

Making Peoples Heard

Essays on Human Rights in Honour of
Gudmundur Alfredsson

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a cure has eluded scientists and doctors alike. Perhaps the answer to finding a cure to some of such diseases may lie in the plants of the rain forests and the traditional knowledge of the indigenous people living in those communities. At the same time however, granting intellectual property protection to innovations derived from traditional knowledge should not preclude use of such material in a traditional context.

In connection with the above view, the report by the Panel of Experts on Access and Benefit Sharing convened by the United Nations Environmental Program (UNEP), expressed the conviction that "there was a need to ensure that granting intellectual property rights does not preclude customary use of genetic resources and related knowledge," and urged the need for "making provision to ensure the continued use of genetic resources and related knowledge" in connection with intellectual property rights and Access and Benefit Sharing Agreements.³

The need for finding a solution regarding the protection of traditional knowledge seems obvious and necessary. It would appear, in my view, that a *suiis generis* system of protection would be more suitable which would not disturb the current intellectual property system that has a long history and has proven useful from its earliest inception. That *suiis generis* system should have its own criteria for the protection of traditional knowledge, criteria that are different from the current intellectual property system. For example, the stringent rules of novelty, inventive step and industrial applicability should not apply. Rather, the system should recognize the owners of such knowledge whether such knowledge is individually or collectively held, and should clarify the method of sharing of the benefits arising from that knowledge.

Chapter 29

Redefining Sovereignty and Self-Determination through a Declaration of Sovereignty: The Inuit Way of Defining the Parameters for Future Arctic Governance

Timo Koivurova*

Numerous developments are underway where the Arctic is concerned in the international political and legal forums. With climate change and economic globalisation rapidly transforming the region, one sees various states and the EU taking new stances on how the Arctic should be governed. For a long time, the soft-law co-operation in the Arctic Council has been enough. This eight-state inter-governmental body comprising the five Nordic states, Russia, the United States and Canada has made it possible to conduct extensive scientific assessments, to draft soft-law guidelines and sometimes even to issue policy recommendations. Having no legal mandate or stable funding mechanism and being confined primarily to only non-sensitive environmental and sustainable development challenges, the Council is hard pressed to counter the vast challenges that lie ahead.¹ One particular concern is the rapidly receding sea ice in the Arctic Ocean, which will enable navigational uses of Arctic waters, offshore oil and gas exploitation, increased tourism, and other activities.

Yet, from the viewpoint of the region's indigenous peoples, the Arctic Council has been an enormously important forum. After all, their international organisations' have received a wholly unique status in an inter-governmental forum: they are permanent participants, who the member states must consult before making decisions and who are involved in conducting all activities and scientific assessments. Many powerful states – the six observer members – have a weaker status in the Council.²

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¹ For an overview of the work within the Council, and whether it can counter the future challenges, see T. Koivurova and David VanderZwaag, 'The Arctic Council at 10 Years: Retrospect and Prospects', http://law.dal.ca/Files/MEL_Institute/ArcticCouncil10.pdf, 40:1 *University of British Columbia Law Review* (2007) pp. 121-194.

² Currently, there are only six permanent observer states, all Member States of the European Union: Poland, Germany, the United Kingdom, the Netherlands, Spain and France. Many non-Arctic states and the European Commission are eager to be granted this status, but have not yet been able to obtain it.

Nevertheless, given the challenges facing the region, it was only a matter of time before the political struggle over how Arctic governance should be organised would commence. It is clear, as will be shown below, that the Arctic states and the European Union (EU) are currently outlining their respective policy positions for that governance. This can be interpreted as a type of pre-negotiation or testing period, in which the Arctic actors are defining the new parameters for Arctic governance, for example, the legitimate actors and their status in any future governance arrangement. Many times this type of policy discussion implies an international regime change, which at the very least would be a challenge for the Arctic Council as the predominant Arctic inter-governmental forum.

This chapter focuses on how the Inuit and their international organisation, the Inuit Circumpolar Council (ICC), have been able to participate in this "battle of words". The ICC represents the Inuit in four Arctic states: Russia (Chukotka), the US (Alaska), Canada and Greenland-Denmark. It is known as the most influential of all the indigenous organisations in the Arctic. The ICC and national Inuit leaders have also taken strict positions on how Arctic governance should be organised. What is particularly interesting, and the focus here, is how they have been able to advance their claims by redefining what state sovereignty and the self-determination of peoples mean in the present-day international reality, in particular that in the Arctic.

