The Right to Self-Determination and International Environmental Law: An Integrative Approach

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The right to self-determination of indigenous peoples can be conceptualised in different ways since international law has more than one avenue available to accommodate it. Colonial and post-colonial concepts of state sovereignty are hostile to the idea of self-determination. However, as the dichotomy between the two is vanishing, the case of a collective human right to self-determination has been argued strongly. This case is supported by recent international environmental law. The UNCED Agreements of 1992 acknowledge that successful environmental management depends on, at least, some form of indigenous self-determination. Indigenous peoples themselves as well as non-governmental organisations have proclaimed and further defined the right to self-determination.

This article argues that the causes of the indigenous and the environmental liberation are closely linked. It can be seen that indigenous peoples' rights and environmental rights are mutually supportive. If international law is to develop effective strategies to protect the global environment, it must formally recognise the right to environmental self-determination of indigenous peoples.

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I: INTRODUCTION

Indigenous peoples have not been served well by international law. Lacking the sovereign status and international standing of states, indigenous peoples are not per se granted any rights. International law has, in fact, never recognised an absolute right of self-determination of indigenous peoples. Will it ever? Given the state-centred paradigm of international law, popular claims of "indigenous sovereignty and self-determination" might be counterproductive and only foster the very system which caused the plight of indigenous peoples in the first place. There is, at least, a need to review the system of international law and see where it offers opportunities for a more successful strategy to the right to self-determination. Indications are that the essentials of self-determination such as autonomy, control over natural resources, preservation of the land, education, language and cultural identity can be better accommodated than a rigorous right of self-determination. At the same time international law itself is undergoing changes which could be utilised by the indigenous rights movement.

International law is increasingly responding to global issues. As the natural environment knows no boundaries, states have to co-operate and employ new concepts. This process, which began only 25 years ago, has already brought innovations of international environmental law which commentators described as "a transformation of the fundamental basis of international law".[1] The fundamental basis shifts from competition to co-operation, from inter-nationality to transnationality. Where does this shift leave indigenous peoples? What are the implications of international environmental law, especially since the 1992 Earth Summit in Rio, for the global indigenous rights movement?

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1 Kiss, A. and Shelton, D., *International Environmental Law* (1991) 2.

This article examines various approaches to the recognition of indigenous peoples' rights. There is a case for more flexibility and for an integrative strategy which involves environmental and indigenous issues alike. This can, in particular, be seen in the references of recent environmental treaties to minorities and indigenous peoples. Ultimately, the struggle for the "liberation" of the environment and of indigenous peoples are closely related. If current trends in international law, both in respect to the environment and to indigenous people are seen together, a more uniform strategy of cultural and environmental sustainability can be formulated.

II: THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW

1. The Colonial Context

There is no commonly agreed definition of indigenous peoples. What "indigenous" means is as controversial as the notion of "peoples".

The United Nations Working Group on Indigenous Populations ("WGIP"), established in 1982, defined the term indigenous as "(...) descendants of the original inhabitants of conquered territories possessing a minority culture and recognising themselves as such."[2] While this definition is widely accepted today, it contains a number of inaccuracies including the fact that indigenous groups are not always the minority population in the host state[3] and the fact that outright conquest was often

2 Charles, G., *Hobson's Choice for Indigenous Peoples* (1992) 26.

replaced by treaty-making as the means of colonisation (e.g. Canada, USA, New Zealand). Further, the notion of "descendants of original inhabitants" is questionable considering the lack of uniform means of identification (self-identity, blood quantum or cultural practice?). And finally, WGIP's definition is so broadly conceived that almost any stateless group could be considered as "indigenous": Are Basques, Bretons, Bavarians, Northern Irish, Welsh, Kurds, Chechens, Tibetans, Timorese or Tamils all equally "indigenous" within their respective territories? Those difficulties have complicated the prospects for the UN General Assembly to adopt the Draft Universal Declaration on the Rights of Indigenous Peoples ("Draft Declaration").[4] Other definitions, for example, by the International Labor Organisation ("ILO") or the World Bank describe indigenous populations more pragmatically to suit specific purposes. In factual respect the term indigenous is used to describe more than 5000 groups with an estimated population of 300 million world-wide.[5]

Even more controversial is the notion of "peoples". Article 1(2) of the UN Charter establishes "respect for the principles of equal rights and self-determination of peoples" as one of the purposes of the UN. WGIP insists that the right of self-determination is an "inherent and alienable right (...) which existed independently from recognition from governments and international organisations". It is "not for governments to determine who constituted a nation or a people, since peoples were entitled to determine

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3 For instance, the Inuit in Greenland count for 90 percent, the Maya in Guatemala for 60 percent, the Quechua in Bolivia for 50 percent and the Malays in Malaysia for 50 percent of the total populations; Sanders, D., "Seeking a New Partnership", *UN Chronicles* (June 1993) 40-42.

4 U.N.Doc. E/CN. 4/Sub.2/1993/29, 50-60.

5 Sanders, supra, note 3, at 40.

for themselves".[6] While indigenous groups understandably use the term "peoples" for themselves, states are adamant on the use of "indigenous populations". They fear competition for their sovereignty. As Anaya notes, behind this fear is a "concern that an acknowledged 'right of self-determination' for indigenous groups may imply an effective right of secession".[7] Nevertheless, the term "indigenous peoples" is employed in international legal documents broadly referring to "those individuals and groups who are descendants of the original populations residing in a country".[8]

For a long time the struggle for self-determination of indigenous people has been a struggle for separate statehood. Having to surrender to the territorial claims of colonial states during the 16th to 19th centuries, indigenous peoples were subjugated and marginalised. As a result, any recognition of self-determination had to be perceived as a reversal of territorial claims. In the logic of international law with its "doctrine of discovery" (enabling European states to justify their conquests) this meant that the colonising state would loose its land titles as against the other European states. In other words, international law as the legal order of

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6 *Proceedings from the 11th Meeting of the UN Working Group on Indigenous Rights*, 18-19, U.N.Doc. E/CN. 4/Sub.2/1992/33 (1993).

7 Anaya, S.J., "The Capacity of International Law to Advance Ethnic or Nationality Rights Claims" (1991)*13 Human Rights Quarterly* 403.

8 Hitchcock, R., "International Human Rights, the Environment, and Indigenous Peoples" (Winter 1994) 5 *Colorado Journal of International Environmental Law and Policy* 1, 2. Similar Anaya, S.J., *Indigenous Peoples and International Law* (1996) 3. For an argument against the use of the term "indigenous peoples" in international law see Stauropoulou, M., "Indigenous Peoples Displaced from their Environment: Is There Adequate Protection?" (Winter 1994) 5 *Colorado Journal of International Environmental Law and Policy* 105, 106.

European nations did not allow for any interpretation of self-determination other than a quest for secession.

