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From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)gain Their Right to Self-Determination

It seems fair to say that, given the generally sluggish pace at which international law evolves, indigenous peoples have achieved a great deal in a relatively short period of time. The modern international indigenous peoples' movement did not begin until the end of the 1970s, and in 1994 a UN body had adopted the Draft United Nations Declaration on the Rights of Indigenous Peoples, which accorded, in provisional terms, indigenous peoples a right to self-determination. Meanwhile, in 1989, the International Labour Organization (ILO) replaced its largely assimilationist 1957 convention with the Convention on Indigenous and Tribal Peoples in Independent Countries (ILO Convention),¹ which fleshed out a wide variety of legal rights for indigenous peoples whose home states ratified the Convention. As the UN worked on adopting the Declaration on the Rights of Indigenous Peoples, the Organization of American States (OAS) began drawing up a similar declaration for American indigenous peoples,² and the Nordic states started to work on a Nordic Saami Convention. This normative activity manifested itself in the work of some UN human rights treaty monitoring bodies, in particular the Human Rights Committee.

Yet, despite the early success, many of these processes are still pending, and some processes have faced severe difficulties in finishing their task of producing a normative instrument. With the exception of the ILO Convention, which is in force but has only 18 ratifications, most other normative processes are pending.³ The treaty monitoring bodies have done an important job, but the legal influence of their pronouncements remains uncertain.

The argument in this article is that, more often than not, the wonderfully crafted treaty drafts – the work of experts in international human rights law – have raised excessive expectations among the indigenous peoples; after all, the drafts must be accepted by the representatives of states. The same

¹ ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, 28 ILM (1989), p. 1382.

² According to a recent press release (dated 27 January 2007), the Declaration is now making progress, <www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-112/07>, visited on 25 June 2007. See also the homepage of the Committee on Juridical and Political Affairs, <www.oas.org/consejo/CAJP/Indigenous.asp>, visited on 25 June 2007.

³ The most recent country to ratify was Spain, on 15 February 2007. See the current status of the ILO 169 Convention, <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>>, visited on 25 June 2007.

applies to the normative activities of the UN treaty monitoring bodies (treaty bodies), whose mandate is to interpret their respective treaties and whose interpretations become authoritative only if states do not oppose them.⁴ If anywhere, unrealistic expectations are most apparent in the case of indigenous peoples' struggle for the right to self-determination and accordingly this will be the focus of the article. It seems fair to say that the greatest ambition of the international indigenous peoples' movement has been to have the UN bodies and international law in general acknowledge their right to self-determination; all other rules and principles flow from this fundamental right.

The article will first take up three examples of international processes advancing the right to self-determination of indigenous peoples: the process whereby the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration), the attempt to negotiate a Nordic Saami Convention (Draft Convention) and the practice of the Human Rights Committee (HRC) in monitoring the observance of the International Covenant on Civil and Political Rights (Covenant). These illustrate well the different contexts in which the right to self-determination of indigenous peoples has been shaped thus far.

All of these processes have enunciated indigenous peoples' right to self-determination, but any claim to such a right has met with resistance from the states of the international community. Section two examines the reasons for such backlashes. The intention is to show how difficult it is to insert indigenous peoples into international law as category and, in particular, to have states accept the peoples' right to self-determination. Section three puts forward conclusions as to whether the problems experienced in promoting the right to self-determination of indigenous peoples are mere setbacks or whether they contain elements that might inform the international movement of indigenous peoples.

1. Three International Processes

The three international processes studied in this section differ from each other in significant ways. The work to produce the UN Declaration and the practice within the HRC reflect processes where the right to self-determination of indigenous peoples was enunciated as a universal right for all indigenous peoples. In contrast, the Draft Convention set out to articulate the right to self-

⁴ For a detailed analysis of this issue, the International Human Rights Law and Practice – Committee of International Law Association (ILA), and their study 'Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies', at <http://www.ila-hq.org/html/layout_committee.htm>, visited on 25 June 2007.

determination for a single indigenous people, the Saami. Adopting the UN Declaration and concluding the Draft Convention differ from the actions of the HRC in that the first two were geared to a final outcome, achieved in the case of the UN Declaration, whereas the Committee's work is ongoing. The UN Declaration is meant to be a non-legally binding declaration, even though it carries legal significance for the development of customary international law, whereas the Draft Convention is intended to be a legally binding treaty. The Concluding Observations by the HRC on the periodic state reports, its General Comments as to how a particular Covenant provision should be interpreted and the views it provides on individual communications all contribute to how the Covenant should be interpreted by the states parties.⁵

Even with these differences, these processes have much in common in that the main legal source they rely on is Article 1 common to the Covenant on Civil and Political Rights and the Covenant on Social, Economic and Cultural Rights.⁶ The Draft Nordic Saami Convention is important, because with the adoption of the draft a commentary was submitted to the Nordic governments and Saami parliaments as to how its provisions should be interpreted. Since the drafting of the UN Declaration did not flesh out the details of what self-determination of indigenous peoples would mean, and HRC practice has not specified this either, the Draft Nordic Saami Convention and the accompanying commentary are crucial in trying to reveal the essence of what would otherwise be a mere pronouncement that indigenous peoples have a right to self-determination.

1.1. The Human Rights Committee

⁵ It is good to bear in mind that even though the HRC has been the main treaty body endorsing the right to self-determination of indigenous peoples, it is not the only one. See, e.g., the Concluding Observations by the Committee on Economic, Social and Cultural Rights monitoring the observance of the Covenant on Economic Social and Cultural Rights to the Russian Federation: 'The Committee is concerned about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under article 1 of the Covenant. The Committee notes that the Law of 2001 On Territories of Traditional Nature Use of Indigenous Numerically Small Peoples of the North, Siberia and the Far East of the Russian Federation, which provides for the demarcation of indigenous territories and protection of indigenous land rights, has still not been implemented'. Concluding observations of the Committee on Economic, Social and Cultural Rights, the Russian Federation, 28 November 2003, E/C.12/1/Add. 94., para. 11.

⁶ The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, 993 UNTS 3.

When the Covenant was concluded in 1966, the international political movement to improve the standard of protection for the world's indigenous peoples had yet to emerge. Yet, the Covenant contained an article – Article 27 – which provided for the protection of minorities and applied to all minorities, including indigenous peoples:

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.

