

# Sovereign States and Self-Determining Peoples: Carving Out a Place for Transnational Indigenous Peoples in a World of Sovereign States

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## Abstract

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Even though self-determination of peoples has an esteemed place in international law, it seems fairly clear that peoples divided by international borders have difficulty in exercising their right to self-determination. It is thus interesting to examine whether general international law places constraints on transnational peoples' right to self-determination. Of particular interest in this article is to examine whether indigenous peoples divided by international borders have a right to self-determination, given the recent adoption of the 2007 United Nations Declaration on the Rights of Indigenous Peoples. The article will also take up cases where transnational indigenous peoples of Sami and Inuit have tried to exercise their joint self-determination and whether we can, in fact, argue that indigenous peoples divided by international borders have a right to exercise their united self-determination. 8  
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## Keywords

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self-determination; peoples' rights; transnational; indigenous people; sovereignty 18

Self-determination of peoples is not easily accommodated in a system of law having as its constituency nation-States. After the Second World War, human rights movement gained strength and many argued that we should focus on humans, not States. International human rights law could well fit in with the State structure of the international community at its very beginning. After all, the 1948 Human Rights Declaration<sup>1</sup> and the 1966 Covenants<sup>2</sup> were mostly about building better nation-States by enhancing the formal and substantive equality between the citizens of these States. 19  
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<sup>1</sup> The Universal Declaration of Human Rights, at <http://www.un.org/en/documents/udhr/> (1 December 2009). 27  
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<sup>2</sup> The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3. 29  
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1        However, the seeds of change were already planted with Common Article 1 to  
2 the 1966 Covenants, arguing that all peoples have the right of self-determina-  
3 tion, with which they can freely determine their political status and freely pursue  
4 their economic, social and cultural development. This is pretty explosive stuff,  
5 given that here we have a collective human right in the two main legally binding  
6 human rights treaties, this right even being one that arguably underlies all other  
7 individual human rights. If read as written, it is a legally binding obligation on  
8 States to honour the self-determining power of peoples. And people cannot be  
9 equated here to States. States are not the beneficiaries of human rights treaties;  
10 peoples, and the individuals composing them, are.

11        Even though it is clear that the mainstream of international law upholds the  
12 nation-States as the primary subjects of international law, it is interesting to  
13 study how much space peoples (which are not States) have been able to carve for  
14 themselves in international law. It is important to emphasize that I am not focus-  
15 ing here on the self-determination of peoples, who already form States. These  
16 peoples are evidently the clearest case of accepted self-determination of peoples,  
17 but not the most interesting.<sup>3</sup> It is the exceptional cases where peoples do not  
18 form States that are the focus here. It is in general interesting that peoples have  
19 indeed been able to have their self-determination accommodated to a highly  
20 institutionalised system of inter-dependent doctrines of international law, all  
21 revolving around the State as the centre of gravity.

22        The main focus of this article centres on the right to self-determination of  
23 transnational peoples, peoples, whose component parts are divided by interna-  
24 tional borders. Why is this interesting question? Currently, the International  
25 Court of Justice (ICJ) is struggling to give an Advisory Opinion to the UN Gen-  
26 eral Assembly over whether the unilateral declaration of independence by the  
27 Provisional Institutions of self-government of Kosovo is in accordance with inter-  
28 national law.<sup>4</sup> Already now it has been argued that if Kosovo gains independence,  
29 it may mean that international law makes it legal to segments of people, in an  
30 ethnographic sense, to possess self-determination and possibly secede from exist-  
31 ing States.<sup>5</sup> Since Kosovars are only component part of a larger Albanian people,  
32 it is important to ask to whom the self-determination belongs.

33        If one reads Common Article 1 to the two 1966 Human Rights Covenants  
34 literally, it does speak of self-determination residing in people, not portions of a  
35 people. This part of the article does not aim to examine the Kosovo case pending

36 <sup>3</sup> See e.g. A. Cassese, *International law* (Oxford University Press, Oxford, 2005, 2nd ed.) pp. 60–4. He  
37 argues that 'Article 1, common to the two 1966 UN Covenants on Human Rights... essentially confers  
38 on the peoples of all the contracting parties the right to internal self-determination' (p. 62).

39 <sup>4</sup> See at, <<http://www.icj-cij.org/docket/files/141/14797.pdf>>, viewed on 1 December 2009.

40 <sup>5</sup> Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and  
41 Recognition", Vol. 12 *ASIL* insights, February 29 (2008), Issue 2, <http://www.asil.org/insights080229.cfm>,  
42 viewed on 1 December 2009.

in the ICJ, but has a more broader goal, i.e., to reflect on how the general law of self-determination of peoples relates to State sovereignty, and thereby how it influences the way we can think of the rights of transnational peoples, in particular indigenous peoples residing in many countries.

Thereafter, the focus will shift on studying the evolving law relating to indigenous peoples. Does this body of law guarantee self-determination to indigenous peoples, in particular to transnational indigenous peoples? Here I will also take up two cases where transnational indigenous peoples have claimed for self-determination. The Nordic Sami parliaments have developed a draft for a Nordic Sami Convention together with the three States, Norway, Finland and Sweden. The Draft is based on the idea that Sami have a right to self-determination. Recently, also Inuit living in four Arctic States have claimed that they are a people having a right to self-determination against the prior move by the Arctic Ocean coastal States to declare the extent of their Arctic sovereignty. Conclusions can then be drawn as to whether we can meaningfully speak of self-determination of transnational peoples, transnational indigenous peoples in particular. If this proves to be the case, it is also relevant to ask what the consequences are.

### **1. Does International Law of States Provide a Place for Peoples and their Claim for Self-Determination?**

Let's first examine how the mainstream understanding of international law perceives who is a rightful power-holder in international law. First off, it seems that the ultimate end-state for any group wanting to exercise full rights in international society is to become a State. To achieve this ultimate goal, the candidate entity needs to possess effective government, territory, population and capability to establish relations with other States. Moreover, the State community needs to – at least to certain extent – recognise it as a State. For the group to become a State, it seems to matter precious little whether it can be considered in an ethnographic sense a people. What matters is that an effective government controls a territory with population and that the State community accepts this candidate to its club.

However, the international law of States has been able to carve a place for peoples. When the European colonialism in Africa and Asia lost its political legitimacy, this development very quickly manifested itself also in international law. State community had to come to terms with a normative development that colonised peoples have a right to self-determination in international law. This could have meant a real challenge, even of revolutionary potential, how political authority and power are organised in the international society.

At least in theoretical terms, if colonial peoples have a right to self-determination, there is no final political status called "State" to be achieved. If the people can

1 come up with other ideas of organising their polity, they would seem to be enti-  
2 tled to execute exactly that.<sup>6</sup> Perhaps more importantly, self-determination inheres  
3 in people, not States. To be a State would only be one of the options the peoples  
4 could opt for in exercising their right to freely determine their political status.  
5 If self-determination inheres in peoples, it is always them who will dictate their  
6 political status to the future.