The methods of indigenous subjugation may have varied ranging from military conquest or outright genocide to removal of indigenous tribes and more constructive means like agreements and treaties. But the effects were largely the same. Even the treaty-making process of colonisation did not lead to any form of self-determination. As can be demonstrated in the colonial history of North America, treaties devolved from documents of mutual recognition to documents of domination. Of over 400 treaties signed between the US government and indigenous populations, most dealt with land cessions, many were concluded fraudulently, and no agreement ever stopped the US government to fully enforce state laws to the concerned indigenous populations.[9] At the end, the whole treaty-making process was no more than "the rubber-stamp land conveyances that opened the West".[10] Rather than dealing with tribal autonomy treaties dealt with real estate transactions.

The treaties signed in Canada and New Zealand featured no better. The problem here was perhaps not so much the intended incremental subjugation as was the case in the USA, but lack of commitment. In Canada it became increasingly apparent that the many treaties signed between various First Nations and the British Crown since the 18th century had no practical effect. The Indian Act 1876 virtually extinguished Aboriginal titles through a policy of "coerced assimilation". While the Native peoples,

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9 Corntassel, J. and Primeau, T.H., "Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing 'Self-Determination'" (1995) 17 *Human Rights Quarterly* 343, 355.

10 Deloria, V., *Behind the Trail of Broken Treaties: An Indian Declaration of Independence* (1974) 108.

supported by commentators,[11] have always maintained that the international personality of First nations was not relinquished,[12] the Canadian government simply ignored previous treaty provisions. The 1995 White Paper of the Royal Commission on Aboriginal Rights, for instance, described Aboriginal land claims as grievances with no basis in law.[13] As for today the deep differences between Aboriginal and Western understandings of the treaties remain unchanged.[14]

Similarly, the Treaty of Waitangi signed 1840 between over five hundred Maori chiefs and representatives of Queen Victoria never was an undisputed document of partnership as it is often portrayed in New Zealand/ Aotearoa.[15] Under international law the status of the Treaty of Waitangi, like other historical agreements between states and indigenous peoples, is unclear. At the time they were concluded they were normally considered to

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11 Turpel, M.E., "Aboriginal Peoples and Canadian Charter: Interpretative Monopolies, Cultural Differences" (1989-90) 6 *Canadian Human Rights Yearbook* 3.

12 Sanders, J., "First Nations Sovereignty and Self-Determination" in Cassidy, F., (ed), *Aboriginal Self-Determination* (1991) 186; Hudson, M.R., "Status of Treaties with Indigenous Peoples in International Law" in *Proceedings of the 1993 Conference of the Canadian Council in International Law: Aboriginal Rights and International Law*, Ottawa, Ontario, 21-23 October 1993, 114 and Henderson, J.Y., "The Status of Indian Treaties in International Law" ibid, 126.

13 Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence,* (Ottawa 1995), at 34. Following resounding rejections by Aboriginal peoples the White Paper was withdrawn by the federal government.

14 A practical attempt to overcome treaty difficulties is the Canadian government's Comprehensive Land Claims Policy which provides for the negotiation of regional agreements leading to six major agreements so far; see Richardson, B.J. et al., *Regional Agreements for Indigenous Lands and Cultures in Canada* (1995).

15 See eg., Kawharu, I.H., (ed), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (1989).

have full international status.[16] This changed when the "new" world was divided-up between nation-states. Around the turn of this century scholarly opinion refused to accord international status to the historical treaties with indigenous non-European peoples.[17] Until today the dominant view is that indigenous peoples rendered sovereignty over their territories to states (in return for certain guarantees) and consequently lost - or never gained - membership in the "Family of Nations" (Oppenheim). Ian Brownlie, for example, does not see the Treaty of Waitangi as a "valid international treaty".[18]

It is, of course, true that the Treaty lacks enforceability under international law,[19] and that it is not honoured as directly enforceable law

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16 Which was, of course, the best means for the colonial power to prevent any rivals from interference. Historically, "that foreign property is respected" (Grotius, H., *De Jure Belli ac Pacis*, 1625) was the foundation-stone of international law; Bosselmann, K.*When Two Worlds Collide* (1995) 89.

17 Westlake, J., *Chapters on the Principals of International Law* 110 (1894) 143-45 explained the "diminished status" for indigenous peoples with the claim that "uncivilised tribes" could not comprehend the full attributes of territorial sovereignty. Oppenheim, *International Law: A Treatise* (3rd ed 1920) 337 stated: "Cessions of territory made to private persons and to corporations by native tribes (...) outside the dominion of the Law of Nations do not fall within the sphere of International Law, neither do cessions of territory by native tribes made to States which are members of the Family of Nations." Janis, M.J., ((1996) 16 *Oxford Journal of Legal Studies* 329) considers Oppenheim´s *International Law* as "the most important English-language international law treatise spanning the twentieth century."

18 Brownlie, I., *Treaties and Indigenous Peoples*, The Robb Lectures 1991, ed. Brookfield, F.M., (1992) 26. This conventional view takes it support from the *Island of Palmas* case, (1928) 2 R. International Arbitration Awards 831, which affirmed sovereignty built upon colonialism to the exclusion of the sovereignty of indigenous peoples.

19 Due to the lack of recognition of Maori as a sovereign people which in turn allowed the New Zealand government to never formally ratify the Treaty.

at the domestic level.[20] Its terms can only be enforced in so far as they have been incorporated through statute. Thus, despite a number of privileges guaranteed to Maori in consequent statutes, these privileges have not accumulated to a right of self-determination. The gap between the Treaty and its enforcement remains as wide as ever.

On the other hand, enforcement and validity of a treaty are two different matters. There has been considerable argument that historical treaties continue their full international status on the grounds that they were considered to have such status at the time of their conclusion.[21] Under current international law of treaties a treaty cannot be terminated or denounced unilaterally,[22] for example, by one party choosing to no longer recognise the other party. Such behaviour could only affect the observance and application of the treaty and could be considered as violating pacta sunt servanda, i.e. the rule that treaties are binding on parties and must be performed in good faith.[23]

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20 The New Zealand Court of Appeal confirmed, however, the legal nature of the Treaty of Waitangi and its guarantee of undisturbed possession of traditional lands; *New Zealand Maori Council v Attorney General,* Judgment of 29 June 1987, CA 54/87.

21 Wiessner, S., "American Indian Treaties and Modern International Law" (1995) 7 *St. Thomas Law Review* 576; McGinty, "New Zealand´s Forgotten Promises: The Treaty of Waitangi" (1992) 25 *Vanderbilt Journal of Transnational Law* 681. In its only decision related to the validity of agreements between states and indigenous peoples the World Court regarded "legal ties" between Morocco and local tribes as valid sources of derivative titles despite denying legal personhood of nomadic tribes in the Sahara (Advisory Opinion, *Western Sahara* case (1975) I.C.J. Rep.122).

22 See Articles 54-56 of the Vienna Convention on the Law of Treaties 1969.

23 Article 26 of the Vienna Convention. Although the Convention does not have retroactive effect, pacta sunt servanda is long established customary law and almost inherent in the very idea of a treaty.

In any case, at the heart of the matter is not whether treaties and agreements with indigenous peoples have the same status as interstate treaties, but whether they are respected and effective. Historical agreements have certainly come to the fore of international concern and have, in their own right, international character.[24] The issue today is whether states are willing to honour their obligations[25] and to recognise self-determination of indigenous peoples.