The article will proceed as follows. It first examines the political dynamic that started with the five Arctic Ocean coastal states convening in Greenland and issuing the Ilulissat Declaration, which prompted other actors, including the Inuit, to take a stance on the form of Arctic governance.³ I will examine briefly the content of the Ilulissat Declaration and the policy reactions it provoked, both within and outside the Arctic Council. I will then go on to examine how the Inuit reacted to the meeting and how they defined their parameters for Arctic governance in the very innovative Circumpolar Inuit Declaration on Arctic Sovereignty.⁴ Finally, I explore the significance of the Declaration.

1. Arctic Ocean Coastal State Meeting and Reactions to it in the Arctic Council and the European Union

It was the Ilulissat meeting of the five Arctic Ocean coastal states in Greenland that really sparked the discussion on the future of Arctic governance. The meeting was primarily designed to explain to the rest of the world that there was no scramble for resources going on in the Arctic, but rather an orderly development. Even though this might have been the original intention, the meeting provoked many unanticipated reactions among various Arctic "constituencies".

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

4 See, *Circumpolar Inuit Declaration on Arctic Sovereignty* (28 April 2009), <<http://www.itk.ca/sites/default/files/20090428-en-Sovereignty-Declaration-A3.pdf>>, visited on 1

According to the Ilulissat Declaration, the coastal states found that the Arctic Ocean is at the threshold of significant changes as a result of climate change and melting sea ice, and thus: "[b]y virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges." They also presented themselves as protecting the environment and indigenous and other local inhabitants on the coast of the Arctic Ocean:

Climate change and the melting of ice have a potential impact on vulnerable ecosystems, the livelihoods of local inhabitants and indigenous communities... By virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges... The Arctic Ocean is a unique ecosystem, which the five coastal states have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities.

The states took the view that there was "no need to develop a new comprehensive international legal regime to govern the Arctic Ocean", because

[n]otably, the law of the sea provides for important rights and obligations concerning the delineation of the outer limits of the continental shelf, the protection of the marine environment, including ice-covered areas, freedom of navigation, marine scientific research, and other uses of the sea. We remain committed to this legal framework and to the orderly settlement of any possible overlapping claims. This framework provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions.

Even though Denmark insisted in the 2007 Narvik meeting of Senior Arctic Officials (SAO) that coastal state co-operation would not compete with the Arctic Council, the meeting caused friction among Council members.⁵ Iceland has been the most concerned of the three states left out of this meeting (the others are Finland and Sweden). It expressed its concern at the Narvik meeting⁶ and in the August 2008

5 Narvik SAO meeting 2007 Final Report (28-29 November 2007), <<http://arctic-council.org/filearchive/Narvik%20-%20FINAL%20Report-%2023Apr08.doc>>, visited on 30 November 2009.

6 In the discussion in the Narvik SAO 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."

Conference of Arctic Parliamentarians.⁷ This is, of course, no surprise. The Ilulissat Declaration seems to outline an agenda for co-operation between the littoral states of the Arctic Ocean on high-level ocean policy issues, potentially challenging the Arctic Council with its eight members, broad circumpolar focus and soft work on environmental protection and sustainable development. At the Ilulissat meeting, the coastal states committed themselves to working in and through various international forums, organisations and existing treaties to, among other things, improve shipping safety, prevent and reduce ship-based pollution in the Arctic Ocean, protect the marine environment, strengthen search and rescue capabilities, and improve accident response mechanisms in general. Moreover, they agreed to co-operate in collecting scientific data on the continental shelf and stated an express commitment to the orderly settlement of any overlapping continental shelf entitlements.⁸

On October 9, 2008, the European Parliament⁹ adopted a resolution in which it first took note of the Greenland meeting (paragraph I) and then established its Arctic agency in the following words:

N. whereas three of the EU's Member States, and a further two of the EU's closely-related neighbours participating in the internal market through the EEA Agreement, are Arctic nations, meaning that the EU and its associated states comprise more than half the numeric membership of the Arctic Council

For the European Parliament, the ultimate governance solution would be one that involves a more extensive group of countries and the region's indigenous peoples:

