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Nunavut & The Right of Self- Determination

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1. Introduction

1.1 Purpose and Background

On April 1st, 1999, the territory of Nunavut was officially recognized as a territory of Canada. The creation of Nunavut had been a goal of the Inuit of the Eastern Northwest Territories since the early 1970s. After several decades of negotiations, bargaining and a couple of plebiscites, the decision to split the Northwest Territories in two new territories was finalized. The territory itself consists of a huge area made up of the eastern part of the former Northwest Territories. It is described in the Nunavut Act as consisting of: “(a) all that part of Canada north of the sixtieth parallel of north latitude and east of the boundary described in Schedule I that is not within Quebec or Newfoundland; and (b) the islands in Hudson Bay, James Bay and Ungava Bay that are not within Manitoba, Ontario or Quebec.”¹

Nunavut is Inuit for ‘our country’. The name symbolises exactly what it is, a territory with Inuit people constituting the majority of the inhabitants. Approximately 85 per cent of the population of Nunavut are of Inuit origins.² The former Northwest Territories on the other hand, consisted of several other indigenous groups, ‘southerners’ -the term often used to refer to Canadians of the more southern provinces- as well as the Inuit. Among the indigenous groups were, most notably, the Denes and the Metis, who both had concerns about the division of the Northwest Territories. The Denes claimed that some of the areas selected to be part of the Nunavut territory consisted of land that was part of their traditional lands.³ This division of interests between people in the Northwest Territories was one of the reasons why Nunavut was created. The Inuit of the eastern part of the Northwest Territories felt their lives were run by a government, in a city (Yellowknife) far from their areas which did not have their best interest in mind.

¹Nunavut Act, S.C. 1993, c. 28 (Bill C-132, 1993), s. 3.

²Jack Hicks & Graham White, *Nunavut: Inuit Self-Determination Through a Land Claim and Public Government?*, unpublished, 2000, p. 1.

³Donald Purich, *The Inuit and Their Land: The Story of Nunavut*, Toronto, 1992, p. 78.

For Canada, a country that in the past has been very reluctant to recognize aboriginal land claims and land rights⁴, the creation of a territory basically run by Inuit may seem as a huge step forward. However, transferring governing authority to indigenous peoples may, I would argue, be an excellent method to integrate and assimilate these peoples into the mainstream Canadian society while diminishing their culture unless it is done without prejudice as to how the particular people are to utilize this governing authority. In other words, if self-government by necessity implies an adoption of a dominate Canadian lifestyle in order for the governing institutions to function according to guidelines set up by the delegating state, this may in the end transform the way of life of the self-governing people to the point where complete assimilation has taken place.

Self-determination may be seen as one of the few remaining solutions if indigenous peoples are to maintain their traditional culture and way of living. Therefore I intend in this paper to examine the international legal doctrine of self-determination and its application to the situation of indigenous peoples and in particular the Inuit of Nunavut. I also intend to explore the extent to which the Inuit have achieved self-determination in the light of political conditions underlying the creation of Nunavut, the degree of autonomy transferred to this new territory, the responsiveness of the Canadian state to the critical issues affecting the Inuit, and the legitimacy of Canadian interests in the territory traditionally belonging to the Inuit. Finally, I intend to examine whether the degree of self-governing power transferred to the Inuit of Nunavut is sufficient to be characterized as internal self-determination.

The topic is particularly interesting since Nunavut has been established during a decade where increasing attention has been directed towards indigenous peoples, making Nunavut a model to most certainly be studied, evaluated and maybe even replicated in other areas of the world. The study of Nunavut may be of special interest to the Sami people of northern Scandinavia because of the similarities between the situations of the Inuit and the Sami, and their standings within their respective countries.

1.2 Material, Method and Delimitation

This thesis is divided into six chapters dealing with certain relevant aspects of the issue. Chapter two provides a brief description of the history of the Inuit of Eastern Northwest Territories. It deals with the first encounters with the European civilization, the interaction with 'southern' Canada and the creation of Nunavut. This chapter also attempts to offer insight into the difference -and to some extent, similarity- to the situation of other indigenous populations across Canada. This, in order to provide the reader with valuable information as to the uniqueness of Nunavut and the situation of its Inuit inhabitants within the federal state of Canada. Chapter three explores the federal structure of the Canadian State and how

⁴The policy of the federal government was, until the watershed case *Calder v. Attorney-General of British Columbia*, not to recognize any aboriginal land rights. In this case the Supreme Court of Canada declared that "indigenous peoples could claim title to traditional lands" (Calder, [1973] 34 D.L.R.3d at 145)

Nunavut fits into this structure. It also explores the Canadian constitution and Nunavut's position under the constitution. In this chapter I also intend to explore and outline the provisions of the Nunavut Act and the Land Claims Agreement between the Inuit of Nunavut, the federal government and the government of the Northwest Territories. In doing this I will examine important provisions regulating issues of particular importance to the Inuit. These issues include, among others, land ownership, harvesting rights and protection of Inuit culture and traditional living. The fourth chapter is devoted to the international legal concept of self-determination of peoples. This chapter will focus on the treaty law on self-determination as well as relevant case law, custom, comments and opinions by authoritative bodies and scholars within the area. This chapter also deals with the distinction between internal and external self-determination, the different possible outcomes of a right to self-determination as well as theories and instruments on self-government and autonomy within international law. The fifth chapter will serve a double purpose. It will be used to apply the contemporary doctrine on self-determination to the territory of Nunavut as well as to critique the modern international law of self-determination. This chapter will serve as the theoretical and practical background needed for the conclusions arrived at in chapter six.

The material utilized consists of official documents. These include legal texts such as the Nunavut Act, the Land Claims Agreement and the Canadian Constitution of 1982. For the examination on the right of self-determination and its relation to indigenous peoples under international law, international legal documents have been of primary interest. These include, documents from the United Nations, relevant case law, general comments from the Human Rights Committee, and reports of appointed special rapporteurs of United Nations organs. To gain a better understanding of the situation of the Inuit of Nunavut and the issue of self-determination, I have also consulted several articles and books dealing with the subject. Some of this material has been written by Inuit people from Nunavut, people with a strong connection to Nunavut or by people belonging to other indigenous groups. I have also had the fortune to interview John Merrit of the Nunavut Tunngavik Incorporated, who was one of the legal advisors to Inuit Tapirisat of Canada and Tunngavik Federation of Nunavut during the land claim negotiations, as well as Louise Leslie, legal advisor of the Government of Nunavut.

Although the situation of the Inuit is deeply affected by modern multi-lateral agreements, particularly the World Trade Organization, the North American Free-Trade Agreement and the upcoming Free Trade Area of the Americas, I will not consider these aspects within my paper. The effect of these treaties on the situation of indigenous peoples would constitute in itself a subject for a thesis. It should be remembered however, that Canada, at the moment of writing, has just co-signed a commitment to negotiate an agreement on a free trade area of the Americas by 2005. Such an agreement is expected to include an investor-state clause similar to that existing in the NAFTA agreement which has been interpreted to limit the ability of states to adopt policies affecting the profitability of trans-national corporate undertakings and investments. Such an agreement may, unless precautionary measures are observed during the negotiations, severely affect treaties between indigenous peoples and states since these often incorporate limitations on the commercial accessibility to traditional lands. In particular, this may turn out to be an issue for the Inuit of Nunavut since their land claim agreement includes, as will be seen, provisions that regulates matters such as resource exploration and Inuit hiring for development projects.

I will also not address the issue of whether or not the Inuit of Nunavut aspire to achieve external self-determination or whether or not most of them feel they already have achieved self-determination through the establishment of Nunavut. The reason for this is twofold. First of all, even within Nunavut different people may not share the same opinion on this matter. Furthermore, even though Nunavut may seem as a dream come true to many Inuit, the fact remains that the goals of many of them may have been critically affected by the options in terms of self-determination that existed in the first place. In other words, in the light of the limited opportunity indigenous peoples traditionally have been given to govern their own affairs, the creation of Nunavut may seem like a dream. Furthermore, for a people which has been nomadic up until the turn of the century, without governmental structures and societies in the 'western' sense, becoming a new 'own' sovereign nation may not have seemed like a desirable alternative to some.⁵ Naturally, this makes the issue of determining the extent to which self-determination has been achieved much more complicated since this is, in my opinion, dependent on a knowledge of the innermost desires of the people in question. Instead, I would argue, the issue may have to be approached from the perspective of what would be possible for the Inuit to achieve, if their desires were different. That is, how would ultimately their aspirations of self-determination be accommodated by the Canadian government if the majority of the Inuit favoured separation?

I will, throughout this paper, utilize the term 'peoples' to refer to indigenous peoples since they see themselves as 'peoples' and not merely as 'populations' or 'people'. Furthermore, I will utilize the terms indigenous, aboriginal and native interchangeably since they basically share the same meaning and implications.

2. Inuit History and the Emergence of Nunavut

⁵It can, of course, be argued that the Inuit would not have to form a new nation in order to be sovereign, but within the modern state-based international structure this seems quite unrealistic. Especially since relations to other states and, in particular, to nationals of other states, would have to be dealt with in a constructive way.

2.1 European Contact

The Inuit of today's Canada, and in particular the Inuit of what we today know as Nunavut, face a different historical past than other aboriginal peoples of Canada. The geographical and demographic conditions of the northern Canada had the effect of slowing the assimilation process with the rest of Canada down, a process that was already taking place in respect of other aboriginal peoples. The central and eastern Arctic were highly inaccessible to Europeans and Canadians before the arrival of the air plane and did not have the resources that attracted these peoples to the north, primarily fur, gold and oil.⁶ The result was that European and Canadian contact with the Inuit occurred much later than it did with other aboriginal groups and was much less intrusive for these than it was for other aboriginal peoples in Canada.⁷

Unlike many other indigenous groups in Canada the Inuit were never placed on reservations.⁸ Furthermore, they never signed any treaties or agreements with either British or Canadian authorities.⁹ In the nineteenth century there was notable interaction between Inuit and people from Europe and North America hunting for whale, but this contact did not affect most Inuit to a considerable extent.¹⁰

It was not until the beginning of the twentieth century that the contact with southern Canada became obvious, and it was the economical contact that preceded the political.¹¹ The change in lifestyle, brought about by the trade between the Inuit and the Hudson's Bay Company -primarily in furs and skins- made the Inuit people dependent on the international commodity market and the demand for these products.¹² The Inuit society was thus affected severely by the eventual downfalls in those markets and thus subjected to forces outside of its own control.¹³ The contact between the Inuit and southern Canada intensified at the time of the World War II. At this point the Canadian government turned its face towards the north for

⁶Hicks & White (2000), p. 19.

⁷Ibid., p. 19.

⁸Alexandra Kersey, *The Nunavut Agreement: A Model for Preserving Indigenous Rights*, 11 Ariz. J. INT'L & COMP. L. 429 (1994), p. 432.

⁹Hicks & White (2000), p. 21.

¹⁰Purich (1992), p. 24 ff.

¹¹Hicks & White (2000), p. 19.

¹²Ibid., p. 20.

¹³Ibid., p. 20.

several reasons. First of all, the collapse of the fur trade in the 1930s resulted in starvation for many of the Inuit who had become dependent on the international trade in furs and skins.¹⁴ The Canadian government was forced to deal with this problem and the outcome was a radical change of Inuit lifestyle. Secondly, there was a belief commonly held by people in southern Canada that the arctic north held numerous treasures in the form of easily extractable natural resources.¹⁵ This assumption proved wrong, however, as the cold climate, the rocky and bare landscape and the long distances slowly defeated the attempts of industry to profit from the North.¹⁶ The third reason was the desire of the Canadian government to assert its sovereignty in the north.¹⁷ Since the Inuit people played an important part in this political game this led to the establishment of Inuit communities in crucial areas and the relocation of Inuit families from traditional hunting grounds to these new locations.¹⁸ This transformation from traditional nomadic living to the life in permanent settlements caused radical change for the Inuit and their lifestyles.

The relocation of Inuit people to permanent settlements also served to facilitate the goal of providing them with the social services associated with modern societies, and to assimilate the Inuit into Canadian society.¹⁹

The impact of Euro-Canadian²⁰ ideas and the increasing dependency on foreign commodity markets together assisted in creating an evil circle. The wildlife surrounding the settlements had to endure severe exploitation with the effect that Inuit hunters and trappers had to travel further and further for efficient hunting and trapping opportunities.²¹ The need for motorized transportation became apparent when distances increased and eventually required that Inuit who wanted to hunt had to be able to provide for the transportation needed. According to one writer, the situation in the 1980s was that:

[O]nly Inuit who do have a job, and hence an income, can afford to go hunting in the little spare time available. Inuit who do not have a job or a regular income cannot afford to go hunting, although they have plenty of time

¹⁴Purich (1992), p. 42.

¹⁵John Merrit, et al., *Nunavut: Political Choices and Manifest Destiny*, Ottawa, 1989, p. 1.

¹⁶*Ibid.*, p. 2.

¹⁷Purich (1992), p. 43 f.

¹⁸This relocation had the effect that the relocated Inuit had to adjust to new and different living conditions. In one of the cases families were relocated from Port Harrison in northern Quebec, where they had relied on hunting for ducks and other birds, to Grise Fiord on Ellesmere Island, where they had to rely on sea mammals and polar bears. See Purich (1992), p. 44.

¹⁹Hicks & White (2000), p. 22

²⁰I will use this term for that part of Canadian culture and population which has its origins and ancestry in early Europe as opposed to Canadian culture and population in general which is very diverse.