7 But, of course, things did not evolve this way. The colonial peoples' right to  
8 self-determination was implemented such that it could be accommodated within  
9 the system of international law. First, the process as a whole, conducted primar-  
10 ily under the auspices of the UN, accorded self-determination to territories  
11 rather than peoples, even though decolonisation was many times described as  
12 the exercise of the self-determination of colonised peoples. It was the Trusteeship  
13 territories, non-self-governing territories (and in some cases even mandated  
14 territories)<sup>7</sup> whose people were eventually accorded the right to self-determina-  
15 tion. It was the territory – not a process designed to identify who were the  
16 authentic colonised peoples – that determined who had the right to self-deter-  
17 mination. This 'territorial approach' to self-determination was well manifested,  
18 with the newly independent States gaining their self-determination to territories  
19 whose boundaries had been drawn by the colonists long before they became  
20 independent and which were given legal recognition in international law (*uti*  
21 *possidetis*).<sup>8</sup>

22 <sup>6</sup> As is provided e.g. in the UN's Friendly Relations Declaration, the emergence into any other political  
23 status freely determined by a people constitutes one mode of implementing the right of self-determina-  
24 tion by that people. See the Declaration on Principles of International Law concerning Friendly Rela-  
25 tions and Co-operation among States in accordance with the Charter of the United Nations, at [http://](http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm)  
26 [www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm](http://www.hku.edu/law/conlawhk/conlaw/outline/Outline4/2625.htm) [1, viewed on 1 December 2009].

27 <sup>7</sup> The ICJ made a decision to treat South West Africa under a model deriving from the League of  
28 Nations Mandated Territories system. South West Africa (Namibia from 1970 onwards) was one of the  
29 German overseas colonies placed under the mandate system of the League of Nations after World War I  
30 to be managed by the Union of South Africa. After World War II, South Africa sought to annex the ter-  
31 ritory, a move that was challenged by the UNGA. In 1949, the UNGA requested an advisory opinion  
32 from the ICJ as to whether South Africa's mandate had survived the termination of the League of  
33 Nations and if it had, how it should be managed and whether it should be transferred to the trusteeship  
34 system. The ICJ answered the first question in the affirmative; that is, it stated that the mandate had  
35 indeed survived the termination of the mandate system. However, it did not opine that the area should  
36 be placed under the trusteeship system but, rather, recommended that it continue to be governed by  
37 rules similar to those of the mandate system.

38 <sup>8</sup> As the ICJ put it in the *Frontier Dispute* between Burkina Faso and Mali: '... At first sight this princi-  
39 ple [uti possidetis] conflicts outright with another one, the right of peoples to self-determination. In  
40 fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to  
41 preserve what has been achieved by peoples who have struggled for their independence, and to avoid a  
42 disruption which would deprive the continent of the gains achieved by much sacrifice. The essential  
43 requirement of stability in order to survive, to develop and gradually to consolidate their independence  
44 in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and  
45 to take account of it in the interpretation of the principle of self-determination of peoples... Thus the  
46 principle of uti possidetis has kept its place among the most important legal principles, despite the appar-  
47 ent contradiction which explained its coexistence alongside the new norms. Indeed it was by deliberate

Furthermore, the whole process operated on the assumption that the peoples of these territories sought to establish new States, not that they would establish some new forms of self-determination which would not fit in with the system of international law. International law also closed the door on self-determination very quickly when the overseas territories (and the people living within these borders) had gained their independence and became States proper. To make it clear that self-determination applied only to overseas colonies, the salt-water criterion emerged, which required geographical distance between the colonised peoples wanting to exercise their right to self-determination and the state of which they were part. The right to self-determination of peoples – understood that way – did not thus pose a threat to the metropolitan territories of States.

Yet, self-determination of peoples always had the potential to reach further. When the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights were negotiated during the 1960's, Common Article 1 was perhaps the most controversial provision to negotiate. Some States perceived the article as limited to colonial situations, while the majority felt that it should apply to the people of any territory but should not accord minorities any right to secede (for whom Article 27 was thus tailored).<sup>9</sup> The two relevant paragraphs of Article 1 are as follows:

1. All 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.
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.

It would seem fairly clear that in any ordinary treaty interpretation, Article 1 applies to all peoples, not only to colonial peoples, even if there is no authoritative definition of who constitutes a people in international law. And, as stated above, these rights are not inherent in States or Governments, but in peoples, Common Article 1 being part of a human rights treaty. Finally, and presumptively, if “people” is given any meaning, it would seem to refer to people in an ethnographic sense, not component parts of it.<sup>10</sup>

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choice that African States selected, among all the classic principles, that of *uti possidetis*. This remains an undeniable fact...’. *The Case Concerning the Frontier Dispute of 22 December 1986 (Burkina Faso v. Republic of Mali)*, 8 December 2000, ICJ, Judgment, *I.C.J. Reports 1986*, p. 554, at 567.

<sup>9</sup> D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford, 1991), pp. 14–15.

<sup>10</sup> James Crawford, “The Right of Self-Determination in International Law: its Development and Future”, in Philip Alston (ed.), *Peoples’ Rights*, pp. 7–68, at 27.

1 Hence, there was always potential for self-determination of peoples to reach  
2 further than colonial peoples. It was difficult to justify why would other kinds  
3 of alien domination would be essentially different from European colonialism.  
4 Surely the basic rationale for why colonialism lost its legitimacy was that foreign  
5 powers should not control the faith of African and Asian peoples and the same  
6 legitimacy deficit would come to haunt any power wanting to invade and domi-  
7 nate another people anywhere in the world, also outside of colonial context. And  
8 if the goal of decolonisation was to liberate these people to govern themselves,  
9 determine themselves their common destiny, would not that imply also that if  
10 a people cannot do that in an existing State, they should do it somewhere else.  
11 After all, if they cannot participate in a political life of a State, does not this  
12 mean a type of alien domination as well, another people in control of a State  
13 dominating the other(s).

14 This type of considerations gained strength, and found their way into various  
15 kinds of State negotiated instruments, well reviewed in perhaps the most famous  
16 modern case dealing with what self-determination of peoples' means in interna-  
17 tional law, the advisory opinion by the Canadian Supreme Court to a question:  
18 "[d]oes international law give the National Assembly, legislature or government  
19 of Quebec the right to effect the secession of Quebec from Canada unilaterally?"<sup>11</sup>  
20 What made this advisory opinion so influential – even though it was not made  
21 by an international court but a national one – was that the Supreme Court could  
22 make use of the leading scholars of international law on this topic.<sup>12</sup> The most  
23 interesting aspect of the opinion – from the perspective of this article – is how  
24 the Supreme Court advances a general view of what self-determination of peo-  
25 ples' means in current international law. For the purposes of the present article,  
26 most interesting aspects of the opinion relate to who are the holders of what type  
27 of self-determination, aspects of the opinion that clearly capture the *lex lata* of  
28 modern law of self-determination.