In the first stage of evolution of indigenous peoples' rights under the Covenant, their rights were specified by the HRC as part of protecting a minority's culture, as shown in the cases which the Committee took up.⁷ A salient case in this regard was *Lubicon Lake Band*, in which an Indian group invoked its self-determination right under Article 1, claiming Canada had been infringing the right by permitting various economic activities to take place in the Band's traditional territory. The HRC stated that Article 1 did not allow it to examine communications from collectives claiming a breach of their right to self-determination, because it may only receive and consider communications from individuals.⁸ The Committee nevertheless agreed to entertain the communication of the Lubicon Band, recasting it as a submission of the chief of the Band on behalf of the collective and thus enabling it to examine whether Canada had violated by its actions the rights of the indigenous minority under Article 27.⁹ This approach would continue in the cases to follow and was described as follows in paragraph 7 of the General Comment on Article 27:

⁷ The main cases are: *Lovelace v. Canada*, 30 July 1981, HRC, no. 24/1977, A/36/40 (1981) U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), *Kitok v. Sweden*, 27 July 1988, HRC, no. 197/1985, CCPR/C/33/D/197/1985, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, 26 March 1990, HRC, no. 167/1984, CCPR/C/38/D/167/1984, *Ilmari Länsman et al. v. Finland*, 26 October 1994, HRC, no. 511/1992, CCPR/C/52/D/511/1992, *Jouni E. Länsman et al. v. Finland*, 22 November 1996, HRC, no. 671/1995, CCPR/C/58/D/617/1995, *Mahuika et al. v. New Zealand*, 27 October 2000, HRC, no. 547/1993, CCPR/C/70/D/547/1993, *Äärelä and Näkkäljärvi v. Finland*, 24 October 2001, HRC, no. 779/1997, CCPR/C/73/D/779/1997.

⁸ See *Lubicon Lake Band*, *supra* note 7, paras 13.3. and 13.4. The wording of Article 1 of the Optional Protocol makes it clear that it is only individuals who can resort to this procedure. Article 1 reads: 'A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol'. Optional Protocol to the International Covenant on Civil and Political Rights, entry into force 23 March 1976. As of March 2007, there were 104 parties to the Protocol. The Protocol is at <http://www.unhchr.ch/html/menu3/b/a_opt.htm>, visited on 25 June 2007. See also *A.D. v. Canada*, 29 July 1984, HRC, no. 78/1980, A/39/49 (1984).

⁹ The Committee stated: 'With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right" the Committee

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.¹⁰

Also of interest is paragraph 3.2, which states:

The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.¹¹

The HRC's practice with respect to indigenous peoples' rights under the Covenant entered a new era with the Committee's adoption of Concluding Observations on the periodic report of Canada in 1999. The Committee urged Canada to report on the situation of its Aboriginal peoples in its next periodic report under Article 1.¹² This was a significant departure from the earlier focus of the HRC: previously it had regarded indigenous peoples as covered by Article 27; now it also viewed them as peoples under the Covenant's Article 1. The two relevant paragraphs of Article 1 are as follows:

reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in Article 1 of the Covenant, which deals with rights conferred upon peoples, as such. The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including Article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of Article 27 or other articles of the Covenant". See *Lubicon Lake Band*, *supra* note 7, paras 13.3. and 13.4.

¹⁰ General Comment No. 23 (50th Session, 1994) by the HRC, UN Doc. HRI/GEN/1/Rev.3, paragraph 7.

¹¹ *Ibid.*, para. 3.2.

¹² The Committee stated: 'The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next periodic report'. Concluding observations by the Human Rights Committee on Canada, 7 April 1999, UN Doc. CCPR/C/79/Add.105, para. 7.

1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

This new trend was also manifest in 2000 in the HRC's views in *Apirana Mahuika*, the first case decided after its 1999 Concluding Observations on Canada. In that case, the Committee stated:

The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, **the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.**¹³ (emphasis added)

At the beginning of this development, the Committee was overtly cautious to see to it that indigenous peoples were covered by Article 1: only if a state had itself addressed indigenous peoples as peoples or as having a right to self-determination, did the Committee urge the state to report on the situation of indigenous peoples under Article 1. A good example can be seen in the Concluding Observations to Norway in 1999:

As the Government and Parliament of Norway have addressed the situation of the Sami in the framework of the right to self-determination, the Committee expects Norway to report on the Sami people's right to self-determination under article 1 of the Covenant, including paragraph 2 of that article.¹⁴

As one former member of the Committee described this stage, it was like walking on thin ice, since the question whether indigenous peoples are peoples in the meaning of Article 1 was apparently a very sensitive one politically.¹⁵

¹³ See *Apirana Mahuika*, paragraph 9.2., *supra* note 7.

¹⁴ Concluding observations by the Human Rights Committee on Norway, 1 November 1999, UN Doc. CCPR/C/79/Add.112, para. 17.

¹⁵ See M. Scheinin, 'The Right to Self-Determination under the Covenant on Civil and Political Rights', P. Aikio and M. Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Turku, 2000), pp. 186-192.

However, after this initial ‘experimental’ period, the HRC seems to have taken a stronger stance on indigenous peoples’ right to self-determination: its concluding observations no longer hinge on the state itself treating indigenous peoples as a self-determining entity; rather, the Committee has considered all well-established indigenous peoples as being covered by Article 1.¹⁶ A good example is the Committee’s Concluding Observations to Finland: in its 2003 periodic report, Finland discussed the situation of its Saami indigenous people under Article 27,¹⁷ to which the Committee responded that, to its regret, “it ha[d] not received a clear answer concerning the rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of article 1 of the Covenant’¹⁸. Since 1999, the Committee has rather consistently regarded indigenous peoples as falling under Article 1, at least when it comes to groups that are widely recognised as such by the international community. Another noteworthy practice is that the Committee has not tried to confine Article 1 to guaranteeing only the resource self-determination of indigenous peoples (Article 1(2)), even though this has been its clearest emphasis.

In sum, over the course of some 20 years, the HRC has gradually developed the rights enjoyed by indigenous peoples. In the first phase, indigenous rights were protected pursuant to the protection of minorities set out in Article 27; from 1999 onwards the Committee has regarded indigenous peoples as covered by Article 1 as well. This clearly reflects the tension that existed even when the Covenant was being negotiated. Article 1 was perhaps the most controversial provision. Some perceived the article as limited to colonial situations, while the majority felt that it should apply to the people of any territory but should not accord minorities any right to secede. The solution adopted at the time was to grant minorities the right to enjoy their rights under Article 27 within the existing states.¹⁹

1.2. The UN Declaration on the Rights of Indigenous Peoples

¹⁶ 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/Add.105 (1999)); Mexico (UN Doc. CCPR/C/79/Add.109 (1999)); Norway (UN Doc. CCPR/c/79/Add.112 (1999)); Australia (UN Doc. CCPR/CO/69/AUS (2000)); Denmark (UN Doc. CCPR/CO/70/DNK (2000)); Sweden (UN Doc. CCPR/CO/74/SWE (2002)); Finland (UN Doc. CCPR/CO/82/FIN (2004)) USA (CCPR/C/USA/Q/3/CRP.4 (2006)).

¹⁷ The Fifth Periodic Report of Finland to the Human Rights Committee CCPR/C/FIN/2003/5, 24 July 2003, paras 86-93.

¹⁸ Concluding observations by the Human Rights Committee on Finland, 2 December 2004, UN Doc. CCPR/CO/82/FIN.

¹⁹ D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford, 1991), pp. 14-15.