²¹Hicks & White (2000), p. 23

to do so.²²

In effect, this displays how the Euro-Canadian lifestyle imposed on the Inuit has had detrimental impact on their traditional livelihood. The nine to five schedule of a modern wage-economy has been difficult to combine with the traditional practices of hunting and trapping. At the same time the money generated through the wage-economy was and still is necessary to provide for the equipment needed for these practices after the impact of modern settlements. Worsening the situation for the Inuit was the fact that employment opportunities were rare in the settlements due to the rapid change of Inuit society.²³ Programs have been adopted to improve this situation, but whether it is possible for the Inuit to maintain their traditional hunting and trapping lifestyle and at the same time participate in a modern wage economy is being questioned by many.²⁴

2:2 The Establishment of a Territory of Nunavut

The government of the Northwest Territories, established in 1967 with its administration in Yellowknife, had the vision that the North should adopt southern Canada's norms and values. In this vision the aboriginal peoples of the Territories would eventually surrender their ideas of aboriginal self-government and slowly become more accommodating.²⁵ The white people of the Northwest Territories were, according to some writers, hoping to acquire "real autonomy and local government".²⁶ The Inuit of the Eastern Arctic, however, had limited interest in having their affairs run by a 'foreign' provincial government in Yellowknife. At the same time, the Inuit regarded the federal government as the protector of their rights and lands. Therefore -their sympathies leaning more towards the federal government than the territorial- the Inuit had, contrary to common belief, continuously pursued an increased federal government presence in the North.²⁷ This division of interests between the territorial government and the Inuit people of the eastern Northwest Territories spurred the Inuit to pursue their plans of self-government and a division of the Territories.

²²Colin Erwin, *Future Imperfect: A Controversial Report on the Prospects for Inuit Society Strikes a Nerve in the NWT*, Northern Perspectives, 17:1, 1989, p. 4

²³Purich (1992), p. 47.

²⁴See for instance J.R. Ponting & R. Gibbins, *Out of Irrelevance: A Socio-Political Introduction to Indian Affairs in Canada*, Butterworths, Toronto, 1980, p. 265. Also, J. Merrit & T. Fenge: *The Nunavut Land Claims Settlement: Emerging issues in Law and Public Administration*, 15 Queens L. J. (1991), p. 255

²⁵Merrit, et al. (1989), p. 4.

²⁶Ibid., p. 4.

²⁷Ibid., p. 4.

The problems for the Inuit manifested on another level, however. The Canadian government did not traditionally recognize land rights based on aboriginal title.²⁸ The Inuit would therefore have little to bring to a negotiating table. However, as a twist of fate the position of the federal government took a radical change with the Canadian Supreme Court's decision in the watershed case of *Calder v. Attorney-General of British Columbia* in 1973. In this case, the Nishga Indian Tribe of British Columbia sued for a declaration that their aboriginal title had never been lawfully extinguished. Justice Judson on behalf of the Court stated that:

the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".²⁹

Even though the Nishga Indian Tribe lost the case, the acknowledgement by the Supreme Court of the existence of an aboriginal title startled the federal government who expected this case to be an easy win.

The decision pressured the government to adopt new policies in regards to aboriginal land rights that were more accommodating to indigenous peoples than previous policies. In that very same year the federal government adopted their new broad comprehensive claims policy, which purpose was "to exchange claims to undefined aboriginal rights for a clearly defined package of rights and benefits set out in a settlement agreement."³⁰

These developments inspired the Inuit Tapirisat of Canada [A national Inuit organization hereinafter referred to as ITC] to work towards increased Inuit influence over the eastern Canada. In 1976, the ITC submitted a land claim proposal to the federal government based on a three-year study, the Inuit Land Use and Occupancy Project, examining and recording the traditional lands utilized and inhabited by the Inuit.³¹

Of major importance to the Inuit was the protection of Inuit culture and lifestyle. To achieve the appropriate protection it was essential with a comprehensive land claim, which would settle the issue of land use and compensate the Inuit for past and future land use by non-Inuit. Similarly it was important to create a government with a special mandate to protect Inuit culture, language and lifestyle.³²

²⁸ Aboriginal title is an English common law doctrine, originating from the competing interests of European settlers and aboriginal peoples at the time of the colonizing of the North American continent. For further information see for instance, J.J. Borrows: *Aboriginal Legal Issues: Cases, Materials & Commentary*, Butterworths, Canada, 1998.

²⁹ *Calder v. Attorney-General of Canada*, 1973, Justice Judson cited in J. Borrows (1998), p. 37.

³⁰ 1973 Comprehensive Claims Policy, See Department of Indian Affairs, <http://www.inac.gc.ca/ps/clm/brief_e.pdf>

³¹ Purich (1992), p. 67

³² Hicks & White (2000), p. 29.

The Inuit perceived the comprehensive land claim and the creation of a new Inuit government to be two aspects of the same issue and, in other words, inseparable.³³ This view conflicted, however, with the position taken by the federal government. According to the 1973 federal land claims policy, these two processes had to be separated. The creation of a Nunavut government could not be negotiated during the same process as the comprehensive land claim since it composed an issue of constitutional development and, hence, affected a wider range of citizens.³⁴ The formation of a new Inuit government could therefore not be negotiated until the land claim was settled. This policy upset the Inuit and stalled the negotiations substantially.

A plebiscite was held in 1982 on the issue of division of the Northwest Territories. The turnout was fairly low but a majority of voters, primarily those living in the Eastern Arctic, favoured division. The support for division was, on the other hand, fairly low among the non-native people.³⁵ This plebiscite -showing a majority support for division among the people of the Northwest Territories- increased the federal governments willingness to accept a division. On 26 of November 1982, the federal government, under Prime Minister Brian Mulroney, announced that it would favour a division provided that issues regarding the boundaries of Nunavut would be agreed upon between the different aboriginal groups.³⁶

In 1986, the federal government revised their comprehensive land claims policy, in many regards to the better from an Inuit perspective, but still maintained the insistence on the separation of these two processes. The Tungavik Federation of Nunavut [an Inuit organization representing the Inuit of Nunavut, hereinafter TFN], which had superseded the ITC at the negotiating table³⁷, insisted that it was necessary for the land claim to include a clause guaranteeing the creation of an Inuit government, if the agreement was to be ratified by the Inuit people at all.³⁸ In the end the federal government listened to these warnings. A compromise was finally agreed upon and the land claim agreement-in-principle, signed on April 30, 1990, provided that Parliament would enact legislation to establish Nunavut at the same time as Parliament ratified the land

³³Katherine A. Graham, et al., *A Climate for Change: Alternatives for the Central and Eastern Arctic*, 1989, p. 33.

³⁴*Ibid.*, p. 33.

³⁵Purich (1992), p. 70., of 18,962 eligible voters, 9,891 voted. 56% supported division. In the east, eighty-two percent supported the division.

³⁶Graham (1989), p. 14.

³⁷This was due to the fact that people in Nunavut were discontent with having a national Inuit organization pursuing their land claim. TFN on the other hand was a coalition of the three different regions within the Nunavut territory and therefore represented the different views of the different regions.

³⁸John Merrit, *Nunavut: Preparing for Self-Government*, Northern Perspectives, vol. 21, Nr. 1, 1993, p. 6.

claims settlement.³⁹

3. The Land Claim Agreement and the Government of Nunavut

3.1 The Government of Nunavut and Delegation of Powers

³⁹Purich (1992), p. 15.

The Nunavut government has often been misconceived as an ethnic government, representing Inuit aspirations of self-determination and thus separation from southern Canada. This view, however, is not a very accurate one. In fact, Inuit negotiators advocated during the land claim negotiations the setting up of a public government in Nunavut as opposed to an ethnic, which is probably also one of the reasons why the negotiations were successful in the first place. What makes Nunavut in effect an 'ethnic' government is the fact that the Inuit make out the vast majority of the inhabitants of the Nunavut territory. If the ratio of Inuit to non-Inuit would dramatically change and the Inuit lose their majority, the Nunavut government would not be an Inuit government more than any other provincial or territorial government in Canada today.

Because of these public qualities, the Nunavut government remains according to Hicks & White (2001), "a fairly conventional jurisdiction within the Canadian federal state."⁴⁰ What distinguishes Nunavut from the other territories and provinces of Canada is the existence of a land claim agreement which regulates matters of principal importance to the Inuit. Whatever is in the Agreement has to be respected by the federal government, as well as the Nunavut government. From this follows that the legislator and government of Nunavut have to act within the frames set out by both the delegated powers from the federal government and the Agreement.

The Nunavut Act is the founding document of a Nunavut government and legislator. This act thus provides for the set up of the government and the legislator, as well as for the delegation of powers from the federal government to the new territory. Hence, the territory of Nunavut is established by a government statute, in contrast to the provinces of Canada which all have their own constitution.

The Nunavut Act thus outlines the set-up of the Legislative Assembly of Nunavut. This assembly has been assigned powers to enact laws in matters such as: the administration of justice in Nunavut, which includes the constitution and operation of territorial courts, both civil and criminal, as well as the procedure in civil matters in those courts; hospitals in Nunavut; direct taxation within Nunavut in order to raise revenue for territorial, municipal or local purposes; education in Nunavut; the preservation, use and promotion of the Inuktitut language; the preservation of game in Nunavut; and generally, all matters of a merely local or private nature in Nunavut.⁴¹

⁴⁰Hicks & White (2000), p. 5

⁴¹The Nunavut Act, Section 23. (1)

The Inuit will, for as long as they remain a majority in the Legislative Assembly, be able to enact laws -within these delegated legislative areas- that serve to promote Inuit culture and Inuit traditional practices. A few restrictions apply however to the areas of education and language promotion. Laws concerning education must provide that both majority and minority populations of any part of Nunavut may establish whatever school they think fit and only pay the rates for their preferred school.⁴² The Act refers specifically to the minority's right to establish their own, either roman catholic or protestant school. In regards to language regulations, the Act provides that regulation for the purpose of promoting the Inuit language may take place only to the extent that it does not diminish the legal status of the two official languages of Canada, that is, English and French.

3.2 The Land Claim Agreement

The Nunavut Land Claim Agreement covers matters such as title to lands, harvesting rights, wildlife management, resource development/management, compensation, transfer payments and Inuit-federal government relationships. In other words, areas that relate to the past and present use of traditional Inuit hunting grounds and lands, and what kind of compensation that is appropriate to be paid to the Inuit for such use of the land. Therefore, it also involves issues relating to the establishment of future projects on lands belonging to the Inuit and the kind of benefits and privileges in terms of Inuit participation and hiring that should be accorded to the Inuit within the ambit of these projects.

The Agreement also provides for the set-up of a number of different boards and tribunals which are to set standards and make rulings on issues such as wildlife management, resource management/development, and so on. These boards play a major role in shaping the future Nunavut and ensuring Inuit influence in the decision making process regarding matters that are of particular importance to the Inuit.

The Land Claim Agreement and the Nunavut Act thus complement each other. The Nunavut Act outlines the powers that have been delegated to the territory of Nunavut from the federal government. The Land Claim Agreement regulates issues of particular importance to the Inuit and limits the ability of the federal government or any future government of Nunavut to unilaterally make decisions in these issues.

3.3 Constitutional Protection

At the time of the arrival of European settlers in North America, the aboriginal peoples of the continent had already existed there for thousands of years within societies with functioning governments and unique cultures. The European settlers became dependent on the good will of the aboriginal people for survival in the unfamiliar landscape on this 'new' continent. The Aboriginal peoples therefore came to play a particularly important role in the struggle for power between the two settling 'super powers' of the time,

⁴² Ibid., 23. (1) m(i) and (ii)

Great Britain and France. Both of these nations made huge efforts to convert aboriginal peoples into allies. The support of aboriginal people was necessary to gain the military and strategic advantage necessary to win the power struggle in which these two nations were engaged. Therefore, the nation that intended to conquer this 'new' continent had no choice but to stay on good terms with the aboriginal peoples already present.⁴³

Because of this important role of the aboriginal people at the time of settlement, and also because of their supreme military power at that time, they were treated with respect and as equals by the British Crown, which was eventually to win the struggle with France. Aboriginal nations were considered sovereign nations and the treaties signed were considered treaties between two sovereign nations. Later on, however, as the settlers outgrew the aboriginal peoples in numbers and, eventually, Canada became an independent nation, treaties signed were often forgotten or disregarded.⁴⁴ The treaties did also not correspond well with assimilative ideas. Therefore, aboriginal peoples were not included in, or consulted before the adoption of the British North America Act, 1867 (later known as the Constitution Act, 1867), which constituted the foundation for Canada's independence. Section 91(24) of this Act, gave the federal government the authority to legislate for "Indians, and Lands reserved for Indians". For the purpose of the Act, Inuit people were also considered 'Indian'.⁴⁵

The Canadian federalist perspective on the relationship between Euro-Canadians and aboriginal peoples -adopted in the Royal Proclamation of 1763⁴⁶ - was that of the Canadian government as the protector of the aboriginal peoples' interests. The Crown, according to this perspective, retained the sovereignty to the land but had an obligation towards the native people to ensure that treaty obligations on behalf of the Crown were followed and that intrusions into the rights of the native peoples were deterred. Treaties were, accordingly, binding on the parties but subjected to the principle of parliamentary supremacy, in the same manner as any contract between the government and any subject of the government would be.⁴⁷

In 1982, a new constitution act was adopted. This new constitution represented a changing view of the relationship between the federal state of Canada and the aboriginal peoples living therein. Section 35 (1) of the new constitution stated that: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Section 35(2) expresses that Inuit people are considered as

⁴³ See, for instance, Borrows & Rotman (1998), p. 105 ff.

⁴⁴ Ibid., p. 105 ff.

⁴⁵ Ibid., p. 441 ff.

⁴⁶ The Royal Proclamation of 1763, was a declaration issued by the British, stating its policy for its North American colonies. The purpose of the Proclamation was to suppress American expansionist ideas, establish control over Quebec with its French population, and prevent the outbursts of costly Indian wars. See for instance, Borrows & Rotman (1998), p. 26

⁴⁷ Sébastien Grammand: *Aboriginal Treaties and Canadian Law*, in Thomas Isaac (ed.): *Readings in Aboriginal Studies, Vol. 5: Aboriginal People and Canadian Law*, Bear Paw Publishers, Brandon, 1996, p. 154 f.

aboriginal people of Canada. Later, amendments were made to the effect that prior and future land claims will receive constitutional protection equal to that of treaties and aboriginal rights existing at the time of the adoption of the 1982 Constitution.

The effect of this provision was to limit the reach of the principle of Parliamentary Supremacy in cases involving aboriginal and treaty rights. Sébastien Grammand thus explains that: "Section 35 of the Constitution Act, 1982 ... restricts the principle of Parliamentary Supremacy and allows treaties to prevail, under certain conditions, over inconsistent statutes."⁴⁸ In other words, a treaty, which would otherwise be open to unilateral revision, according to the principle of Parliamentary Supremacy, is through Section 35 of the Constitution, 1982, protected under certain circumstances.

The meaning and implications of Section 35(1) was at issue in the case *R. v. Sparrow*. In this case, a member of the Musqueam Indian Band in British Columbia invoked the provision as a defence upon being caught fishing with nets that superseded the length regulations in the Band's Indian food fishing licence. The defendant held that the regulations were inconsistent with his aboriginal right to fish, protected under Section 35(1) of the Constitution Act, 1982. The Supreme Court of Canada stated that Section 35(1) was: "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."⁴⁹ The Court then went on and explained the impact of Section 35(1) being such that legislation that affects the exercise of aboriginal rights will be invalid, unless it meets the test for justifying an interference with a right recognized and affirmed under Section 35(1).⁵⁰ In other words, legislation that interferes with aboriginal rights protected under Section 35(1) can be passed, if it meets the justification requirements. According to some writers, this legal construction of the Supreme Court was, in effect, a limitation of the rights of aboriginal peoples set out in Section 35(1) in that it recognized and affirmed the right of the Canadian legislator to circumvent aboriginal and treaty rights.⁵¹ Bob Freedman argues that:

The issue of concern, particularly in this context, is that by holding that section 35 rights can be limited, there is the potential for the right of self-government, or indeed for any aboriginal rights, to be curtailed, perhaps to the point of nonexistence, as is the case of the right of aboriginal peoples to commercial sale of fish.⁵²

Rights established through treaties have in the past not been immune from legislative intervention by the Canadian legislator. The interpretation of Section 35(1) by the Supreme Court of Canada indicates that

⁴⁸Ibid., p. 154

⁴⁹See *R. v. Sparrow* [1984] 1 C.N.L.R. 145, p. 166 ff.

⁵⁰Ibid., p. 168 ff.

⁵¹See, for instance, Bob Freedman, (1998), p. 271.

⁵²Ibid., p. 275.

treaty rights may not be ‘guaranteed’ rights in the future either.⁵³ Similarly, rights, established through the comprehensive land claim policy, which also, as a consequence of Section 35(3), receive their constitutional protection by Section 35(1), face a similar risk of limitation by legislation.

The Nunavut Land Claim, which is a modern day treaty, is thus not a “guaranteed” right but is “recognized and affirmed” under Section 35(1), in conjunction with Section 35(3), which means that these rights “warrant the greatest legal and political respect”.⁵⁴ What this implies in reality may not be possible to say at the moment. However, with the knowledge of how treaties has been treated in the past and how indigenous peoples continues to be viewed as ‘property’ by many governments it is difficult to think of the land claims as articulating assured rights.

The Nunavut Government, established through the Nunavut Act, and the Land Claim Agreement are, as explained in Chapter 2, separate entities. The Nunavut Act is enacted by Parliament and is therefore not a Land Claim Agreement and thus not protected as such under Section 35(1) of the Constitution Act, 1982. This was, of course, of major concern to the Inuit negotiators who were reluctant to agree to the terms of the Land Claim without a constitutional protected obligation on the federal government to create Nunavut. Therefore, a compromise was agreed upon to the effect that an obligation to create Nunavut was incorporated into the actual Land Claim Agreement. Article 4.1.1. thus states that:

The Government of Canada will recommend to Parliament, as a government measure, legislation to establish, within a defined time period, a new Nunavut Territory, with its own Legislative Assembly and public government, separate from the Government of the remainder of the Northwest Territories.

The effect is that the creation of Nunavut and a Nunavut government is constitutionally protected through the Land Claim Agreement while it is not in and by itself constitutionally protected. The negative consequences of this construction may not be as severe as one may first think however. John Meritt of the NTI argues that there are few reasons, economically or politically, for any future Canadian federal government to alter the constitutional status of the Nunavut territory.⁵⁵ In the event that an alteration actually would occur, it can also be argued, according to John Meritt, that the existence of a Nunavut territory was a necessary precondition for the validity of the treaty as a whole, which would take both of the parties back to square one.⁵⁶ An unattractive and undesirable outcome for all parties involved.

⁵³This is also due to the fact that Section 35 of the Constitution Act, 1982, is in Part II of the Constitution, and, therefore not part of the Canadian Charter of Rights and Freedoms, which applies to Part I of the Constitution Act. See, for instance, Bradford W. Morse, *Two Steps Forward and One Step Back: The Frustrating Pace of Building a New Aboriginal-Crown Relationship in Canada*, in Cynthia Price Cohen (ed.), *Human Rights of Indigenous Peoples*, Transnational Publishers, Ardsley, U.S., 1998, p. 303.

⁵⁴B. Morse in C. Price Cohen (ed.) (1998), p. 324f.

⁵⁵From an interview with John Meritt, Constitutional Advisor of the Nunavut Tunngavik Incorporated (NTI), 28 November, 2000.

⁵⁶*Ibid.*

Despite this it must be pointed out that the constitutional protection of neither the Land Claim Agreement nor the Territory of Nunavut is complete and absolute. Also, since territories in Canada, unlike the provinces, do not have their own constitution Nunavut as a territory is subjected to federal legislative authority.

3.4 Basic Acknowledgements, Commitments and Objectives

As is the case with most treaties, the Land Claim Agreement constitutes an exchange of commitments and granting of rights between the three parties to the treaty. In other words the TFN, the government of the Northwest Territories, and the federal government. The preamble of the Land Claim Agreement confirms the commitment set out in Article 35(1) of the Constitution Act, 1982, acknowledging the aboriginal and treaty rights of the Inuit of Nunavut, based on traditional use and occupancy. It determines the goal of the Agreement as granting the Inuit defined rights and benefits in exchange for surrender of any claims, rights, title and interests based on their assertion of aboriginal title.

The objectives of the Agreement are stated as being:

to provide for certainty and clarity of rights to ownership and use of lands and resources, and of rights for Inuit to participate in decision-making concerning the use, management and conservation of land, water and resources, including the offshore; to provide Inuit with wildlife harvesting rights and rights to participate in decision-making concerning wildlife harvesting; to provide Inuit with financial compensation and means of participating in economic opportunities; to encourage self-reliance and the cultural and social well-being of Inuit;⁵⁷

The most important commitment of the government of the Northwest Territories and the federal government was, obviously, the transfer of the land rights to the Inuit. The landmass subject to the Land Claims Agreement is almost identical to that making up the territory of Nunavut according to the Nunavut Act.⁵⁸ The territory of Nunavut, however, covers a greater area than the area granted to the Inuit according to the Agreement, thus emphasizing the public qualities of the government of the Territory as opposed to the ethnic.⁵⁹

Besides this commitment, the federal government made a promise in the Land Claim Agreement, as explained in the previous section, to create a Nunavut government. For the efficient administration of this process, the federal government obliged themselves to create a political accord, which would set up time

⁵⁷ Preamble of the Land Claim Agreement Act, S.C. 1993, c.29 (Bill C-133, 1993)

⁵⁸ Hicks & White (2000), p. 35.

⁵⁹ Article 3 of the Land Claims Agreement compared to Section 3 of the Nunavut Act.

limits as well as designate the different management and government bodies that had to be established.⁶⁰

The Inuit on their behalf agreed to surrender any future aboriginal claims, rights, and interests in Canadian lands and waters in exchange for the commitments agreed to by the two governments. This commitment entailed surrendering the claim to roughly 1 400 000 square kilometres of traditional Inuit land. Article 2.7.1 (a) thus states that the Inuit:

cede, release and surrender to Her Majesty The Queen in Right of Canada, all their aboriginal claims, rights, title and interests, if any, in and to lands and waters anywhere within Canada and adjacent offshore areas within the sovereignty or jurisdiction of Canada.⁶¹

Article 2.7.1 (b) obliges the Inuit and their descendants not to "assert any cause of action, action for a declaration, claim or demand of whatever kind or nature which they ever had, now have or may hereafter have against Her Majesty The Queen in Right of Canada..."⁶² Together, these provisions replicates the extinguishment clauses present in most older days treaties and prevent the Inuit from expanding their claim in the future. It is important to remember, however, that this extinguishment clause does not imply the surrender of political, cultural and indigenous rights that the Inuit are entitled to according to international law. The extinguishment also does not amount to a surrender of Inuit right to self-government existing at the time of the Agreement or according to future amendments of the Canadian Constitution.⁶³

3.5 Inuit Land Rights and Resource Management

The land is, as with many other aboriginal peoples, of particular importance to the Inuit of the Eastern Arctic. It supports the Inuit culture and traditional way of living by supplying the Inuit people with trapping and hunting opportunities as well as other resources necessary to manage a living in the cold and barren landscapes of the Eastern and High Arctic. Accordingly, J. Merritt, et al., (1989), explains that: "Land ownership is a deeply felt and highly emotive issue, striking at the heart of Inuit self-identity and aspirations."

These same authors comment that: "Inuit feel passionately that they already own all the land in Nunavut, and it will be very difficult for them to accept a land claim settlement that confirms Crown ownership of approximately 80 per cent of that territory."⁶⁴

⁶⁰The Nunavut Land Claim Agreement, Sections 4.1.1 and 4.1.2

⁶¹Ibid., Section 2.7.1 (a)

⁶²Ibid., Section 2.7.1 (b)

⁶³Hicks & White (2000), p. 34.

⁶⁴Merritt, et al. (1989), p. 16.

Access to lands for hunting and trapping and waters for fishing, as well as access to appropriate rocks for extracting carving stone, is crucial to the sustaining of Inuit culture. Issues concerning land rights were therefore of obvious importance during the negotiating process.

The major provisions regarding harvesting rights, wildlife management, resource development and conservation are all to be found in the Land Claim Agreement. This is evidently due to the fact that this agreement constitutes the actual transfer of lands to the Inuit from federal and territorial ownership while the Nunavut Act simply outlines and regulates the construction of a public, Nunavut government. However, a few provisions regarding land rights are to be found in the Nunavut Act as well. These provisions describe which lands within the territory of Nunavut that are still vested in the Crown of Canada and to what use they can be made.

3.5.1 Title to Land and Land Use

The Nunavut Settlement Area⁶⁵ is constituted of those lands that have traditionally been inhabited by the Inuit of the eastern Arctic and used for trapping, hunting and extracting other resources necessary for their physical and cultural survival. Within this area approximately 350 000 square kilometres of land is set aside for the use of the Inuit. Hence, an area smaller than the territory of Nunavut while still a fairly large share of this.

The kind of title held to the lands determines the use to which these lands can be put. Title held may differ between different lands. According to the Agreement, title to Inuit Owned Lands can be held in two different forms:

- (a) fee simple including the mines and minerals that may be found to exist within, upon or under such lands; or
- (b) fee simple saving and excepting the mines and minerals that may be found to exist within, upon or under such lands, together with the right to work the same, but including the right to all specified substances.⁶⁶

Title according to the first form (a), is a comprehensive set of rights and includes title to subsurface mineral and mining rights. This kind of title constitutes approximately ten percent of the total land area subject to be granted to the Inuit according to the Agreement.⁶⁷ The title to the rest of the lands is held according to the second form (b) which excludes the subsurface rights. This second form includes, however, the right to

⁶⁵The Nunavut Settlement Area, is the term used in the Land Claim Agreement to describe the area of lands and waters subject to the Agreement, and which is almost identical to that of the Nunavut Territory.

⁶⁶The Nunavut Land Claim Agreement, Section 19.2.1

⁶⁷Hicks & White (2000), p. 33.

all "specified substances". These specified substances are defined in the Agreement as being different kinds of stone gravel and earth; more precisely "construction stone, sand and gravel, limestone, marble, gypsum, shale, clay, volcanic ash, earth, soil, diatomaceous earth, ochre, marl, peat and carving stone".⁶⁸

Title to Inuit owned Lands include in general the right to lands covered by water except in those situations where the water make out a boundary between Inuit Owned Land and other land or, in the case of lakes, where Inuit Owned Lands do not surround the body of water.⁶⁹

With the title to certain lands comes a right to utilize the lands and waters for specific purposes. In most contexts, title to lands also includes a right of exclusive use. In other words, a right to exclude others from capitalizing on these lands. This is also the main principle of the Agreement, although a number of exceptions have been adopted which restrict this fundamental principle. These exceptions usually refer to situations where a particular part of the land is of importance to the Canadian public, for instance, as a prospect for extraction of valuable natural resources; for management, research and protection of the wildlife; or for public transportation purposes.⁷⁰ In these cases provisions have been adopted to ensure the application of general laws on expropriation, presence of government officials and the Royal Canadian Mounted Police (RCMP) on Inuit Owned Lands.⁷¹ Exceptions are also made for the purpose of utilizing Inuit Owned Lands for military manoeuvres although these have to be sanctioned according to regulation addressing the use of any non-public lands for the purposes of military manoeuvres.⁷²

A further restriction to the title to the lands are the regulations in the Agreement addressing to whom Inuit Owned Lands can be transferred or how it can be disposed of. The Agreement asserts that Inuit Owned Lands can not be transferred or disposed of by the Designated Inuit Organization⁷³ [Hereinafter the DIO] except to another DIO or to the federal government. The exceptions are lands within a municipality, which can be transferred to another DIO, the federal government, the territorial government or a municipal corporation.⁷⁴ The purpose of this provision is to ensure that the Inuit Owned Lands will stay within Inuit

⁶⁸The Nunavut Land Claim Agreement, Section 1.1.1

⁶⁹Ibid., Section 19.2.5

⁷⁰See, for instance, Sections 19.2.7, and 21.9.12 of the Land Claim Agreement.

⁷¹Ibid., Sections 21.5.1, 21.5.2, and 21.9.1.

⁷²Ibid., Section 21.5.10.

⁷³The Designated Inuit Organization (hereinafter DIO) is defined in Article 1.1.1 of the Agreement as being either the Nunavut Tunngavik Incorporated or, in respect of a particular function, any Inuit organization that has been designated as responsible for that function.

⁷⁴The Nunavut Land Claim Agreement, Sections 19.7.1, and 19.7.2.

ownership for the present and for all future generations to come.⁷⁵ In my view, however, this provision may also serve to ensure that conclusions in terms of Inuit self-determination will not be drawn from the fact that the Inuit possess a large mass of land geographically quite separate from the rest of Canada. In other words, the provision unambiguously declares that the Government of Canada is still the sovereign over these lands and their inhabitants. The importance of the Inuit in asserting Canadian sovereignty in the Arctic has been explained in chapter 2 and, as will be more thoroughly explored later on, without a clear declaration of Canadian sovereignty in the north, the Inuit may have a greater entitlement to external self-determination under international law.

As mentioned earlier, the lands granted to the Inuit, according to the Land Claim Agreement, only account for part of the lands within the Nunavut territory. The rest of the lands are separate from these and titles to the other lands are regulated through the Nunavut Act, in conjunction with the relevant provisions of the Agreement. The Act thus provides that lands acquired with funds of Nunavut or lands within Nunavut acquired with funds of the Northwest Territories before the implementation of the Nunavut Act, are and remain Crown lands.⁷⁶ Public lands of which the administration has been transferred to the commissioner of Nunavut, or to the Commissioner of the Northwest Territories before the implementation of the Nunavut Act, as well as roads, streets, lanes, and trails on public land also remain as Crown lands.⁷⁷ The control over these lands is in the hands of the Commissioner of Nunavut. The Commissioner is the chief executive officer of Nunavut and is appointed by the Governor in Council of Canada. The Commissioner has the administrative control over these Crown lands and can manage and dispose of these lands according to any law passed by the Legislative Assembly of Nunavut.⁷⁸

3.5.2 Outpost Camps

The Inuit have traditionally been a nomadic people relying on hunting and trapping for survival. This lifestyle -although not necessary for survival in today's Inuit societies- still remains an important part of Inuit culture. The possibility for Inuit people to travel to certain hunting areas where they can live for a longer period of the year, or on an all year round basis, to continue this old way of living, was an important aspect during the negotiation process. Outpost camps are camps used by the Inuit as living quarters for a longer period of time, while hunting or trapping within a particular area. Provisions have been incorporated into the Agreement to satisfy the need of the Inuit to establish outpost camps for longer periods of time on land that is not under Inuit ownership.

⁷⁵ *Our Land Our Future: Questions and Answers About the Nunavut Land Claim Agreement*, Tungavik Federation of Nunavut, Ottawa, 1990, p. 27.

⁷⁶ The Nunavut Act, Section 49 (1).

⁷⁷ *Ibid.*, Section 49 (1).

⁷⁸ *Ibid.*, Section 49 (3).

The term ‘outpost camps’ is defined in the Agreement. There it has the meaning of camps, which are located out on the land and which are used by Inuit groups or families for living and harvesting during shorter periods of time, on a seasonal basis, or on a year-round basis.⁷⁹ In order to suit the definition, however, the outpost camp has to be used for a longer period of time than just a few weeks or several days.⁸⁰

In regards to outpost camps on Crown land, the Agreement states, with a few exceptions, that Inuks can set up outpost camps anywhere in Nunavut where they are allowed access to harvest.⁸¹ The exceptions are: lands held in fee simple (i.e. non-Crown lands) and which are not Inuit Owned Lands or lands owned by a Municipal Corporation (practically all land privately owned by non-Inuit); lands to which a third party has a surface lease from the government; or lands which are within the municipal boundaries unless the Municipal Corporation approves to the camp. The Municipal Corporation can not, without good reason, refuse a request to set up an outpost camp.⁸² Outpost camps can also be set up in parks and conservation areas provided such an establishment is not inconsistent with the requirements of the park or conservation area management plan.⁸³

The Inuit occupy these outpost camp areas as “tenants-at-will”. The implication of this is that the Inuit can keep their outpost camps until they receive a notice from the government saying that the government intends to use the area for a purpose incompatible with the maintaining of the outpost camp.⁸⁴ In this case the Inuit have to leave within reasonable time, or -if they had announced the setting up of an outpost camp to the government in advance- after one year has past since the notice was received.⁸⁵ The Inuit are not required to pay any tax, fee, rent or similar payment for the setting up of an outpost camp used for harvesting.⁸⁶

The provisions regulating the establishment of outpost camps seem to be fairly generous when considered within the context of the present situation of northern Canada, where mining and resource development is

⁷⁹The Nunavut Land Claim Agreement, Section 7.1.1. See also, for interpretation, *The Nunavut Land Claim Agreement in Plain Language*, Tungavik Federation of Nunavut, Ottawa, 1992, p. 30.

⁸⁰*Ibid.*

⁸¹The Nunavut Land Claim Agreement, Section 7.2.2. Section 5.7.16, is the provision relevant to determine where the Inuit are allowed access to harvest. This provision will be dealt with in the following section.

⁸²*Ibid.*, Section 7.2.3.

⁸³Section 7.2.4. Sections 8.4.13 and 9.3.7 of The Nunavut Land Claim Agreement regulate the preparation of the management plans for parks and conservation areas.

⁸⁴*Ibid.*, Sections 7.3.1, and 7.3.2

⁸⁵*Ibid.*, Sections 7.3.1, 7.3.2, and 7.3.3.

⁸⁶*Ibid.*, Section 7.5.1

still comparably non-frequent. The issue of concern is, in my view, that this situation may very likely change and the area become of considerably greater interest for prospecting in the future. In such a case, the provisions seem to be rather tenuous when it comes to protecting the Inuit people's right to establish outpost camps on non-Inuit Owned Land in Nunavut. Furthermore, the thought of an expanding resource development in the High Arctic may not be that far fetched in the light of a changing global climate and new technical developments.

3.5.3 Harvesting Rights and Wildlife Management

The rights to hunt and trap are deeply related to aspects of conservation in that without an effort to ensure the survival of harvested species, hunting and trapping may eventually be confined to the past. This fact is recognized in the Agreement where harvesting rights and conservation are treated as two sides of the same coin. Section 5.1.2 enumerates a set of principles setting the standard for the entire Article 5, which is the article devoted to harvesting rights and wildlife management. These principles recognize the need of Inuit to hunt and trap as well as the need for conservation measures. They also recognize the important role of Inuit people in the management of wildlife and the need for co-operation between Inuit and the Government around these issues. The principles still point out, however, that the Government carries the ultimate responsibility for wildlife management.

The objectives of Article 5 are stated in Section 5.1.3 as the creation of a system of harvesting rights that takes into account the tradition of Inuit harvesting and the basic harvesting need of the Inuit; that gives the DIO the priority to control harvesting for economical purposes; that allows non-Inuit people -particularly long-term residents- continued access to harvesting; and which avoids unnecessary interference in the exercise of the rights, priorities and privileges to harvest. The objective is also to create a wildlife management system that is geared towards conservation; that acknowledges the primary role of the Inuit in wildlife harvesting; that serves to protect the long-term interests of Inuit harvesters; that invites public participation and promotes public confidence, particularly amongst Inuit; and that empowers a Nunavut Wildlife Management Board to make wildlife management decisions within these matters.⁸⁷

The Nunavut Wildlife Management Board [hereinafter the NWMB] lies at the heart of the wildlife management system of Nunavut. Although government⁸⁸ retains the ultimate responsibility for wildlife management and conservation, the NWMB is the "main instrument" of wildlife management in the Nunavut Settlement Area. The NWMB thus takes decisions on harvesting quotas, measures of conservation, and instigates different types of wildlife studies. These studies serve the purpose of determining appropriate

⁸⁷Ibid., Section 5.1.3 (a), (b).

⁸⁸The term "Government" is used to refer to either the federal government, the territorial government, or both. Whichever the government referred to in a particular case is, depends upon the context of the provision, the jurisdiction in the specific matter, or an agreement between the federal and territorial governments for a specific provision.(See Article 1.1.1 of the Land Claim Agreement, on definitions.)

levels of harvesting for different populations of wildlife as well as determining the Inuit people's need for harvesting of these different species.⁸⁹ The NWMB also takes decisions in matters relating to the distribution of harvesting quotas for non-Inuit people in Nunavut.⁹⁰

The creation of this institution is initiated through Section 5.2 of the Agreement. The board itself is constituted of nine members, each appointed differently. Four of the members are appointed by each of four DIO:s. Three of the members are appointed by the Governor in Council. One on the advice of the minister responsible for fish and marine mammals, one on the advice of the minister responsible for the Canadian Wildlife, and one on the advice of the Minister of Indian Affairs and Northern Development in consultation with the Commissioner-in-Executive Council Service. The Commissioner-in-Executive Council appoints one member and the last member, the chairman, is appointed by the Governor in Council from nominations made by the NWMB.⁹¹ The implication of this is that four members of the NWMB are appointed by the DIO:s and four by government officials. Only the four members appointed by the DIO:s and the four members appointed by the government officials can vote on the Board's decisions. The chairman can only vote when there is a tie.⁹² Thus, the DIO:s can not, in and by themselves, create an Inuit majority on the Board. This drawback, on behalf of the Inuit, is somewhat reduced by the requirement in the Agreement that the business of the Board is to be conducted in Inuktitut, and -when legislation or policy so requires- in Canada's official languages⁹³. The effect of requiring the Board to conduct its business in Inuktitut is that people with knowledge of Inuktitut are more likely to be elected as members of the board. This should result in more Inuit being elected as board members.

Depending on the jurisdictional aspects of the matter at issue, all decisions by the NWMB are to be forwarded either to the territorial or federal minister responsible for the particular subject matter. The minister then has the opportunity to, within a certain time frame, either accept the decision or reject the decision. If a decision is accepted, the minister is to take appropriate measures for the implementation of this decision. If a decision is rejected, the NWMB has to make a final decision on the subject matter, in the light of the written reasons supplied by the minister as the grounds for the rejection of the initial decision. At this point the minister has to either accept the decision, as it is, accept it with some alterations, or reject it. Although the NWMB has a substantial influential power in wildlife management decisions and has to be consulted before the adoption of certain wildlife decisions affecting Nunavut, it does not have a 'final' decision making power under the Agreement and is subjected to the will of the appropriate minister.⁹⁴

⁸⁹The Nunavut Land Claim Agreement, Sections 5.2.33, and 5.6.1

⁹⁰*Ibid.*, Section 5.2.33 (g)-(l).

⁹¹*Ibid.*, Section 5.2.1

⁹²*Ibid.*, Section 5.2.9

⁹³*Ibid.*, Section 5.2.17

⁹⁴*In Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries & Oceans)*, [1997] 4 C.N.L.R. 193, 149 D.L.R.

Harvesting is defined in the Agreement as meaning the "reduction of wildlife into possession, and includes hunting, trapping, fishing, as defined in the *Fisheries Act*, netting, egging, picking, collecting, gathering, spearing, killing, capturing or taking by any means".⁹⁵ Subject to where the NWMB has established total allowable harvest for a stock or population, an Inuk have, according to the Agreement, the right to harvest that stock or population in the Nunavut Settlement Area "up to the full level of his or her economic, social, and cultural needs".⁹⁶

Where conservation measures are necessary to protect an endangered stock or population, the NWMB has the authority to determine a level of total allowable harvest. If at this point the basic needs level of the Inuit (also determined by the NWMB based on previous years level of harvesting) is greater or equal to the total allowable harvest, all the harvesting of this particular stock or population will be given to the Inuit. The Inuit thus have priority over non-Inuit, and commercial harvesting in the Nunavut Settlement Area, but are less prioritized than the goal of conserving endangered wildlife.

The NWMB is, according to the Agreement, to presume "as a matter of fact and without further evidence" that the basic needs level of the Inuit equals that of the total allowable harvest established by the Board for the harvesting of bear, musk-ox, bowhead whales, some migratory birds, raptors and eiderdown.⁹⁷ This means that the Inuit have the right to all the harvesting of these species within the Nunavut Settlement Area, if there is a total allowable harvest determined by the NWMB in regards to these species. The Agreement also contains provisions for limiting the possibility of non-Inuit people to hunt within the Nunavut Settlement Area by giving preference in issuing licences to a person who has lived in Nunavut, with the intention of permanency, for more than 18 months prior to submitting an application for a hunting licence, and to applications which will likely provide benefits to the Nunavut economy.

The Agreement also regulates where an Inuk can make use of his or her hunting rights. The basic principle is that all Inuit have unrestricted access to all lands and waters within the Nunavut Settlement Area for harvesting purposes. Excepted are mainly those lands that are owned by private subjects; lands used for national defence and security purposes; and lands that are subject to a surface lease.⁹⁸ The right to access

(4th) 519, 134 F.T.R. 246 (Fed. T.D.), the issue at stake was the obligation of the Minister to consider the advice of the NWMB in making his decision on fishing quotas for turbot as is required by the Agreement. The court held that 'consider' entails, in the light of the Agreement, much more than just receive and examine the advice and recommendations given by the NWMB. This is, according to the court, especially true since the Agreement was created within the context of acknowledgement of an existing aboriginal right. The trial judge thus states that: "regarding consultation under Article 15.3.4 and 15.4.1, there must be *meaningful inclusion* of the NWMB in the Governmental decision-making process before any decisions are made."

⁹⁵The Nunavut Land Claim Agreement, Section 1.1.1

⁹⁶*Ibid.*, Section 5.6.1

⁹⁷*Ibid.*, Section 5.6.5

⁹⁸*Ibid.*, sections 5.7.16 and 5.7.17

lands for harvesting purposes can also be confined by legislation enacted for public safety purposes.⁹⁹

A few provisions that relate to harvesting are to be found in the Nunavut Act. The Canadian Parliament has delegated legislative authority in regards to several matters relating to Nunavut to the Legislative Assembly of Nunavut. This Assembly has the authority to legislate for the purpose of preserving game in Nunavut. However, Section 24 of the Nunavut Act expressly states that:

The Legislature may not make laws under section 23 that restrict or prohibit Indians or Inuit from hunting, on unoccupied Crown lands, for food game other than game declared by order of the Governor in Council to be game in danger of becoming extinct.

Lastly, Inuit harvesters are not required to obtain licences except for commercial fishing of some fish and shellfish.¹⁰⁰ They can dispose of the harvested wildlife in any way they favour and to any person they desire. This right is not restricted to only within the Nunavut Settlement Area. In other words, an Inuit harvester can sell the harvested wildlife to anyone inside or outside of the Nunavut Settlement Area. A permit may however be required for an Inuk to transport the harvested wildlife outside of the Nunavut Settlement Area.¹⁰¹

3.5.4 Resource Development and Management

The regulation of resource development and resource management is of great importance to the Inuit since the extraction and usage of renewable and non-renewable resources affects the ability of the Inuit to use their -and surrounding- lands. Both in terms of the occupation of potential harvesting lands, and for the potential environmental impact that resource development projects may have.

As mentioned in earlier sections, the Agreement only gives the Inuit title to approximately ten per cent of the subsurface rights of the Inuit Owned Lands. Hence, the remaining ninety percent of the rights are 'earmarked' for the purpose of future resource development projects. This is of course a cause of concern for the Inuit who has a major interest in keeping their lands intact for future use. Therefore, the Agreement contains provisions in order to regulate resource development within the Nunavut Settlement Area, as well as regulating other related issues of concern. For instance, consultation on issues of safety, Inuit hiring, language of workplace, and so on.

Before any lands within the Nunavut Settlement Area are opened up for petroleum exploration, the government is obliged to notify the DIO in order to give this organization a possibility to discuss with the

⁹⁹Ibid., Section 5.7.18

¹⁰⁰Ibid., Sections 5.7.26 and 5.7.27

¹⁰¹Ibid., Sections 5.7.30 and 5.7.31

government the terms and conditions that should be attached to such rights. Before the initializing of any project for development or production of resources in the Nunavut Settlement Area, the proponent is obliged to consult the DIO regarding issues such as Inuit hiring, labour relations, Inuit access to facilities constructed by the project, and environmental concerns of special importance to the Inuit.

Besides the obligation of project developers to consult the DIO before the initialization of a development or production project, Inuit influence into the matters of resource development and management is taken care of in basically the same manner as with the wildlife management. A Nunavut Impact Review Board [hereinafter the NIRB] is set up by the Agreement, which is of a similar construction as the NWMB. The Board is the equivalent of the NWMB in the areas of resource development and management and is the establishment responsible for screening project proposals. Its objectives are defined as: "to protect and promote the existing and future well-being of the residents and communities of the Nunavut Settlement Area, and to protect the ecosystemic integrity of the Nunavut Settlement Area."¹⁰²

The NIRB consists of nine members of which four are appointed by the federal Minister of Northern Affairs on nominations made by the DIO. Government officials appoint the rest of the members and the eight appointed members of the Board appoint the chairman.

The emphasis on Inuit influence on the NIRB's decision-making process is, however, less prominent it is with the NWMB. This is clear from some of the provisions. For instance, the Agreement stipulates that the NIRB shall conduct its business in Canada's official languages (English and French) and in Inuktitut upon request. As explained earlier, the NWMB is to conduct its business in Inuktitut except where legislation provides otherwise.

The primary function of the NIRB is to screen project proposals to determine whether or not the impact potential of a particular project is such that a review of the project is necessary before it is initialized. The NIRB can at this point decide whether or not the project needs screening; if it needs to be adjusted before any screening takes place; or whether the potential for harmful impact is such that the project needs to be completely modified or abandoned. The decision of the Board is then presented to the Minister responsible for the subject matter at issue. The Minister then has the option to accept the decision, with or without modifications, or to override the decision to reject a proposal, if the benefits of the project are in national or regional interests.

This ability of the Minister to override decisions by the Board resembles the relationship between the NWMB and the federal government. That is, the Board as the 'main instrument' of the government, while the government itself retains the ultimate decision making power. The relationship does not end there though. The Agreement, to some extent, limits the Minister's power to override a decision by the NIRB. For instance, the assessments by the NIRB on the regional impacts of a project has to be taken into account

¹⁰²Ibid., Section 12.2.5

by the Minister in his or her determination of what is in regional interest.¹⁰³ As explained in the previous section, the Minister can only override a decision by the NIRB to reject a project proposal if the project is in national or regional interest.

A similar situation, which may shed light on the situation, is the requirement of the Minister to take into account the position of the NWMB on certain matters relating to fishing quotas. This requirement led up to the case of *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries & Oceans)*, 1997.¹⁰⁴ At issue in this case was the obligation of the Minister of Fisheries and Oceans to take the position of the NWMB into account in making decisions as to the setting and distribution of fishing quotas. The NWMB accused the Minister of setting a total allowable catch for turbot without taking into consideration the position of the Board on the subject matter. They also accused the Minister of not taking into consideration requests by the NWMB that the Nunavut quota of the total allowable catch would be increased and that Inuit fishermen would be given licences to take part in the commercial fishing of turbot further south. The court ruled that the Minister had failed to fully fill his obligations towards the Inuit according to the Agreement. Justice Campbell stated for the court regarding consultation in the Agreement that: "there must be meaningful inclusion of the NWMB in the Governmental decision-making process before any decisions are made." This requirement meant in reality that the NWMB must be given recognition as to their position and explanations, if so, on why their position has been disregarded, before decisions are taken. The judge also explains that:

There is no doubt that, when it comes to wildlife management, the positions of many competing parties will need to be considered. In this case, however, there is only one party competing with the benefit of an agreement extinguishing an Aboriginal right. Accordingly, the position of that party, being the Nunavut, is to be given priority consideration.¹⁰⁵

Thus, the influence of these two Boards on the decision making process is reinforced somewhat by provisions in the Agreement certifying that the Minister takes into account the positions of these Boards before taking decisions on certain matters.

The Agreement also regulates when non-Inuit people can access Inuit Owned Lands for the purpose of prospecting or exercising mineral rights. The basic rule is that any operator who wishes to access Inuit Owned Lands in order to explore, develop, produce, or transport minerals has to obtain the consent of the DIO before accessing the lands.¹⁰⁶ A few exceptions to this rule exist. First, if the operator held a right to explore specified substances or any other interest that is not a mineral interest before the DIO became the owner of the lands, a permission to access Inuit Owned Lands need not be sought. Second, a person with

¹⁰³Ibid., Section 12.2.2

¹⁰⁴*Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries & Oceans)* [1997] 4 C.N.L.R. 193, 149 D.L.R. (4th) 519, 134 F.T.R 246 (Fed. T.D.)

¹⁰⁵Ibid., p. 211

¹⁰⁶The Nunavut Land Claim Agreement, Sections 21.7.8 and 21.7.11

a right to prospect for minerals and whose activities are of a nature that would not require a land use permit if they were conducted on Crown lands does not need a permission to access Inuit Owned Lands to exercise these rights.¹⁰⁷

If the DIO refuses to consent to the operator applying for access to Inuit Owned Lands according to the basic rule, this person may apply to a Surface Rights Tribunal for an entry order.¹⁰⁸ The set-up of the Surface Rights Tribunal is, according to the Agreement, to be arranged for by the Government on the request of the DIO. The functions of the Tribunal are, primarily, to issue entry orders and to determine compensation payable to surface rights holders. When determining the compensation in cases where Inuit are surface rights holders the Tribunal has to take into account a number of considerations. For instance, considerations as to the effects on wildlife harvesting, loss of use to Inuit, damage, inconvenience, cultural attachment, and so on, has to be taken into account when calculating an appropriate compensation.¹⁰⁹ In regards to the constitution of the Tribunal, the Agreement provides that at least half of the members of any panel dealing with issues relating to Inuit Owned Lands have to be residents of the Nunavut Settlement Area.¹¹⁰ The Tribunal conducts its business in Canada's official languages and in Inuktitut if required to do so.¹¹¹

The Agreement also contains provisions regulating how and when the Government can expropriate Inuit Owned Lands. Any person with expropriating authority under federal or territorial legislation may exercise this authority on Inuit Owned Lands. Legislation that is adopted after the ratification of the Agreement, has to provide for an opportunity for the DIO to object to the expropriation, as well as to the determination of compensation by mediation or arbitration.¹¹² There are, however, a few qualifications provided for in the Agreement for the expropriation of Inuit Owned Lands. Any expropriation has to be approved by an order of the Governor in Council, except where the expropriation is within municipal boundaries for municipal purposes where the approval of the Commissioner-in-Executive Council has to be sought.¹¹³ Inuit Owned Lands may also only be expropriated up to a certain amount. If twelve percent of the Inuit Owned Lands or any interest therein have been expropriated, further

¹⁰⁷ Ibid., Section 21.7.9

¹⁰⁸ Ibid., Section 21.7.11

¹⁰⁹ Ibid., Section 21.8.3

¹¹⁰ Ibid., Section 21.8.7

¹¹¹ Ibid., Section 21.8.9

¹¹² Ibid., Sections 21.9.1 and 21.9.4

¹¹³ Ibid., Sections 21.9.3 and 21.9.14

expropriation is not permitted.¹¹⁴ The expropriating authority is also required, if ‘reasonably possible’ to offer compensation in the form of lands of equal value. If the DIO requires monetary compensation, the same principles as those utilized by the Surface Rights Tribunal in assessing compensation for an entry order, shall be applied.¹¹⁵

Access to fresh water is a growing concern, globally and locally, as modern farming practices and environmental pollutants continue to contaminate water resources. The regulation of access to fresh water and its usage are important resource management issues. The Agreement stipulates that the DIO shall have exclusive rights to all the water in, on or flowing through Inuit Owned Lands. Furthermore, subject to a few restrictions, the water flowing through the lands shall be “substantially unaffected” in quality, quantity, and flow.¹¹⁶ If, however, a person applying for a licence to use water within the Nunavut Settlement Area -for a purpose that will affect the water quality, quantity or flow- enters into a compensation agreement with the DIO, such usage of the water may take place. This may, at first, seem as a voluntary procedure, but the Agreement then stipulates that if an agreement on appropriate compensation can not be reached, either party to the dispute may refer the matter to the Nunavut Water Board [hereinafter the NWB] for a decision on the compensation to be paid.¹¹⁷ These provisions of the Agreement seem rather vague, and the question that arises is: do the DIO have to enter negotiations on the appropriate compensation even if the DIO is not interested in having the water quality, quantity or flow altered? The way that the Agreement is formulated this seems to be the case but it will eventually be up to the courts to decide, if or when the issue arises.

¹¹⁴Ibid., Section 21.9.11

¹¹⁵Ibid., Section 21.9.9

¹¹⁶Ibid., Sections 20.2.2 and 20.2.4

¹¹⁷Ibid., Sections 20.3.1 and 20.3.2

4 Self-Determination

The international legal doctrine of self-determination of peoples constitutes one of the more contentious issues in modern international law. One of the reasons is the obvious fact that the issue involves that of two fundamental but conflicting legal concepts. On the one side is the doctrine of state sovereignty, represented in the United Charter through the principle of non-intervention¹¹⁸, and on the other side is the evolving sphere of human rights law, with an increasing focus on minority populations and indigenous peoples within states. As would be suspected, the principle of self-determination has therefore been subjected to different interpretations and an ongoing development of its core essence.

In this Chapter the law on self-determination will be discussed. As will the legal implications of the concept and the different views held by legal scholars, state parties and indigenous peoples. Aspects of particular importance to the effective enjoyment of a right of self-determination will also be examined.

4.1 Self-Determination in International Law

International law relating to the principle of self-determination has ever since the principle's introduction evolved on a continuous basis. The development has been in regards to who the principle applies to and the legal implications of its application. Since international law, contrary to national law, is not dictated and enacted by a sovereign subject, development of the right of self-determination has occurred through its utilization in various legal sources.

The valid sources from which international law is derived is generally recognized as being those enumerated in Article 38 of the Statute of the International Court of Justice.¹¹⁹ According to this Article international law consists of three categories: international conventions, international custom, and general principles of law recognized by civilized nations. Judicial decisions and teachings by legal scholars are recognized as a fourth category, but only as a subsidiary means of interpreting the law which therefore lacks any binding legal force. Together these categories constitute the normative framework within which the international law of self-determination is manifested. The examination in this chapter of the legal aspects of self-determination will therefore take place within the context of these four categories.

¹¹⁸Charter of United Nations, June 26, 1945, 1976 YBUN 1043. Article 2 (7)

¹¹⁹See, for instance, Peter Malanczuk, *Akehurst's: Modern Introduction to International Law*, London, Routledge, 1997, p. 36

4.1.1 United Nations and the Regulation of a Right to Self-Determination

Of all the numerous U.N. instruments the Charter of 1945 makes out the foundation of the U.N. machinery. It also accounts for the first incorporation of the principle of self-determination into the U.N. sphere. The incorporation of the principle of self-determination into the Charter also, according to Cristescu "marks...the recognition of the concept as a legal principle...".¹²⁰ The right of self-determination is mentioned twice in the U.N. Charter of 1945. Article 1 (2), expresses the purpose of the United Nations as, amongst other, "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,..." Similarly, Article 55 addresses the importance of respect for the principle of equal rights and self-determination of peoples.

Despite the clear language of the two provisions, the question of who the principle applies to has been vigorously debated. The term 'peoples' has been interpreted in a number of different ways, often depending on the interpreter's own interests at stake. Likewise, the term 'nations' is not defined in the Charter, which further obscures the reach of the provisions.¹²¹ The provisions also fail to address the implications of a right of self-determination. That is, what the effective outcome of a people exercising its right to self-determination would be. What is clear, however, is that Article 2 (7) of the Charter prevents the U.N. to intervene in matters which are "essentially the domestic jurisdiction of any state..."¹²² This has led many to argue that secession from a sovereign state as an expression of self-determination is prohibited by international law, except in extreme cases. Chapters XI and XII of the Charter deal with non-self-governing territories and the international trusteeship system. Although the principle of self-determination is not explicitly mentioned in these chapters, the provisions therein are through their wording linked with the principle of self-determination.¹²³ In particular, Article 76 expounds that the basic objectives of the trusteeship system shall be carried out in accordance with "the Purposes of the United Nations laid down in Article 1 of the present Charter,..."¹²⁴ Hence, Chapters XI and XII seem to apply the principle of self-

¹²⁰Aureliu Cristescu, *The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter of the United Nations and other Instruments adopted by the United Nations Organs, with Particular Reference to the Promotion and Protection of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN. 4/Sub. 2/404, 2 June 1978, Vol. 3, 86

¹²¹Although the Co-ordination Committee of the UN Secretariat has stated that "the word 'nation'...is broad and general enough to include colonies, mandates, protectorates, and quasi-states as well as states." Quoted in: Cristescu (1981), para. 262

¹²²U.N. Charter, Article 2 (7)

¹²³For a discussion on this, see Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, *Emory International Law Review*, Vol. 9, Nr. 1, 1995, 153, p. 140ff.

¹²⁴U.N. Charter, Article 76

determination to non-self-governing territories and the trusteeship system.

The trusteeship system, as a successor to the Mandate system of the League of Nations¹²⁵ was intended to apply to three categories of territories: "a. territories now held under mandate; b. territories which may be detached from enemy states as a result of the Second World War; and c. territories voluntarily placed under the system by states responsible for their administration."¹²⁶ Non-self-governing territories are defined in Article 73 of Chapter XI as being those "territories whose peoples have not yet attained a full measure of self government".¹²⁷

In 1946 a letter was sent by the secretary-general of the United Nations to all the member states requesting their opinion on what factors should be of importance in determining the territories under Chapter XI. The response was poor and the issue was referred to a subcommittee. Different opinions were held on the issue, often for reasons of self-interest as opposed to concern for non-self-governing peoples.¹²⁸ No general consensus was reached as to which territories that should be subjects under this chapter of the Charter. However, although the language in Chapter XI and XII links these chapters with the principle of self-determination, nothing in the Charter limits, in my understanding, the application of this principle to these chapters.

Self-determination took on a more clearly defined role with the adoption of resolution 1514 (XV) of December 14, 1960, entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples". This declaration intended to more specifically apply the principle of self-determination to the existing colonies. The Declaration uses strong wording to assert that "the peoples of the world ardently desire the end of colonialism in *all* its manifestations,"¹²⁹. In a similar fashion Article 2 declares that: "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"¹³⁰. Despite the strong wording of the document, Articles 6 and 7 of the Declaration reinforces the principle of non-intervention and promotes the territorial integrity of sovereign states. This fact supports the contention that self-determination, as it has been interpreted within the context of the United Nations, is more concerned with territorial aspects as opposed to aspects of peoplehood.¹³¹ In other words, self-determination becomes more of a right of the

¹²⁵James E. Falkowski, *Indian Law/Race Law: A Five-Hundred-Year History*, Praeger Publishers, New York, 1992, p.48

¹²⁶U.N. Charter, Article 77 (1)

¹²⁷U.N. Charter, Article 73

¹²⁸Falkowski (1992) p. 44

¹²⁹G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No.16, U.N. Doc. A/4684 (1960), preamble (emphasis added)

¹³⁰G.A. Res. 1514, Article 2

¹³¹See, for instance, Gudmundur Alfredsson, *Different Forms of and Claims to the Right of Self-Determination*, in Donald Clark (ed.), *Self-Determination: International Perspectives*, London, MacMillan Press

entire population of a specific territory -regardless of its ethnic or cultural composition- which has previously been subjugated to foreign control or rule, than a right of *one* particular people within a territory regardless of other peoples present on the same territory.

This reasoning is further augmented by the fact that previous African colonies did not reconstruct most of their borders when they were liberated from the colonizing states. Instead the Organization of African States supported that the right to self-determination was to be applied to entire territories as they had been mapped out by colonizers, regardless of the different ethnic groupings within the territories. This application of the right has had the effect that self-determination has been severely restricted in its present application concerning indigenous peoples since these peoples inhabit areas which are mostly situated within the boundaries of sovereign states, often sharing their territories with other non-indigenous people.

General Assembly Resolution 1541 (XV) of December 15 1960,¹³² further amplifies the assertion that it is the territory, not the people, that is the decisive aspect.¹³³ This resolution sets out to clarify the reach of the chapters in the Charter concerning non-self-governing territories and the trusteeship system and explains that "there is an obligation to transmit information in respect of territory that is geographically separate and is distinct ethnically and/or culturally from the country administering it". Thus emphasizing the importance of territory when mapping out the right of self-determination.

In Principle 1, it is declared that "[t]he authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type."¹³⁴ In laying the foundation for the 'salt-water theory',¹³⁵ the resolution seems to limit the extent of Chapters XI and XII to certain narrowly defined territories, in contrast with the provisions in the Charter and resolution 1514 which seem apply these to all non-self-governing territories.

In addition to clarifying the reach of Chapters XI and XII of the Charter, the resolution also recognizes the means through which self-determination can be achieved. These are (a) emergence as a sovereign independent state, (b) free association with an independent state, or (c) integration with an independent state.¹³⁶

Ltd., 1996, p. 60

¹³²G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960)

¹³³Yussuf N. Kly, *Proceedings of the conference on African-Americans and the Right to Self-Determination*, Hamline University School of Law, Saint Paul, Minnesota, May 14, 1993, p. 23

¹³⁴G.A. Res. 1541, Principle 1

¹³⁵This theory, or concept, requires that a territory is separated by an ocean from the colonizing state in order to qualify as a colony.

¹³⁶G.A. Res. 1541, Principle VI

The right of self-determination is also recognized in the International Covenant on Economic, Social and Cultural Rights as well as in the International Covenant on Civil and Political Rights. Both of these came into force in 1976. Article 1 of these covenants states that: "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." The same article declares that "All peoples may, for their own ends, freely dispose of their natural wealth and resources..." and delegates the responsibility to "promote the realization of the right to self-determination,..." to the states parties to the covenants.¹³⁷ The Covenants thus articulates self-determination as a right of all peoples, however without defining the term 'peoples'.

The adoption of G.A. Resolution 2625, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, reiterates the contention of previous United Nations documents that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development,..."¹³⁸ Furthermore, this declaration represents a small but significant expansion of the principle of self-determination compared to how it has been constructed in previous documents. First of all, the declaration expands on the possible means through which self-determination can be achieved by adding a fourth option to the three categories listed above. This is "the emergence into any other political status freely determined by a people...". Secondly, while upholding the principle of non-intervention the declaration somewhat limits the non-negotiable status this principle has enjoyed in previous documents. It thus states that:

Nothing in the foregoing paragraphs shall be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹³⁹

In other words, the territorial integrity and political unity of sovereign states is made conditional upon that particular state's conformity to the principle of equal rights and self-determination of peoples, as well as upon the extent to which the entire population inhabiting its territory is democratically represented through its political system. This aspect clearly marks a step forward in the application of the right of self-determination since it constitutes a recognition that democratic values must serve as the foundation of any state system that is not going to create more conflicts and separation than it resolves. C. Tomuschat thus argues that:

¹³⁷The International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 and the International Covenant on Economic Social and Cultural Rights, 16 December 1966, 993 UNTS 3, Article 1

¹³⁸G.A. Res. 2625 (XXV), 24 October 1970

¹³⁹Ibid.

It is a matter of common knowledge that, in its elaboration on self-determination, the Friendly Relations Declaration of the General Assembly would appear to go even further when stating that the principle of national unity and territorial integrity may have to yield if the state concerned is not possessed of a government "representing the whole people belonging to the territory without distinction as to race, creed or colour."¹⁴⁰

The right of self-determination in cases of non-representation of groups in national governments is likewise made apparent in the Vienna Declaration adopted in 1993 by the World Conference on Human Rights.¹⁴¹ The last sub-paragraph of paragraph 2 reiterates the wording of the Friendly Relations Declaration on this issue. Paragraph 2 of the Vienna Declaration also recognizes a right of peoples under foreign occupation to take appropriate action to enforce their right of self-determination.¹⁴²

However, a warning must be issued for the possibility of using democracy as a legitimate ground for denying otherwise very credible claims for self-determination. The fact that a government is representative of the "whole people belonging to the territory without distinction as to race, creed or colour" should not, I would argue, justify situations where small distinct peoples, making out only a very small proportion of the voters within a large state, are denied self-determination.

In 1982, the United Nations adopted a resolution for the purpose of establishing a permanent Working Group on Indigenous Populations with a mandate to

(a) Review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyze such materials, and to submit its conclusions to the Sub-Commission, bearing in mind the report of the Special Rapporteur of the Sub-Commission.

(b) Give special attention to the evolution of standards concerning the rights of indigenous populations, taking into account of both the similarities and the differences in the situation and aspirations of indigenous populations throughout the world.¹⁴³

The working group itself consists of five independent experts. These are chosen from the group of international law experts of the United Nations Sub-Commission on Prevention of Discrimination and

¹⁴⁰C. Tomuschat, *Self-Determination in a Post-Colonial World*, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 1993, p.9

¹⁴¹Gudmundur Alfredsson, *Access to International Monitoring Procedures: Choices Between Self-Determination and the Human Rights of Groups*, in Michael C. van Walt van Praag, Onno Serroo (Ed.), *Report of the International Conference of Experts Held in Barcelona From 21 to 27 November 1998: The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, UNESCO Division of Human Rights, Democracy and Peace/UNESCO, Centre of Catalonia, p. 200

¹⁴²*Ibid* p. 199

¹⁴³Economic and Social Council Resolution 1982/34 of 7 May 1982.

Protection of Minorities. Usually the geographical distribution of seats is such that one member represents one particular region.¹⁴⁴ The working group follows a unique set of rules of procedures compared to other U.N. organs. The hearings of the working group allow oral and written interventions from all indigenous groups with a desire to participate. Usually such privilege is restricted to states, intergovernmental agencies, and accredited non-governmental organizations.¹⁴⁵

The main contribution of the working group to the issue of indigenous peoples' rights is the Draft Declaration on the Rights of Indigenous Peoples.¹⁴⁶ The concern of the draft declaration is the relationship between states and their indigenous populations. It focuses mainly on the issue of indigenous autonomy in matters relating to internal and local affairs.¹⁴⁷ The draft declaration is rather broad in its scope on autonomy and far reaching in the powers accredited to indigenous peoples. According to G. Alfredsson: "these drafting suggestions go far beyond mere cultural autonomy as far as the foreseen political and, not least, economic functions are concerned. The powers proposed would be legislative and administrative, not merely advisory."¹⁴⁸

In regards to the right of self-determination, the draft declaration does not represent a major shift in attitudes from the one presented in the Human Rights Covenants, the Friendly Relations Declaration and the other U.N. resolutions.¹⁴⁹ Instead it leaves the doors open for interpretation. G. Alfredsson argues that article 3 of the draft in accordance with article 31 may refer to both internal and external self-determination.¹⁵⁰ Article 3 states that:

Indigenous peoples have the right to self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development.¹⁵¹

Article 31 expands on this by adding that:

¹⁴⁴Falkowski (1992), p. 61

¹⁴⁵Falkowski (1992), p. 62

¹⁴⁶Draft Declaration on the Rights of Indigenous Peoples as Agreed upon by the Members of the Working Group at its Eleventh Session (The Working Group of Indigenous Populations), UN Doc. E/CN. 4/sub. 2/1993/29

¹⁴⁷Gudmundur Alfredsson, *Indigenous Peoples and Autonomy*, in Markku Suksi (ed.), *Autonomy: Applications and Implications*, Kluwer Law International, the Netherlands, 1998, p. 129

¹⁴⁸*Ibid.*

¹⁴⁹Falkowski (1992), p. 64

¹⁵⁰Alfredsson in Clark (1996), p. 67

¹⁵¹WGIP report in U.N. document E/CN.4/Sub.2/1993/29, Annex 1.

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.¹⁵²

At the same time, the declaration later upholds that:

Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or to the Declaration of Principles of International Law on Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations...¹⁵³

The declaration thus endorses the principle of non-intervention and integrity of sovereign states in accordance with the U.N. Charter and relevant conventions and declarations, and conditions the right of self-determination on the upholding of this principle.

The drafting process is since 1995 in the hands of a new working group of the Commission on Human Rights, consisting of government delegates as opposed to experts. It is, according to G. Alfredsson, "likely that many of the ideas put on paper by the WGIP, including those on autonomy, will be maintained albeit in watered-down versions."¹⁵⁴ Though adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, it has as of yet not entered into force.

4.1.2 Case Law

Although not recognized as a source of law, the decisions of the International Court of Justice serve as an indication of the law as it stood at the time of a particular decision. The ICJ has given its opinion on the issue of colonial peoples and their rights in two cases. These are the Namibia Case and the Western Sahara Case.¹⁵⁵

The Western Sahara Case relates directly to the question of self-determination. In resolution 3292 (XXIX) the General Assembly of the U.N. decided to request the ICJ to give its advisory opinion on the matter of self-determination for the territory of Western Sahara and the people inhabiting the territory. In this case the issue was the claims of sovereignty by Morocco, Mauritania and Algeria over the territory of Western

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Alfredsson in Suksi (1998), p. 129

¹⁵⁵ Advisory Opinion of the International Court of Justice [1971] ICJ Reports 16, and Advisory Opinion of the International Court of Justice Concerning the Western Sahara [1975] ICJ Reports 12

Sahara. The Sahrawis who favoured independence to integration with any of the neighbouring states inhabited this territory, a Spanish Colony since the 15th century. Despite some historical-cultural links between the Sahrawis and the peoples of the neighbouring countries, the ICJ upheld the right of self-determination and supported the right of Western Sahara to independence and political decolonization. The right of self-determination was defined by the ICJ as a need to require "a free and genuine expression of the will of the peoples concerned."

Argued by some, the fact that the ICJ insisted on the importance of complying with the will of the peoples of the particular territory enhanced the importance of the territory in assessing a right of self-determination. In particular since the Sahrawis did not constitute a unitary people until awareness of the issues arose in the second half of the 20th century. However, the fact that the ICJ advocates a right of self-determination for a particular people as opposed to integration -against this peoples's will- with a neighbouring state to which only a limited set of historical-cultural ties exists, does not, in my view, bring with it any major implications which in their turn would restrict the principle of self-determination to exclude non-territorial based factors, such as culture, language and religion, concerns. Disregarding the question of the relationship between self-determination and territory, the fact remains that the Western Sahara Case stands as an indication and acceptance of the principle's foundation in international law.

4.1.3 Definitions of Peoples, Minorities and Nations

Crucial for the effective construction and implementation of international provisions protecting rights of groups is the understanding of whom these rights confer benefits upon. This reality may also be part of the reason why the international community has had such a difficulty arriving at agreed upon definitions in regards to minorities, and to what constitutes peoples for the purpose of international law. Indigenous peoples in general oppose the characterization of themselves as minorities, mainly for the reason that only peoples are recognized as possessing a right of self-determination. Those minorities who do not qualify as peoples are merely entitled to minority rights protected by Article 27 of the International Covenant on Civil and Political Rights. As long as the definitions on minorities and peoples remain unclear and vague, the legal obligations conferred upon States by international treaties and case law dealing with indigenous, minority, cultural and political rights remain arbitrary and therefore in many cases virtually non-existent. This of course benefits some states who have been and still are reluctant to acknowledge minority rights and rights specific to indigenous peoples. This view is supported by A. Eide who asserts -in regards to the attempts by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish a universal definition- that "The efforts made by the Sub-Commission itself, however, have failed,.....partly because of a wide-spread reluctance by governments to establish a general system for minority protection."¹⁵⁶

There are however other reasons why there has been such a difficulty arriving at common definitions. For

¹⁵⁶ Asbjörn Eide, *In Search of Constructive Alternatives to Secession*, in C. Tomuschat, *Modern Law of self-Determination*, 1993, p. 157.

example, the different situations to which the concept of minorities and peoples would apply make it difficult to agree upon a definition that would suit all possible different applications.¹⁵⁷ Many attempts have, however, been made to try to define minorities and peoples. Despite the fact that it is in the majority of cases perfectly clear to most of us what they are, none of these attempts have been successful of reaching a general consensus.¹⁵⁸ In regards to minorities, the one definition that has gained the most recognition and acceptance is the one utilized by Special Rapporteur Francesco Capotorti.¹⁵⁹ His definition is often cited as suggesting that a minority is:

A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members -being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹⁶⁰

This definition has been criticized by some writers¹⁶¹ suggesting that it is not in conformity with the wording of Article 27 of the International Covenant on Civil and Political Rights in respect to which the definition was constructed. F. de Varennes contends that nothing in either the wording of the Article nor the *travaux préparatoires* supports the proposition that minority rights should only apply to 'nationals'.¹⁶² This objection is also supported by A. Eide who argues that "There is, for instance, no inherent reason why settled groups of non-nationals should not have the right to practice their own religion or use their own language between themselves."¹⁶³

As argued by G. Alfredsson, most of the definitions that have been proposed share some common characteristics and usually recognizes that a minority is a group of people which is numerically smaller than the rest of the population, share some common characteristics in regards to religion, ethnicity and/or language, with a long-term presence on the land and show self-identification or a sense of solidarity, directed towards preserving their culture, traditions, religion or language.¹⁶⁴ This type of definition is based

¹⁵⁷Ibid., p. 158.

¹⁵⁸Gudmundur Alfredsson, *Minority Rights: International Standards and Monitoring Procedures*, Latvian Human Rights Quarterly, 5/6, 1998, p. 11.

¹⁵⁹P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford, 1992, p. 6 f.

¹⁶⁰Ibid. p. 6

¹⁶¹See, for instance, F. de Varennes, *Language, Minorities and Human Rights*, Martinus Nijhoff Publishers, the Hague, 1996, p. 136 ff., or J. Packer & K. Myntti, *The Protection of Ethnic and Linguistic Minorities in Europe*, Institute for Human Rights, Åbo Akademi University, 1993, p. 24 ff.

¹⁶²de Varennes (1996), p. 136 ff.

¹⁶³Eide in Tomuschat (1993), p. 159.

¹⁶⁴G. Alfredsson in Latvian Human Rights Quarterly (1998), p. 12.

on the Capotorti definition which is also the one most commonly accepted in the international community.¹⁶⁵

The international community has faced equal difficulties in finding a common solution to the definition of the term 'peoples'. States have been reluctant to accept a definition that would extend the application of the term to minority populations residing within existing sovereign States. The United Nations has, as explained in previous section, been unwilling or unable to define the term 'peoples' since the implications of a definition would affect matters traditionally within the domestic jurisdiction of sovereign states. This has become a particularly difficult issue to resolve in regards to indigenous peoples who most definitely constitute distinguishable peoples but find themselves living within the borders of sovereign states.

I would argue that there is one fundamental difference between minorities and peoples that would underline the necessity of referring to indigenous peoples as peoples. This is the fact that minorities can move between different states without losing their status as minorities in either the original or the recipient state (provided the receiving state is not the country from which this particular group of people originate and where their people still constitute a majority). Peoples, on the other hand, -as the term has been utilized in international instruments- are only peoples in relation to a specific territory and, within the western state-system, a given country. In the same way, indigenesness can not follow a people around the world from country to country. For instance, Mohawks are only indigenous to North America. They would not constitute an indigenous people in, for instance, Africa (at least not for legal purposes). The fact that we often denote indigenous peoples indigenous even if they move to a country different than their origin indicates that indigenous peoples still today face prejudice and that we still make a distinction between indigenous peoples and others.

Related to the definition of peoples is the issue of whether Indigenous peoples should be referred to as peoples -with or without an 's'- or simply as populations. Again the issue has to do with the implications for the right of self-determination, normally accredited only to 'peoples'. There has been no general consensus on the issue, but indigenous peoples have generally claimed that they constitute 'peoples', while state parties have been more reluctant to refer to indigenous peoples as 'peoples'. Different instruments and international bodies use different terminology. For instance, 'population' is utilized in the name of the Working Group of Indigenous Populations. On the other hand the ILO Convention 169 of 1989, consistently refers to indigenous peoples as 'peoples'. Article 1(3), however, contains a disclaimer which asserts that:

The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.(64)

¹⁶⁵ As argued by P. Thornberry, *International Law and the Rights of Minorities*, 1991, p. 6.

Indigenous peoples themselves have advocated the term ‘peoples’ to be applied to their situation. Especially since ‘indigenous peoples’ was originally used by the League of Nations to describe all non self-governing groups, while the U.N. later introduced ‘indigenous populations’ for the purpose of distinguishing indigenous peoples in the Americas from colonized peoples in Asia and Africa.¹⁶⁶ The idea of having a dominant culture arbitrarily applying their terms for the purpose of meeting a legal requirement has also been viewed as oppressive and racist to many indigenous peoples.

However, the manner in which the term ‘peoples’ has been utilized indicates that under the present system of international law the term is interpreted to specify the population of a defined territory, constituting a separate political unit.¹⁶⁷ G. Alfredsson explains that: “The reduction of minorities and indigenous peoples to groups, even when they are large and associated with territory, is further evidence of the importance granted to political units with accepted boundaries.”¹⁶⁸ Political units, in this sense, mean something different than just a people inhabiting an area within a metropolitan state.

In my opinion these developments are highly questionable. After a set of rights have been attributed to the term ‘peoples’ through international instruments, the application of this term has been limited to the extent of excluding groups that would obviously otherwise have fitted the definition of peoples. In other words, the meaning of an otherwise unambiguous term has been altered to suit certain political goals. Although legally questionable since terms in agreements, treaties, conventions, declarations and further on, should be interpreted according to their ordinary meaning,¹⁶⁹ this is probably how the law stands.

4.1.4 The Subjects and Implications of Self-Determination

As explained in the previous section, several different views have emerged as to who the ‘peoples’ entitled to self-determination are, and what this right consist of. Despite their difference, these views generally seem to be founded on a right of self-determination as it has been expressed in the U.N. documents. There are, however, some applications of the principle that are virtually undisputed. First of all, the right of the peoples of former colonies to enjoy self-determination has been spelled out in U.N. resolutions and constitutes the standard of self-determination; secondly, there exists a right of peoples in occupied territories -under alien domination- to self-determination; thirdly, there is an undisputed right of separation by agreement between different groups within a state. Besides these situations where a right of self-determination remains undisputed, there are strong indications that a people is entitled to self-determination if they are subjected

¹⁶⁶See submission by the Inuit Circumpolar Conference on the revision of the 1957 ILO Convention 107, quoted in Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Rights*, Theytus Books Ltd., 1998, p. 91

¹⁶⁷Alfredsson in Clark (1996), p. 59

¹⁶⁸Alfredsson in Clark (1996), p. 60

¹⁶⁹This legal principle is expressed in the Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969. Article 31

to systematic non-representation by the government of the territory they reside within. This 'right' has, as explained above, been made evident in the Vienna Declaration of 1993, and in the Friendly Relations Declaration. Similarly, the right of self-determination in cases of non-representation has been expressed by a number of scholars including Special Rapporteur A. Eide.¹⁷⁰

Besides these more or less undisputed cases, a more general right of self-determination has not been endorsed by international law. Instead, the view has often been held that a general right of self-determination of all peoples would lead to increased global instability and increased focus on ethno-nationalistic values.¹⁷¹

Increasingly, emphasis has been placed on the concept of internal self-determination which supports the development of a right of self-determination that still respects the integrity of sovereign states. This has been done to favour a more general application of self-determination with the possibility of gaining greater support from state-actors while at the same time limiting the possibilities of obstructing world peace. Self-determination in an internal sense emphasizes autonomy and self-government as means of allowing a people within a state to determine their own political future. This concept has been advocated for use within the setting of the WGIP in relation to indigenous peoples.¹⁷² It would thus serve as a possible middle ground between the interests of indigenous peoples and the states in which they reside. However, the problem with a concept of *internal* self-determination is that it easily, I would argue, overstates the essence of the right of self-determination. That is, in my opinion, the possibilities of a people to determine its own future without interference from others.

A people entitled to the right of self-determination have a few options in exercising this right. In the case of former colonies enjoying the right of self-determination resolution 1541 (XV) of 1960 states that self-determination can be achieved through either (a) emergence as a sovereign independent state, (b) free association with an independent state, or (c) integration with an independent state. A people which has chosen free association retains the possibility to later on make a choice on its political status while a people which has opted for integration with an independent state is reduced to a group within that state and can from that moment only claim rights applicable to groups.¹⁷³

The important part is that the people itself is given the option to choose. This is pointed out in the Western Sahara Case where Justice Dillard contended that "self-determination is satisfied by a free choice[,] not by

¹⁷⁰Gudmundur Alfredsson in van Walt van Praag and Seroo (1998), p. 200

¹⁷¹A. Eide argues that "one of the most serious threats both to a peaceful evolution of the international order and to the advancement of human rights protection is the ideology of ethno-nationalism, in its expansionist, exclusivist and secessionist modes, and that this ideology constitutes a retrogressive development which needs to be counteracted." A. Eide, *In Search of Constructive Alternatives to Secession*, in C. Tomuschat, *Modern Law of Self-Determination*, Kluwer Law International, the Netherlands, 1993, p. 140

¹⁷²G. Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, in C. Tomuschat, *Modern Law of Self-Determination*, Kluwer International Law, the Netherlands, 1993, p.41 ff.

¹⁷³*Ibid.*, p. 60

a particular consequence of that choice or a particular method of exercising it.”¹⁷⁴ As explained above, The Friendly Relations Declaration expands on the choices available to peoples in general, exercising their right of self-determination. It thus states that:

The establishment of a sovereign and independent state, the free association or integration with an independent State or the emergence into any other political status freely determined by a peoples constitute modes of implementing the right of self-determination by that people.

In cases where a situation of non-representation exists the procedure is not as clear cut. A first problem relates to the question of when a situation of non-representation exists, or rather of who decides when such a situation exists. These questions may have to be solved on a case-by-case basis. However, the fact that international law is a horizontal legal system and that states govern their own internal matters has the effect, I would argue, that peoples within a state who themselves feel they are subjected to non-representation have to adopt whatever measures they need to resolve the situation. In order not to violate international law however, other states, if they intend to intervene on behalf of the non-represented people, may have to ensure that the degree of non-representation is severe enough that intervention in support for the non-represented people is justified under international law.

For instance, many aboriginal nations in North America, such as the Mohawks of the Iroquois confederacy, feel strongly that they are separate, independent nations with a nationhood that never ceased to exist. They also feel that states have applied warfare against these nations, and that they have been and are subdued by military and police force while their lands are being used for natural resource extraction. Similarly, these nations are not recognized as state-subjects under international law with a possibility of creating obligations under international law and are thus without obligations under international law. In other words, when such a nation use violence to achieve their self-determination this will, I would argue, not be a matter of international law. International law is however violated when and if a second state -which is a recognized state-subject under international law- intervenes on behalf of this nation without justifications under international law.

Thus the question should in my opinion be: when are states justified under international law to intervene on behalf of a non-represented people, and who determines when such is the case? Although no clear answer exists, I would argue that in order to not produce increased instability a fairly strict standard must be applied. This fact must be weighted against the danger that comes from setting a strict standard that in itself serves to justify, under the name of international law, a certain amount of non-representation by reinforcing the view that peoples are subjects of states. Generally it is held that other means of achieving the desired results must first have been exhausted.

¹⁷⁴Western Sahara, 1975 I.C.J. 4, p 123 (separate opinion of Dillard, J.)

These other means could be attempts at constructing autonomies where the rights of peoples are safeguarded by national and international forums and procedures.¹⁷⁵

4.2 Competing View on Self-Determination and its Implications

[I]deally, self-determination and sovereignty principles will work in tandem to promote a peaceful, stable, and humane world. But, where there is a violation of self-determination and human rights, presumptions in favour of territorial integrity or political unity of existing states may be offset to the extent required by an appropriate remedy.¹⁷⁶

4.2.1 Self-Determination From an Indigenous Perspective

As we can see from the discussion in previous sections, three problems stand in the way of indigenous peoples enjoying a right of external self-determination. Although the main reason behind all of these 'barriers' may be a reluctance of sovereign states to agree to the granting of rights to indigenous peoples which may have an impact on their own sovereignty, they take on different manifestations in international law. The first barrier is the reluctance of the international community to apply the term 'peoples' to indigenous peoples. The second barrier is the history of matching a right of self-determination with a territorial requirement. As opposed to granting a right of self-determination to a particular people on a certain territory, self-determination is understood as a right to representative government. In other words, a right to democracy for all peoples inhabiting a certain territory. The third barrier is the view generally held that this territory has to be geographically separate from the territory of the state, thus the 'salt water theory'.

These 'limitations' on the right of self-determination have been opposed by indigenous peoples, as well as by some scholars and state-parties. Indigenous peoples have, as we have seen above, opposed the classification of themselves as simply 'minorities', or 'groups'. Indigenous peoples in North America have argued that they never gave up their sovereignty and that treaties signed between native nations and European states were international treaties. Hence, reduction of indigenous peoples to the status of mere 'minorities' or 'groups' would counteract the intentions behind these treaties. The approach of generalizing in regards to all indigenous peoples in denying them the right to people hood as opposed to applying a case by case method also has to be questioned. In other words, we do not generalize in such a way when labelling groups of peoples in the western world. Accordingly, the rationale behind generalizing in regards to indigenous peoples is questionable.

¹⁷⁵ Alfredsson in van Walt van Praag and Seroo (1998), p. 201

¹⁷⁶ S. James Anaya, *Indigenous Peoples in International Law*, Oxford University Press, New York, 1996, p. 85

The principle of interpreting terms in international treaties according to their clear and plain meaning has been referred to above. Similarly, S. James Anaya argues that "Ordinarily, terms in international legal instruments are to be interpreted according to their plain meaning. There should be no exception for the term *peoples*."¹⁷⁷ He thus emphasizes the absurdity of interpreting terms for the purpose of excluding a group of people from rights they otherwise may have been entitled to. Furthermore, the Human Rights Committee has firmly expressed the importance of a literal reading of provisions on self-determination, reiterating that self-determination is a right of *all* peoples.¹⁷⁸ There are apparently several arguments to be made to support the position that indigenous peoples should in most instances be classified as peoples for the purpose of international law.

The common method of teaming a right of self-determination to a territorial base has also been questioned extensively. First of all, it has been argued that such an approach is far too caught up in a state-centred view of the world, based on a post-Westphalian model, when in fact state boundaries are increasingly losing their importance.¹⁷⁹ Furthermore, it does not account for the situations of peoples with a nomadic history, or for peoples with a less centralized system of governance.

Belgium in the famous 'Belgian Thesis' also challenged the focus on territory.¹⁸⁰ In this document the Belgian government expressed the view that the issue was not a geographical one but, rather, an issue of exploitation of peoples of a lower grade of civilization by peoples of a higher grade of civilization.¹⁸¹ The Belgian government also questioned the contention that colonization only happened over seas. They argued that lands could constitute a far more insurmountable obstacle than oceans. Especially before the advent of air traffic.¹⁸² This contention especially holds true for the high Arctic, which was practically inaccessible before the turn of the century.

Others have supported this kind of argument, particularly in regards to indigenous peoples that reside in a secluded part of a state. G. Bennet, for instance, states that:

it is strongly arguable that indigenous groups who are isolated from the rest of the nation by vast tracts of unoccupied land, as for example the Eskimos of Northern Canada, must on any rational basis be regarded as

¹⁷⁷Ibid., p. 80

¹⁷⁸Tomuschat (1993), p.3

¹⁷⁹Anaya (1996), p. 78

¹⁸⁰The Belgian Thesis was the opinion submitted by the Belgian government to the subcommittee established by the U.N. to decide which territories fell within under Chapter XI of the Charter. The Thesis can be found in: Text of Replies to the Ad Hoc Committee on Factors (May 8, 1952), U.N. Doc. A./AC.67/2, p 3-31

¹⁸¹Falkowski (1992), p. 49

¹⁸²Ibid., p. 51

”geographically separate”.¹⁸³

G. T. Morris argues that the requirement for a territory to be geographically separated from the colonizing state in order to be entitled to self-determination is made obsolete by the cases of Lesotho and Gambia.¹⁸⁴

Another strong argument contradicting the logic’s of the ‘salt water theory’ is the fact that the territories of many of the Nations of indigenous peoples, particularly in North America, have been viewed as separate from the colonizing states and as foreign jurisdictions, and that treaties signed were international treaties rather than national treaties.¹⁸⁵ An illustrative example of this is the statements made by Justice Marshall in the early case of *Worcester v. State of Georgia*. In this case J. Marshall argued that:

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.¹⁸⁶

Accordingly, the doctrine of discovery was created by the European nations to settle, between the European nations themselves, the rights and entitlements to the newly discovered territories and their inhabitants. As pointed out by J. Marshall, these doctrines did not ”affect the rights of those already in possession [of the land]...”¹⁸⁷ Thus when indigenous peoples today are denied the right of nationhood, four or five hundred-year-old ‘contracts’, or agreements, regulating the rights to newly discovered territories between European nations of that time, are effectively utilized to exclude indigenous peoples from the international community and to justify a continuation of the colonization.

These arguments all indicate that the logic behind the decolonization process and the exclusion of indigenous peoples from the very same has more to do with critical location of territories and the values of these territories to colonizing states than with legal principles guarding world peace. Warfare is in a sense already being used on indigenous peoples who chose not to comply with the authority of the states in which they reside through the use of police-enforced laws, backed up by military power when necessary. Thus, depending on whose viewpoint that is adopted, the indigenous peoples’ situation can generally be described in quite different ways.

¹⁸³G. Bennet, quoted in Falkowski, (1992), p.52

¹⁸⁴G. T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples Under International Law*, German Yearbook of Int’l L. (GYIL 29) Vol. 29 (1986), 277, p. 309

¹⁸⁵This view was expressed by J. Marshall in the U.S. case: *Worcester v. State of Georgia* 6 Pet. 515 (U.S. 1832)

¹⁸⁶*Ibid.*, p. 542-543

¹⁸⁷*Ibid.*, p. 542-543

4.2.2 In the Absence of External Self-Determination: Internal Self-Determination

An alternative approach is advocated by many scholars, which represents somewhat of a middle position between the two views described above. This view, often seen as internal self-determination, emphasises the distinction between self-determination and the different means through which it can be achieved. According to S. James Anaya, limiting the principle's application to a pre-determined set of situations, such as over-seas colonialism, excludes certain segments of peoples from its use and hence neglects the human rights values embodied within a right of self-determination.¹⁸⁸ On the other hand, proponents of a *full-scale* right of self-determination too quickly adopt a view where self-determination will lead to the forming of nation-states founded in historical and ethnical considerations.¹⁸⁹ This approach will also fail to gain the support necessary from states since it is incompatible with the principles of state sovereignty and territorial integrity.

Instead, a view is proposed which distinguishes between the substance of the norm of self-determination and the remedial prescriptions that serves to match this substance in a given situation. Thus the decolonization process is one remedial prescription for the situation of peoples under foreign control. The substance of the norm, on the other hand, consists of the human rights values that gave rise to the right in the first place. In terms of self-determination these are among others equality, rights of peoples to govern their own economical, political and cultural matters, and so on.

The value of such a revised view of self-determination is, obviously, that it would be attainable and appropriate for peoples who resides within sovereign states or who does not have the fundamental criteria necessary for forming an independent state.¹⁹⁰ It is thus argued that self-determination is a process and not a particular outcome of that process and that the bias displayed by the U.N. in favour the independence outcome is unsatisfactory. This bias has arguably been the result of Sub-Commission studies and General Assembly resolutions distorting the legal foundations of the right of self-determination as they exists in the U.N Charter and the International Covenants.¹⁹¹

Anaya distinguishes between constitutive and ongoing self-determination. In its constitutive form self-determination ensures the democratic process through which systems of governance are imposed on territories and their peoples. In its ongoing form, self-determination serves to protect the right of individuals

¹⁸⁸ Anaya (1996), p. 77

¹⁸⁹ Ibid., p. 78

¹⁹⁰ G. Nettheim, *Rights of Indigenous Peoples*, in J. Crawford: *The Rights of Peoples*, Oxford, 1988, p. 119 f.

¹⁹¹ Ibid.

and groups "to make meaningful choices in matters touching upon all spheres of life on a continuous basis"¹⁹² thus expressed in international instruments through the statement that peoples are to "freely pursue their economic, social and cultural development."¹⁹³

The emphasis of this theory is therefore not so much on self-determination in its external sense, but rather on several important aspects of life that are determinative of an ongoing self-determination. In other words, the substance of the norm of self-determination, in its ongoing form, protects and guarantees certain necessary rights. Anaya identifies the subjects of non-discrimination, cultural integrity, lands and resources, social welfare and development, and self-government as areas where international norms are created through which indigenous peoples' right to self-determination is manifested.¹⁹⁴

Non-Discrimination:

Equality, as forming a part of the substance of a right of self-determination has been discussed above. Norms of non-discrimination serves to protect this right to equality by abolishing political practices that separates between groups of peoples on basis such as race or colour. The norm of non-discrimination is expressed in several international documents, most notably the U.N. Convention on the Elimination of All Forms of Racial Discrimination, the Universal Declaration of Human Rights, the two Covenants, the American Convention of Human Rights, the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief, the 1989 ILO Convention No. 169 and the Draft United Nations Declaration on the Rights of Indigenous Peoples. The last two instruments refer to a right of non-discrimination in regards to indigenous peoples in particular. The U.N. Convention on the Elimination of All Forms of Racial Discrimination is intended to cover a broad spectrum. As N. Lerner explains:

¹⁹²Anaya (1996), p. 82

¹⁹³This is the wording of Article 1(1) of both Covenants. Ibid., p. 82

¹⁹⁴Ibid., p. 97

Political or circumstantial considerations can compel particular attention to one or another aspect of the Convention, but it would be a distortion of its purposes not to bear in mind that the Convention is aimed at racial discrimination in *all* its forms and manifestations, anywhere.¹⁹⁵

The principle of non-discrimination has grown so strong that some even suggest that it has become a principle of customary international law.⁽⁹⁾

Cultural Integrity:

Although distinct from non-discrimination as a concept, cultural integrity is closely linked to the idea of non-discrimination. It serves to protect cultural equality by preventing one culture from imposing its dominance over another. The right to cultural integrity is not only a right of indigenous peoples but also a right of all minorities. It has, however, significant importance for the protection of indigenous people's communities since it could potentially be invoked to protect land rights and many other aspects which would adversely affect indigenous peoples.¹⁹⁶ The protection of cultural integrity is made explicit in Article 27 of the International Covenant on Civil and Political Rights. This article states that persons belonging to ethnic, religious, or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."¹⁹⁷ Both the Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States have held the norm of cultural integrity to protect all those aspects of relevance for indigenous groups' survival as distinct cultures.¹⁹⁸

Although Article 27 speaks of "rights of *persons*..." the Human Rights Committee has in the case *Lovelace v. Canada* emphasised the necessary connection between the individual and the collective right of cultural integrity.¹⁹⁹ In many instances, however, provisions protecting the right of indigenous peoples' cultural integrity may not be far reaching enough, particularly in the light of the attempts that have been made by colonizing states to assimilate indigenous peoples and wipe out their culture. Therefore, provisions supporting affirmative action have been incorporated into some instruments. Particularly, ILO Convention No. 169 provides that: "Governments shall have the responsibility for developing, with the participation of

¹⁹⁵N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, A.W. Sijthoff's Uitgeversmaatschappij, The Netherlands, 1970, p. 24, (my emphasis)

¹⁹⁶See for instance discussion by Garth Nettheim, in Crawford (1988), p. 117

¹⁹⁷ICCPR (1966), