

# HOW INTERNATIONAL LAW HAS INFLUENCED THE NATIONAL POLICY AND LAW RELATED TO INDIGENOUS PEOPLES IN THE ARCTIC

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## I. INTRODUCTION

There is a wide diversity of indigenous peoples in the Circumpolar Arctic. The Inuit and Saami peoples live in the area of four nation-states. There are many Indian tribes (or first nations, as they like themselves to be called in Canada) in North America as well as Metis, who trace their historical origin to joint European-Indian parentage. Nenets in Russia still conduct their semi-nomadic reindeer herding in Nenets Autonomous Okrug and Yamal Peninsula. There are different estimates of the number of indigenous peoples in the region, given that there is no widely accepted definition who counts as such people.<sup>1</sup> A rough estimate is that there are 400-500 thousand indig-

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1 There is no universally accepted definition for indigenous peoples, but perhaps the widest in use is what is known as the Cobo definition: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. There is historical continuity that may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a) Occupation of ancestral lands, or at least of part of them; b) Common ancestry with the original occupants of these lands; c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e) Residence on certain parts of the country, or in certain regions of the world; f) Other relevant factors. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference." See Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/1986/7/Add.4 [379]. Noteworthy is that the UN Declaration does not even try to define indigenous peoples. See however International Labour Organisation (ILO) Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989, Geneva, entered into force 5 September 1991) 72 ILO Official Bull 59 at art 1.

enous individuals comprising roughly ten per cent of the total Arctic population. Obtaining exact data for how many indigenous peoples there are in the Arctic still proves difficult.<sup>2</sup>

Indigenous peoples are mostly minorities in the Arctic. Only in Greenland and in some parts of Canada do indigenous population form a majority. As most of the Arctic is under the sovereignty and sovereign rights of eight nation-States, it is of interest to ask what kind of legal protection the original occupants of the region currently enjoy in international law, especially when many groups are transnational by nature and minorities in their home regions. It is many times more difficult to establish legal recognition and rights as well as to influence policy-making when indigenous peoples find themselves minorities even in their traditional territories and are ruled by majority decision-making. This is, of course, a more general problem that the world's indigenous peoples face, which has led them to increasingly relying on international law as the basis for their continued fight to live as distinct peoples.

This article will examine whether, and how much, the Arctic States are influenced by international law when developing their national indigenous policy and law, in particular in their Arctic regions. By Arctic States we will refer to the eight States that are members of the Arctic Council, the predominant soft-law intergovernmental forum for advancing co-operation and sustainable development in the region (among the Arctic Eight, only Iceland does not have indigenous peoples in its territory). Specific emphasis lies on examining whether there are special Arctic policy and legal measures for improving the situation of Arctic indigenous peoples and whether these are influenced by international law developments.

The article will proceed as follows. Firstly, it is important to examine the main ways that various international soft and hard law instruments regulate the relationship between the settler society and indigenous peoples. Since there are various international standards available, it will be shown in the next sections that some international instruments are relevant for some Arctic states while others are not. After this overview of the country situation, it is useful to consider how different Arctic States' national indigenous policy and law have been influenced by international standards. Finally, it is of interest to examine what it is likely to happen in the future, given that the 2007 United Nations Declaration on the Rights of Indigenous Peoples<sup>3</sup> is gaining more acceptance around the world.

## I. INTERNATIONAL STANDARDS RELEVANT FOR INDIGENOUS PEOPLES

The significance of international law for indigenous peoples has a long pedigree. It was, in effect, international law and organisations that gave birth to indigenous rights and indeed the concept of indigenoussness. The International Labour Organisation (the ILO), as early as 1920s, and later the United Nations (UN) system provided venues for international norm setting and conscious development of international indigenous movement. The term indigenous – having different scope and reach than laws referring to natives in particular states – was first used at an international level in

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2 Arctic Human Development Report (AHDR) (Arctic Council, Stefansson Arctic Institute, Akureyri, 2004) at 28-29.

3 United Nations Declaration of the Rights of Indigenous Peoples (General Assembly Resolution A/RES/61/295, 13 September 2007, New York).

a way that demonstrated these peoples were perceived as rights holders. Indigenous peoples have for the last 100 years resorted to international bodies and forums in their search for justice.<sup>4</sup>

It is therefore practically impossible to have fully isolated domestic indigenous policy for any nation-State nowadays that escapes any international scrutiny. Moreover, the borders between internal and external policy of States and normative frameworks to which they adhere have become blurred in the course of time.<sup>5</sup> States' human rights policies are continuously scrutinised by a web of international bodies, in particular those in the UN. There are the general mechanisms – the periodic country review by the Human Rights Council and the examination of country reports by various human rights treaty monitoring bodies – which also look into the States' indigenous policies and laws. There are also the indigenous-specific UN institutions, most prominently the Permanent Forum on Indigenous Issues (UNPFII), which is composed of an equal number of State and indigenous representatives with the Chair coming from an indigenous constituency. UNPFII supervises in general the observance of international standards related to indigenous peoples. Moreover, an important indigenous-specific UN institution that monitors the State performance regarding indigenous rights monitoring is the Special Rapporteur on the rights of Indigenous Peoples.<sup>6</sup>

Even if there are many institutions supervising the indigenous international standards by States, it is important to emphasise that there are very few hard and fast legal rules obligating the nation-States to establish exactly a certain type of status and rights for indigenous peoples living in the nation-States territory. There is a wide diversity in the history of settler/coloniser and indigenous peoples in each country, demanding different solutions for different countries and regions, as recognised in the preamble of the UN Declaration on the Rights of Indigenous Peoples.<sup>7</sup>

There are, in effect, many treaties and other international instruments that contain different ways of regulating the basic relationship between majority society and indigenous peoples, most of which are (potentially at least) applicable in the Arctic. There are five main models or ideal frames, starting from the more modest, and proceeding to more ambitious ways of according power to indigenous peoples: indigenous peoples assimilated into the mainstream population; indigenous peoples as minorities; indigenous and mainstream societies evolving in parallel; a relationship based on a historic treaty; and the most ambitious, self-determination of indigenous peoples on the basis of their relationship in mainstream society in the State.

### *A. Assimilation*

Even if the first ever international treaty focussing exclusively on indigenous peoples, the ILO Convention No 107 1957, gave a number of important rights to indigenous peoples, it had as its final goal the assimilation of indigenous groups into the mainstream society. The ideology underlying this Convention is abandoned now, but there are still some countries that adhere to this treaty and try to justify their actions on the basis of them being parties to this Convention. For instance,

4 Ronald Niezen *Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Ewing, 2002); Karen Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Durham: Duke University Press, Durham, 2010).

5 Annika Bergman "Co-Constitution of Domestic and International Welfare Obligations. The Case of Sweden's Social Democratically Inspired Internationalism" (2007) *Cooperation and Conflict: Journal of the Nordic International Studies Association* 42(1) at 74.

6 See website of the Office of the United Nations High Commissioner on Human Rights, Special Rapporteur on the Rights of Indigenous Peoples <[www2.ohchr.org/english/issues/indigenous/rapporteur/](http://www2.ohchr.org/english/issues/indigenous/rapporteur/)>.

7 UN Declaration 2007, above n 3, preamble.

Bangladesh, who has an on-going armed conflict with its indigenous peoples in Chittagong Hills, still retains this legal stance.

The ILO Convention No 107 reflects well the attitudes of policy-makers to the native issue up until the 1970's in the political discourse and practices also of the Arctic states. In Norway, the first half of the 20<sup>th</sup> Century was marked by the policy of Norwegianisation (*fornorsking*), the aim of which was to create an ethnically uniform Norwegian North, comprised of loyal Norwegian citizens. At the same time, Sweden pursued policies of assimilation and segregation; the latter had been applicable to Saami reindeer herders. The system of boarding schools in Canada was aimed at transforming indigenous children into regular Canadian citizens; the 20th Century amendments of the 1876 Indian Act imposed on the indigenous communities alien governance and leadership system. In the Soviet Union, the peoples of Siberia and Russian North underwent the process of forced collectivisation. The time of political and economic transformation of the 1990s in Russia had the unfortunate effect of chaotic privatisation of reindeer herds, traditionally used resources and lands for the northern indigenous peoples, and thereby causing assimilation to yet another alien socio-economic system.<sup>8</sup>

All over the circumpolar North, indigenous peoples were expropriated of their traditionally used lands via the processes of colonisation, industrialisation, modernisation and infrastructural development, all leading to their assimilation into the mainstream society. The liberal perception of land property based on an extensive use (a view shared, for example, by Adam Smith) resulted in indigenous lands being considered as State owned. The associated colonial concept of *terra nullius* was responsible for the view that indigenous communities and nations are non-self-governing and lack viable political structures.<sup>9</sup>

### B. *Indigenous Peoples as Minorities*

Article 27 of the 1966 adopted International Covenant on Civil and Political Rights (ICCPR) provides:<sup>10</sup>

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

Given that this main universal international human rights treaty was adopted before the emergence of the international indigenous peoples' movement, it reflects in general the rights of individual members of cultural, linguistic and religious minorities. What it expects of State parties is only passive minority protection, namely that States are only required not to prevent certain phenomena, for example the indigenous peoples speaking their own language to each other. Yet, the way the Human Rights Committee has interpreted this Article shows also the interpretative power of the human rights treaty monitoring bodies. The manner in which the Human Rights Committee (HRC) has developed the way the Article 27 should be interpreted in respect of indigenous peoples is almost opposite from the way the Article is articulated. The HRC has done this via the dif-

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<sup>8</sup> For a general overview, see Yuri Slezkine *Arctic Mirrors: Russia and the Small Peoples of the North* (Cornell University Press, Ithaca, 1994).

<sup>9</sup> Tony Penikett *Reconciliation: First Nations Treaty Making in British Columbia* (Douglas and McIntyre, Vancouver, 2006) at 27-33.

<sup>10</sup> International Covenant on the Civil and Political Rights (ICCPR) (16 December 1966, New York, entered into force 23 March 1976) 999 UNTS 171.

ferent ways in which it can influence how the Covenant should be interpreted, for example: concluding observations on State reports; general comments on individual provisions; and, if the State is a party to the Optional Protocol, individual views on human rights petitions from individuals (and those representing groups). With its General Comment on Article 27, the Committee opined that States are required to take active positive measures of protecting the indigenous peoples' culture, in particular to protect their traditional livelihoods.

### *C. Indigenous and Mainstream Societies Evolving in Parallel*

The only modern international convention specifically addressing the situation of indigenous peoples is the 1989 ILO Convention No 169,<sup>11</sup> which is based on the idea that indigenous society can live separate existence but in parallel to the dominant society. The Convention requires the State identify the traditional territories of indigenous peoples and to hand them back to the original occupants of the region, even if this may prove difficult in practice. It also implicitly requires States to recognise some form of self-governance for indigenous peoples.

### *D. Relationship Based on a Historic Treaty*

Treaties negotiated in the past to govern the relationship between the settlers and indigenous peoples are endorsed and supported in the UN Declaration by the preambular paragraph that recognises "...the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States".<sup>12</sup> A good example of such a historic treaty is the 1840 Treaty of Waitangi, which still functions as the basis for European settlers' and Māori peoples' legal relationship.<sup>13</sup> The model of treaty-making to organise the relationship between the native population and European settlers was a central feature of particularly British colonialism. Explanations for such a solution can be found in early English common law; later the 1763 Royal Proclamation declared that Indians continue to own the lands they had used and occupied.<sup>14</sup> As a result, significant numbers of treaties were concluded throughout North America in the 19th Century. Yet, the treaty making process and their subsequent application very often lead to expropriation. Hence, treaties that were originally designed as instruments of the law of nations became gradually domesticated and seen as regulating relations between the sovereign State and its aboriginal citizens/subjects.<sup>15</sup> Historical treaties and modern agreements, in particular land claim agreements, still constitute a major pillar of indigenous policies and regulatory frameworks in Canada and the United States.

### *E. Self-Determination of Indigenous Peoples*

The most ambitious approach from the viewpoint of indigenous peoples is to invoke the body of law that helped the colonised peoples of Africa and Asia to gain, via their self-determination

11 ILO Convention No 169, above n 1.

12 UN Declaration 2007, above n 3, Preamble; Penikett, above n 9, at 43-46, 111.

13 See the recent report by the James Anaya (Special Rapporteur on the Rights of Indigenous Peoples) "The Situation of Māori People in New Zealand" (A/HRC/18/XX/AddY, 2011) OHCHR <[www2.ohchr.org/english/issues/indigenous/rapporteur/docs/A.HRC.18\\_NewZealand.pdf](http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/A.HRC.18_NewZealand.pdf)>.

14 Sheryl Lightfoot "Emerging International Indigenous Rights Norms and 'Over-Compliance' in Canada and New Zealand" (2010) 62(1) Political Science at 99.

15 Niezen, above n 4, at 90-92.

guaranteed in international law, the status of independent States. Self-determination of indigenous peoples was the cornerstone principle that was the basis of the Draft UN Declaration on the Rights of Indigenous Peoples when it was adopted by the Working Group on Indigenous Populations in 1993 and the Sub-Commission on the Promotion and Protection of Human Rights in 1994.<sup>16</sup> The then main human rights body of the UN, the Human Rights Commission, established an inter-session process to finalise the Draft for a Declaration to be adopted by the UN General Assembly by the end of 2004 (which was also the end of the first UN decade of indigenous peoples).<sup>17</sup> In these direct negotiations between States and indigenous peoples, one of the main problems was that indigenous peoples were not willing to compromise on their full self-determination as expressed in Article 3 of the Draft:<sup>18</sup>

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.

Finally, in June 2006, the UN Declaration was adopted in a modified form by the new main human rights body of the UN, the Human Rights Council. Indigenous peoples had to compromise their self-determination stance to the effect that Article 4 was inserted after Article 3, making it clear that self-determination for indigenous peoples meant self-governance and autonomy in their internal and local affairs. Yet, even after this compromise, the African States, who were involved to a limited degree in the negotiations over the UN Declaration, objected to some parts of the Declaration, in particular that espousing self-determination for indigenous peoples, and blocked the progress of the Declaration in the UN. For this reason, a new Article 46 was added to the Declaration, ensuring that nothing in the Declaration threatens the territorial integrity and political unity of independent States.<sup>19</sup> Even if States and indigenous peoples were able to achieve a compromise over what self-determination means for indigenous peoples, it is also clear that this is not the last word on the matter. Both monitoring bodies of the two main universal human rights covenants, the ICCPR's Human Rights Committee and the Committee monitoring the Covenant on Economic Social and Cultural Rights, are requiring the States parties to report their policies and laws towards indigenous peoples under Common Article 1, thus implicitly signalling that well-established indigenous peoples have a right to self-determination, that is, to determine freely their political status and dispose of their natural resources.<sup>20</sup>

16 United Nations High Commissioner for Human Rights, 1994 Draft of the UN Declaration on the Rights of Indigenous Peoples annexed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities decision 1994/5, <[www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/e.cn.4.sub.2.res.1994.45.en?opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/e.cn.4.sub.2.res.1994.45.en?opendocument)>.

17 International Work Group on Indigenous Affairs (IWGIA) "The Declaration on the Rights of Indigenous Peoples – A Brief History" (undated) IWGIA <[www.iwgia.org](http://www.iwgia.org)>.

18 United Nations High Commissioner for Human Rights, above n 16.

19 See Timo Koivurova "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)gain Their Right to Self-Determination" (2008) 15 International Journal on Minority and Group Rights at 1.