The work on the UN Declaration began already in 1985 within the Working Group on Indigenous Populations (WGIP), which consisted of five expert members (and, which, from the beginning, allowed indigenous peoples broad access to the process, irrespective of whether they had gained indigenous status with ECOSOC).²⁰ For almost a decade, the WGIP devoted a large part of its time to drafting the text of what was to become the UN Declaration in a process involving representatives of indigenous peoples, government delegations and experts on the subject. In 1994, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights) adopted the Draft Declaration prepared by the WGIP and sent it to its parent body, the Commission on Human Rights (now replaced by the Human Rights Council), for consideration.²¹ The article on self-determination drew heavily on Article 1(1) of the common Article to the Covenants in stating:

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.²²

Another important provision of the 1994 Draft for the future framing of the right to self-determination of indigenous peoples was Article 31, which set out a right to autonomy:

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

²⁰ In 1982 the Working Group on Indigenous Populations was established as a subsidiary organ to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), endorsed by ECOSOC on May 7, 1982; UN Doc. E/Res/1982/34. It is comprised of five members of the Sub-Commission, one representing each of the five geographical regions designated by the UN for electoral purposes. As a subsidiary organ of the Sub-Commission, the Working Group is located at the lowest level of the hierarchy of UN human rights bodies. Its recommendations have to be considered and accepted first by its superior body, the Sub-Commission, then by the Commission on Human Rights (now the Human Rights Council) and the Economic and Social Council (ECOSOC) before being submitted to the General Assembly.

²¹ Draft United Nations Declaration on the Rights of Indigenous Peoples, 1994/45, at

<[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En)>, visited on 25 June 2007.

²² Article 3, E/CN.4/Sub.2/1993/29/Annex I, 23 August 1993

²³ *Ibid.*, Article 31.

The Draft Declaration's provision on self-determination was heavily influenced by the persistence of indigenous peoples,²⁴ who attached great importance to such a right and were able to push for the amendment of this article in the last stages of producing the Draft. The 1993 version of the Draft, which was rejected by the indigenous peoples, set out the right in much more modest terms:

Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with Charter of the United Nations. By virtue of this, they have the right, *inter alia*, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government.²⁵

In 1995, the Commission on Human Rights considered the text submitted by the Sub-Commission and decided to establish an inter-sessional Working Group²⁶ with a mandate to consider the text presented and to draw up a draft declaration for the consideration by the Commission and eventual adoption by the UN General Assembly as part of the International Decade of the World's Indigenous People (1995-2004) - a goal that was never achieved. The inter-sessional Working Group consisted only of state representatives, although indigenous peoples were given access to the process by being accorded the status of observers.

Even though progress was slow in the Working Group and the goal of having the UN General Assembly adopt the UN Declaration by the end of 2004 was never achieved, in June 2006 the newly created UN Human Rights Council adopted the Declaration (although not without opposition (30 votes in favour, 2 against, 12 abstentions)),²⁷ recommending that the UN General Assembly adopt it with the following formulations of the right to self-determination:

²⁴ C.E. Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples' in 12 *European Journal of International Law* (2001), pp. 141-157, at 142-143.

²⁵ *Ibid.*, at p. 156. Operative paragraph 1 of the 1992 version reads: 'Indigenous peoples have the right to self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government'. E/CN.4/Sub.2/1992/33.

²⁶ Resolution of the Commission on Human Rights 1995/32, 3 March 1995.

²⁷ See the version adopted by the Human Rights Council (A/HRC/1/L.10, 30 June 2006, pp. 56-72), at <<http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/HR%20Council/HRCouncil1streport2006.pdf>>, visited on 25 June 2007. See the explanatory paper by Canada after its voting against the Declaration, which also outlines the reasons why the other countries that abstained from the vote did so, many of them having problems with Article 3 on self-determination (Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples -June 29, 2006), at <http://www.ainc-inac.gc.ca/nr/spch/unp/06/ddr_e.html>, visited on 25 June 2007.

Article 3

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

Article 4

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

Even though the original 1994 Draft and the 2006 Draft adopted by the Human Rights Council are identical in framing the right to self-determination of indigenous peoples, it is noteworthy that what had been Article 31, dealing with autonomy and self-government, had become Article 4; it was now possible to read Article 3, on self-determination, and Article 4 – the two key provisions - together. It can be argued that Article 4 specifies that indigenous peoples' right to self-determination is limited to the 'right to autonomy or self-government', which is often called the right to internal self-determination, that is, self-determination within the confines of existing states. This interpretation is made even more pertinent when we compare the way the right to autonomy and self-government are worded in Articles 31 and 4: the former saw it 'as a specific form of exercising their right to self-determination', the latter 'in exercising their right to self-determination'. The first formulation, if read in the context of Article 3, seems to indicate that autonomy and self-government are possible ways to implement indigenous peoples' right to self-determination, whereas the new Article 4 gives more force to the argument that the right to autonomy and self-governance embraces the ways in which indigenous peoples' self-determination can be realised.

Even with the relocation of Article 31, the process of adopting the UN Declaration came to a halt when a non-action resolution by the Namibian Delegation was supported by the majority in the 3rd Committee of the UN General Assembly.²⁸ One likely reason for this was precisely Article 3, which was still there stating that indigenous peoples have a right to freely determine their political status.

²⁸ See the press release from the 3rd Committee, at <<http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm>>, visited on 25 June 2007. As stated in the UNGA press release: 'But an initiative led by Namibia, co-sponsored by a number of African countries, resulted in the draft being amended. In its new form, the draft would have the Assembly decide "to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon"... The amendments were adopted by a vote of 82 in favour to 67 against, with 25 abstentions (annex II)... Prior to the vote, the representative of Peru — recalling that it had taken 24 years for the Declaration to be hammered out -- said the original draft had been revised to address the concerns of many delegations, particularly regarding the principle of self-determination of peoples and respect for national sovereignty... However, his counterpart from Namibia, explaining the proposed amendments, said that some provisions ran counter to the national constitutions of a number of African countries and that the Declaration was of such critical importance that it was only "fair and reasonable" to defer its adoption by the Assembly to allow for more consultations'.

It is not difficult to imagine that adopting such a text would have been troublesome for anyone in the 3rd Committee, especially those representing the African countries.

The matter came up for a final decision in the 61st session of the General Assembly, in September 2007, where the Declaration was adopted, with 143 states voting in favour, 4 against (New Zealand, Australia, the USA and Canada) and 11 abstaining (including Russia).²⁹ There were some important changes in the Declaration as compared to the version adopted by the Human Rights Council, most importantly with regard to the right to self-determination of indigenous peoples. The version adopted by the Human Rights Council left the door open for indigenous peoples to claim full-blown self-determination for the simple reason that Article 3 was still there, entitling them in principle to fully determine their political status. This was the crux of the matter, even though a good argument can be made that Articles 3 and 4 should have been interpreted together to mean that indigenous peoples were entitled to internal self-determination only; Article 3 still left the door open for indigenous peoples to claim full self-determination. In order to make sure that there was no possibility to read too much into Article 3, the version ultimately adopted by the UN General Assembly made a crucial change in Article 46(1), which in the version adopted by the Human Rights Council reads as follows:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

This was changed to make sure that indigenous peoples' self-determination could mean at most internal self-determination:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action **which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.** ³⁰(emphasis added)

1.3. The Nordic Saami Convention

²⁹ For a general overview, see the information at <<http://www.iwgia.org/sw248.asp>>, visited on 25 October 2007.