[The Parliament] suggests that the Commission should be prepared to pursue the opening of international negotiations designed to lead to the adoption of an international treaty for the protection of the Arctic, having as its inspiration the Antarctic Treaty, as supplemented by the Madrid Protocol signed in 1991, but respecting the fundamental difference represented by the populated nature of the Arctic and the consequent rights and needs of the peoples and nations of the Arctic region; believes, however, that as a minimum starting-point such a treaty could at least cover the unpopulated and unclaimed area at the centre of the Arctic Ocean (paragraph 15).¹⁰

7 The Conference statement in its para. 39 "notes the information from the Danish delegation concerning the Ilulissat Declaration, and the concerns of the Icelandic delegation regarding full participation of all states of the Arctic Council". Conference of the Arctic Parliamentarians Report (Fairbanks, August 2008), <http://www.arcticparl.org/_res/site/file/files%20from%208th%20conference/Conference_Report_Fairbanks_final.pdf>, visited on 30 November 2009.

8 See the *Ilulissat Declaration*, *supra* note 3.

9 The European Parliament, *Resolution of 9 October 2008 on Arctic Governance*, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0474+0+DOC+XML+V0//EN>>, visited on 1 December 2009.

10 The Commission did not follow this suggestion by the EU Parliament, but stated: "The

Given that the EU has no Arctic coastline – but does have potentially significant navigational and fisheries interests in the region – the alternative of establishing a more inclusive governance arrangement for the Arctic would further its interests better than the law of the sea approach embraced by the five Arctic coastal states or even the Arctic Council, which is predicated on the difference between Arctic and non-Arctic states. This strategic choice by the Parliament to have an inclusive governance arrangement for the Arctic is well reflected in the resolution: it suggests a combination of the Antarctic Treaty and the Madrid Protocol as a model for the Arctic, a system which is a very inclusive governance arrangement, given that Antarctic Treaty is in principle open to all states who conduct scientific research in Antarctica.¹¹ As a minimum requirement, the Parliament outlines a treaty covering the unpopulated and unclaimed area at the centre of the Arctic Ocean. Although worded in a legally incorrect manner,¹² this suggestion also takes up an inclusive approach to Arctic governance since under the law of the sea all states possess rights and interests in the high seas and the deep sea-bed of the Arctic Ocean.

2. The Reaction by the Inuit

The Ilulissat meeting was a blow to the Inuit. Given that the meeting of the coastal states involved the four states where Inuit live and the Inuit were not invited to the meeting (as they are to all the Arctic Council meetings), it was to be expected that they – and particularly the ICC, which represents them in four states – would react negatively to the meeting. Indeed, the coastal states observed that the Arctic Ocean stands at the threshold of significant changes because of climate change, which may impact vulnerable ecosystems and the livelihoods of local inhabitants and indigenous communities. The coastal states then argued that:

[b]y virtue of their sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges...The Arctic Ocean is a unique ecosystem, which the five coastal states

struments should be advocated. This however should not preclude work on further developing some of the frameworks, adapting them to new conditions or Arctic specificities" (Arctic Communication 2008: 4).

11 See the provision on membership in article IX.2 of the Antarctic Treaty, 72 U.N.T.S. (1961) 5778.

12 The EU Parliament speaks of the "unclaimed area at the centre of the Arctic Ocean", by which it may be referring to types of areas beyond national jurisdiction, that is, the deep sea-bed (the Area) and the high seas. First, if the Parliament is referring to the deep sea-bed, this cannot be called an unclaimed area: The deep sea-bed is what remains after the coastal states have drawn the outer limits of their continental shelves, which are natural prolongations of their land mass into the sea and thus need not be "claimed". Second, high seas cannot be subjected to sovereignty claims under the law of the sea. It would thus have been legally correct to speak, for instance, of "areas beyond national jurisdiction at the centre of the Arctic Ocean." It is also a bit odd that the Parliament speaks of this area

have a stewardship role in protecting. Experience has shown how shipping disasters and subsequent pollution of the marine environment may cause irreversible disturbance of the ecological balance and major harm to the livelihoods of local inhabitants and indigenous communities.¹³

As is abundantly clear from the Ilulissat Declaration, the coastal states defined themselves as sovereigns with stewardship over "livelihoods of local inhabitants and indigenous communities". This was a difficult issue for the Inuit: they were not given an active role but rather found themselves to be under the stewardship – along with the region's ecosystem – of the coastal states.

The Inuit reacted very quickly. On 6–7 November 2008, the ICC and Inuit leaders issued their "Inuit Leaders' Statement on Arctic Sovereignty", in which they noted that the Ilulissat Declaration on Arctic sovereignty by ministers representing the five coastal Arctic states did not go far enough in affirming the rights that the Inuit have acquired through international law, land claims and self-government processes. This statement was refined for the Arctic Council ministerial meeting at the end of April 2009, when the Inuit issued their "Circumpolar Inuit Declaration on Arctic Sovereignty",¹⁴ in which they explicitly took issue with the outcome of the Greenland meeting:

In spite of a recognition by the five coastal Arctic states (Norway, Denmark, Canada, USA and Russia) of the need to use international mechanisms and international law to resolve sovereignty disputes (see 2008 Ilulissat Declaration), these states, in their discussions of Arctic sovereignty, have not referenced existing international instruments that promote and protect the rights of indigenous peoples. They have also neglected to include Inuit in Arctic sovereignty discussions in a manner comparable to Arctic Council deliberations.¹⁵

Yet, as is apparent from the lengthy declaration, the Inuit used this opportunity to establish why they will be important actors – and thus should be included – in any governance arrangement emerging (or not) in the region.¹⁶

Before studying how the Inuit defined sovereignty and its relationship to the self-determination of peoples and other human rights, it will be useful to examine whether the Arctic Ocean coastal states indeed did something extraordinary in the Ilulissat Declaration from the viewpoint of international law.

In light of international law, the coastal states' meeting and its outcome, the Declaration, are not provocative at all. Since it was a meeting of "the Arctic Ocean coastal states" surely it was a meeting of precisely those states that enjoy "sovereignty, sovereign rights and jurisdiction in large areas of the Arctic Ocean". They have undisputed sovereignty over the Arctic land spaces, which provides a basis for full sovereignty (up till the outermost limit of the territorial sea) and sovereign rights over various

maritime zones (the continental shelf and the exclusive economic zone). If they tell the rest of the world in the Declaration that they will act responsibly, as stewards, over the rapidly transforming region, it sounds like a very responsible way of using their sovereignty. And when they state that they are ready to start regulating even now, before economic activities have entered the region, they again seem to be acting responsibly.

Why did the coastal states not involve the Arctic Council or the region's indigenous peoples? The principal reason was that they issued the Declaration in their capacity as Arctic Ocean coastal states, as a response to the distorted story line carried in the media that they are scrambling for Arctic sea-bed resources. This, as has been shown, is not the case.¹⁷ Moreover, none of the three Arctic Council member states left out of the meeting, even Iceland, qualifies as an Arctic Ocean coastal state. This is a simple geographical fact. To not involve the region's indigenous peoples, in particular the Inuit was a much more dubious decision. Two major reasons might be advanced. First, many Inuit self-governance areas within the four nation-states include maritime jurisdiction. Secondly, the Inuit's immemorial usage of the Canada's Arctic archipelago (including its still mostly icy waters) serves as the main basis for the Canadian argument that the waters within the archipelago are historic internal waters and thus under full Canadian sovereignty.¹⁸ Yet, both are ultimately matters of domestic jurisdiction, not of international law, and thus it is understandable – at least for an international lawyer – why the meeting was organised the way it was.

This brings us to the question of what international lawyers mean by "sovereignty" and "sovereign rights". If we consider "sovereignty" in the abstract, the essence of the concept is that a state is independent, that is, not under the dominance of another state. This also means that the land territories that are under the sovereignty of a state are under its exclusive jurisdiction, to the exclusion of other states. This is full sovereignty in the specific sense of full decision-making power that excludes the powers of other sovereign states. The term "sovereign rights" applies to those maritime areas where a coastal state has limited competence vis-à-vis other states, for instance, where a coastal state has exclusive jurisdiction over exploiting the resources of the sea-bed on the continental shelf but not over other uses. Yet, it is important to distinguish the basic contours of sovereignty from its content in practice. To be sure, states have full sovereignty in their territory, but this is very much a relative notion,

17 See T. Koivurova, 'Is there a Race to Resources in the Polar Regions', in A. Dey Nuttall and M. Nuttall (eds.), *Canada's and Europe's Northern Dimensions* (University of Oulu Press, 2009) pp. 52–62. See also H. Corell, 'The Arctic: An Opportunity to Co-operate and to Demonstrate Statesmanship' (2009), <<http://www.havc.se/res/SelectedMaterial/20090206corellarcticopportunity.pdf>>, visited on 1 December 2009.