20 ICCPR, above n 10; and International Covenant on the Economic, Social and Cultural Rights (16 December 1966, New York, entered into force 3 January 1976) 999 UNTS 3 at joint art 1. See the following concluding observations by the HRC where explicit references to either the concept of self-determination of peoples or article 1 can be found: Canada (UN Doc CCPR/C/79/Add105 (1999)); Mexico (UN Doc CCPR/C/79/Add109 (1999)); Norway (UN Doc CCPR/C/79/Add112 (1999)); Australia (UN Doc CCPR/CO/69/AUS (2000)); Denmark (UN Doc CCPR/CO/70/DNK (2000)); Sweden (UN Doc CCPR/CO/74/SWE (2002)); Finland (UN Doc CCPR/CO/82/FIN (2004)); USA (CCPR/C/USA/Q/3/CRP4 (2006)).

The UN Declaration expects States to at least grant indigenous peoples self-governance or autonomy in their internal and local affairs and it thus builds on the idea of two distinct but parallel societies living in the same State. Yet, it does clearly recognise that there has to be room for different solutions for different regions, as is explicitly provided in the preamble to the Declaration:

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.

## II. HOW HAVE THE ARCTIC STATES IMPLEMENTED INTERNATIONAL STANDARDS?

In this section, the goal is to examine what international standards are at least potentially applicable to the Arctic States (and thus requiring them to take measures also towards their Arctic indigenous peoples). Another goal is to examine whether the Arctic indigenous peoples have resorted to human rights petitions against the Arctic States in order to improve their situation.

### A. *North America*

In North America, the prevailing common law system and the American constitutionalism limits the overall influence of international law. Therefore, domestic solutions are preferred. Both in Canada and in the United States, special Indian laws have been adopted in order to govern State-indigenous affairs, supplemented by numerous treaties and agreements with Indian and Inuit groups. Thus, the concrete regulatory frameworks differ significantly: in Alaska versus other United States states, within Alaska itself (as the example of the North Slope Borough shows),<sup>21</sup> and between Canadian Arctic regions. In both states, it is the Federal Governments (Congress in the United States and the Government in Canada) that have responsibility over indigenous affairs.

Despite the development of new international normative consensus on indigenous rights, very often Western land still uses patterns and standards to prevail over indigenous ones. The doctrine of discovery, a concept on which both North American states were founded, gradually changed the legal relationship of indigenous peoples with their lands from self-determination to “aboriginal title”.<sup>22</sup>

When the UN Declaration was adopted in the General Assembly, there were four States voting against it: Australia, Canada, New Zealand and the United States. By now all these four States have come to endorse the Declaration, testifying to the strength of the document. Canada did this in November 2010<sup>23</sup> and the United States in December 2010,<sup>24</sup> both signalling their support for the Declaration but also expressing clearly how they interpret the Declaration and that they still have reservations on certain parts of it.

21 See Gunnar Knapp and Thomas A Morehouse “Alaska’s North Slope Borough Revisited” (1991) 27(163) *Polar Record* 303.

22 “International Law as an Interpretative Force in Federal Indian Law” [Notes] (2003) 116(6) *Harv L Rev* 1751 at 1752-1753, 1765-1768.

23 “Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples” (2010) US Department of State <[www.state.gov/documents/Organisation/153223.pdf](http://www.state.gov/documents/Organisation/153223.pdf)>.

24 “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (2010) Indian and Northern Affairs Canada <[www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp](http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp)>.

Both the United States and Canada are also parties to the ICCPR, and Canada is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). As stated above, the former has been interpreted by the Human Rights Committee in a very indigenous-friendly manner. The Committee requires States to undertake active measures to protect especially the indigenous peoples' traditional livelihoods under Article 27. Canada is also a party to the Optional Protocol to the ICCPR, enabling the individuals (also those who represent indigenous groups) to make individual communications against their home States after exhausting domestic remedies. Both monitoring bodies of the Covenants require States – also the United States and Canada – to report the situation of their country's indigenous peoples under Common Article 1, implicitly signalling that indigenous peoples are peoples and that they have the right to self-determination as enshrined in Article 1.

Another legally relevant instrument is the 1948 Declaration on the Rights and Duties of Man negotiated under the auspices of the Organisation of American States (OAS), which has been perceived by the Inter-American Regional Human Rights bodies (Commission and the Court) as legally binding, thus also obligating the United States and Canada.<sup>25</sup>

Yet, as Nigel Bankes has examined in the context of Canada, the aboriginal rights and policy are dealt with domestically, without regard to international human rights obligations.<sup>26</sup> This applies also to northern and Arctic indigenous peoples in Canada, those living above the 60th parallel to the west from Hudson Bay and the Nunavut, all of which are constitutional territories that derive their powers from the Federal Government in contrast to provinces, which have an extensive self-governance on the basis of the 1867 Constitution Act. In other words, the Federal Government has more extensive powers to negotiate directly with the indigenous peoples in Yukon, Northwest and Nunavut territories, and both territorial and ethnic Governments have been established for the northern indigenous peoples.

The United States also follows its own domestic indigenous policy and law and has its own specific legislation for the natives in Alaska. Alaska became the 50th state of the United States in 1959 and in 1971 the Alaska Native Claims Settlement Act (ANCSA) was enacted, which gave natives title to territory and compensation in exchange for extinguishing their inherent land claims. Alaskan natives are also required to govern and administer their possessions via regional and village corporations; forms of governance that do not match with their traditional concepts of governance. Even if there is a specific legislation for Alaska natives, the design for this legislative solution was not influenced by international human rights law but it was a national and regional model tailor-made for Alaskan natives.

In the United States, indigenous international norms meet with constraints similar to those faced by other international human rights and international law standards. The United States ratification of the ICCPR included multiple reservations, safeguarding the primacy of constitutional

25 See Douglass Cassel "Inter-American Human Rights Law, Soft and Hard" in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000) at 393, 397. The declaration has achieved international legal relevance through the so-called double-incorporation. First, this declaration was included in the Statute of the Commission on Human Rights in 1960 when the legal status of the Commission on Human Rights was still unclear. Secondly, an amendment incorporated the Commission on Human Rights into the OAS Charter in 1970. In this way, the declaration on human rights evolved to become legally binding and as such it has also been treated in the case-practice of the Commission and the Court of Human Rights.

26 Nigel Bankes "Land Claim Agreements in Arctic Canada in Light of International Human Rights Norms" [2010] *Yearbook of Polar Law* at 175-231.



protection and non-self-executing nature of the ICCPR. As Stanley Katz noted, Americans “are too thoroughly constitutionalists (in the American way) to make international human rights a matter of domestic jurisdiction”. He further argued that “if we are to sign on more fully to international human rights, we will have to rethink and reinvent some basic elements of our constitutional legacy”.<sup>27</sup>

There still appears to be significant opposition in the United States to adopt international human rights instruments.<sup>28</sup> The reception of customary international law in the United States’ courts has, however, much wider application than human rights treaties, and this is also the case in Canada.<sup>29</sup> Human rights treaties usually require implementing legislation to be incorporated as part of the domestic law of the United States.<sup>30</sup> Moreover, international legal norms can influence the way domestic statutes are interpreted.<sup>31</sup> Thus, there are some possibilities for having greater influence of international human rights law, including indigenous norms, on the United States and Alaskan policies in the future. In a similar vein, it is the executive branch of the Government in Canada that concludes international agreements, making it necessary to incorporate and implement treaties domestically.<sup>32</sup>

There are few petitions made by indigenous peoples in North America to the inter-American regional human rights system and the Human Rights Committee. Since Canada is a party to the Optional Protocol to the ICCPR, there have been a couple of indigenous complaints against Canada in the Human Rights Committee, most importantly in the *Lubicon Lake Band*<sup>33</sup> case, where the Band won the case against Canada. The Human Rights Committee viewed that the Albertan approved logging and hydrocarbon activities in the Band’s traditional territories breached Article 27 of the ICCPR. Even though the Band won the case against Canada, the judgment still remains unimplemented, a fact that is regularly criticised by the Committee in its Concluding Observations to Canada.