³⁰ Article 46 (1) of the adopted UN Declaration, which can be downloaded at <<http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13ResolutiontextDeclaration.pdf>>, visited on 25 October 2007.

The process which led to the adoption of the Draft Nordic Saami Convention (Draft Convention) reflects well the approach codified in Article 3 of the Draft: that the Saami are a people, not only four indigenous/minority groups living in four states.³¹ This is seen first of all in the way the process was commenced; that is, the Saami Council was the first to take up the idea of concluding an international convention that would address the legal status and rights of the Saami.³² After several years of discussions and studies on the issue, the idea of a Saami Convention reached the Nordic Council in 1995. During the meeting, the three Nordic ministers responsible for Saami affairs decided that a working group should be established whose task would be to clarify the need and basis for such a convention.³³

The working group (which was composed of three representatives from each Nordic state and one representative from each of the Saami parliaments) was established in 1996 and completed its work by 1998 with a recommendation that the work on the Nordic Saami Convention should be continued. As one possible way forward in the process, the working group suggested the establishment of an expert committee that would provide the actual negotiations with a draft text.³⁴ The Saami Co-operation Council, established in 2000 and comprising the ministers responsible for Saami affairs from the three Nordic states as well as the presidents of the Saami parliaments, took the next step and decided, on 7 November 2001, that an expert committee should be appointed; it also set out the terms of reference for the committee.³⁵ On 13 November 2002, the Council appointed the members of the Expert Committee.³⁶ Interestingly, the composition of the Committee was fully equal in representation, as each of the three Nordic states had appointed one member, and each of the three Saami parliaments representatives of their own. The Committee thus had six members, and their deputy members, to attain the goal set out by the Council: to produce a

³¹ One problematic issue the Expert Committee needed to tackle was the exclusion of the Russian Saami, the smallest of the Saami communities (approximately 2000 persons). When outlining the terms of reference for the Committee, the Saami Co-operation Council also asked it to take a stance on whether the Russian Saami could be included in the Draft Convention. The Committee, however, argued that the Draft was meant to be a Nordic one, and thus the Russian Saami were not included (pp. 63-64 of the Report). On the other hand, the Committee made it clear that it would be desirable for the three Nordic states to organise relations with Russia in such a way that it would be possible to co-operate with the Russian Saami (p. 64). The Committee also pointed out that a Saami who is a Russian national and resides in any of the three Nordic states would be covered by the Draft Convention.

³² See p. 57 of the Report.

³³ *Ibid.*, p. 58.

³⁴ *Ibid.*, p. 59.

³⁵ *Ibid.*, pp. 44-46.

³⁶ *Ibid.*, pp. 45-46.

draft text of a Nordic Saami Convention together with material explaining how the Expert Committee had produced the draft . The Committee submitted its work in October 2005.³⁷

The extensive document (hereinafter ‘the Report’) consists of nine sections and four annexes totalling 340 pages.³⁸ The Finnish version of the Report consists of the Committee’s proposed draft of the Convention in the Finnish and in Swedish languages (section 1)³⁹. The most important part of the Report for present purposes is section 9, which clarifies the content of each of the 51 provisions of the Draft Convention and is referred here as ‘the Commentary’. At the moment, the states and Saami parliaments are preparing their negotiation positions. The final decision on whether and in what way the negotiations on the basis of the Draft Convention will proceed will be taken by the Saami Co-operation Council in November 2007.⁴⁰

As amply demonstrated in the process by which the Draft Convention was drawn up, the core of the approach is the assertion that the Saami are a people with a right to self-determination. This is expressed in the following way in the Draft, Article 3:

As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources.

³⁷ The Report was submitted by the Expert Committee in Oslo 26 October 2005. In Finland, it was submitted, in the presence of all ministers responsible for Saami affairs and the presidents of the Saami parliaments, at the premises of the Ministry of Justice, on 16 November 2005. See the press release at <<http://www.om.fi/Etusivu/Ajankohtaista/Uutiset/Uutisarkisto/Uutiset2005/1145624694333>>.

³⁸ See pp. 151-246. The other parts of the Report consist of the following: how the Committee was appointed and its terms of reference (Section 2, pp. 44-46); a summary of the content of the proposed text for a convention (Section 3, pp. 47-56); an explanation of the process leading to the appointment of the Committee and how the Committee has fulfilled its task (Section 4, pp. 57-62); a discussion of some of the general issues related to the Convention (Section 5, pp. 63-64); a review of the legal and factual situation of Saami in Finland, Norway, Sweden and the Russian Federation (Section 6, pp. 65-103); an extensive analysis of the international treaties and other international instruments relevant from the viewpoint of Saami rights (Section 7, pp. 104-147); and a discussion of the status of Saami in the Convention (Section 8, pp. 148-150). The Annexes consist of a review of a study of whether Saami could be parties to the proposed Convention (Annex I, pp. 247-250), a discussion of the legal status of the Russian Saami (Annex II, pp. 251-262), an article by three members of the Expert Committee on the right to self-determination of the Saami (Annex III, pp. 263-318) and the Draft United Nations Declaration on the Rights of Indigenous Peoples, together with suggestions from the Nordic countries, New Zealand and Switzerland (Annex IV, pp. 319-340). The unofficial English version of the Draft Convention can be found on the Saami Council website, at <[http://www.saamicouncil.net/includes/file_download.asp?depid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?depid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc)>, visited on 25 June 2007.

³⁹ *Ibid.*, pp. 9-43.

⁴⁰ Telephone conversation with the director of legal affairs at the Ministry of Justice, Matti Niemivuo (who was also the Finnish representative on the Expert Committee), on 8 October 2007.

This article clearly relies on common Article 1 of the Covenants. The Expert Committee also provided extensive material on how it came up with the particular wording with regard to self-determination. This is contained not only in the Commentary, where individual provisions are explained, but also in Annex III, in an article on self-determination written by three members of the Committee.⁴¹ Even though the part of the Commentary dealing with Article 3 does not refer to the analytical distinction between internal and external self-determination but the article in Annex III does, the Commentary and the background article are fully in line with each other and together provide a rich body of interpretative material showing why and how Article 3 is written the way it is.