Still influencing the attitude of states towards the "prior sovereigns"[26] (before the arrival of Europeans) is a deeply embedded fear that self-determination may result in secession and independent statehood.[27] Colonialism and decolonisation[28] make it difficult for the international community to accept the new shape of self-determination as it emerged in the post-colonial era.

Instrumental in this respect was the Draft Declaration containing specific recognition of the right to self-determination of indigenous peoples. And there is increased interest of states to take notice of it. The number of

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24 Anaya, supra, note 8, at 132.

25 See eg., the Resolution of the European Parliament on *Action Required Internationally to Provide Effective Protection for Indigenous Peoples* (Eur.Parl.Doc. PV 58(II)(1994) which "calls in the strongest possible terms on states which in the past have signed treaties with indigenous peoples to honour their undertakings, which remain imprescriptible (...)."

26 Macklem, P., "Distributing Sovereignty: Indian Nations and Equality of Peoples" (1992-93) 45 *Stanford Law Review* 1311, 1333.

27 For an analysis see Iorns, C.I., "Indigenous Peoples and Self-Determination: Challenging State Sovereignty" (1992) 24 *Case Western Reserve Journal of International Law* 199.

28 Which has involved the transformation of colonial territories into new states.

states participating in the annual meetings of the WGIP increased steadily[29] until the Draft Declaration was finally passed in 1994 by the WGIP and the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Increased interest does, of course, not necessarily indicate growing support. But more and more states are on record for giving support to a meaningful right to self-determination. In a "supplemental statement" to the WGIP the New Zealand government sought "to put the record straight" by denying that New Zealand was not willing to recognise the "right to self-determination".[30] The Australian government delegation signalled support at the 1991 session of the WGIP, so did the US government at the 1994 session[31] and also the Canadian Delegation at the World Conference on Human Rights on the Subject of Indigenous People, 1993 in Vienna.

However, the question remains how the states' sovereignty and the rights of indigenous peoples could be reconciled.

2. The Human Rights Approach

Any student of global environmental issues will readily acknowledge that the nature and scope of state sovereignty is undergoing dramatic changes.[32] The environmental - and economic - reality of today has forced states into strategies of international co-operation which severely undermine

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29 For instance, from thirty in 1988 to sixty in 1994 many of which have no traditionally-conceived indigenous borders within their borders.

30 Supplemental Statement by the New Zealand Government to the Working Group, July 1990.

31 See Anaya, supra, note 8, at 86.

32 See, for example, Handl, G., "Environmental Security and Global Change: The Challenge to International Law" in Lang, W. et al., *Environmental Protection and International Law* (1991) 59, 85.

their autonomous status as traditionally perceived.[33] Restrictions on state autonomy are hinted at in a number of new concepts such as "sustainable development", "intergenerational equity", "common heritage of mankind" and "shared responsibility".[34] This process of redefining the doctrine of state sovereignty has largely been observed with respect to international environmental law and international trade law. But is it also visible with respect to the relation between states and ethnic minorities or indigenous populations?

It would be premature and, in fact, dangerous to argue that state sovereignty has lost its place in today's world. On the contrary: After initial euphemisms towards a "new world order" following the end of the cold war, nation-state ideas have had a renaissance. The disintegration of the Soviet Union, Czechoslovakia and Yugoslavia did not simply lead to greater autonomy and self-determination of the constituting republics, but to a struggle for state independence. In Yugoslavia, the five seceding republics see the situation as an establishment of six new states on equal footing. And the Serbian communities in Croatia, Bosnia-Herzegovina and Kosova seek to establish themselves as independent states, if they cannot be unified with Serbia. The fact that the various ethnic groups in Eastern Europe opted for statehood in their strive for self-determination does not, in itself, make secession the only or even most appropriate form of self-determination. It does, however, confirm a principle which has developed as part of the decolonisation process of the 20th century and which may be of crucial importance in the present era of wide-spread nationalism: uti possidetis juris. According to the World Court "the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved".[35]

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33 Bosselmann, supra, note 16, at 74-94.

34 See eg., Kiss/Shelton, supra, note 1, at 9-31.

35 ICJ Rep. (1986), 566.

Following the decolonisation process in Africa, the international community has largely accepted the view that the peace order between states would be at severe risk if the right of self-determination is commonly understood to include the creation of new boundaries. The *Frontier Land* case[36] involving the boundary between Burkina Faso and Mali confirmed this view. At least in Africa the right of self-determination was subject to the principle of uti possidetis juris. "The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African states judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples."[37]

Leaving aside the unsolved "African" problem of the drawing-up of colonial boundaries and their quick consecration by the post-colonial elites, the principle of uti possidetis has helped to foster the role of international law as a peace order. It was certainly important for the post-communist reconstruction of order in Europe. In 1991 the European Community Arbitration Commission adopted the Declaration on the "Guidelines on the Recognition of New States in eastern Europe and in the Soviet Union" which required a "respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement".[38] With respect to Yugoslavia the commission determined from the outset that the right of self-determination on no account involved the modification of borders as they existed at the moment of independence (uti possidetis juris) except by common consent.[39] While the commission used this means to

36 ICJ Rep. (1986), 554.

37 Ibid, at 556-7.

38 31 I.L.M. (1992) 1486.

39 Ibid.

prevent a total unravelling of the existing territorial structures of Yugoslavia, it also confirmed the need to afford to minorities, specifically Serbian populations in Bosnia-Herzegovina and Croatia, the full benefits of international human rights law including a right of self-determination. "In essence, therefore, the commission in this case defined the right of self-determination not as a peoples right to independence but as a human right of minorities and groups."[40]

There are a number of implications in the international community's trend towards self-determination within existing boundaries. First, the resort to international human rights law is a rejection of the two approaches traditionally taken in the pursuit of self-determination: the treaty approach and the territorial approach. As shown above, throughout the 19th and 20th century colonial states practiced the widespread abrogation of the rights of indigenous peoples that were enumerated in the treaty-making process. A "trail of broken treaties"[41] has accompanied the treaty-making process, and remarkably the international community stayed silent over this large-scale violation of pacta sunt servanda. In the absence of a persona status of tribes and indigenous peoples under international law, states have conveniently overlooked their initial promises.[42] Thus, resorting to prior treaties made at the time of contact as a means of reclaiming "sovereignty" appears to be a fruitless strategy.[43]

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40 Weller, M., "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 *American Journal of International Law* 569, 592.

41 Supra, note 10.

42 Von Glahn notes that despite occasional attempts of scholars to recognise the international persona of tribes, states deny such status and consequently denied the binding power of treaties; von Glahn, G., *Law of Nations* (1986) 80.