The United States is not a party to the Optional Protocol and the human rights petitions against it have been taken to the only human rights body that can deal with human rights complaints against the United States, the Inter-American Commission on Human Rights (IACHR). The only complaint by the Arctic indigenous peoples to the IACHR was developed under the auspices of the Inuit Circumpolar Council (ICC).<sup>34</sup> Eventually, the application to the IACHR was made by 67 named individuals and the President of the ICC, Sheila Watt-Cloutier, on behalf of all Inuit in Alaska and Canada. The application captured considerable attention as the Inuit accused the United States of breaching their various human rights (for example right to life and culture) by

27 Stanley N Katz “A New American Dilemma? U.S. Constitutionalism vs. International Human Rights” (2003) 58 U Miami L Rev 323 at 328-331, 344-345; “International Law as an Interpretative Force...” above n 22, at 1751-1752.

28 Jack Goldsmith “Should International Human Rights Law Trump US Domestic Law?” (2000) 1 Chicago Journal of International Law at 327.

29 Jennifer E Dalton “International Law and the Right of Indigenous Self-Determination: Should International Norms be Replicated in the Canadian Context?” (Working Paper, IIGR: Queens’ University, 2005) at 14-15.

30 Katz, above n 27, at 324-325; “International Law as an Interpretative Force...” above n 22, at 1762-1763.

31 “International Law as an Interpretative Force....” above n 22, at 1763.

32 There are, however, certain exceptions if the international norm refers to the bases of international order, for example in the case of genocide. Gib van Ert “Dubious Dualism: The Reception of International Law in Canada” (2010) 44(3) Valparaíso University Law Review at 927.

33 *Lubicon Lake Band v Canada Communication* No 167/1984 (26 March 1990) UN Doc Supp No 40 (A/45/40) at 1.

34 When the application was made to the IACHR, the ICC was abbreviation from Inuit Circumpolar Conference, a name that was changed to that of Council in 2006.

their alleged irresponsible climate policy. The petition was deemed inadmissible although a public hearing was organised by the IACHR to understand the application better.<sup>35</sup>

### *B. The Russian Federation*

From the historical perspective, the colonisation and settlement process in Russia was fairly similar to other regions of circumpolar North. For instance, the 1822 Statute of Administration of Non-Russians in Siberia declared all lands as belonging to the State; natives were granted possession rights, which had the effect of placing them under direct State protection. During Soviet times, the property of indigenous communities was collectivised and later in 1990's restructured or privatised, all which resulted in major and rapid cultural and economical changes. In the 1990s, even the existence of some indigenous groups became threatened, prompting the Government to adopt urgent measures to protect numerically small peoples of the North and Siberia in 1992. Apart from providing legal protection from emerging private and state-private commercial activities, these measures were also designed to implement the ICCPR.<sup>36</sup>

The Russian Federation studied the possibility of ratifying the ILO Convention No 169 at least until 1998 but after that there seems to have been no further effort in this respect.<sup>37</sup> Yet, Russia is a party to the main international human rights treaties, in particular those of the ICCPR (including the Optional Protocol) and the ICESCR. Ironically, it was the Soviet Union that became a party to these treaties without any real effort to implement these human rights standards in practice. Russia, as a successor State to the Soviet Union, is still bound by these treaties so there is at least a possibility to invoke their provisions. Russia is also a party to the Council of Europe Framework Convention on the Protection of National Minorities.<sup>38</sup> The monitoring body (Advisory Committee) also scrutinises the indigenous policy and law of the States parties.

Russia has not been supportive of the UN Declaration process. When the Human Rights Council voted in 2006 on the acceptance of the UN Declaration, only two members opposed its acceptance: Canada and Russia. When the UN Declaration came to a final vote in the UN General Assembly, Russia abstained from voting. In contrast to the United States and Canada that have later come to endorse the UN Declaration, Russia has not yet done so.

The Russian Federation clearly wants to retain indigenous policy and law issues under its own control. It has fairly strong, even unique, indigenous laws for small indigenous minorities in the North, Siberia and the Far East. In order to qualify as indigenous minority, the group cannot exceed 50,000 in number, a policy stance that was created previously during the Soviet era. There are also arguments that even if indigenous constitutional status and laws are strong in theory, they are fairly weak in practice, especially in the Arctic, where the country has vast hydrocarbon interests.

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35 Timo Koivurova "International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects" (2007) 22(2) *J Envtl L & Litig* at 267.

36 Gail Oshrenko "Indigenous Land Rights In Russia: Is Title to Land Essential For Cultural Survival?" (2001) 13 *Geo Int'l Envtl L Rev* 695 at 715-716.

37 "Practical Implementation of Indigenous Peoples' Land Rights: A Case Study of the Russian Federation (Comparison with Certain Developments in Africa in Relation to Indigenous Peoples)" [2011] *The Yearbook of Polar Law* (forthcoming).

38 Framework Convention on the Protection of National Minorities (Council of Europe, 1 February 1995, Strasbourg) CEST 157.

The Russian constitution includes in its Article 69 guarantees for the rights of numerically small peoples in accordance with the generally accepted principles of customary international law and treaties concluded by the Russian Federation.<sup>39</sup> Hence, at least in principle, international indigenous norms, such as Article 27 of the ICCPR as it has been interpreted by the Human Rights Committee could have an influence in the Russian domestic legal system. Yet still this remains in general largely a possibility as Russia has not ratified or endorsed any of the international indigenous instruments.

Russian regulations referring to indigenous peoples are composed of the 1999 Law on the Guarantees of Rights of Indigenous Numerically Small Peoples and the 2000 Law on obshchinas.<sup>40</sup> The legal framework is quite advanced and reflects to a certain degree various provisions of international rights instruments. This includes, for example, designating territories for traditional natural use and providing safeguards for cultural and linguistic rights. Moreover, further regulations may be adopted by the subjects of the Federation, thus adjusting the legislation to local circumstances. However, the implementation of the existing legislation is often inadequate with local administration being usually indifferent or insensitive to issues of numerically small peoples and the indigenous organisations are often times too weak and dependent on administrative support to make a real policy difference.<sup>41</sup>

Of note is that there are no human rights petitions from indigenous peoples against Russia even though Russia is a party to the Optional Protocol to the ICCPR.

### *C. Saami Region*

As noted above, the Saami live in the territory of four nation-States: Norway, Sweden, Finland and Russia, last of which does not have any distinct Saami specific policies (and is thus not examined in this part). In the three Nordic countries, the Saami have their own Parliaments, although it is only in Norway where the Saami Parliament exercises larger self-governance powers. In addition, the three Nordic states have introduced constitutional safeguards for Saami rights and status.<sup>42</sup>

Norway was the first country in the world to ratify the ILO Convention No 169 in 1990 and also partially implemented it in the course of fifteen years with its 2005 Finnmark Act.<sup>43</sup> With this Act, the State transferred the land ownership in the northernmost municipality of Norway (Finnmark) to its residents, Kvens, Norwegians and the Saami. It is the Finnmark Estate, a body composed of three members from the county Council and three from the Saami Parliament, that

39 Constitution of the Russian Federation (12 December 1993) at art 69.

40 0 garantiyakh prav korennykh malochislennykh narodov Rossiiskoi Federatsii, [On the Guarantee of Rights of Indigenous Numerically Small Peoples of the Russian Federation], No 85 FZ, 30 April 1999 [hereinafter Russian Federation Law No 85]; Ob obshchikh printsipakh organizatsii obshchin korennykh malochislennykh narodov Severa, Sibiri i Dalnevo Vostoka Rossiiskoy Federatsii [On Common Principles of Organisation of Obshchinas of Indigenous Minorities of the North, Siberia and the Far East of the Russian Federation] No 104 FZ, 20 June 2000.