29 The Supreme Court starts by outlining the basics:

30 <sup>11</sup> Reference re Succession of Quebec from Canada [1998] 2 SCR 217. Reprinted in Vol. XXXVII,  
31 November 1998 *International Legal Materials*, pp. 1340–1377. There were three questions that were  
32 referred to the Supreme Court: "1. Under the Constitution of Canada, can the National Assembly, leg-  
33 islature or government of Quebec effect the secession of Quebec from Canada unilaterally? 2. Does  
34 international law give the National Assembly, legislature or government of Quebec the right to effect the  
35 secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under  
36 international law that would give the National Assembly, legislature or government of Quebec the right  
37 to effect the secession of Quebec from Canada unilaterally? 3. In the event of a conflict between domes-  
38 tic and international law on the right of the National Assembly, legislature or government of Quebec to  
39 effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?"

40 <sup>12</sup> Since Quebec declined to take part in the proceedings, an *Amicus curiae* was appointed on behalf of  
41 the Supreme Court to represent the interests of Quebec. Both the Minister of Justice and *Amicus Curiae*  
42 commissioned leading international law experts on the issue to provide their opinion on the interna-  
43 tional law aspects dealt with in answering to question 2.

While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the “rights” of entities other than nation states – such as the right of a people to self-determination.<sup>13</sup>

The Court is also of the view that this is not only conventional right, but a general principle of international law.<sup>14</sup> But who are these people? The Supreme Court provides a very interesting answer:

International law grants the right to self-determination to “peoples”. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of “peoples”, the result has been that the precise meaning of the term “people” remains somewhat uncertain.<sup>15</sup>

Yet, even though not been able to provide a clear-cut definition of people, as such does not exist in international law, the Court advances the following view:

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.<sup>16</sup>

Even though the Court contemplates in passing that the Quebec population does seem to share many characteristics (such as a common language and culture) that are relevant in determining whether a group is a people, it did not have to make this determination, given that in any case it came to the conclusion that Quebec has no grounds for unilateral secession.<sup>17</sup> Yet, what is interesting is that it did provide that there can be many self-determining peoples in a State. These peoples exercise their right to self-determination normally within the existing States (internal self-determination), but if they cannot do so, their right to external self-determination is in exceptional cases triggered, perhaps even leading to secession from an existing State.<sup>18</sup> The Court seems to accept – in addition to colonial situations and alien domination – even that external self-determination of people can be exercised as a remedy if the people cannot

<sup>13</sup> See the advisory opinion, paragraph 113.

<sup>14</sup> *Ibid.*, para. 114.

<sup>15</sup> *Ibid.*, para. 123.

<sup>16</sup> *Ibid.*, para. 124.

<sup>17</sup> *Ibid.*, para. 125.

<sup>18</sup> *Ibid.*, para. 126.

1 meaningfully participate in a political life of a State, even though it does say  
2 this cautiously.<sup>19</sup>

3 Now, the question arises as to how the Court's treatment of "people" could be  
4 interpreted. It certainly provided that the "people" does not have to be the same  
5 as the whole population of an existing State, so there can be many peoples in  
6 one State. It also quickly contemplated the general criteria of what is a "people"  
7 (common language and culture), but since the Court did not have to determine  
8 this, it left it at that. Yet, it can be presumed that the Court's liberal treatment of  
9 the effectivity principle – that if the entity is able to gain independence in the  
10 streets and even receives recognition from other States, it can become a State –  
11 testifies to the effect that for the Court any entity that would go as far as Quebec  
12 did, organising referendums to unilaterally declare independence from the mother  
13 State, qualifies presumptively as a people.<sup>20</sup>

14 What is important to realise from the perspective of the main question of this  
15 article is that the Supreme Court places vast importance on the territorial integ-  
16 rity of States.<sup>21</sup> The question of who has a right to self-determination must be  
17 seen against the background of territorial integrity of each and every State in the  
18 world. In the normal state of affairs, if there are many peoples in a State, they  
19 exercise these rights internally within the sovereign State. As the Court provides,  
20 international law does not prohibit or permit secession in these circumstances,  
21 but it certainly lays a heavy burden for such a group to secede. This is essentially  
22 a matter of domestic law, and if domestic law does not allow a sub-entity to  
23 secede, the central government can suppress any insurgency, within the limits of  
24 human rights and international humanitarian law. But the peoples' right to self-  
25 determination takes place always within the context of a nation-State. If there is  
26 a people living in three States, each of these "segments" enjoy their self-determi-  
27 nation within each of the States. If one or all of them have grounds for external  
28 self-determination, they have to break free from their home State, with legal  
29 grounds (they have been oppressed) or illegally (by being successful in the streets).

30 <sup>19)</sup> This cautious attitude can be seen in paras. 134–135: "A number of commentators have further  
31 asserted that the right to self-determination may ground a right to unilateral secession in a third circum-  
32 stance. Although this third circumstance has been described in several ways, the underlying proposition  
33 is that, when a people is blocked from the meaningful exercise of its right to self-determination inter-  
34 nally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration, supra*, requirement  
35 that governments represent "the whole people belonging to the territory without distinction of any  
36 kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of  
37 secession. 135 Clearly, such a circumstance parallels the other two recognized situations in that the abil-  
38 ity of a people to exercise its right to self-determination internally is somehow being totally frustrated.  
39 While it remains unclear whether this third proposition actually reflects an established international law  
40 standard, it is unnecessary for present purposes to make that determination...".

41 <sup>20)</sup> *Ibid.*, see the discussion in paras. 141–142.

42 <sup>21)</sup> *Ibid.*, para. 112: "... international law places great importance on the territorial integrity of nation  
43 states and, by and large, leaves the creation of a new state to be determined by the domestic law of the  
44 existing state of which the seceding entity presently forms a part...".



At the very least one thing is clear: the modern law of self-determination does make it very difficult for transnational peoples to exercise their right to self-determination. In the above-mentioned example, for these three segments of a people to form their own State, they would all need to make their case against their nation-States, a fact that would make it very difficult for such a people to unite and form a State. It would also seem that international law would not raise any obstacles to self-determination struggle of one segment of a people, if it only can a) gain consent from its home state, b) break free with legal (invoking grave breaches of human rights) or c) illegal grounds (factually gaining independence and acceptance to it from other States, even if it was done against the constitutional law of the home State) since it would qualify as a people in the eyes of international law.

## **2. Have (Transnational) Indigenous Peoples Been Able to Gain Self-Determination in International Law?**

During the decolonization, the peoples of African and Asian continents were able to exercise their right to self-determination. However, after the process was over, international law of States closed off quickly and made it clear that self-determination applies mainly to overseas colonies; the so-called salt-water criterion emerged, requiring geographical distance between the colonised peoples wanting to exercise their right to self-determination and the State they were part. Metropolitan States were not threatened as colonies were geographically distant.

