops only slowly, relying on the consensus of states, the adaptation of old principles to new situations and the slow emergence of new principles (Taylor, 1998, p. 3), a strengthened position of indigenous peoples in environmental decision-making would not require too much of the states, since it would not destroy the basic principles of state sovereignty and legal subjectivity. Here, the soft law model of the Arctic Council might lead the way, as it does not equate indigenous peoples with NGOs or states but gives them a kind of intermediate position with permanent participant status but no formal decision-making power. In the permanent participant model, it would still be the states, as parties to a certain treaty, who would make the final decisions. Yet indigenous peoples would not be merely 'objects' of protection either, but could be actively involved in decision-making that is significantly related to their own lives and their future development as individuals and as peoples.

Should the permanent participation model be used, the UN Permanent Forum on Indigenous Issues seems like a suitable body to represent indigenous peoples in international environmental regimes. Arctic indigenous peoples should have a strong representation in the Permanent Forum in relation to climate change issues, since, at present, the impact of climate change is most visible and most severe in the Arctic areas. With such participation, Arctic indigenous peoples would be in a better position to contribute to the mitigation of climate change and adaptation to it.

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[96] See, for instance, Shelton (2001; 2002) and Metcalf (2004).

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