41 Oshrenko, above n 36, at 710-720.

42 Stortinget, Constitution of Norway (17 May 1814 with amendments as of 20 February 2007) at art 110a; Constitution of Finland (11 June 1999, 731/1999) at ss 17 and 121; Riksdagen, Constitution of Sweden, The Instrument of the Government (1 January 1975 as amended 7 December 2010, SFS 1974:152) at ch 1, art 2, ch 2, art 17.

43 See Act (Norway) of 17 June 2005 No 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act), <[www.galdu.org/govat/doc/the\\_finnmark\\_act\\_act\\_17\\_june\\_2005\\_no\\_85.pdf](http://www.galdu.org/govat/doc/the_finnmark_act_act_17_june_2005_no_85.pdf)> Ministry of Justice and Police and the Ministry of Local Government and Regional Development (Norway) (2005) "The Finnmark Act – A Guide" [Information brochure distributed in Finnmark] Zoom Grafisk AS <[www.galdu.org/govat/doc/brochure\\_finnmark\\_act.pdf](http://www.galdu.org/govat/doc/brochure_finnmark_act.pdf)>.

governs these lands. All the residents of the county can prove their use right or immemorial usage right to a commission, which studies these in depth. The Saami Parliament is entitled to draw guidelines for non-cultivated lands in the county, which are important for their reindeer herding (the Saami, with minor exceptions, have exclusive right to conduct reindeer husbandry). Norway continues to examine the rights of the Saami under the ILO Convention No 169 in coastal areas and other counties.

It is likely that due to the progressive nature of Saami policy and law in Norway, there have not been many petitions from the Norwegian Saami to human rights bodies. During the famous Alta dam conflict, the Saami made a petition to the then European Commission on Human Rights.<sup>44</sup>

In Finland and Sweden, the situation is more challenging from the viewpoint of the Saami as compared to Norway. These states have not yet ratified the ILO Convention No 169, although they have been studying that possibility for a long time. The public discourse on the settler/Saami relationship is done mainly via whether the ILO Convention No 169 should be ratified and under what conditions. In Finland, the ICCPR has a very strong status since it has been incorporated into the Finnish legal system at the level of an Act of Parliament. In Sweden, all the other international human rights treaties other than the European Convention on Human Rights are not directly applicable, since Sweden presumes that its legal order is in compliance with international human rights treaties. Also the two Council of Europe minority treaties, the Framework Convention on the Protection of National Minorities, as well as the Charter for Minority and Regional Languages,<sup>45</sup> are legally relevant for the Saami and applicable in both countries.

Both the Finnish and Swedish Saami have been active in launching human rights petitions, although both have tapped into different legal mechanisms: Finnish Saami have relied on Article 27 of the ICCPR and the Swedish Saami on the European Court of Human Rights.<sup>46</sup> One reason for this difference is that the Saami can better rely on Article 27 in Finland than in Sweden before the Human Rights Committee. As noted above, in Finland, Article 27 is directly applicable. Perhaps even more importantly, in Sweden and Norway reindeer herding is an exclusive Saami livelihood (with some exceptions), whereas in Finland it is not. Since the Human Rights Committee has in its case-practice created criteria for protecting especially the traditional livelihoods of indigenous peoples, it is no wonder that the Finnish Saami have tried to protect their reindeer herding via making communications against Finland to the Human Rights Committee. These have not, except in one case, been successful for the Finnish Saami.<sup>47</sup> Yet, in a recent case, Article 27 was one of the factors that persuaded the Finnish Forestry Board – which administers the state-owned lands in the Saami homeland region (this region being for Saami to exercise their cultural and linguistic rights) – not to log the old growth forests that are very important for Saami reindeer herding. The

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44 Timo Koivurova “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” (2011) 18 *International Journal on Minority and Group Rights* at 1; Johan Eriksson *Partition and Redemption: A Machiavellian Analysis of Sami and Basque Patriotism* (Umeå University, Umeå, 1997) at 99-104; Trond Thuen *Question of Equity. Norway and Saami Challenge* (Memorial University of Newfoundland, Newfoundland, 2001) at 44-46.

45 Charter for Minority and Regional Languages (Council of Europe, 5 November 1992, Strasbourg, entered into force 1 March 1998) CETS 148.

46 See Timo Koivurova, above n 44.

47 Human Rights Committee, *Anni Äärelä and Jouni Näkkäläjärvi v Finland* (Communication No 779/1997), Views adopted 24 October 2001, Report of the Human Rights Committee, Vol II UN doc A/57/40 at 117-130.

Saami in this case were again prepared to take it to the Human Rights Committee after exhausting local remedies.<sup>48</sup>

Saami villages (Saami cooperatives managing reindeer herding and resource use) in Sweden have many times resorted to the European regional human rights institutions, nowadays including only the European Court of Human Rights (ECtHR). One reason for Saami villages in Sweden to use this legal path is that they have standing before the ECtHR, which is not easy to attain with other Saami representative bodies. For example, the Finnish Saami Association, Johtti Sapmelacat, did not have standing in its case against Finland because it did not have authority over the issues about which they complained, in this case fishing, whereas Swedish Saami villages have extensive powers, especially over reindeer herding. Yet, since the ECtHR has thus far been very restrictive in acknowledging collective rights, the Saami villages have not been meritorious in their human rights petitions to the ECtHR.<sup>49</sup>

The relationship between the Nordic countries is characterised by close ties between their bureaucracies and transnational networks bringing together decision-makers and resulting in policy diffusion,<sup>50</sup> policy convergence<sup>51</sup> or even competition between States' bureaucracies towards the conduct of the most advanced and developed policy.<sup>52</sup> Moreover, the existence of the Nordic Council (an inter-parliamentary body) and the Nordic Council of Ministers, which openly aim to harmonise policies, as well as the work of various committees within the Council, induces the formal policy diffusion processes. When Norway was developing its Saami Parliament in the 1980s, it was influenced by the predecessor of the Finnish Saami Parliament that started already in 1974. The establishment of the Saami Parliament in Sweden in 1993 had the effect of inducing reform of the Finnish Saami assembly in 1995, both following closely the Norwegian example. This type of policy diffusion has had a significant impact on the way in which international norms are incorporated and applied. Both Sweden and Finland are currently looking at the experiences of the way in

48 See Saami Council "The Saami Council Applauds Historic Settlement Between Paadar Brothers and Metsähallitus in Nellim!" (press release, 24 August 2009) Saami Council <[www.saamicouncil.net/?newsid=2688&deptid=2192&languageid=4&NEWS=1](http://www.saamicouncil.net/?newsid=2688&deptid=2192&languageid=4&NEWS=1)>.

49 See Timo Koivurova, above n 44. See however, the *Handölsdalen* case, European Court of Human Rights, *Handölsdalen Sami Village and Others v Sweden* (39013/04) ECHR 30 March 2010.

50 Policy diffusion is the spreading of certain policy innovations, such as new legal measures or policy instruments, from one country to the other. The diffusion of policy innovations, such as those occurring in indigenous policy within the last decades may depend on various factors, including: the dynamics of the international system (in this case Nordic cooperation); the prominence of the state where the policy innovation originates (in the case of Nordic indigenous politics, usually Norway); domestic factors (often hindering adoption of certain policy innovations); and internal characteristics of the policy instrument to be adopted. In general, policy diffusion rests upon constructivist theories of norm dynamics. A term policy transfer is also used. See eg, Kersten Tews, Per-Olof Busch, and Helge Jorgens "The Diffusion of New Environmental Policy Instruments" (2003) 42 Eur J Pol Res at 572-578; Jacqui True and Michael Mintrom "Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming" (2001) 45 International Studies Quarterly 27 at 36.