18 D. McRae, 'Arctic Sovereignty? What is At Stake?', 64:1 *Behind the Headlines* (Canadian Institute of International Affairs and the Centre for International Governance Innovation, 2007). See also M. Byers and S. Lalonde, 'Who controls the Northwest Passage?', background paper for a model negotiation between non-governmental teams from the United States and Canada (Ottawa, 18–19 February 2008) on file with the author; Oceans and Environmental Law Division, Foreign Affairs Canada. 'A Primer on Arctic Canada

13 See the Ilulissat Declaration, *supra* note 3.

14 Circumpolar Inuit Declaration on Arctic Sovereignty, *supra* note 4.

15 *Ibid.*, para. 2.6.

16 *Ibid.*

given that they must work under a vast number of international legal and other types of obligations.

Self-determination of peoples has a very limited scope and content in present-day international law, as compared to its meaning in the days of decolonisation. In normal circumstances, when all groups and peoples in a state are represented in its political life, or at least when the government of the state does not gravely breach the human rights of a people within the state, the self-determination of peoples is exercised within that state.¹⁹ From the perspective of international law, this type of internal self-determination does not entail any rights to participate in foreign policy. If such a right is provided for in domestic law, as it is in some Arctic indigenous self-governance arrangements, it is governed by domestic law.²⁰

The evolving law related to indigenous peoples does not go further than this. It is true that indigenous peoples are increasingly equated to peoples in the legal sense. Most interestingly, this is seen in the way the Human Rights Committee (HRC) has given authoritative interpretation to the Covenant on Civil and Political Rights. Gradually, the HRC has come to view indigenous peoples' rights as peoples' rights under Article 1, not only as minority rights as set out in Article 27.²¹ Most importantly, states and indigenous peoples have succeeded in coming up with political compromises and future goals with the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples.²² It can be argued that this compromise also captures the essence of the position that the HRC now subscribes to:

19 The basics of the law of self-determination are authoritatively discussed in the Canadian Supreme Court's advisory opinion *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. The Court answered three questions, the second of which was: "Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" (examined by the Court in paras. 109-146). Since Quebec declined to take part in the proceedings, an *amicus curiae* was appointed on behalf of the Supreme Court to represent the interests of Quebec. Both the Minister of Justice and *amicus* commissioned leading international law experts on the issue to provide their opinion on the aspects of international law dealt with in answering the question.

20 See, e.g., the Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in the Right of Canada (1993), <<http://www.gov.nu.ca/hr/site/doc/nlca.pdf>>, visited on 1 December 2009, which provides in art. 5.9.2: "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 nongovernmental organizations".

21 See T. Koivurova, 'From High Hopes to Disillusionment: Indigenous peoples' Struggle to (Re)gain Their Right to Self-Determination', 15 *International Journal on Minority and Group Rights* (2008) pp. 1-26.

22 See UN Declaration on the Rights of Indigenous Peoples (13 September 2007), <<http://>

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.

Article 46

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.

The compromise thus consists 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 community of states and indigenous peoples has been able to identify an acceptable approach for organising their mutual relations for the future.

2.1. The Inuit Definition of Arctic Sovereignty and Self-Determination

The Circumpolar Inuit Declaration on Arctic Sovereignty is a long document, not all aspects of which can be reviewed here. The basic thesis of the Declaration is that the Arctic and the world at large do not consist solely of sovereign states and their territories; rather, the international order is based on a very complex system of governance, where authority and power are exercised at various levels and with various mandates and legal or non-legal bases.²³ This is undoubtedly true. For a long time, we have not been able to speak exclusively of "government" as we understood it in the case of the traditional nation-state, but have increasingly had to refer to forms of "governance" or "international governance". In a similar vein, indigenous peoples have various levels of governance of their own, ranging from the ICC and its national offices in the case of the Inuit to indigenous governance arrangements under domestic law.

With such a highly complex, multi-level governance framework, the Declaration also advances Inuit agency in multi-layered 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.²⁴ Various parts of the Declaration point out the various forms of governance in which the Inuit act in these legally relevant positions spanning the international, domestic and even sub-unit level (e.g. Canadian provinces and territories and US states).

The Inuit set out to find a way to reconcile their self-determination rights as a people and an indigenous people with the principle of 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 issue politically influential decisions, scientific studies and guidelines of good practice. It has the eight sovereign Arctic states as its members and the international organisations of the region's indigenous peoples as its permanent participants, with the status to influence considerably how sovereign states make their decisions. The Council typifies the common multi-level soft-law governance landscape of the circumpolar Arctic, which includes organisations such as the Barents Euro-Arctic Council and the Northern Forum.