Contrast this to a challenge posed by indigenous peoples to the system of international law. They were also colonised, long before the African and Asian peoples, but they are living within the metropolitan territories of established States, making it difficult to apply any 'territorial approach' to self-determination of indigenous peoples. Depending on the way one defines indigenous peoples, it is estimated that there are 300–500 million indigenous peoples in the world, living in the territory of most States of the world, meaning that to grant them self-determination would pose a direct challenge to the way the states of the world have organised their internal governance structures.<sup>22</sup> Hence, at first sight, it would seem very difficult for indigenous peoples to exercise any kind of self-determination in the world of States. Yet, as will be shown below, the process to adopt a UN Declaration on the rights of indigenous peoples have indeed been able to make some important opening here.

<sup>22</sup> See, e.g. L. Malezer, 'Permanent Forum on Indigenous Issues: Welcome to the Family of the UN', in J. Castellino and N. Walsh (eds.), *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers, Leiden, 2005) p. 67.

1 *2.1. The Process to Adopt the UN Declaration*

2 The work to produce the UN Declaration began already in 1985 within the  
 3 Working Group on Indigenous Populations (WGIP), consisting of five expert  
 4 members (and, which, from the beginning, allowed a broad access to indigenous  
 5 peoples, irrespective of whether they had gained a status with ECOSOC).<sup>23</sup> For  
 6 almost a decade, the WGIP devoted a large part of its time to drafting the text  
 7 for a UN Declaration, the process to which the representatives of indigenous  
 8 peoples, government delegations and experts on the subject took part in. In  
 9 1994, the then Sub-Commission on Prevention of Discrimination and Protec-  
 10 tion of Minorities adopted the Draft Declaration prepared by the WGIP and  
 11 sent it to its parent body the Commission on Human Rights (now replaced by  
 12 the Human Rights Council) for consideration.<sup>24</sup> The Article on self-determina-  
 13 tion drew heavily on Article 1 (1) of the common Article to the Covenants:

14           Indigenous peoples have the right of self-determination. By virtue of that right they freely deter-  
 15           mine their political status and freely pursue their economic, social and cultural development.<sup>25</sup>

16 Another important provision of the 1994 Draft, from the perspective of future  
 17 framing of the right to self-determination of indigenous peoples, was Article 31,  
 18 which outlaid the following:

19           Indigenous peoples, as a specific form of exercising their right to self-determination, have the right  
 20           to autonomy or self-government in matters relating to their internal and local affairs, including  
 21           culture, religion, education, information, media, health, housing, employment, social welfare, eco-  
 22           nomic activities, land and resources management, environment and entry by non-members, as well  
 23           as ways and means for financing these autonomous functions.<sup>26</sup>

24 The Draft Declaration's provision on self-determination was heavily influenced  
 25 by the persistence of indigenous peoples,<sup>27</sup> them attaching a great importance to  
 26 such a right, and being able to push for the amendment of this Article in the last

27 <sup>23</sup> In 1982 the Working Group on Indigenous Populations was established as a subsidiary organ to  
 28 the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-  
 29 Commission on the Promotion and Protection of Human Rights), endorsed by ECOSOC on May 7,  
 30 1982; UN Doc. E/Res/1982/34. It is comprised of five members of the Sub-Commission, one repre-  
 31 senting each of the five geographical regions designated by the UN for electoral purposes. As a subsidi-  
 32 ary organ of the Sub-Commission, the Working Group is located at the lowest level of the hierarchy of  
 33 UN human rights bodies. Its recommendations have to be considered and accepted first by its superior  
 34 body, the Sub-Commission, then by the Commission on Human Rights (now the Human Rights  
 35 Council) and the Economic and Social Council (ECOSOC) before the UN General Assembly itself.

36 <sup>24</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, 1994/45, at <[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En)> visited on 1 December  
 37 2009.

38 <sup>25</sup> Article 3, E/CN.4/Sub.2/1993/29/Annex I, 23 August 1993.

39 <sup>26</sup> *Ibid.*, Article 31.

40 <sup>27</sup> C.E. Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous  
 41 Peoples' in 12 *European Journal of International Law* (2001), pp. 141–157, at 142–143.

stages of producing the Draft. The 1993 version of the Draft, which was rejected by the indigenous peoples, states much more modestly that:

Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with Charter of the United Nations. By virtue of this, they have the right, inter alia, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government.<sup>28</sup>

In 1995, the Commission on Human Rights considered the text submitted by the Sub-Commission and decided to establish an inter-sessional working group<sup>29</sup> with the mandate to consider the text presented and draw up a draft Declaration for the consideration of the Commission and eventually for the adoption by the UN General Assembly within the framework of the International Decade of the World's Indigenous People (1995–2004) – a goal that was never achieved. The inter-sessional Working Group consisted only of state representatives, although indigenous peoples were given access to the process via being accorded the status of observers.

Even though the progress was slow in the inter-sessional Working-Group and the goal of having the UN General Assembly to adopt the UN Declaration by the end of 2004 was never achieved, in June 2006 the newly created UN Human Rights Council adopted the Declaration (even though not without opposition (30 votes in favour, 2 against, 12 abstentions)),<sup>30</sup> recommending the UN General Assembly to adopt it, with the following formulations on the right to self-determination:

**Article 3**  
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.

**Article 4**  
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

<sup>28</sup> *Ibid.*, at p. 156. The operative paragraph 1 of the 1992 version reads: “Indigenous peoples have the right to self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government”. E/CN.4/Sub.2/1992/33.

<sup>29</sup> Resolution of the Commission on Human Rights 1995/32, 3 March 1995.

<sup>30</sup> See the version adopted by the Human Rights Council (A/HRC/1/L.10, 30 June 2006, pp. 56–72), at <<http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/HR%20Council/HRCouncil1streport2006.pdf>> visited on 1 December 2009. See the explanatory paper by Canada after its voting against the Declaration, and also outlining the reasons why the other countries that abstained from the vote did so, many of them having problems with Article 3 on self-determination (Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples – June 29, 2006), at <[http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr\\_e.html](http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr_e.html)> visited on 1 December 2009.

1 Although the original 1994 Draft and the 2006 Draft adopted by the Human  
2 Rights Council are identical in framing the right to self-determination of indig-  
3 enous peoples, noteworthy is the re-placing of Article 31 on autonomy and  
4 self-government immediately after the self-determination Article 3, making it  
5 possible to read these two provisions together. It can now be argued that Article  
6 4 specifies that indigenous peoples right to self-determination is limited to ‘right  
7 to autonomy or self-government’, what is many times called the right to internal  
8 self-determination within the confines of existing states. This interpretation is  
9 made even more pertinent when we compare the way the right to autonomy and  
10 self-governance are worded in Articles 31 and 4, where the former sees it ‘as a  
11 specific form of exercising their right to self-determination’ and the latter ‘in  
12 exercising their right to self-determination’. The first formulation, if read in the  
13 context of Article 3, seems to indicate that autonomy and self-governance are  
14 possible ways to implement the right to self-determination of indigenous peo-  
15 ples, whereas the new Article 4 gives more force to the argument that the right  
16 to autonomy and self-governance are the ways the indigenous peoples self-deter-  
17 mination can be realised.