51 Policy convergence is a more general process of a State's policies, structures and even institutions becoming increasingly similar in time – of which policy diffusion is a part. Despite the existence of various theories, concepts and an impressive body of research, especially in the field of Comparative Public Policy, the causes and mechanisms of policy convergence are still debated or unknown, and the concept itself is repeatedly contested. Convergence is to increase with the existence of strong linkages within transnational networks (such as Nordic states). See eg, Katharina Holzinger and Christoph Knill "Causes and Conditions of Cross-National Policy Convergence" (2005) 12(5) Journal of European Public Policy at 775.

52 See eg, similar process described in the case of Danish (and Nordic) development aid, Lars Engberg-Pedersen "The Future of the Danish Foreign Aid: The Best of the Second-Best" [2006] Danish Foreign Policy Yearbook 107 at 129.

which Norway is implementing its Finnmark Act as a possible model to ratify and implement the ILO Convention No 169.

There is also an interesting process to negotiate an international convention for regulation of the relations between the Saami and the three Nordic countries (thus, excluding Russia), which would constitute another step in policy diffusion and harmonisation of Nordic regulations. The attempts to create a Saami Convention date back to the mid-1980's idea proposed by the Saami Council, after which it was enthusiastically received in the Nordic Council.<sup>53</sup> An expert committee commenced its work in 2002 and this group, which had a unique composition of equal number of representatives from both the three Saami Parliaments and the three Nordic States, came up with a very innovative idea for an international convention. The Draft is very ambitious, clearly endorsing the Saami self-determination, and in general terms, giving the Saami Parliaments a status close to treaty parties. For example, ratification of a treaty and any amendments to it would require the consent of the three Saami Parliaments. If this type of convention could be negotiated, it certainly would serve as a pioneering model for regulating the relations between nation-states and transnational indigenous peoples, an issue that is relevant in the Arctic and elsewhere in the world.

Yet the road from the Draft to an actual treaty may be challenging because the Draft is very ambitious in terms of Saami status and rights. Negotiations were supposed to start at the beginning of 2008 but there were several postponements when the three States studied the implications of the Draft for their national legal systems, and the outcomes of these studies have shown that there are many difficult challenges ahead. A good example is the Finnish situation in terms of granting Saami full self-determination. The current Finnish system is typical of a unitary State, where "[t]he powers of the State in Finland are vested in the people, who are represented by the Parliament".<sup>54</sup> Finland is also divided into municipalities that enjoy a great deal of self-governance, and the land area of three municipalities (and one portion of one municipality) overlap with that of the Saami homeland where the Saami have the lowest form of self-governance, namely that over their cultural and linguistic affairs. To ratify and implement the (Draft) Nordic Saami Convention in the form as it was when the Expert Committee submitted it would require at least a partial overhaul of the Finnish constitutional system.

#### *D. Greenland (Denmark)*

After World War II, Greenland was listed as a non-self-governing territory in accordance with Chapter XI of the UN Charter. The Administering powers, in the case of Greenland Denmark, assumed the responsibilities defined in Article 73 of the Charter:<sup>55</sup>

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

[...]

53 See the whole history, Timo Koivurova "The Draft of a Nordic Saami Convention" (2007) 6 *European Yearbook of Minority Issues* at 103; Timo Koivurova "The Draft Nordic Saami Convention: Nations Working Together" (2008) 10 *Int C L Rev* at 279.

54 Constitution of Finland (11 June 1999, in force 1 March 2000, 731/1999) at s 2.1.

55 Charter of the United Nations (26 June 1945, San Francisco) 1 UNTS XVI at ch XI at 73.

B. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

Yet just before the listed non-self-governing territories started to gain their independence via exercising their right to self-determination from the mid-1950s, Denmark removed Greenland from the UN list. Denmark argued that it had organised a referendum in Greenland and that the population composed of Inuit majority wanted to join Denmark. As argued by Alfredsson, there are good reasons to suspect that the referendum was faulty in many respects and thus can be seen as invalid. For instance, only some Inuit in Greenland were consulted and even then they were not fully informed as to what was the ultimate purpose of this “referendum”.<sup>56</sup>

Denmark treated Inuit in Greenland as indigenous peoples and ratified the ILO Convention No 169 in 1996 (without introducing any changes in domestic regulations). Greenlanders were guaranteed large Home Rule in 1979 and they chose to withdraw from the then European Economic Community (EEC, predecessor of the EU) in 1985. After many years of heated debate over the status of Greenland and whether Inuit are a people with a right to self-determination, the Danish-Greenlandic Commission was established and in July 2009 the Inuit were, after a referendum, guaranteed greater autonomy as a people, who also have a right to become independent under certain conditions.

There is only one human rights petition that has been launched by Greenlandic Inuit. The Thule Tribe complained against Denmark about their forced eviction from their home region due to the 1952-1953 establishment of the United States Thule air base in the area. The case progressed through the whole Danish judiciary and eventually the Inuit complained to the ECtHR after not having all their complaints endorsed by the Danish judiciary.<sup>57</sup> In 2006, the ECtHR ruled that the infringement of the right to property cannot be taken up by the Court as the event occurred before Danish ratification of the European Convention on Human Rights;<sup>58</sup> the Convention was ratified four months after the relocation took place.<sup>59</sup>

### III. WHY DOES INTERNATIONAL LAW INFLUENCE THE DOMESTIC INDIGENOUS POLICY AND LAW IN THE ARCTIC STATES AND WHY IT DOES NOT?

It is possible to speculate on the reasons why there are so many differing ways that the Arctic States receive and endorse indigenous international standards. There seems to be clear difference between the three vast federal States and the four Nordic States as regards their receptivity of indigenous international standards. The Nordic States are known to be active in the UN system, and thereby also taking UN and international standards seriously in their national legal and political

56 Gudmundur Alfredsson “Greenland and the Law of Political Decolonization” (1982) 25 GYIL at 290.

57 *Hingitaq and Others v Denmark* (18584/04) ECHR 12 January 2006.

58 Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, Rome, entered into force 3 September 1953) CETS 5.

59 However, Inuit affected by the relocation complained to the ECtHR regarding the amount of compensation ruled in 1990s by Danish courts, which indeed found the action interfering with the property rights of the Inuit. The Court, in turn, ruled that these complaints fall under its competence, but eventually found them ill-founded. See Aida Grgić and others “The Right to Property Under the European Convention on Human Rights. A Guide to the Implementation of the European Convention on Human Rights and its Protocols” (Human Rights Handbooks, No 10, Council of Europe, 2007) European Court of Human Rights <<http://echr.coe.int/NR/rdonlyres/97564258-437D-4FFD-A54D-2766DE255CCA/0/DG2ENHRHAND102007.pdf>>.

systems, and also in terms of indigenous standards. It can be presumed that this is one factor distinguishing the Nordic State policies from the indigenous policy and law of the three big federal States.

The internationalist approach by the Nordic States, but also to lesser extent Canada,<sup>60</sup> has the effect of making these States be more concerned about their human rights reputation, both domestically and in international fora. One can argue that the international identity of these States was very much built on their contributing to the UN system and promoting a strong international legal regime with respect for human rights. Nordic countries often view themselves as good international citizens or even moral superpowers,<sup>61</sup> and have been many times perceived also by others as State norm entrepreneurs, that is, those developing and advocating new norms and early adopters of such new norms.<sup>62</sup> The fulfilment of international obligations constitutes in this context a value in itself, as the state becomes “proud to be a forerunner of human rights” and an example for other states to follow.<sup>63</sup>

Nordic States have long cherished their alleged multilateralism, that is, placing greater weight on normative and ethical considerations in the formation and conduct of their foreign policies in contrast to real politik considerations.<sup>64</sup> This type of foreign policy has made these States more vulnerable to international pressures and the politics of embarrassment by domestic groups, inter alia indigenous peoples.