Yet, the most challenging task the Inuit have is to convince sovereign states that the Inuit's rights to self-determination set limits on states. As discussed above, the evolving law related to indigenous peoples is moving in the direction of asserting that indigenous peoples are indeed peoples, with the attendant right to full self-determination. Yet, as was also noted, the compromise recently achieved between states and indigenous peoples indicates that the future direction is to try to reconcile state sovereignty with the right of indigenous peoples to autonomy and self-governance in their internal and local affairs. This would not seem to entail aspects of external self-determination. Greenland is a special case, however. The Inuit in Greenland can arguably be seen as having been colonised by Denmark, whereby they have a different legal basis for their claims than indigenous peoples in general, since colonisation constitutes one of the grounds for exercising external self-determination.²⁵ Today, with the new self-rule in Greenland, it is up to the Inuit to decide whether they want independence or not.²⁶ Yet, there do not seem to be any grounds for indigenous peoples in general, which would include all Inuit other than those in Greenland, to exercise external self-determination in international law, at least as yet. This is not, of course, the way the Inuit see it, a position manifested in many parts of the Declaration:

2.4. International and other instruments increasingly recognize the rights of indigenous peoples to self-determination and representation in intergovernmental matters, and are evolving beyond issues of internal governance to external relations. (See, for example: IC-

24 See *ibid.*, paras. 1.3-1.8.

25 See G. Alfredsson, 'Greenland and the Law of Political Decentralisation', 25 *German Yearbook of International Law* (1982) pp. 290-308.

26 See the Draft Act on Greenland Self-Government, <<http://www.ambliissabon.um.dk/NR/rdonlyres/EDC5978E-77C2-467E-974A-598A01EEA562/0/DraftActonGreenlandSelf-Government.pdf>>.

29 Timo Koivurova, 'Redefining Sovereignty and Self-Determination through a Declaration of Sovereignty', CPR, Art. 1; UNDRIP, Art. 3; Draft Nordic Saami Convention, Art. 17, 19; Nunavut Land Claims Agreement, Art. 5.9).²⁷ (emphasis TK)...

3.2 The actions of Arctic peoples and states, the interactions between them, and the conduct of international relations must give primary respect to the need for global environmental security, the need for peaceful resolution of disputes, and the inextricable linkages between issues of sovereignty and sovereign rights in the Arctic and issues of self-determination.

3.3 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 Inuit as partners in the conduct of international relations in the Arctic... (emphasis TK)

3.10 The magnitude of the climate change problem dictates that Arctic states and their peoples fully participate in international efforts aimed at arresting and reversing levels of greenhouse gas emissions and enter into international protocols and treaties. These international efforts, protocols and treaties cannot be successful without the full participation and cooperation of indigenous peoples... (emphasis TK)

4.2 The conduct of international relations in the Arctic and the resolution of international disputes in the Arctic are not the sole preserve of Arctic states or other states; they are also within the purview of the Arctic's indigenous peoples. The development of international institutions in the Arctic, such as multi-level governance systems and indigenous peoples' organizations, must transcend Arctic states' agendas on sovereignty and sovereign rights and the traditional monopoly claimed by states in the area of foreign affairs. (emphasis TK)

These are important statements and try to contribute to the discussion maintaining that indigenous peoples in general have a right to participate in international co-operation. A colleague of mine and I have argued that currently the best chance for indigenous peoples to participate effectively in international governance (other than as observers) is via soft-law forums, such as the Arctic Council.²⁸ One can also argue the opposite, that is, that every successful attempt to enhance the right to external self-determination of a particular indigenous people may in time change the ground rules for international co-operation. The downside, as recently expressed by Gummur Alfredsson, is that by taking indigenous peoples' external self-determination too far, such attempts may also lead to unnecessary failures, which might hinder progress.²⁹

Alfredsson is pointing to the Draft Nordic Sami Convention, which was a product of a very interesting process of equal preparation by three Nordic states and their

27 *Ibid.*, para. 2.4.

28 See T. Koivurova and L. Heinämäki, 'The Participation of Indigenous Peoples in International Norm-making in the Arctic', 42:221 *Polar Record* (April 2006) pp. 101-109.