The part of the Commentary dealing with Article 3 starts by citing common Article 1 to the Covenant and the Covenant on Economic, Social and Cultural Rights. It further emphasises that all three Nordic states have become parties to these two Covenants, and two of the states (Norway and Finland) have incorporated the Covenants as part of their national legal system. In addition, and importantly, the Commentary refers to the practice whereby the HRC from 1999 onwards has applied Article 1 to certain indigenous peoples and cites the Concluding Observations which the HRC has submitted to Finland, Sweden and Norway in regard to their Saami people. The Commentary also refers to the process of having the General Assembly of the UN adopt the UN Declaration, which contains an almost identical provision to that of Article 1(1) of the Covenant, the difference being that the beneficiaries of the right to self-determination in the UN Declaration are indigenous peoples. The Commentary points out that during the process of drafting the UN Declaration, the Nordic states supported the provisions on the right to self-determination for indigenous peoples. With this, the Committee concluded that the Saami are not only an indigenous people but a people as defined in Article 1 of the Covenant.⁴² By way of further evidence, the article in Annex III takes up the practice of certain other human rights monitoring bodies that have also pronounced that Article 1 applies to indigenous peoples and cites the EU's Northern Dimension programme, which has articulated the Saami's inherent right to self-determination.⁴³

The Commentary also makes it clear that this right to self-determination does not contain a right to secession except in extreme circumstances, and that the Saami are not in a position to demand the right to establish their own state on the basis of international law as it currently stands. However,

⁴¹ J.B. Henriksen, M. Scheinin and M. Åhren, 'Saamelaisten itsemääräämisoikeus', pp. 263-315 of the Report (Annex III). The name of the article in English is 'The Right of the Saami to Self-determination', translation by the author.

⁴² *Ibid.*, pp. 155-157.

⁴³ *Ibid.*, pp. 263-315

the Commentary argues that the reference to international law in the context of Saami self-determination means that the content of the Saami right to self-determination will evolve as international law does.⁴⁴ Of particular interest is that the article attached to the Report as Annex III and written by three members of the Expert Committee states that indigenous peoples' right to self-determination cannot be restricted to its internal dimension. In support of their argument, the Committee submits that since 1999 the HRC has treated indigenous peoples as covered by Article 1 of the Covenant without excluding the external aspects of self-determination as enshrined in Article 1(1).⁴⁵ In addition, the article puts forward the argument, which coincides with the understanding of the Nordic states, that Article 3 of the UN Declaration entails a restriction whereby the right to self-determination currently does not empower a people to secede from independent states save in exceptional circumstances. Yet, the Expert Committee does espouse the view that indigenous peoples are entitled to exercise their external self-determination via representation in inter-state affairs and in international relations in general.⁴⁶ Perhaps surprisingly, the article does not even ponder the question whether the Saami have other powers of external self-determination, such as that to conclude treaties, if they are a people.⁴⁷ This obviously becomes a problem when one opens up the external self-determination argument: it is difficult to argue in a logical way which powers, short of secession, are included in the external part of self-determination and which are not.

⁴⁴ *Ibid.*, p. 157.

⁴⁵ *Ibid.*, pp. 263-315, at pp. 297-303.

⁴⁶ This was codified in the Draft Convention, Article 19, as follows: 'The Saami parliaments shall represent the Saami in intergovernmental matters. The states shall promote Saami representation in international institutions and Saami participation in international meetings'.

⁴⁷ What is surprising is that the article does not go into the question of whether the indigenous peoples, including the Saami, have external self-determination in the form of limited treaty-making power, given that the authors argue that Saami are an international legal subject, with powers in terms of not only internal but also external self-determination. The reason behind this choice by the Expert Committee seems to be that the foreign ministries of Finland and Norway very clearly stated that only states have treaty-making power (pp. 148-150 of the Report). The issue was discussed in the Expert Committee and it even commissioned a researcher, Annika Tahvanainen, to study the issue (Annex I). Ms Tahvanainen argued that it is primarily subjects of international law that have a right to conclude international treaties, that is, states and their organisations. In addition, some groups that have a decolonised past or are under alien occupation have been regarded as entities that may conclude international treaties in certain circumstances (p. 247). Yet, indigenous peoples do not qualify as such groups, and they are at most, according to Ms Tahvanainen, accorded the right to internal self-determination within the existing states. For a more comprehensive presentation of her argument, see A. Tahvanainen, 'The Treaty-Making Capacity of Indigenous Peoples', 12 *International Journal on Minority and Group Rights* (2005) pp. 397-419. In the end, the Expert Committee decided that having Saami parliaments as parties to the treaty would only confuse matters and hence it suggested that Saami parliaments ought not to be parties to the treaty but would otherwise have a powerful position in the treaty. For example, they would be in a position to veto the entry into force of the Convention, since their approval is required before the states can ratify the Convention (Articles 48 and 49) and before any amendments are adopted (Article 51). For an argument that Saami parliaments/Saami should be parties to the Nordic Saami Convention, see G. Alfredsson, 'Minimum Requirements for a New Nordic Sami Convention' in 68 *Nordic Journal of International Law* (1999), pp. 397-411. He argues at page 408 that: 'The Sami should be a party to a new Sami convention. The traditional approach has it that States conclude treaties, but there is no rule without exception. Sovereign States may choose to make agreements with non-state entities; accordingly, it is easy and simple for the Nordic States, if they so decide for reasons of equality and justice, to conclude a new convention with and not only about the Sami. It would be for the representative organs of the Sami themselves to decide whether they were to ratify a new convention as one group or as three groups'.

With such an ambitious wording on Saami self-determination, it seems fairly clear that if and when the actual negotiations commence on the Nordic Saami Convention on the basis of the draft presented, one of the bones of contention will be Article 3. This has already been indicated by the fact that the Finnish representatives on the Expert Committee have expressed reservations on some issues, one being Article 3 on Saami self-determination.⁴⁸ Since Finland seems to have the most problems with the Draft Convention in general, it will be useful to look into the remarks that were made in Finland when the Draft was circulated for comment.

The Ministry of Justice, the ministry responsible for Saami affairs in Finland, together with the Finnish Saami Parliament, requested comments on the Draft Convention from a total of 88 authorities, bodies and associations on 2 March 2006. The commenting period, which was the same for all three Nordic countries, lasted till 15 June 2006. The Finnish Ministry of Justice and the Saami Parliament received 63 statements on the Draft Convention from those solicited, as well as 4 unsolicited responses, all of which were compiled into a Summary Report.⁴⁹ In reading the published Summary Report, it seems fairly clear that many obstacles exist in Finland to signing and ratifying the Draft Convention at least as it presently stands.

In general, the associations or bodies that represent the Saami feel that the Draft Convention can be ratified as is or with slight modifications.⁵⁰ In addition, the ombudsman for minorities has taken a very positive stance on the Draft Convention in all of its aspects. The strongest resistance to the Draft has come from two authorities: the Ministry of Agriculture and Forestry (which is in charge of reindeer herding) and the *Metsähallitus* (a state enterprise which manages state-owned lands and waters that constitute approximately 90% of the land and water areas in the Saami homeland). Even though other authorities have also entered certain reservations regarding the Draft Convention, only these two have made their stance on the Draft Convention clear, arguing that it should not be accepted as it now stands and that Finland should continue its traditional path of examining the possibilities to ratify the ILO Convention. In addition, the municipalities in the Saami homeland region – Enontekiö, Inari, Sodankylä and even the strong Saami municipality of Utsjoki (almost

⁴⁸ See the preface to the Report.

⁴⁹ See the Summary Report of the statements in Finnish (introductory page), which can be downloaded from the Ministry of Justice's homepage at <<http://www.om.fi/Etusivu/Julkaisut/Lausuntojajaselvityksia/Lausuntojenjaselvitystenarkisto/Lausuntojajaselvityksia2007/1172045482900>> (1.6.2007). Lausuntoja ja selvityksiä 2007:6, Luonnon pohjoismaiseksi saamelaisopimukseksi (lausuntotiivistelmä).

⁵⁰ *Ibid.*, pp. 4-5.

half of whose residents are Saami) – expressed serious concerns about the Draft Convention, especially with regard to its relationship to and influence on the self-government of municipalities guaranteed in the Finnish Constitution.⁵¹

The Ministry of the Environment has taken the view that attention should be paid to how Article 3 on Saami self-determination is worded, and how it is related to the general structure of the system of government in Finland. There is an apparent contradiction between Section 2(1) of the Constitution (which states that the powers of the State in Finland are vested in the people, who are represented by the Parliament) and Section 121(4), which provides that ‘In their native region, the Saami have linguistic and cultural self-government, as provided by an Act’. Essentially, the Ministry is concerned about how the question of the Saami’s self-determination as a people relates to the linguistic and cultural self-government rights guaranteed by the Constitution.⁵² The municipality of Enontekiö even suggested that the self-determination proposed for the Saami would mean the end of self-government for municipalities in the Saami homeland region, since it would be stronger than the other forms of self-government within the state.⁵³

Arguably, one of the most controversial issues in the negotiations will be the way the self-determination of Saami is formulated. In the present version, there is no reference to autonomy or internal/local self-determination; this issue may be opened up in the negotiation stage to further make it clear that what is involved is expanded self-governance for the Saami rather than self-determination. Apart from being a delicate and controversial issue in international law, the question of Saami self-determination may prove problematic from the perspective of constitutional laws of the three Nordic states: they are unitary states – in contrast to federal states, which have more room to accommodate different arrangements for various groups – and their constitutional frameworks rest upon the idea of one people governing themselves through parliamentary democracy. For instance, in Finland, the Saami are guaranteed the right to self-governance in cultural and linguistic issues, which is altogether different from Finland accepting the Saami as another people inhabiting the same territory. The legal relationship between the Draft Nordic Saami Convention, especially its

⁵¹ *Ibid.*, pp. 5-7 and 36-37. Section 121(1 and 2) of the Finnish Constitution provides: ‘Finland is divided into municipalities, whose administration shall be based on the self-government of their residents. Provisions on the general principles governing municipal administration and the duties of the municipalities are laid down by an Act. The municipalities have the right to levy municipal tax. Provisions on the general principles governing tax liability and the grounds for the tax as well as on the legal remedies available to the persons or entities liable to taxation are laid down by an Act’.

⁵² *Ibid.*, p. 36. The Faculty of Law of the University of Lapland sees this as problematic from the Constitutional law viewpoint. (p. 37).

⁵³ *Ibid.*

provision on Saami self-determination, and the Finnish Constitution is currently being analysed in the Ministry of Justice.⁵⁴

2. Why the Problems?

It seems very difficult indeed to convince states that indigenous peoples should (re)gain their self-determination. We evidently have to distinguish between the Draft Nordic Saami Convention, which deals with well-recognised indigenous peoples living in modern – some would say progressively minded – states as to their regard for group rights, and the other processes, which deal in general with the right to self-determination of all indigenous peoples. However, all three processes rely very heavily on common Article 1 of the two covenants. The Human Rights Committee does so expressly, especially in its concluding observations and the UN Declaration did so in articulating self-determination with wording nearly identical to that of common Article 1, only replacing the word ‘peoples’ with ‘indigenous peoples’. Even the Expert Committee that produced the draft text for the Nordic Saami Convention builds heavily on common Article 1, asserting that well-established indigenous peoples, such as the Saami, fall within the scope of common Article 1.

As shown for all three processes, the expert body, which mainly consists of specialists in international law – in particular human rights law – has ended up endorsing the right to self-determination of indigenous peoples. This took place first in the case of the UN Declaration, where a five-member expert body produced the 1994 draft for the UN Declaration, then in the changed practice of the Human Rights Committee from 1999 onwards and, finally, in the Expert Committee that produced the draft for a Nordic Saami Convention in October 2005. In all cases, the expert bodies consisted mainly of persons having expertise in international human rights law, as indigenous issues come within the ambit of this body of international law.

All these processes, with the possible (and arguable) exception of the work of the Human Rights Committee, have had to struggle with indigenous peoples’ right to self-determination. The UN Declaration was ultimately adopted by the UN General Assembly but only after a guarantee was in place that self-determination for indigenous peoples meant only autonomy/self-governance. The Draft Nordic Saami Convention has met with resistance on both the governmental and regional levels even before any negotiations have begun, owing to its formulation of Saami self-

⁵⁴ Telephone conversation with the director of legal affairs in the Ministry of Justice, Matti Niemivuo, on 8 October 2007.

determination. The Human Rights Committee has started to apply Article 1 to indigenous peoples, but it is difficult to say what the legal significance of this comparatively recent policy will be. The HRC is a monitoring body which clearly has influence on how the Covenant's provisions are interpreted, but we will still have to wait to see how states react to its policy of considering indigenous peoples as peoples in the meaning of Article 1. Especially important in this respect will be the next periodic reports from those states parties to the Covenant that reported on the situation of their indigenous peoples under Article 27, and whom the HRC has asked – through its Concluding Observations – to submit information on the situation of their indigenous peoples under Article 1. At least Canada, the first state urged to address the situation of its Aboriginal peoples under Article 1, was rather evasive on this issue in its fifth periodic report.⁵⁵

Why do these drafts, skilfully crafted by expert bodies, who rely on common Article 1, end up being fraught with problems? The first evident answer is that in the end it will always be state representatives who decide whether a Declaration or treaty is adopted/ratified, and with what content. It is also states whose attitude to the interpretation work by the treaty bodies will be decisive. If they do not object in any way to the interpretation given to certain provisions of the Covenant by the HRC, it can be argued more convincingly that the interpretation adopted by the respective Treaty Body can be regarded as an authoritative one. But why would states be hesitant to accept that indigenous peoples have self-determination in international law? The relevant process to be studied to answer this question is decolonisation, where the principle of self-determination became a full-blown right entitling colonised peoples to (re)gain their self-determination.