The Nordic States have also been among those that have contributed most to the development of international norms specific to indigenous peoples, such as the ILO Convention No 169, 2007 UN Declaration or the establishment of the UN Permanent Forum on Indigenous Issues. Correspondingly, they are expected to be diligent in implementing domestically the very same international normative frameworks they have themselves promoted.<sup>65</sup>

Furthermore, crucial experiences, such as the damming of the Alta River in northern Norway prepare political and social actors for policy changes. The permitting of construction of the Alta dam that flooded reindeer pastures of the indigenous Saami triggered the first serious political and legal fight by the Saami against the Norwegian authorities during the end of 1970s and the beginning of 1980s. The *Alta* case made the issue of indigenous rights particularly visible and created domestic pressure on the authorities.<sup>66</sup> Therefore, lack of such experience may limit the openness of a State to international norms. The difficulties connected with the ratification of the ILO Convention No 169 in Finland and Sweden, despite the pressures described above, demonstrate that domestic challenges and barriers in international law reception may prove particularly critical in the case of the norms applicable to indigenous peoples. Constraints connected with the liberal

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60 Lightfoot, above n 14, at 101.

61 Bergman, above n 5, at 74-77; Peter Lawler “Janus-Faced Solidarity: Danish Internationalism Reconsidered” (2007) 42 *Coop & Conflict* 101 at 101-106; Christopher S Browning “Branding Nordicity. Models, Identity and the Decline of Exceptionalism” (2007) 42(1) *Coop & Conflict* 27 at 28-34.

62 The term norm entrepreneur originally refers to persons developing new norms, but has over time extrapolated also to groups and states. See Martha Finnmore and Kathryn Sikkink “International Norm Dynamics and Political Change” (1998) 52(4) *International Organisations* at 896-899; Christine Ingebritsen “Norm Entrepreneurs: Scandinavia’s Role in World Politics” (2002) 37(1) *Coop & Conflict* at 11.

63 Anne Julie Semb “How Norms Affect Policy – The Case of Saami Policy in Norway” (2001) *International Journal on Minority and Group Rights* 8 177 at 206-207.

64 Lawler, above n 61, at 101-102; Browning, above n 61, at 38.

65 Lawler, above n 61.

66 Semb, above n 63, at 203-206.



welfare state system, principles of equality and the legacy of colonisation and settlement process limit the ability of also Nordic States to adopt strong rights protections for the Saami.

Such constraints are much more visible in Canada and the United States, countries that were established on the basis of the doctrine of discovery. Indigenous collective rights, as they are currently shaped by the UN 2007 Declaration, challenge these notions.<sup>67</sup> For this reason, arguably, the States attempt to fit the indigenous claims into their liberal systems rather than complex indigenous rights frameworks offered by international instruments. In Canada, aboriginal self-governance is accepted and resonates with common law tradition, while the doctrine of self-determination appears to be often rejected.<sup>68</sup>

Resistance to the direct influence of international law on the domestic systems, based on common law legacy and the United States constitutionalism (discussed earlier) poses another, more general challenge to the adoption of indigenous rights instruments in North America.<sup>69</sup> As argued by constructivists, new norms need to fit into the already existing normative systems, for instance the UN Declaration needs to confront the full force of common law legacy and the United States' constitutionalism.<sup>70</sup>

Due to the normative pressures from the international community, even those States where international law has less influence than in Nordic States may find it difficult to reject altogether the influence of indigenous international standards. According to some researchers, the achievements of Canadian indigenous peoples would have been impossible without the existence of international institutional pressure, even if its influence is not direct from a legal point of view.<sup>71</sup>

Most commentators would agree that even if Canada has not internationalised its domestic indigenous policy and law, indigenous issues are handled well and are seen as part of the Canadian nation-building, which accommodates diversity of solutions. This is likely to be one more reason why Canada has followed its own path in this field of policy. The United States and the Russian Federation also prefer domestic solutions. This is probably because the treatment of various groups in a State is at the core of domestic policy and many larger States have problems with international law intervening in these core domestic policy issues. Russia's current fairly eccentric indigenous domestic policy and law (together with the diversity and number of various indigenous peoples) would seem to underline Russian problems in buying into any of the indigenous international standards available.

Even if Inuit in Greenland were long treated as indigenous people of Denmark, it seems fair to argue that Denmark's alleged illegal annexation of Greenland in 1953 would come to haunt the country sooner or later, especially because Denmark is known to respect and promote international law in its foreign policy.<sup>72</sup> Thus the situation in Greenland may be explained as a kind of prolonged decolonisation process.

Another domestic factor influencing the way in which the international norms are implemented by Arctic States is the advocacy conducted by indigenous groups themselves. Indigenous

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67 Lightfoot, above n 14, at 98-102; "International Law as an Interpretative Force....," above n 22, at 1751-1753.

68 Dalton, above n 29, at 3-5.

69 Lightfoot, above n 14, at 98-99; Katz, above n 27.

70 Finnmore and Sikkink, above n 62, at 906-909; Adam Stepien "The Influence of the Sámi and Inuit on the Danish and Norwegian Development Cooperation with the Indigenous Peoples in the Global South: Actors and Norms" [2011] *Polar Law Yearbook* (in print).

71 Dalton, above n 29, at 1.

72 Lawler, above n 61.

movements often take up the role of norm entrepreneurs,<sup>73</sup> pressing their Governments to adopt various norms, often already existing in international law. Such influence may occur through diverse channels: politics of embarrassment performed at the international level; lobbying; public awareness campaigns; persuasion; formation of coalitions with other civil society actors (for example environmental advocacy organisations, as in conflict over logging in Finnish Lapland); or legal actions before international courts and human rights bodies. It is hardly surprising that the adoption of international indigenous rights instruments, providing complex legal protection and safeguarding indigenous autonomy, is high on the agenda of indigenous organisations in their advocacy activism.

The difference in the power of influence of indigenous movements in various states is obvious when Western states are compared with Russia. Indigenous groups from North America and the Nordic States have greater resources at their disposal and stronger organisational capacity than their Russian counterparts. Moreover, they are the ones that started the international indigenous movement and therefore international indigenous instruments often reflect their particular situation (hence the accusation that international indigenous law is mainly applicable to the Western hemisphere). State funding, more favourable economic situation, well educated elites, and comparatively strong organisations in Western democracies create better conditions for indigenous peoples to claim their rights. In contrast, Russian indigenous groups often lack State funding and organisational capacity in order to facilitate international (or even national) activity. At the beginning of 1990s, when the Russian indigenous peoples' representatives took part for the first time in international indigenous meetings, their limited understanding and knowledge of international mechanisms in comparison to their counterparts from the other side of the Arctic Ocean, was evident (however, Russian indigenous capacity is gradually rising).<sup>74</sup> Thus, the lack of Russian indigenous cases in international bodies may be an outcome, *inter alia*, of the weakness of indigenous movement and the constraints put on the indigenous activism by the national and local administration.

In the three Nordic countries, the Saami movement began in earnest from the famous *Alta* case in Norway. This case, which was also taken to the then European Commission on Human Rights, concerned a dam built on one of the northern rivers by Norway, the construction of which had an adverse effect on Saami reindeer herding. It heralded a momentous awakening of Saami identity, which led to fight for their rights attitude not only in Norway but in other Saami areas as well. It clearly had an impact in Norway, Finland and Sweden and also influenced the way these three Nordic countries treat their Saami people, a development that was strengthened by the abovementioned process of policy convergence or policy diffusion between Nordic States.<sup>75</sup>

The impact of internal factors on the possibility for the State to incorporate and implement international norms is also clearly visible in Russia, where indigenous groups are diverse and numerous, and Arctic populations located in remote areas. This, together with federal political system and centralised Government, makes it particularly challenging for international indigenous law to be fully implemented throughout the Federation.

In order for international norms to make their way into domestic legal frameworks, it is evidently important that the international norm in question is connected to the already existing nor-

73 Finnmore and Sikkink, above n 62, at 896-900.

74 Mads Fægteborg "Reflections on the Arctic Leaders' Summit Process" (2005) Arctic Information, Saami Council <[www.saamicouncil.net/files/20051227133433.pdf](http://www.saamicouncil.net/files/20051227133433.pdf)>.

75 Eriksson, above n 44, at 99-104; Trond, above n 44, at 44-46.

mative and legal frameworks.<sup>76</sup> The importance of the adjacency of new norms to pre-existing frameworks is evident in the case of Nordic States. Since these States have relied on general international human rights instruments and mechanisms, they are also influenced by indigenous international standards as these are part and parcel of human rights law. Yet, those provisions of indigenous international law that stand in opposition to liberal, equality-based perceptions of human rights have to confront difficulties in terms of their incorporation and implementation. Therefore, cultural, language and individual rights of indigenous people are adopted fairly easily, while land and broadly understood self-determination rights encounter political and legal resistance.

#### IV. CONCLUSIONS – LIKELY DEVELOPMENTS IN THE FUTURE

It is useful to ponder two questions in this final section. First, what kind of normative developments are likely to take place in the Arctic in view of the progress (or lack of progress) of indigenous status and rights in the Arctic? Second, spurred by the UN Declaration, what are the possible developments in the Arctic States and their impact on policy on the Arctic and Northern States?

Two very important soft-law developments from the perspective of Arctic indigenous peoples are the evolution of the Arctic Council and the Barents Euro-Arctic Region. As mentioned above, the still predominant inter-governmental forum in the Arctic is the Arctic Council, having as its members all the eight Arctic States. The region's indigenous peoples have a unique status in the Council as its permanent participants, who need to be consulted before any decision is made by the Council members. Their status is higher than many non-Arctic nation-States who participate only as observers in the Council. As permanent participants, the six indigenous peoples' international organisations have been able to exert influence on the policy and science sponsored under the Arctic Council and made stronger contacts with each other. Currently, the three indigenous peoples taking part in the co-operation in the Barents Euro-Arctic Region (BEAR), consisting of co-operation between both Governmental and local level, have started to demand at least the same status in this international co-operation (taking place in the North-West Russia and Northern Fennoscandia) as the indigenous peoples enjoy in the Arctic Council as permanent participants.

A good example of how strong international policy actors Arctic indigenous peoples' organisations have become is the reaction by the Inuit Circumpolar Council and the Inuit leaders in four Arctic countries to the 2008 May Ilulissat Declaration by the five coastal States of the Arctic Ocean (Norway, Denmark, the United States, Canada and Russia). Since they were not invited to this meeting, and Ilulissat Declaration included a somewhat paternalistic vision of State-indigenous relationship,<sup>77</sup> they issued their Inuit Circumpolar Declaration on Arctic Sovereignty where they insisted that the Inuit need to be involved in this process as full partners because of their self-determination and many other internationally guaranteed human rights.

This type of status given to indigenous peoples' international organisations at the international level has served also to awaken the identity of Russian indigenous peoples, as most of them are now represented by the Russian Association of Indigenous Peoples of the North, Siberia and the Far East (RAIPON), one of the Arctic Council's permanent participants. Even if the centralisation and modernisation processes during the Putin-Medvedev era have not been amenable to internationalising indigenous law and policy, it is also the case that Russian indigenous peoples'

<sup>76</sup> Semb, above n 63, at 179-182; Finnmore and Sikkink, above n 62, at 908.

<sup>77</sup> Ilulissat Declaration (Ilulissat, 28 May 2008) Ocean Law <[www.oceanlaw.org/downloads/arctic/Ilulissat\\_Declaration.pdf](http://www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf)>.

consciousness of their internationally guaranteed human rights has risen, which can even in the longer-term lead to human rights petitions, for instance, to the Human Rights Committee.

With respect to the legal status and rights of the Saami, there are two interesting developments: the negotiations over the Nordic Saami Convention, and whether Finland and Sweden will ratify the ILO Convention No 169. To some extent, we can foresee that even if the content of the two conventions differs in many respects, there are many similarities, making it likely that in Finland and Sweden the ratification of the ILO Convention No 169 (and implementation of the UN Declaration) and the negotiation of the Nordic Saami Convention need to be done together. The more likely outcome seems to be that Sweden and Finland could ratify the more modest standards of the ILO Convention No 169, meaning that the negotiations on the basis of the Draft Nordic Saami Convention will likely tilt towards making this Convention closer in content to the ILO Convention No 169. In the longer term, it seems difficult for Finland and Sweden not to adopt the legal standards, such as the ILO Convention No 169. This is due to the fact that both these countries receive vast amount of criticism from all international human rights and other bodies for not ratifying the ILO Convention No 169. As an example, if there is one single human rights issue undermining Finland's reputation internationally, it is the non-ratification of the ILO Convention No 169.

Greenlandic Inuit will likely establish their own independent State at some point in time. The timing of this secession from Denmark is very much connected to how quickly and effectively Greenland can exploit its vast offshore hydrocarbon deposits. The more revenues the Inuit receive, the less financial transfers they receive from Denmark, a deal, which was struck when reaching the latest compromise and the ensuing Self-Governance Act.<sup>78</sup> If and when the Inuit establish their own State, they will no longer be indigenous peoples from the international legal perspective, as they will no longer need protection of indigenous legal standards against a State. Yet, Greenlandic Inuit would probably in any case remain part of the ICC, and continue to be represented as indigenous people in the institutions of Arctic governance and on the UN level.

What about the influence of the UN Declaration opening even the United States and Canada to international standards in their indigenous domestic policy and law? Even if the UN Declaration accommodates diverse solutions, it does provide a strong status and rights for indigenous peoples and is the first truly universal normative instrument for indigenous peoples. The reason why it has already caused so many normative developments all around the globe is that it was negotiated directly between States and indigenous peoples for over twenty years. It is truly a milestone document for indigenous peoples all over the world, including Arctic indigenous peoples.

The UN Declaration was the first time that Canada and the United States explicitly and intentionally endorsed an international instrument that espouses rights for indigenous peoples.<sup>79</sup> Yet, its implementation is something different for nation-States than implementing the law of the sea or international environmental treaties. This is due to the fact that if any normative instrument implementing the UN Declaration touches the very fundamentals of the continuous nation-building.

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78 Statsministeriet, Act on Greenland Self-Government (No 473 of 12 June 2009) Statsministeriet <[www.stm.dk/multimedia/GR\\_Self-Government\\_UK.doc](http://www.stm.dk/multimedia/GR_Self-Government_UK.doc)>.

79 In addition, there is also an ongoing process within the Organisation of American States to adopt Inter-American Declaration on the Rights of Indigenous Peoples. See on the drafting process within OAS, Organisation of American States, 2011. Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Permanent Council of OAS (2011) Committee on Judicial and Political Affairs OAS <[www.oas.org/consejo/cajp/Indigenous.asp](http://www.oas.org/consejo/cajp/Indigenous.asp)>.

Hence, even if it certainly will have an effect on internationalising the indigenous domestic policy and law around the world, we should not expect any speedy implementation process. That much is clear also from the way Canada and the United States explained why they endorsed the Declaration, making it plain that it is the domestic process that is the crucial one and that they still have problems with certain parts of the Declaration.<sup>80</sup> However, it seems that in the course of time, the Canadian position that the UN Declaration does not codify customary international law will be called into question. Already many human rights treaty bodies apply many provisions of the UN Declaration that detail what these general human rights treaties require of States as regards their indigenous peoples.<sup>81</sup> Hence, in the long-term, the UN Declaration is likely to transform the indigenous policy and law of even larger federal States to be more influenced by universal human rights norms, which is also for the benefit of Arctic indigenous peoples.

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80 “Canada’s Statement of Support...,” above n 24; “Announcement of US Support...,” above n 23.

81 See Mauro Barelli “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58 *International and Comparative Law Quarterly* at 957; Jo M Pasqualucci “International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 27 *Wis Int’l L J* at 51.