29 See G. Alfredsson, 'Human Rights and the Arctic', 1 *The Yearbook of Polar Law* (1999) 1-10.

respective Sami parliaments.³⁰ The Draft advanced a very strong view of Sami self-determination. According to Article 3 of the Draft:

As a people, the Saami has the right of 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, 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 specifies the external self-determination of Sami:

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.

One negative ramification of these provisions is that they have delayed the beginning of negotiations on the Convention. Initially, these were supposed to start in November 2007, but the most recent information is that the decision whether and how the negotiations on the basis of the Draft will commence will be made in January 2010.³¹ Recently, 30 November 2009, the Committee appointed to examine whether the Draft is consonant with the Finnish legal system released its final report, with predictable but unfortunate conclusions.³² Sami self-determination – in contrast to what the Finnish Sami now have as indigenous peoples with cultural and linguistic self-government in their native region – was found to conflict with the Finnish Constitution. The Committee was also of the opinion that Article 3 as worded would require more of Finland than do its international legal obligations and the UN Declaration on the Rights of Indigenous Peoples. The Committee found problematic that the Sami parliaments “shall represent the Saami in intergovernmental matters” – a

30 This extensive document consists of nine sections and four annexes totalling 340 pages. The unofficial English translation can be found at <[http://www.saamicouncil.net/includes/file_download.asp?depid=2213&fileid=2097&file=Nordic%20Saami%20Convention%20\(UNofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?depid=2213&fileid=2097&file=Nordic%20Saami%20Convention%20(UNofficial%20English%20Translation).doc)>, visited on 1 December 2009. For an overview of the process and product, the Draft Nordic Sami Convention, see T. Kolvuvova, ‘Draft for a Nordic Sami Convention’, 6 *European Yearbook of Minority Issues* (2006/7) pp. 103–136.

31 Email information from the responsible official from the Finnish Ministry of Justice, received on 11 November 2009.

32 ‘Luonnos pohjoismaiseksi saamelaisopimukseksi Arvio sopimusluonnoksen suhteesta Suomen perustuslakiin ja muuhun kansalliseen lainsäädäntöön sekä Suomea sitoviin kansainvälisiin ihmisoikeusvelvoitteisiin’, TYÖRYHMÄMIETINTÖ, 2009:18, <http://www.om.fi/Satellite?blobtable=MungoBlobs&blobcol=urldata&SSURLapptype=BlobServlet&SSURLcontainer=Default&SSURIsession=false&blobkey=id&blobheadervalue=inline; filename=OMTR2009_18_arviomietinto_110_sivua.pdf&SSURIscontext=SatelliteServer&blobwhere=1243795057110&blobheadername1=Content-Disposition&sbinary=tr>.

manifestation of external self-determination. In its view, this provision contradicts the Constitution, given that Section 93 of the Constitution defines exhaustively who are in charge of Finnish foreign policy: “The foreign policy of Finland is directed by the President of the Republic in co-operation with the Government.”³³

Finland is likely not the only Nordic state that has problems with the Draft Nordic Sami Convention. As pointed out by Gudmundur Alfredsson, even though the Nordic states voted in favour of the UN Declaration, “Sweden made an explanation of the vote that rendered her vote in favour next to meaningless.”³⁴ This also has implications for Sweden’s position on commencing negotiations on the Draft Nordic Sami Convention: Sweden stated, among other things: “[w]hile the Swedish Government had no difficulty in recognizing such rights outside the framework of international law, it was of the firm opinion that individual human rights prevailed over the collective rights mentioned in the Declaration.” It is hard to see how Sweden could vote in favour of the UN Declaration, which primarily concerns the collective rights of indigenous peoples, if it expressly prioritises individual rights when taking a stance on the status and rights of indigenous peoples. In a similar vein, if this is the general position of the Swedish government towards the Sami, it becomes all the more difficult to see how Sweden could ratify the Draft Nordic Sami Convention.³⁵

33 See the Constitution of Finland, 731/1999 [English translation] (11 June 1999, entry into force on 1 March 2000), <<http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>>, visited on 1 December 2009.