43 Anaya, supra, note 7, at 404; Corntassel and Primeau, supra, note 9, at 359.

Similarly, the territorial approach is creating more problems than solving them. Article 73 of the UN Charter (regarding non-self-governing territories) somewhat misleadingly relates the development of self-government to achieving territorial sovereignty which can be interpreted as weighing "heavily towards taking political demarcations as they stand, and making these the focal point of political change".[44] While in some circumstances self-determination may include the exclusive control over a defined territory, thus leading to secession,[45] the territorial approach often entails a "homeland" or "reservation" mentality confining indigenous peoples or minorities to designated areas. If understood as a right of territorial sovereignty, self-determination carries the risk of either total isolation[46] or instability and conflict[47] - without serving the needs of oppressed peoples or minorities. After all, the bottom line is not secession and statehood, but justice.

While the human rights approach to self-determination accords with

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44 Thornberry, P., "Self-determination, Minorities, Human Rights: A Review of International instruments" (1989) 38(4) *International and Comparative Law Quarterly* 867, 873.

45 That is, where a territory can be appropriately re-drawn as, for example, in the case of the Palestine people.

46 An illustration is South Africa´s Apartheid era, which created isolation for both, the homeland peoples and the country as a whole.

47 See, for instance, the Yugoslavian tragedy which arguably could have been averted if appropriate measures of self-control and self-government could have been found. It is crucial for international law - and world peace - to provide these measures without resorting to the concept of territorial integrity.

the general development of international law,[48] it also - as a second implication - accords with recent developments of international human rights law. Seen from the perspective of human rights theory the right of self-determination of peoples appears as a collective right, thus somewhat at odds with the traditional view of human rights as individual rights.

However, since Locke who located human rights in the tension between the individual and the State, human rights have come a long way. Following Locke's first generation of individual liberty rights, the second generation of human rights - since the end of the 19th century - embraces economic, social and cultural rights. These are recognised today by many international documents, e.g. the International Covenant on Economic, Social and Cultural Rights, and underlying all United Nations human rights texts is the understanding that the rights of the first and second generation are interdependent. Arguably, this also includes human rights of the latest, i.e. the third generation of collective rights.

The idea of a third generation of human rights is reasonably well established today as a concept of collective, group rights, and the right to

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48 Important milestones were the 1970 Declaration on Principles of International Law which linked the right of minorities to self-determination irrespective of the concept of territorial integrity, the 1975 Helsinki Final Act 1975 which affirmed peoples right of self-determination whilst preserving the territorial integrity of existing states, and the 1981 African Charter on Human and Peoples´ Rights aiming for the protection of a culture, but also for the "empowering process of human rights"; see McCorquodale, "Self-determination: A Human Rights Approach" (1994) 43(4) *International and Comparative Law Quarterly* 857, 859.

self-determination is a prime example of this.[49] The collective dimension is not opposed, but rather complementary to the individual dimension of human rights. For example, in Article 27 of the UN Covenant on Civil and Political Rights attention is paid to the problem of minorities: Although the right to enjoy their own culture, to profess and practice their own religion and to use their own language is guaranteed to the individual members of the minority, it is expressively stated that they must be able to exercise the right "in community with the other members of their group". These and other individual rights as encompassed by the collective right of self-determination cannot be claimed individually, but collectively, i.e. by a minority group or an indigenous people.[50] Thus, the classification of the right of self-determination as a human right, functionally, is no different from the previous treaty and territorial approaches to self-determination. The crucial issues of cultural identity and self-government of indigenous people remain, after all, the same.

The third and perhaps most important implication of the human rights approach is that it allows for flexibility and solutions appropriate to

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49 Kooijmans, P.H., "Human Rights - Universal Panacea?" (1990) 37 *Netherlands International Law Review* 317, 324; Harris, D.J., *Cases and Materials on International Law* (4th ed 1991) 601-2; for "third generation human rights" in general see Alston, P.H., "A Third Generation of Solidarity Rights: Progressive development or Obfuscation of International Human Rights Law?" (1982) 29 *Netherlands International Law Review* (1982), 307; Klein, E., "Human Rights of the Third Generation" in Klein et al (eds), *Rights, Institutions and Impact of International Law According to German Basic Law* (1987) 63.

50 Notably, the UN Human Rights Committee suggested that the right of self-determination "was not to be construed as implying the right of individuals within nations to express their special ethnic, cultural or religious characters or the exercise of the democratic method in internal affairs"; see Moskowitz, L., *The Politics and Dynamics of Human Rights* (1968).

individual situations. The all-or-nothing attitude underlying unspecified claims for sovereignty and self-determination tends to simplify and polarise the debate - to the disadvantage of both, states and indigenous peoples. Notwithstanding the importance of historical injustice and ongoing grievance, there is a strong case for overcoming the stumbling block of sovereignty and pursuing self-determination in the form of individual and collective rights. States and international law are well equipped to accommodate such pursuit, and indigenous groups could concentrate on what self-determination essentially involves, namely greater autonomy, cultural integrity and cultural preservation. As Douglas Sanders suggests, self-determination can be understood to mean "a degree of autonomy involving cultural, economic and political rights within the structures of recognised states".[51] Similarly, Michael Bryant excludes secessionist elements from the right to self-determination and propagates the indigenous peoples' "fundamental right to determine their own lives and their own future."[52] James Anaya notes in this context that "the institutions and degree of autonomy, necessarily, will vary as the circumstances of each case vary."[53]

A basic right of cultural preservation is recognised since the Genocide Convention of 1948, and its components are spelled out in various international documents including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and

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51 Sanders, D., "The UN Working Group on Indigenous Populations" (1989) 11 *Human Rights Quarterly* 406, 429.

52 Bryant, M., "Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law" (1992) 56 *Saskatchewan Law Review* 267, 296. See also Nettheim, G., "The Consent of the Natives: Mabo and Indigenous Political Rights" *Essays on the Mabo Decision* (1993) 103, 113: "The critical thing is the right of people to make a free choice about their political/legal relationship with the state."

53 Anaya, supra, note 7, at 409.

Cultural Rights, and the Convention Concerning Indigenous and Tribal peoples in Independent Countries (ILO Convention 169). None of these documents are free of paternalistic and assimilationist tones, but it is possible to derive, at least, some elements of the right of self-determination. They include autonomy, preservation of cultural identity (education, language, religion), control over natural resources and environmental preservation of the land, in sum all the aspects which make up the cultural preservation of an indigenous group. The notion of cultural preservation, while as such acceptable,[54] cannot, however, be understood as preserving a static, folkloristic form of culture. Culture is constantly changing and growing, and it must lie within the right of self-determination to determine what the revitalisation, development and evolution of indigenous culture involves.

III: INTERNATIONAL ENVIRONMENTAL LAW AND THE RIGHT TO SELF-DETERMINATION

One important component of self-determination is the environmental sphere. It needs to be understood that indigenous claims for increased control over conservation issues are not just about management of natural resources; they go far beyond that. They directly effect the status as Native peoples since the relationship to their environment has a deeply felt, spiritual dimension. This makes it impossible to distinguish between the spiritual

54 See Corntassel and Primeau, supra, note 9, at 362.

and environmental side of self-determination.[55] On the other hand, international law has developed a host of new principles and instruments concerning the environment. A number of these instruments refer to the status of indigenous peoples. The following chapters examine relevant documents in order to locate the right of self-determination and to see how far international environmental law is supportive to the self-determination of indigenous peoples. Does international environmental law offer an alternative and additional basis to international human rights law for ensuring self-determination?

1. Linking Indigenous Rights and Environmental Issues

The environment is not only subject to international environmental law, but also to international human rights law. The emergence of the third generation of human rights is closely associated with the awareness of the international dimensions of human rights and the global concerns of humankind.[56] And from the beginning a collective right to development[57]

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55 In this respect Cox and Elmquist point out that because of the "discrepancy between Western rationales for conservation, focusing on resource protection, and indigenous rationales, based on sacred responsibility to kin, ancestors, and deities, that even well-intentioned conservation programmes can be destructive of indigenous cultures."; Cox, P.A. and Elmquist, T.H., "Ecocolonialism and Indigenous Knowledge Systems: Village Controlled Rainforest preserves in Samoa" (1993) 1 *Pacific Conservation Biology* 6, 8.

56 Klein, supra, note 49, at 65.

57 Advocated, in particular, by developing countries and indigenous groups and adopted in 1986 by a Resolution of the UN General Assembly; *UN Doc. A741753 (1986).* Brownlie, I., (*The Human Right to Development* 1989, at 19) states that "there can be no doubt that indigenous peoples are among the beneficiaries and claimants of the right to development."

has been promoted along with a right to a clean and ecologically balanced environment.[58] The underlying concern is that one cannot exist without the other as environmentally sustainable development is seen as the key for global survival.

The evolving consciousness of the world as interdependent was instrumental for both, third generation human rights and international environmental law as it emerged since the 1972 Stockholm Conference. However, the Stockholm Declaration on the Human Environment itself made no reference to indigenous peoples when formulating the "need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment" (Preamble). The link between indigenous peoples and environmental issues was first made by non-governmental organisations ("NGOs"), e.g. at the NGO Environment Forum held simultaneously with the 1972 Conference.[59] In 1980, the World Conservation Strategy[60] in creating a blueprint for sustainable development gave particular emphasis to the status and rights of indigenous peoples. The conservation ethic underlying this influential document is largely consistent with the tradition of indigenous peoples, e.g. the Maori conservation ethic.[61] Later, in 1987, the Brundtland Report noted that indigenous peoples "can offer modern society many lessons in the management of resources" and called for "the recognition and protection

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58 Ibid. Further Shutkin, W.A., "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virginia Journal of International Law* 479, 503.

59 See Caldwell, L., *International Environmental Policy: Emergence and Dimensions* (2nd ed 1990) 62.

60 Jointly developed by the IUCN, UNEP and WWF.

61 Roberts, M. et al., "Kaitiakitanga: Maori perspectives on conservation" (1995) 2 *Pacific Conservation Biology* 7, 16.

of their traditional rights to land and the other resources that sustain their way of life - rights they may define in terms that do not fit into standard legal systems".[62]

The World Conservation Strategy and the Brundtland Report, although of no binding character, shaped the conservation approach of the 1992 Rio Conference. The United Nations Conference on Environment and Development ("UNCED") created some of the key agreements in international environmental law including the Rio Declaration, Agenda 21, the Climate Change Convention and the Biodiversity Convention. The progress being made by UNCED in terms of indigenous perspectives and global environmental strategies should not be underestimated.[63] However, traditional international law is tenacious, and the "standard legal systems" that the Brundtland Report talked about so far have overlooked indigenous rights.

The application of the doctrine of state sovereignty in international law is effectively unbroken. It continues to ignore the special status and rights of indigenous peoples. In the negotiation process of environmental treaties indigenous peoples are usually marginalised and, at best, treated as non-governmental organisations without negotiation status. Consequently, indigenous rights can be effectuated where they are directly represented and marginalised where they are represented by states. While the various documents with direct involvement of indigenous peoples (i.e. the ILO Convention 169, Draft Declaration and the UNCED NGO treaties) clearly define self-determination and self-government as essential for environmental sustainability, all states-negotiated treaties including the UNCED agreements settle for less.

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62 World Commission on Environment and Development, *Our Common Future* (1987) 115.

63 As will be discussed shortly.

2. Agreements with Direct Involvement of Indigenous Peoples

(a) I.L.O Convention Draft Declaration and UNCED NGO Treaties

In the first category is the ILO Convention 169 which came into force in 1991.[64] In contrast to the deliberations leading to the previous ILO Convention 107 from 1957 which had no input of indigenous peoples, the Convention 169 was negotiated by some 60 National delegations including representatives of governments and indigenous peoples. The Preamble specifically moves away from the traditional assimilationist approach: "Considering that the developments which have taken place in international law since 1957, as well as developments of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, (...)." These new international standards include "respect for cultures, ways of life and traditional institutions" of indigenous peoples and "effective involvement of these peoples in decisions that affect them."[65]

Article 2 requires measures for the realisation of cultural rights and cultural identity, further defined by Article 4: "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property,

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64 To date, the Convention has been ratified by Argentina, Bolivia, Colombia, Costa Rica, Mexico and Norway.

65 International Labour Office, "Ways and Means of Strengthening Sustainable and Environmentally Sound Self-Development of Indigenous Peoples", *Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples*, Santiago de Chile, 18-22 May 1992, at 77.

labour, cultures and environment of the peoples concerned. Article 7 states the right of indigenous peoples to determine their own priorities for the process of development as well as "co-operation" between governments and indigenous peoples concerned "to protect and preserve the environment of the territories they inhabit." Article 14 provides for the recognition of rights of ownership and possession of traditional areas as well as use rights in relation to areas that are not exclusively occupied by indigenous peoples.

The Convention generally is exhaustive about the rights and interests of indigenous and tribal peoples, but it is, as Michael Hudson observes, "otherwise silent about the status of their agreements with States."[66] There is certainly no formal recognition of the right of self-determination, however, some contents of such rights are defined and, for the first time, incorporated into international law. A core of indigenous rights and expectations can certainly be considered as reflecting emergent customary international law.[67]

(b) Draft Universal Declaration on the Rights of Indigenous Peoples

The Draft Declaration of 1993 goes a considerable step further. While all of its 45 articles are compatible with the Declaration of Human Rights, thus representing a wide international consensus, several articles introduce a formal right of self-determination. Article 3 of the Draft Declaration states: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic and cultural development." That right is defined in Article

66 Supra, note 12, at 125

67 See eg., Anaya, "Canada´s Fiduciary Obligations Towards Indigenous Peoples in Quebec under International Law in General" in Anaya, S.J., Falk, R., and Pharand, D. (eds), *Canada´s Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec*, vol.1, International Dimensions, Royal Commission on Aboriginal Peoples, August 1995, 9, at 20.

31: "Indigenous peoples (...) have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by nonmembers, as well as ways and means of financing these autonomous functions." Further, Article 25 sets out "the right to maintain and strengthen their distinctive spiritual and material relationships with lands, territories, waters, and coastal seas and other resources which they have traditionally occupied or used", and Article 26 states "the right to the full recognition of their law, traditions and customs, land tenure systems and institutions for the development of resources." Article 27 provides for the right to restitution of lands, territories and resources traditionally owned and, where this is not possible, the right for just and fair compensation. Finally, Article 28 contains "the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources (...)."

Seen together the right to self-determination covers a wide range of cultural rights and land rights and links itself to the right to autonomy or self-government, but in doing so it makes no claim to territorial sovereignty or secession. In fact, the context and drafting process show that this was never intended. The mandate of the WGIP was "to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples" and to give special attention to the "evolution of standards concerning the right of indigenous peoples (...)."[68] And the composition of the WGIP ensured a wide range of views. The final session in 1994, for example, included the participation of 44 governments, 11 UN agencies and other inter-governmental organisations,

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68 E.S.C. Rex. 1982734, U.N. ESCOR, Supp. No.1 p. 26, *U.N. Doc. E71982/82 (1982).*

164 indigenous peoples' organisations and communities, 83 human rights NGOs, and a large number of individual scholars.[69] Clearly, the Draft Declaration is embedded in the human rights process of the UN, thus in accordance with international (human rights) law. More specifically, the right to autonomy or self-government (Article 31) is limited to internal and local affairs.

It would be hard, therefore, to argue that the right to self-determination, as defined in the Draft Declaration, would violate international principles of territorial integrity and non-intervention in domestic affairs.[70] Far from it. With its emphasis on cultural preservation and environmental preservation, the right to self-determination merely secures for indigenous peoples what the international community at large, and human rights law in particular, take for granted. State sovereignty is not at threat.[71]

The Draft Declaration is directly relevant to international environmental law. By referring to "sustainable development" the Draft Declaration creates a link to the Rio Declaration. The Preamble describes the knowledge, culture and traditions of indigenous peoples as crucial for sustainable development. The Draft Declaration's definition of the right of self-determination could, therefore, be used to clarify the role of indigenous

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69 See Berman, H., "Introductory Note to the United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous peoples" (1995) 34 *I.L.M.* 541.

70 At the October 1996 meeting of a working group convened by the Human Rights Commission delegates from New Zealand, Canada and the United States opposed, in particular, the Draft Declaration's support for self-determination, thereby causing a walk-out of delegates from indigenous peoples.

71 Arguably the resistance of many member states of the UN is politically motivated and not justified in terms of international law.

peoples for sustainable development as defined in the UNCED agreements.

(c) UNCED NGO Treaties

The UNCED agreements, negotiated between states, provide guidelines and principles for state parties to observe when they implement international environmental standards at national level. They do not, of course, provide guidelines and principles for the transformation of indigenous rights and interests into domestic law. States consider this their own prerogative, and indigenous peoples were excluded from the states' UNCED summit 1992 in Rio ("the Earth Summit"). However, the NGO's UNCED summit ("the Global Forum") had substantial input from indigenous peoples. The Global Forum generated a wealth of ideas and principles based on partnership between states and indigenous peoples.

In the week prior to the UNCED summit the World Conference of Indigenous Peoples on Territory, Environment and Development was held in Kari-Oca, Brazil. It adopted the Earth Charter of the Indigenous Peoples - usually referred to as the Kari-Oca Declaration - which states, inter alia, the following: "We, the Indigenous Peoples, maintain our inherent right to self-determination. We have always had the right to decide our own forms of government, to use our own laws, to raise and educate our children to our own cultural identity without interference. We continue to maintain our rights as peoples despite centuries of deprivation, assimilation and genocide. We maintain our alienable rights to our lands and territories, to all our resources - above and below - and to our waters. We assert our ongoing responsibility to pass these onto future generations. We cannot be moved from our lands. We, the Indigenous Peoples, are connected by the circle of life to our lands and environments."

While the Earth Summit did little to elaborate further on self-

determination,[72] the NGOs' Global Forum negotiated a total of more than 30 "Treaties" [73] in which the right to self-determination featured prominently. The purpose of these Treaties was to focus attention on the issues and provide models for future international law. Among the NGO UNCED treaties the Earth Charter, in its Preamble, states, inter alia: "We recognise the special place of Earth's Indigenous peoples, their territories, their customs and their unique relationship to Earth." And the "Treaty on Indigenous Peoples" defines self-determination as a basic principle: "Self-determination of Indigenous Peoples is one of the essential bases for liberty, justice and peace, in each country as well as internationally. Without recognition of this right, democracy cannot be claimed. On the international level, the right of Indigenous Peoples to self-determination must be recognised and respect given to their traditional systems of self-government." The Treaty commits NGOs to "promote this recognition on local, national and international levels, including rights to autonomy and self-government" (Article 2) and affirms this as "a new direction that will contribute to genuinely sustainable development" (Article 6).

The link between the right to self-determination and sustainable development is a common denominator among NGOs and indigenous peoples. This was one of the positive outcomes of the Global Forum. While not shaping the UNCED process directly the findings of the Global Forum has certainly influenced the general learning process.

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72 Indigenous peoples were entirely excluded from the negotiations in the Rio Centro, the venue of the government summit.

73 See *Commitment for the Future . The Earth Charter and the 30 Treaties Agreed To at the International NGO and Social Movements Forum*, Rio de Janeiro June 1992, compiled by the New Zealand NGO/UNCED Liaison Committee, October 1992.

3. The UNCED Agreements: Rio Declaration, Agenda 21, Statement of Forestry Principles and Biodiversity Convention

The UNCED agreements themselves avoid any recognition of a right to self-determination. They do, however, reflect much of the content forming this right.

(a) Rio Declaration on Environment and Development

The Rio Declaration is not legally binding, but represents customary international law and may, where it goes beyond that, indicate emerging rules and principles of international law.[74] While the Rio Declaration and Agenda 21 are not enforceable, they are a "moral force" and catalyst for the implementation of their content at regional, national and international levels. It is, therefore, significant that the Rio Declaration acknowledges the special role of indigenous populations for achieving sustainable development. Article 22 states: "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their traditional knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." What the "vital role" and "effective participation" entail in terms of self-government is left to the discretion of states. But in exercising this discretion states would have to consider the development of international law at large. In this respect the ILO Convention 169, the Draft Declaration and the NGO UNCED treaties offer valuable guidelines.

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74 Ruffert ("Das Umweltvölkerrecht im Spiegel der Erklärung von Rio und der Agenda 21" (1993) 4 *Zeitschrift für Umweltrecht* 209) gives a comprehensive explanation of how the soft law of UNCED is being created.

(b) Agenda 21

Agenda 21[75] provides specific implementation measures for the general principles which the Rio Declaration sets out. Chapter 26 ("Recognising and Strengthening the Role of Indigenous People and their Communities") defines the role of indigenous communities in a comprehensive manner. Section 26.1 notes, inter alia, the historical relationship with their lands, the holistic traditional knowledge of their lands and concludes: "Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." The right to self-determination is not mentioned, but could be understood as being referred to here if the human rights approach as outlined above is activated.

Moreover, section 26.2 specifically refers to the ILO Convention 169 and the Draft Declaration. Section 26.3 requires governments to work "in full partnership with indigenous people and their communities" and makes specific provisions for environmentally sound and sustainable development, for the recognition of indigenous values and for active participation of indigenous peoples in environmental decision-making.

With respect to international law development Howard Mann assesses the significance of Chapter 26 as follows: "Chapter 26 of Agenda 21 sets out not just the procedural issues for the furtherance of indigenous concerns in the development of international environmental law, or perhaps more fully the international law of sustainable development, but also the concepts of indigenous intellectual property and compensation for its use, as well as the protection of indigenous peoples' lands and cultures from environmental

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75 *U.N. Doc. A/Conf. 151/26* (Vol. I-III), 12 August 1992. For a detailed commentary see Robinson, Hassan, and Burhenne-Guilmin (eds), *Agenda 21 & The UNCED Proceedings*, Volumes I-VI (1992-94).

impacts outside their control".[76] This describes some of the key elements of the right to self-determination.

(c) The Statement of Principles for Sustainable Development of Forests

The Statement of Principles regarding forests was adopted by UNCED as a "non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests".[77] The Statement specifically refers to "the identity, culture and rights of indigenous people" which need to be recognised through, inter alia, land tenure arrangements and sustainable management of forests (Principle 5(a)). Further, Principle 12 (d) addresses the utilisation of indigenous knowledge. It provides for an equitable share of benefits arising from such utilisation.

(d) The Convention on Biological Diversity

The Convention on Biological Diversity was signed by 150 states present at UNCED and entered into force on 29 December 1993. The Biodiversity Convention[78] not only provides for establishing measures of ecosystem conservation and technology transfer,[79] but also of indigenous peoples' survival. To this end, the preambular paragraph 12 of the

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76 Mann, H., "International Environmental Law and Aboriginal Rights" *Proceedings of the 1993 Conference of the Canadian Council on International Law: Aboriginal Rights and International Law*, Ottawa, Ontario, 21-23 October 1993, 144 at 146.

77 *U.N. Doc. A/Conf. 151/26* (Vol. I-III), 12 August 1992.

78 *U.N. Doc. 6.10. 31 I.L.M. 818* (1992).

79 Bosselmann, K., "Plants and Politics: The International Regime Concerning Biodiversity and Biotechnology" (1996) 7 *Colorado Journal of International Environmental Law and Policy* 111.

Convention recognises "(...) the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components."

The importance of the Convention can hardly be underestimated in respect to biodiversity, economic development - and indigenous peoples. At current estimates 25% of the 10-100 million or more species are at risk and may be eliminated within the next half century. Fifty species of plants and animals are lost every day. At the same time "biological wealth"[80] becomes a key to economic prosperity of the rich and of the poor nations. Given their traditional biological wealth indigenous peoples potentially gain a stronger position as the Convention operates in a process of commercialising genetic resources.[81]

The Convention aims for a fair distribution of advantages resulting from the use of genetic resources (Articles 16 and 19) and provides for an institutional framework of international co-operation (Articles 5 and 18). Article 10 is of particular significance as Parties are to "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation and

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80 Rubin, S.M. and Fish, S.C., "Biodiversity Prospecting: Using Innovative Contractual Provisions to Foster Ethnobotanical Knowledge, Technology, and Conservation" (1994) 5 *Colorado Journal of International Environmental Law and Policy* 23, 27.

81 Of particular importance is the issue of indigenous ownership of native flora and fauna and indigenous knowledge related to medicinal preparations derived from plants. For a comprehensive discussion see Posey, D. and Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (1996).

sustainable resource requirements." However, the political split between North and South which dominated the negotiations before and after the adoption of the Convention has not disappeared. The more commercialised the distribution process of genetic resources becomes, the more likely rich countries will be the winners, while poor countries along with indigenous peoples and biological diversity will be the losers.[82]

(e) Response of Indigenous Peoples to the Biodiversity Convention

The views of indigenous peoples themselves are considerably stronger than those of the Biodiversity Convention with its ambiguous language. In June 1993 an international conference with delegates from fourteen countries adopted the Mataatua[83] Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. It stated: "Indigenous Peoples of the world have the right to self-determination and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property." Article 2.6 provides that "[i]ndigenous flora and fauna is inextricably bound to the territories of indigenous communities and any property right claims must recognise their traditional guardianship." Article 2.7 demands that the commercialisation of any traditional plants and medicines are managed by indigenous peoples. The Declaration also calls for a moratorium on any further commercialisation of indigenous genetic resources until indigenous communities have developed appropriate measures (Article 2.8).

In an attempt to implement this (non-binding) Declaration, the Maori Congress Indigenous Peoples Roundtable Meeting in Whakatane, New Zealand/Aotearoa made it clear that "cultural and intellectual property rights

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82 Bosselmann, supra, note 79, at 114-115.

83 New Zealand/Aotearoa.

of indigenous peoples [should] be fully protected at local, national and international levels and mechanisms [should be] established to ensure that any resultant benefits be directed to the local/national indigenous communities concerned."[84] The New Zealand government responded by releasing a document which recognises "Maori rights" and Iwi/tribes involvement in the management of genetic resources, but makes no reference to cultural and intellectual property rights or any self-determination in respect to biodiversity.[85]

In addition to the Mataatua Declaration and the Kari-Oca Declaration mentioned earlier, there are, at least, ten further indigenous peoples' declarations and statements all calling for the recognition of intellectual property rights of indigenous peoples.[86]

The gap between indigenous objectives and the Biodiversity Convention is evident. And the same may be said for the gap between the right to self-determination and the whole UNCED process. However, indigenous peoples have achieved some significant gains in recent years. It is remarkable, that indigenous peoples and NGO's not only provided the structural framework of the right to self-determination in which the international debate of indigenous environmental concerns takes place. They

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84 *Maori Congress Indigenous Peoples Roundtable Meeting*, Recommendations and Final Statement, June 1994.

85 Te Puni Kokiri/Ministry of Maori Development, *Biodiversity and Maori* (1994). For a general discussion of international law with respect to the control of indigenous peoples of biodiversity and plant genetic resources see Rose, "International Regimes for the Conservation and Control of Plant genetic Resources" in Redgwell and Bowman (eds), *International Law and the Conservation of Biological Diversity* (1995) 145 and Woodliffe, "Biodiversity and Indigenous Peoples" ibid, 255.

86 See Posey, supra, note 81, at 129-130.

also influenced, and continue to influence, the debate in substance. Documents such as the Draft Declaration, the Kari-Oca Declaration, the NGO Earth Charter and Treaty on Indigenous Peoples, and the Mataatua Declaration give meaning to the right to self-determination in the environmental sphere.[87] The UNCED process is under increased pressure. As Howard Mann observed: "[T]here is a clear indication in recent environmental law development surrounding the UNCED and elsewhere that the period of silence and neglect of the link between international environmental law and indigenous concerns has ended. Substantively, the seeds have been sown for the development of international law in relation to indigenous intellectual property, the protection of indigenous lands and culture from outside interference, and for priority harvesting of environmental resources."[88]

IV: CONCLUSION: TOWARDS THE RIGHT TO ENVIRONMENTAL SELF-DETERMINATION OF INDIGENOUS PEOPLES

A stock-taking five years after the 1992 Rio Earth Summit shows that international law has brought indigenous and environmental issues closer together. UNCED itself marked a certain turning-point in its attempt to integrate indigenous rights and environmental protection. The attempt did

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87 For example, the 1994 resolution of the European Parliament, supra note 25, specifically links environmental issues and indigenous rights and holds, inter alia, that indigenous peoples have the "right to determine their own destiny by choosing their institutions, their political status and that for their territory" (Para.2).