There is no need to rehearse the political and ideological forces behind decolonisation here, because these have been studied in depth by a vast number of scholars. What is interesting from the perspective of this article is the way in which international law, with its inter-linking doctrines and principles, opened up to the self-determination of colonised peoples. The colonial peoples' right to self-determination was implemented such that it could be accommodated within the system of

⁵⁵ Canada makes the following statement in its fifth periodic report: 'The Government of Canada acknowledges the Human Rights Committee's request for further explanation of the elements that make up Canada's concept of self-determination as it is applied to Aboriginal peoples. As the Government of Canada's concept of self-determination as it may be applied to Aboriginal peoples is continuing to evolve in relation to its ongoing participation in the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples and other international fora, the Government of Canada will present information on this specific issue at the oral presentation of this report'. See the fifth periodic report by Canada, CCPR/C/CAN/2004/5, 18 November 2004, para. 8. As noted above, Canada voted against the UN Declaration.

international law. First, the process as a whole, conducted primarily under the auspices of the UN, accorded self-determination to territories rather than peoples, even though decolonisation was many times described as the exercise of the self-determination of colonised peoples. It was the Trusteeship territories, non-self-governing territories (and in some cases even mandated territories)⁵⁶ whose people were eventually accorded the right to self-determination. It was the territory - not a process designed to identify who were the authentic colonised peoples - that determined who had the right to self-determination. This 'territorial approach' to self-determination was well manifested, with the newly independent states gaining their self-determination to territories whose boundaries had been drawn by the colonists long before they became independent and which were given legal recognition in international law (*uti possidetis*).⁵⁷ Furthermore, the whole process operated on the assumption that the peoples of these territories sought to establish new states, not that they would establish some new forms of self-determination which would not fit in with the system of international law. International law also closed the door on self-determination very quickly when the overseas territories (and the people living within these borders) had gained their independence and became states proper. To make it clear that self-determination applied only to overseas colonies, the salt-water criterion emerged, which required geographical distance between the colonised peoples wanting to exercise their right to self-determination and the state of which they were part.

⁵⁶ The ICJ made a decision to treat South West Africa under a model deriving from the League of Nations Mandated Territories system. South West Africa (Namibia from 1970 onwards) was one of the German overseas colonies placed under the mandate system of the League of Nations after World War I to be managed by the Union of South Africa. After World War II, South Africa sought to annex the territory, a move that was challenged by the UNGA. In 1949, the UNGA requested an advisory opinion from the ICJ as to whether South Africa's mandate had survived the termination of the League of Nations and if it had, how it should be managed and whether it should be transferred to the trusteeship system. The ICJ answered the first question in the affirmative; that is, it stated that the mandate had indeed survived the termination of the mandate system. However, it did not opine that the area should be placed under the trusteeship system but, rather, recommended that it continue to be governed by rules similar to those of the mandate system.

⁵⁷ As the ICJ put it in the *Frontier Dispute between Burkina Faso and Mali*: '...At first sight this principle [uti possidetis] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. 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... Thus the principle of uti possidetis has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*. This remains an undeniable fact...'. *The Case Concerning the Frontier Dispute of 22 December 1986 (Burkina Faso v. Republic of Mali)*, 8 December 2000, ICJ, Judgment, *I.C.J. Reports 1986*, p. 554, at 567. For a thorough analysis, see J. Klabbers and R. Lefeber, 'Africa: Lost between Self-Determination and Uti Possidetis', C. Brölmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1993), pp. 37-76.

Contrast this to the challenge posed by indigenous peoples to the system of international law. They were also colonised, long before the African and Asian peoples, but they are living within the home territories of established states, making it difficult to apply any ‘territorial approach’ to self-determination. Depending on the way one defines ‘indigenous peoples’, it is estimated that there are 300-500 million indigenous people worldwide; with indigenous people living in the territory of most states granting them self-determination would pose a direct challenge to the way the states of the world have organised their internal governance structures.⁵⁸ In addition, even though there exist working definitions of ‘indigenous people’, these remain fairly abstract, giving ample room for any group to re-define themselves as indigenous.⁵⁹ Indeed, if international law granted self-determination to indigenous peoples, it would be easy to imagine a development whereby many groups would re-define themselves as indigenous and thereby claim a right to self-determination.

We should also ask why it is that these expert bodies have produced texts and pronouncements that have raised the hopes of indigenous peoples by endorsing their right to self-determination. Most of the persons who sit on these expert bodies have special expertise in international human rights law, since this is the body of law that covers claims by indigenous peoples. There are many specialised branches of international law today, as the greatly expanded normative universe of the field has made it imperative for scholars to specialise. In contrast to the other specialisations in international law, international human rights law does not primarily build upon general international law, for in many ways it tries to challenge the basic doctrines and fundamental principles of state-based international law. Those who specialise in human rights law tend to view the international system

⁵⁸ See, e.g. L. Malezer, ‘Permanent Forum on Indigenous Issues: Welcome to the Family of the UN’, in J. Castellino and N. Walsh (eds.), *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers, Leiden, 2005) p. 67.

⁵⁹ 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. This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors: a. Occupation of ancestral lands, or at least of part of them; b. Common ancestry with the original occupants of these lands; c. Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.); d. Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); e. Residence 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 recognized 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, UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para.379. Noteworthy is that the UN Declaration does not even try to define indigenous peoples. See However the ILO Convention, Article 1.

from the bottom up, seeing humans rather than states at the centre of international regulatory efforts. This approach was skilfully outlined by the three experts who wrote the background article on self-determination for the Report of the Expert Committee that produced the draft text for the proposed Nordic Saami Convention.⁶⁰ In their view, human rights are rights of human beings, not of states, and since common Article 1 is part of a human rights treaty, it is clearly a human right, albeit of a collective kind. As a collective human right, the right to self-determination belongs to peoples (and, as many have put it, underlies all the individual human rights); according to the members of the Expert Committee, this cannot, contrary to the argument of the mainstream, mean only the total population of existing states.⁶¹ The Committee's conclusion is that there can exist many peoples in a state⁶² and even where there is no clear-cut definition of who a people is, there are authoritative working definitions⁶³ providing a basis for identifying the clearest cases of indigenous people.⁶⁴

This contrasts starkly with the traditional conception of international law as a society of states and a body of law regulating their mutual legal relations. This traditional notion is deeply rooted in the institutional practices of international politics, and has built a deeply ingrained system of mutually reinforcing doctrines and principles, which all tend to rely on each other. Consider the doctrine of international legal personality, which concerns itself with the criteria that groups of human being have to fulfil in order to achieve statehood and the concomitant legal personality. If they manage to

⁶⁰ See p. 280 of the Report.

⁶¹ See e.g. A. Cassese, *International law* (Oxford University Press, Oxford, 2005, 2nd ed.) pp. 60-4. He argues that 'Article 1, common to the two 1966 UN Covenants on Human Rights...essentially confers on the peoples of all the contracting parties the right to internal self-determination' (p. 62).

⁶² Here the article refers to *Re. Secession of Quebec*, which provides that 'It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean that the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.' *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 124.

⁶³ The article takes up the so-called Kirby definition (in p. 279 of the Report), which was used by the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27-30, 1989. According to the Kirby definition, a people is: '1. a group of individual human beings who enjoy some or all of the following common features: a. a common historical tradition; b. racial or ethnic identity; c. cultural homogeneity; linguistic unity; e. religious or ideological affinity; f. territorial connection; g. common economic life. 2. the group must be of a certain number which need not be large but which must be more than a mere association of individuals within a State; 3. the group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of such groups, through sharing the foregoing characteristics, may not have that will or consciousness; and possibly; 4. the group must have institutions or other means of expressing its common characteristics and will for identity', at <<http://unesdoc.unesco.org/images/0008/000851/085152fo.pdf>>, visited on 25 June 2007.

⁶⁴ This is complemented by an argument that the rules of treaty interpretation require that the term 'people' must be given its ordinary meaning (see pp. 288-289 of the Report).

become states, they become sovereign, equal to other states in law and enjoy the protection given by the principles of territorial integrity and non-interference in internal affairs, both against other states and threats posed by groups within the states. They have treaty-making power (even to establish other international legal persons, such as organisations of states) and enjoy permanent sovereignty over their own natural resources. With such an established structure in place, it is difficult to see exactly where the self-determination right of indigenous peoples would fit in this general structure – save under very exceptional circumstances. International law would seem to grant a state the right to determine – via its national legal system – which groups enjoy what status, depending, of course, on which minority or other human rights treaties the state has become a party to.

The human rights experts are quick to point out that indigenous peoples' self-determination does not, at least as yet, mean any right to secession save in exceptional circumstances. What the indigenous peoples aim for, according to this line of argument, is their internal self-determination, which is guaranteed in international law and implemented via national law and policy. But even internal self-determination seems to be too much for present-day international law, especially if it means that international law would guarantee indigenous peoples the right to establish self-governance arrangements of their own liking. Why?

Even internal self-determination – e.g. interpreting common Article 1 to accord indigenous peoples the right to only internal self-determination – implies that international law guarantees the peoples such a right. Gaining a right to self-determination (even if limited to internal self-determination) in international law would translate into some form of limited international legal personality, with concomitant duties for states and the whole international society. And, if indigenous people (numbering 300 million to 500 million and living in most states of the world) had such an internal right to self-determination, the same logic would become available to other groups for redefining themselves as indigenous peoples, since even internal self-determination would seem tempting for most groups. Furthermore, if internal self-determination were to be based on a restrictive interpretation of common Article 1, it is hard to see why it would not in time invite arguments for a more expansive right to self-determination. After all, in the end, as put by the members of the Expert Committee who wrote the article on self-determination, the right to self-determination is

something that a group itself defines; otherwise, it would not be self-determination, but something else.⁶⁵

3. Concluding Remarks

As we have seen, the vast normative activity in the field of indigenous peoples' rights has, despite some early successes, led to problems. On the one hand, the reasons for this are easy to understand; on the other, they relate to the prevailing structure of international law. For one thing, it seems that at least part of the success was attributable to the fact that the experts producing these drafts have a distinctly different worldview than that espoused by the mainstream of international law, the understanding which still dominates present-day international law and policy. When these drafts enter the foreign ministries or appear before state representatives in international bodies, the ideas contained in them face the still valid structure of international law as the law regulating the relations between states.

For anyone familiar with the mainstream view of international law, it seems almost miraculous how the indigenous peoples' movement could, in part, induce the UN General Assembly to adopt the UN Declaration and has been able to persuade the Expert Committee to produce a draft of a Nordic Saami Convention, both of which instruments contain far-reaching provisions on the self-determination of indigenous peoples and the Saami, respectively. For the mainstream, the pronouncements by the treaty bodies that indigenous peoples are covered by Article 1 can only seem progressive in nature, and a very incipient development in international law. For many in the mainstream, such an approach is not only progressive in the sense that it is a very embryonic development, but they also perceive it as an undesirable one since it certainly poses the question whether international law should encourage all kinds of human collectives to seek self-determination, internal or even external.⁶⁶ The ultimate goal and value of general international law,

⁶⁵ *Ibid.*, p. 314. See also their argument that the Saami cannot give up their self-determination right, because international law may change – as it has during the course of history – and because they cannot give away the right to self-determination on behalf of the future Saami generations (pp. 302-3).

⁶⁶ As put by the current president of the ICJ Rosalyn Higgins at the beginning of the 1990s: 'So I return to the importance of using concepts with some care. Looking at the ideas behind this current battle of words, I am of course very aware that there are those who use the armoury of words in full knowledge of what they do. What, they ask, is wrong with secession/self-determination for every minority that wants it? Why shouldn't this be their right? And what is so wrong with the prospect of a world of two thousand states? I can only give my own answer... There is, quite simply, no end to the disintegrative processes that are encouraged... The attempt to legitimate these tendencies by the misapplication of legal terms runs the risk of harming the very values that international law is meant to promote'. See R. Higgins 'Postmodern Tribalism and the Right to Secession, Comments by R. Higgins', C. Brölmann, R. Lefeber and

to maintain the peace in the world of sovereign states, seems to be threatened if ideas are supported that encourage various groups to seek more power to organise their own affairs.

The high hopes of indigenous peoples can be seen to have been dashed in two ways. First, all the hard work that they have done to (re)gain their right to self-determination - a normative struggle that stems from the fact that they too were colonised, but only much earlier - seems to fall by the wayside, with governments stepping in and halting the process. It does seem unlikely that indigenous peoples will (re)gain their right to full self-determination. In the UN Declaration, it was made clear that the most the indigenous peoples can hope for is the right to autonomy/self-governance within the existing states, and we will still have to see how customary international law develops to determine the extent to which the UN Declaration has encouraged indigenous peoples to rely on their right to autonomy/self-governance and the degree to which states accept this as a right guaranteed to those peoples by international law – a factual development which would turn the Declaration's right to autonomy/self-governance into a customary law norm. If the Draft Nordic Saami Convention is signed and ratified, it is highly likely that this will happen only when its self-determination provisions have been rephrased.

And even if the HRC and the other treaty bodies continue their practice of regarding common Article 1 as applicable to all well-established indigenous peoples, this news might not in the end be as good as it sounds for indigenous peoples. The reason for this is that the distance between the reality of state practice and the normative world of human rights law might become too grave. It is one thing to pronounce that indigenous peoples have a right to self-determination, as the treaty bodies now do, and quite another to actually document such developments in the practice of states. When the distance between the two grows out of proportion, it can only challenge the legitimacy of the important work done in the treaty bodies and, at the same time, produce more disillusionment for indigenous peoples, prompting them to ask why their status and rights remain the same in the national setting even though international law specifically provides that they have a right to self-determination.

Perhaps the difficulties of fleshing out an expansive right to self-determination for indigenous peoples encountered in the processes of drafting the UN Declaration and the Draft Nordic Saami

Convention will contribute to a more realistic assessment of what indigenous peoples can expect from international law. At the moment, it is not reasonable to expect that indigenous peoples will be regarded as possessing a right to self-determination, internal or external; the international law of states is simply not yet ready for such a big change. Even a right to some kind of autonomy would be a great accomplishment, to which the UN Declaration may well contribute in the course of time.⁶⁷

The indigenous peoples' movement can only stand back and watch this development from having first raised their hopes with the various expert committees pronouncing that they indeed have a right to self-determination – a legitimate desire on the part of those who have been colonised – and then facing the cruel reality of a state-dominated world . One might hope that the ensuing disillusionment will act as a reality check, showing them what they can expect from international law rather than crushing their hopes entirely. At the end of the day, a realistic strategy at the level of international law will enhance their possibilities to improve their legal rights and status in national law, the level where most important decisions are made.

⁶⁷ For a realistic argument, see Foster, *supra* note 24, pp. 141-157.