34 Alfredsson, *supra* note 29, p. 240.

35 It is easy to see why Sweden may have problems with the Draft Nordic Sami Convention after reading the following explanation of vote over the UN Declaration by Sweden: “[Swedish representative] said that her Government was pleased that the Assembly had finally adopted the Declaration. Sweden had supported the Declaration throughout the negotiation process, had voted in favour of the text and hoped that its implementation improved the situation of indigenous peoples. At the same time, the Declaration included several references to collective rights. While the Swedish Government had no difficulty in recognizing such rights outside the framework of international law, it was of the firm opinion that individual human rights prevailed over the collective rights mentioned in the Declaration. She went on to say that the Sami people were recognized as indigenous by the Swedish Parliament, and the Government had based its relations with the Sami on dialogue, partnership and self-determination, with respect and responsibility for cultural identity. To that end, Sweden looked forward to discussing the implementation of the Declaration with Sami representatives. She stressed that the political discussion on self-determination could not be separated from the question of land rights. The Sami’s relationship to the land was at the heart of the matter and the Swedish Government must maintain a balance between competing interests of different groups living in the same areas of the north of the country. She said that some clarification of her country’s interpretation of the Declaration was necessary. For instance, the text’s reference to self-determination should not be construed as authorizing or encouraging any action which would impair the territorial integrity or political unity of sovereign and independent States. She noted that a large part of the realization of the right to self-determination could be ensured through article 10 of the Declaration.”

Yet, the Inuit are advancing their views of external self-determination and extensive international participation rights in a wholly different context than the Sami. The Draft Nordic Sami Convention is an effort to create a legally binding treaty to govern the relationships between the three Nordic states and their Sami peoples and to further integrate the Sami communities in these states with one another, whereas the Inuit Declaration aims to participate in a political discussion of how the Arctic should be governed in the future. In this effort, the Inuit are well justified in "stretching the law", and making their case.

5. Concluding Note

The Inuit Declaration is at its most convincing, at least to my mind, when it gives grounds why sovereignty should be exercised in accordance with the self-determination of the Inuit. As put in paragraph 3.12: "The foundation, projection and enjoyment of Arctic sovereignty and sovereign rights all require healthy and sustainable communities in the Arctic. In this sense, 'sovereignty begins at home.'" The Inuit make the case in manifold ways for why it is important to have them as participants in creating a sustainable Arctic, these reasons including their traditional knowledge and knowledge of the area and their being able to deliver the message to the larger international forums about Arctic climate change and the concomitant problems.³⁶ These arguments constitute a strong message to the effect that it is only in the interests of the sovereign states to allow the Inuit to exercise as much self-determination as possible within the constraints of the current international system. And certainly the international system is evolving in the direction that the Inuit identify – at least towards stronger forms of indigenous self-governance within nation-states and perhaps even towards external self-determination over the longer term. The Inuit also remind us that, if anyone, they are the original occupants of the region. This alone accords them natural agency in Arctic governance.³⁷

ferent ways, including through a consultative process between institutions representing indigenous peoples and Governments, and through participation in democratic systems, such as the current Swedish system. It did not entail a collective right of veto, she added. Among other examples, she said that her Government interpreted references in the Declaration to ownership and control of land to apply to the traditional rights of the Sami people. In Sweden, those rights were called reindeer herding rights and included the right to land and water for the maintenance of reindeer herds by Sami herding communities, as well as the right to build fences and slaughterhouses for the reindeer and the right to hunt and fish in reindeer herd areas. Article 28 did not give Sami people the right to redress for regular forestry by the forest owner". See at <http://www.un.org/News/Press/docs/2007/ga0612.doc.htm>, visited on 1 December 2009.

³⁶ See, especially, *ibid.*, paras. 3.4-3.6.

³⁷ Inuit live in the vast, circumpolar region of land, sea and ice known as the Arctic. We depend on the marine and terrestrial plants and animals supported by the coastal zones of the Arctic Ocean, the tundra and the sea ice. The Arctic is our home. From time immemorial, Inuit have been living in the Arctic. Our home in the circumpolar world, Inuit Ninnet stretchen from Greenland to Canada, Alaska, and Russia.

The Circumpolar Inuit Declaration on Sovereignty is a powerful normative statement, but that it must be. The Inuit have now let the other Arctic players know that they have legal, political and moral justification for being involved in future Arctic governance, which is likely to involve an increasing number of strong players. Already now the European Union, China, Japan and South Korea have started to increase their presence in the region (first by applying for observer status to the Arctic Council). It is only a matter of time before the sea ice recedes in the Arctic Ocean to the extent that all the states of the world are guaranteed to have rights in Arctic waters. It will not be easy for the Inuit, a small nation, to defend their rights and maintain their strong position in any international governance arrangements in the future. But prepared they are, with a strong moral position, a good strategic eye and an awareness of their individual and collective human rights.