88 Supra, note 76, at 144.

not go very far, but it did exist. For the first time international agreements acknowledged that indigenous peoples are in need of concrete measures to protect their rights and that these measures are also crucial for humanity´s survival as a whole. The vital role of indigenous peoples in the management of natural resources is recognised in Article 22 of the Rio Declaration. Chapter 26 of Agenda 21 makes an important link between the "full measure of human rights and fundamental freedoms" and the Draft Declaration containing the right to self-determination. And Article 12 of the Biodiversity Convention recognises that customary use of biological resources meets sustainable use requirements. The "seeds" of a right to environmental self-determination of indigenous peoples are all there.

Whether the seeds will grow depends on the progressive implementation of the UNCED documents. If, for example, the notion of human rights and fundamental freedoms for indigenous people has any meaning it can only be understood as being able to resist further exploitation of indigenous land by states and multinational corporates. Thus, to bring a halt to the ongoing genocide and ethnocide of indigenous groups[89] it is crucial to formally recognise a right to self-determination with respect to environment and development.[90] The provisions in the UNCED documents are not sufficient. The lack of concrete control measures, the absence of timetables and unsubstantiated "effective participation" (Rio Declaration) are among the deficiencies.

However, the UNCED process is developing. Apart from the ongoing

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89 See the report by Ksentini, Human Rights and The Environment, *E/CN.4/Sub.2/1994/9* at 26; further Shutkin, "International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virginia Journal of International Law* 484.

90 See Annex I, No.14 "Draft Principles On Human Rights and the Environment" of the report by Ksentini, supra, note 89, at 76.

implementation of the UNCED documents one significant step forward was the release of the Draft International Covenant on Environment and Development in 1995.[91] This document was drafted over six years under the auspices of the IUCN Commission on Environmental Law in co-operation with the International Council of Environmental Law and the UN Environmental Programme. It represents a wide consensus among environmental lawyers around the world and is intended as a model for the envisaged UN Earth Charter.[92] Among the Draft Covenant's key provisions are the respect for all life forms (Article 2),[93] the interdependence of environmental protection and human rights (Article 4), intergenerational equity (Article 5) and the pivotal role of public participation in decision-making processes (Article 12). In this respect Article 12, Paragraph 6 stresses "the involvement of indigenous peoples and local communities in environmental decision-making at all levels" and the need to "take measures to enable them to pursue sustainable traditional practices." Such an indigenous right to the use of natural resources has been recognised in various environmental treaties.[94]

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91 Commission on Environmental Law of IUCN-The World Conservation Union, *International Covenant on Environment and Development* (March 1995).

92 The UN Secretary-General in his 1990 report stated: "The Charter of the United Nations governs relations between States. The Universal Declaration of Human Rights pertains to relations between the State and the individual. The time has come to devise a covenant regulating relations between humankind and nature."

93 "Nature as a whole warrants respect; every form of life is unique and is to be safeguarded independent of its value to humanity."

94 For example, Article IV of the Whaling Convention (1946), Article V(82)(d) of the North Pacific Seals Convention (1957), and Article 12 of the Protocol to the East African Marine Environment Convention Concerning Protected Areas and Wild Fauna and Flora (1985).

With respect to adapted lifestyles of indigenous peoples and communities it is important to distinguish between voluntary and non-voluntary forms of adapted lifestyles. If the adaptation is voluntary, i.e. following indigenous peoples' own choice, there is a need of national regulations and controls for environmental protection. An example is the choice of Aboriginals in Australia to engage in tourism around Ayers Rock. However, if development is imposed on an indigenous people like, for example, the Cree people in Quebec, the state has to provide the legal and financial means to object and appeal against those impacts.

"Development" is an ambivalent concept. In the context of sustainability, however, it becomes clear that development is a global concept with responsibilities for all and economic, social, cultural and environmental rights for all.[95] Thus, there is an inherent link between common responsibility for states and indigenous peoples and the rights of indigenous peoples. Without full recognition of indigenous rights a "common responsibility" of indigenous peoples cannot be expected. It follows that sustainable development and the right of environmental self-determination are two sides of the same coin.

There is much debate over the question whether indigenous peoples have always been the responsible guardians of the environment or just "future eaters",[96] more or less like the rest of us. The truth may be

95 Shutkin, supra, note 89, at 507.

96 Flannery, T., *The Future Eaters: An Ecological History of the Australasian Lands and People* (1994).

somewhere in the middle.[97] It is important, however, that the right to self-determination as espoused in Articles 26 and 31 of the Draft Declaration is not understood as a privilege of unsustainable resource use. In order to achieve the full status of international law the Draft Declaration needs to acknowledge the body of international environmental law in its move to sustainability. Thus, the right to self-determination doesn't come unrestricted, but with an obligation to accept common responsibility. The commitment of indigenous peoples to environmentally sustainable development is more than a price to pay in return for self-determination; it is a pre-condition for the indigenous peoples' own future. The importance of Article 10 (c) of the Biodiversity Convention should not be underrated in this respect: The protection and encouragement of customary use of biological resources is provided only in so far compatible with sustainable use requirements.[98] At the same time, Principle 22 of the Rio Declaration requires the effective participation of indigenous peoples in determining how to achieve sustainable development. In this way the UNCED documents highlight the model character of indigenous peoples for achieving a caring, respectful relationship with nature.[99]

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97 The traditional view of indigenous peoples that people belong to the land and not the other way round has, of course, not prevented from excessive forms of resource use. The significance of the traditional, holistic view for environmental law is to learn from the past and re-arrange contemporary environmental strategies accordingly. See Bosselmann, K., "Der Mensch als Maß und die Rechte der Natur" in Stüben, P., (ed), *Die neuen "Wilden" - Theorie und Praxis der Ethno-Ökologie* (1988) 132.

98 The same is stated in Article 12, Paragraph 6 of the mentioned Draft Covenant.

99 Carstens, M., "Minderheitenschutz und Umweltrecht seit dem UN-Umweltgipfel von Rio" (1996) 7 *Zeitschrift für Umweltrecht* 193, 200.

The right to self-determination is a fundamental right of indigenous peoples. It can be derived from the developments in international law during the last nearly two decades. Indigenous peoples' initiatives have been instrumental and international human rights law has been supportive towards the recognition of a right to self-determination. Its contents are shaping up through the Draft Declaration and other declarations of indigenous peoples, but also through the growing body of international environmental law[100]. To realise the close link between these two areas of international law would be to the benefit of all, indigenous peoples, states and the environment. There is, after all, only one Earth to live in.

100 See also Posey, D., *Traditional Resource Rights: International Instruments for Protection and Compensation for Indigenous peoples and local Communities* (1996).