18 Even with this re-placing, the process to finally adopt the UN Declaration  
19 came to a halt when a non-action resolution by the Namibian Delegation was  
20 supported by the majority in the 3rd Committee of the UN General Assembly.<sup>31</sup>  
21 One likely reason for this is exactly Article 3, since even though with this  
22 re-placing mentioned above, Article 3 was still there, stating that indigenous  
23 peoples have a right to freely determine their political status. It is not difficult to  
24 imagine that adopting such a text would be troublesome for anyone representing  
25 their state in the 3rd Committee, especially, as it were, to the African countries.

26 The matter came to the final decision-making in the 61st session of the Gen-  
27 eral Assembly in September 2007, where the Declaration was adopted by 143  
28 states voting in favour, 4 states against (New Zealand, Australia, the USA and  
29 Canada) and 11 abstaining (including Russia).<sup>32</sup> There were some important  
30 changes to the version adopted by the Human Rights Council, most importantly

31 <sup>31</sup> See the press release from the 3rd Committee, at <<http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm>> visited on 25 June 2007. As put in the UNGA press release: ‘But an initiative led by Namibia, co-sponsored by a number of African countries, resulted in the draft being amended. In its new form, the draft would have the Assembly decide “to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon”...The amendments were adopted by a vote of 82 in favour to 67 against, with 25 abstentions (annex II)... Prior to the vote, the representative of Peru – recalling that it had taken 24 years for the Declaration to be hammered out – said the original draft had been revised to address the concerns of many delegations, particularly regarding the principle of self-determination of peoples and respect for national sovereignty... However, his counterpart from Namibia, explaining the proposed amendments, said that some provisions ran counter to the national constitutions of a number of African countries and that the Declaration was of such critical importance that it was only “fair and reasonable” to defer its adoption by the Assembly to allow for more consultations’.

32 <sup>32</sup> For a general overview, see at <<http://www.iwgia.org/sw248.asp>> visited on 1 December 2009.

from the perspective of the right to self-determination of indigenous peoples. As will be recalled, the version adopted by the Human Rights Council left the door open for indigenous peoples to claiming full-blown self-determination for the simple reason that Article 3 was still there, entitling in principle them to claim full right to determine their political status. This was the crux of the matter, even though a good argument can be made that Articles 3 and 4 should have been interpreted together, entitling indigenous peoples only internal self-determination, Article 3 was still left the door open for indigenous peoples to claim full self-determination. In order to make sure that there is no possibility to read too much into Article 3, the final adopted version by the UN General Assembly changed in crucial way Article 46 (1), which had read in the version adopted by the Human Rights Council the following:

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.

This was changed to make sure that indigenous peoples' self-determination can mean at the most internal self-determination within existing states:

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.**<sup>33</sup> (my emphasis)

The compromise consists thus of three moves. The right to self-determination of indigenous peoples is recognised in Article 3, but its practical content is defined in Article 4 and its outermost scope is limited in Article 46. Overall, with this compromise, the State community and indigenous peoples were able to identify an acceptable compromise for organising their mutual relations, even if in non-legally binding manner.

What is also clear is that the UN Declaration is very much based on certain measure of self-determination of indigenous peoples within the established nation-States. It does not promise much for transnational indigenous peoples, even if it contains one article focusing exactly on this issue, Article 36:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

<sup>33</sup> Article 46 (1) of the adopted UN Declaration, which can be downloaded at <<http://www.un.org/esa/socdev/unpfi/en/declaration.html>> visited on 1 December 2009.

1 The provision upholds a view of indigenous communities living at various sides  
 2 of the border, having a right to develop their contacts, relations and cooperation  
 3 with communities at the other side of the border. It is also very much in line  
 4 with the UN Declaration, which defines that indigenous peoples self-determina-  
 5 tion means right to autonomy or self-governance in their internal or local affairs,  
 6 within the broader nation-State. In other words, the UN Declaration does not  
 7 encourage the segments of the transnational people to unite, find a common  
 8 identity, but to keep good contacts with each other, the primary reference soci-  
 9 ety being each nation-State.

### 10 **3. Moving from the Abstract to the Concrete: Self-Determination of Sami** 11 **and Inuit Transnational People**

12 Both Sami and Inuit live in four States. The Sami live in the northernmost parts  
 13 of Scandinavia (in Norway, Sweden and Finland) and Russia;<sup>34</sup> the Inuit also live  
 14 in Russia but at the other side of its vast Arctic territory (in Chukotka). They  
 15 also live in the United States (Alaska), Canada and Denmark-Greenland.<sup>35</sup> Both  
 16 Sami and Inuit have established their international organisations, the Sami Council  
 17 and Inuit Circumpolar Council (ICC), respectively. These organisations have  
 18 been actively involved in Arctic and international inter-governmental forums.

19 The Sami Council and the ICC are permanent participants in the 1996 estab-  
 20 lished Arctic Council. This is a very unique inter-governmental co-operation  
 21 body between the eight Arctic states (the five Nordic States, Russia, the US and  
 22 Canada) in that the international organisations of Arctic indigenous peoples  
 23 have a status as permanent participants and they need to be consulted before the  
 24 decision-making by member States. They have even better status in the Arctic  
 25 Council than major nation-States, who are only observers in the Council.<sup>36</sup>

26 <sup>34</sup> The Saami are an indigenous people living in the northern parts of three Nordic states – Norway,  
 27 Sweden and Finland – and on the Kola Peninsula in the Russian Federation. They arrived in the region  
 28 well before the present majority populations of those states and are ethnically and linguistically distinct  
 29 as a people from the mainstream societies. At present, there are approximately 90,000 Saami living in  
 30 the northernmost regions of the North Calotte and the Kola Peninsula. Of these, the Norwegian Saami  
 31 constitute the largest group, numbering approximately 50,000–65,000 persons, followed by the Saami  
 32 in Sweden (20,000), Finland (8000) and Russia (2000). These figures are at best rough estimates as there  
 33 is no clear definition of who constitute the Saami. See the Report, p. 65. See also 'Introduction to the  
 34 Saami', the Saami: A Cultural Encyclopedia, p. 5. The Saami are now a minority in most parts of their  
 35 traditional areas.

36 <sup>35</sup> There are approximately 155 000 Inuit living in four States, see at <http://en.wikipedia.org/wiki/Inuit>,  
 37 visited on 1 December 2009.

38 <sup>36</sup> For a comprehensive study of the Arctic Council, see Timo Koivurova and David VanderZwaag,"  
 39 The Arctic Council at 10 Years: Retrospect and Prospects", 40:1 *University of British Columbia Law*  
 40 *Review* (2007) pp. 121–194.

### 3.1. *Self-determination of Transnational Sami People*

Even though Sami live in four States, the process leading to the Draft Nordic Sami Convention did not seriously try to include Russia as one of the contracting States.<sup>37</sup> This was due to many factors, most importantly because Russia wants to primarily regulate the rights and status of its numerous indigenous peoples itself.<sup>38</sup> The Draft was developed under the auspices of the Nordic Council, Nordic parliamentary co-operative body, the three States inhabiting Sami in Norway, Sweden and Finland as its members. After many stages, an Expert Committee, with unique composition (three members from each State and each Sami parliament), was established, which handed down its proposal for a Nordic Sami Convention in October 2005.<sup>39</sup>

The Draft advances a very ambitious extent for the Sami self-determination, in particular in its Article 3:

<sup>37</sup> This was despite the Saami Council calling for Russians to be included in their Honningsvåg conference: “Consider the ongoing work on a Nordic Saami Convention an important step in the effort to reduce the negative implications of state borders to the Saami society and likewise an important contribution in the acceptance of basic Saami rights regardless of the state border; In this context emphasize the importance that Finland, Norway and Sweden also make effort to incorporate Russia in the development of a Saami convention to ensure that the entire Saami nation acquires legal protection through a treaty of this character”. See the preamble of the Honningsvåg Declaration from the website of the Saami Council, at <http://www.saamicouncil.net/files/20041215142715.doc>, visited on 1 December 2009.

<sup>38</sup> There are also many other considerations. Since Sami are only one of the indigenous groups in its territory, it might be viewed as discriminatory, if Russia was to enter into an international treaty over one very small indigenous group (approximately 2000 members). In addition, the Nordic countries have very close contacts with each other, and the same goes with the three Sami communities. The Russian Sami, are, however, active participants in the Sami Council.

<sup>39</sup> See the Report on the Draft Saami Convention, “Pohjoismaiden saamelaisopimus: Suomalais-norjalais-ruotsalais-saamelaisen asiantuntijatyöryhmän 27. lokakuuta 2005 luovuttama luonnos (Finnish Ministry of Justice Publication No. H-2183 F, 90–96. The extensive document (hereinafter ‘the Report’) consists of nine sections and four annexes totalling 340 pages. See pp. 151–246. The other parts of the Report consist of the following: how the Committee was appointed and its terms of reference (Section 2, pp. 44–46); a summary of the content of the proposed text for a convention (Section 3, pp. 47–56); an explanation of the process leading to the appointment of the Committee and how the Committee has fulfilled its task (Section 4, pp. 57–62); a discussion of some of the general issues related to the Convention (Section 5, pp. 63–64); a review of the legal and factual situation of Saami in Finland, Norway, Sweden and the Russian Federation (Section 6, pp. 65–103); an extensive analysis of the international treaties and other international instruments relevant from the viewpoint of Saami rights (Section 7, pp. 104–147); and a discussion of the status of Saami in the Convention (Section 8, pp. 148–150). The Annexes consist of a review of a study of whether Saami could be parties to the proposed Convention (Annex I, pp. 247–250), a discussion of the legal status of the Russian Saami (Annex II, pp. 251–262), an article by three members of the Expert Committee on the right to self-determination of the Saami (Annex III, pp. 263–318) and the Draft United Nations Declaration on the Rights of Indigenous Peoples, together with suggestions from the Nordic countries, New Zealand and Switzerland (Annex IV, pp. 319–340). The unofficial English version of the Draft Convention can be found from the Saami Council website, at [http://www.saamicouncil.net/includes/file\\_download.asp?deptid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?deptid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc), visited on 1 December 2009.

1 As a people, the Saami has the right of self-determination in accordance with the rules and provi-  
 2 sions of international law and of this Convention. In so far as it follows from these rules and provi-  
 3 sions, the Saami people has the right to determine its own economic, social and cultural  
 4 development and to dispose, to their own benefit, over its own natural resources.<sup>40</sup>

5 There are two parts in this Article. The first part provides that the Sami has a  
 6 right to self-determination in accordance with the rules and provisions of inter-  
 7 national law. This is further explained in the Commentary to the Draft. The  
 8 Expert Committee clarifies that even though Sami as a people has a right to self-  
 9 determination, this does not mean that they have a right to secede from the  
 10 existing States. As the Commentary provides:

11 The Sami as a people and as the indigenous people of Scandinavia are not in such a position that  
 12 they could claim the establishment of their own state on the basis of international law. The Sami  
 13 and the contracting States must, on the basis of international law, develop such ways of organizing  
 14 the exercising of Sami self-determination that the present borders of the States are not challenged.<sup>41</sup>

15 This is done in a very innovative manner in the Draft. Even though the Sami  
 16 parliaments are not envisaged as contracting parties to the Nordic Sami Conven-  
 17 tion, an issue that was discussed extensively in the Expert Committee, they do  
 18 have a very strong role in all aspects of the operation of the Convention (if it was  
 19 adopted as it now stands in draft form). They have a power to reject its ratifica-  
 20 tion and any amendment to the Convention and have an equal representation  
 21 in the Committee that steers the development of the Convention.

22 The second part of the Article provides that as a people, the Saami has the  
 23 right of self-determination in accordance with the rules and provisions of this  
 24 Convention. This provision is further clarified in Article 14 (3):

25 The Saami parliaments shall have such a mandate that enables them to contribute effectively to the  
 26 realization of the Saami people's right of self-determination pursuant to the rules and provisions of  
 27 international law and of this Convention. Further regulations concerning the mandate of the  
 28 Saami parliaments shall be prescribed by law.

29 This part of the Article aims to express that the goal of the envisaged Conven-  
 30 tion is to further integrate the Sami communities in the three States, and this  
 31 would happen via the existing democratically elected Sami parliaments assuming  
 32 more powers and co-operate further with each other. The vision of the Draft is  
 33 to have joint Nordic Sami parliament, as expressed in the report and more cau-  
 34 tiously in Article 20: "The Saami parliaments may form joint organizations. In

35 <sup>40</sup> Article 3. The unofficial English version of the Draft Convention can be found from the Saami  
 36 Council website, at [http://www.saamicouncil.net/includes/file\\_download.asp?depid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?depid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc), visited on  
 37 1 December 2009.

38 <sup>41</sup> The author's translation from the report.  
 39



consultation with the Saami parliaments, the states shall strive to transfer public authority to such joint organizations as needed.” Interesting is also that Sami parliaments are provided with extensive powers in relation to participation in international affairs in Article 19: “The Saami parliaments shall represent the Saami in intergovernmental matters. The states shall promote Saami representation in international institutions and Saami participation in international meetings”.

The Draft Sami Convention has not progressed as envisaged. When the Draft was handed down in October 2005, it was foreseen that negotiations would commence in November 2007. However, especially the problems experienced in Finland and – to some extent Sweden – have postponed the process. The most recent information is that the decision over whether the negotiations will be commenced is to be taken in January 2010.<sup>42</sup>

### 3.2. *Self-determination of Transnational Inuit People*

The five Arctic Ocean coastal states, the United States, the Russian Federation, Denmark-Greenland, Norway and Canada organised a political meeting (preceded by a senior level official meeting in Norway in October 2007) in May 2008 in Greenland, where they issued the so-called Ilulissat Declaration.<sup>43</sup> The main motivation for the meeting was for the coastal states to clarify to the media that there is no scramble for resources on-going in the Arctic Ocean sea-bed but an orderly development, regulated by the law of the sea. Still, the fact that Denmark intentionally did not convene a special meeting of the predominant intergovernmental Arctic co-operation forum, the Arctic Council, met with lot of resistance. Of the Arctic Council member states, Finland, Sweden and Iceland were not invited, an issue that Iceland was particularly concerned about.<sup>44</sup>

For the region’s indigenous peoples, the Greenland meeting was also a concern. Given that the Arctic Ocean coastal state meeting involved the four States where Inuit people are living, and they were not invited to the meeting (as they are to all Arctic Council meetings), it was to be expected that Inuit and in particular the organisation representing all the Inuit in four states the ICC would

<sup>42</sup> E-mail from the responsible official from the Finnish Ministry of Justice on 11 November 2009. On file with the author.

<sup>43</sup> See at the Arctic Council website, at <http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>.

<sup>44</sup> In the discussion in the Narvik Senior Arctic Official meeting (18.1.), “Iceland expressed concerns that separate meetings of the five Arctic states, Denmark, Norway, U.S., Russia and Canada, on Arctic issues without the participation of the members of the Arctic Council, Sweden, Finland and Iceland, could create a new process that competes with the objectives of the Arctic Council. If issues of broad concern to all of the Arctic Council Member States, including the effect of climate change, shipping in the Arctic, etc. are to be discussed, Iceland requested that Denmark invite the other Arctic Council states to participate in the ministerial meeting. Permanent participants also requested to participate in the meeting. Denmark responded that the capacity of the venue may be an issue”. Narvik SAO meeting 2007 Final Report (28–29 November 2007), <<http://arctic-council.org/filearchive/Narvik%20-FINAL%20Report-%2023Apr08.doc>>, visited on 1 December 2009.

1 react negatively to the Ilulissat meeting. What is interesting in this development  
2 is that both the Arctic Ocean coastal states and the Inuit issued a declaration  
3 defining their presence in the region via the concepts of sovereignty and self-  
4 determination. The Arctic Ocean coastal States defined that the Arctic Ocean  
5 stands at the threshold of significant changes because of climate change conse-  
6 quences, one implication which is that there is potential impact on vulnerable  
7 ecosystems and the livelihoods of local inhabitants and indigenous communities.  
8 The coastal states then argued that:

9 By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean  
10 the five coastal states are in a unique position to address these possibilities and challenges...The  
11 Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protect-  
12 ing. Experience has shown how shipping disasters and subsequent pollution of the marine environ-  
13 ment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods  
14 of local inhabitants and indigenous communities.<sup>45</sup>

15 As is readily clear from the Ilulissat declaration, the coastal states defined them-  
16 selves as sovereigns with stewardship role also over “livelihoods of local inhabit-  
17 ants and indigenous communities”. This was a difficult issue for Inuit, as they  
18 were not given any active role in the meeting and were, in effect, seen as under  
19 the stewardship – together with the region’s ecosystem – of the coastal States.  
20 Hence, very quickly after the Greenland meeting, on 6–7 November 2008, the  
21 ICC and Inuit leaders issued their “Inuit Leaders’ Statement on Arctic Sover-  
22 eignty” in which they noted that the Ilulissat Declaration on Arctic sovereignty  
23 by ministers representing the five coastal Arctic states did not go far enough in  
24 affirming the rights Inuit have gained through international law, land claims and  
25 self-government processes.<sup>46</sup> This was then further refined for the Arctic Council  
26 ministerial meeting at the end of April 2009, when the Inuit’s issued their Cir-  
27 cumpolar Inuit Declaration on Arctic Sovereignty.<sup>47</sup>

28 The Circumpolar Inuit Declaration on Arctic Sovereignty is a lengthy docu-  
29 ment, of which all aspects cannot be reviewed here. The basic legal architecture  
30 of the Declaration is this. Arctic and the world at large does not consist of sover-  
31 eign States and their territories, but has grown to be a very complex governance  
32 system, where authority and power is exercised in various levels and with various  
33 mandates and legal or non-legal basis.<sup>48</sup> And this is undoubtedly true. For a long  
34 time, we have not only been able to speak of “government”, but increasingly  
35 refer to forms of authority escaping the nation-States as forms of “governance”  
36 or “international governance”. In a similar vein, indigenous peoples’ have vari-

37 <sup>45</sup> See *Ilulissat Declaration* (8 May 2008), <<http://arctic-council.org/filearchive/Ilulissat-declaration.pdf>>,  
38 visited on 1 December 2009.

39 <sup>46</sup> See at <[http://www.sikunews.com/skriv\\_ut.html?catid=2&artid=5711](http://www.sikunews.com/skriv_ut.html?catid=2&artid=5711)> visited on 1 December 2009.

40 <sup>47</sup> See at <http://www.itk.ca/circumpolar-inuit-declaration-arctic-sovereignty>, visited on 1 December 2009.

41 <sup>48</sup> *Ibid.*, see, especially, para. 4.2. of the Declaration.

ous levels of governance of their own, ranging in the case of Inuit from their international organisation ICC to national ICC offices, and down to domestic law indigenous governance arrangements.

With such a highly complex multi-level governance framework, the Declaration also advances Inuit agency in multilayered manner: as a people, indigenous people, indigenous people of the Arctic, citizens' of the Arctic States, indigenous citizens' of the Arctic States and even indigenous citizens' of each of the major political sub-units of Arctic States.<sup>49</sup> Various parts of the Declaration raise the various governance forms where the Inuit act in these legally relevant positions, from international level to domestic and down to the sub-unit level.

The Inuit set out to find a way to reconcile between their self-determination rights as people and indigenous people and State sovereignty. Partly this can be done via soft-law forums such as the Arctic Council. Even though it cannot enact legally binding decisions, the Council does make politically influential decisions, scientific studies and guidelines of good practise. It has the eight sovereign Arctic States as its members and region's indigenous peoples' international organisations as its permanent participants, with highly influential status to influence on how sovereigns make their decisions. The Council typifies the common multi-level soft-law governance landscape of the circumpolar Arctic, with Barents Euro-Arctic Council, Northern Forum etc.

Yet, the most challenging task the Inuit have is to convince that their self-determination rights set limits to sovereign States. As was studied above, the evolving law related to indigenous peoples is moving to the direction that indeed indigenous peoples are peoples, with peoples' right to full self-determination. Yet, as was also noted, the compromise recently achieved in the UN Declaration between States and indigenous peoples indicates that the future direction is to try to reconcile the competing demands of States and indigenous peoples, with the latter having a right to autonomy and self-governance in internal and local affairs. This would not seem to entail aspects of external self-determination. Greenland is a special case here. Inuit in Greenland can, arguably, be seen as colonised by Denmark and thus having different legal basis for their claims than indigenous peoples in general, since colonisation constitutes one of the grounds for use of external self-determination of a people.<sup>50</sup> And now, with the new self-rule, it is up to the Inuit to decide whether they want independence or not.<sup>51</sup> Yet, there does not seem to be any grounds for indigenous peoples in general,

<sup>49</sup> *Ibid.*, see paras. 1.3.-1.8. of the Declaration.

<sup>50</sup> Classic work is Gudmundur Alfredsson, "Greenland and the Law of Political Decentralisation", in *German Yearbook of International Law* (1982) pp. 290–308.

<sup>51</sup> See the Draft Act on Greenland Self-Government, at <http://www.amblissabon.um.dk/NR/rdonlyres/EDC5978E-71C2-467E-974A-598A01EEA562/0/DraftActonGreenlandSelfGovernment.pdf> (1.12.2009).

1 which concerns all the other Inuit than the Greenlandic ones, to exercise exter-  
2 nal self-determination in international law, at least as yet.

#### 3 **4. Concluding Observations**

4 I have argued above that international law of States has been able to accommo-  
5 date the right to self-determination of peoples in general and indigenous peoples  
6 in particular. Yet, this self-determination has its clear limits, which became clear  
7 already at the time when the decolonisation was implemented. It was not the  
8 African and Asian peoples in any ethnographic sense that were entitled to exer-  
9 cise their right to self-determination, but populations of the territories that hap-  
10 pened to fall within the borders drawn by the colonists. The decolonisation had  
11 also the effect of creating transnational peoples by erecting State borders and  
12 thereby placing peoples on both sides of the border.

13 The same applies in the current day law of self-determination. The self-deter-  
14 mination of peoples always takes place within the frame of sovereign nation-  
15 States, which does hinder possibilities for the transnational peoples to exercise  
16 their “joint” self-determination, given that each people has to address its con-  
17 cerns towards the sovereign in whose territory it is located. For this reason, also  
18 the provision that addresses the special situation of transnational indigenous  
19 peoples, Article 36, is very much built on these premises. Indigenous peoples  
20 may have internal self-determination within existing States, but transnational  
21 indigenous peoples have rights only to maintain and develop contacts, relations  
22 and cooperation with each other, across the border. There is no attempt at the  
23 UN Declaration to bridge the gap between these segments of people divided  
24 by State borders, encourage them to unite, but rather to develop the contacts  
25 between separate indigenous communities.

26 This can be contrasted to the attempts by the Sami and the Inuit, which  
27 clearly try to build a more ambitious approach, based on the whole people’s  
28 self-determination. Even though the Draft – for political reasons – cannot ensure  
29 full rights to the Russian Sami, an attempt is made to include them as well as  
30 possible. If they live in any of the three Scandinavian States, they are entitled to  
31 all the rights in the Draft, and the institutional co-operation provisions of the  
32 Draft envisage involving Russian Sami even more. The self-determination of the  
33 whole people calls for their international standing to be developed. This is very  
34 clear in the Draft, since the Sami parliaments can nearly be seen as parties to the  
35 envisaged Convention. They participate in the development of Convention, its  
36 supervision (by appointing half of the members in the supervisory committee),  
37 they can block the ratification and amendments to the Convention. Individual  
38 Sami parliaments are also guaranteed strong participation in inter-governmental  
39 affairs.

It seems fairly clear that even though the Draft Nordic Sami Convention does not refer to Article 36, completed as it was before the UN Declaration was adopted the Draft would certainly be an ideal manner to implement this Article. But the Draft goes further. It aims to create a gradual process whereby the Sami and the three Nordic nations could develop their relationship in such a way that we could perceive four nations co-existing in the same physical space composed of the territories of three States. From this perspective, the Draft Nordic Sami Convention should probably be seen as a type of “social contract” between the Sami and the three Nordic States rather than a typical international treaty.<sup>52</sup> Moreover, the goal is to ultimately unite the three Nordic Sami communities, rather than to have them co-operate more with each other.

The Inuit voice their self-determination rights as a people in an innovative manner. It is, of course, a totally different context where the Inuit claim their self-determination as a people as compared to the Sami. The Inuit took issue with the prior Declaration made by the Arctic Ocean coastal States, these States apparently thinking that Arctic governance is about their sovereignty and sovereign rights, and their stewardship rights over the Inuit and the region’s ecosystems. The instrument Inuit use is also very different from the Sami. The Sami parliaments are engaged in negotiating a legally binding treaty with their home States whereas Inuit issued a Declaration of their own to clarify their legal position to the Arctic Ocean coastal States, other States and the EU all interested in influencing the future scene of Arctic governance.<sup>53</sup> Because of the different context, Inuit had more freedom to come up with their own views of what State sovereignty and self-determination of peoples mean in present-day international society. But they did find it important to advance their self-determination as Inuit people as a whole. By contrasting the self-determination of Inuit of four States to the sovereignty of five Arctic Ocean coastal States, the Inuit were able to use the whole leverage of their self-determination as a transnational people.

Even though general international law does not really give much politico-legal space for peoples divided by borders, transnational indigenous peoples in particular, it is not impossible to exercise these peoples’ self-determination if political willingness to this can be found. In fact, both examples taken up in this article – the Sami and the Inuit exercise of self-determination together and against their home States – does provide inspiring examples not only that it is possible for

<sup>52</sup> This has been argued by one of the members of the Expert Committee producing the Draft Nordic Sami Convention, Martin Scheinin, see chapter 7, “The Right of a People to Enjoy Its Culture: Towards a Nordic Saami Rights Convention” in *Cultural Human Rights* (eds. Francesco Francioni and Martin Scheinin). Martinus Nijhoff Publishers 2008.

<sup>53</sup> For a recent analysis, see Timo Koivurova, “Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance. *Polar Record*. Cambridge University Press 2009. Published online by Cambridge University Press, 8 September 2009.

1 transnational indigenous peoples to exercise self-determination, but also in very  
2 constructive and effective ways. This is not to say that it is certain that there will  
3 be a Nordic Sami Convention or that the Inuit will be able to gain more power  
4 in international Arctic governance, but it does mean that the transnationality of  
5 these peoples has not died out and will likely to serve as a check for State action  
6 also in the future.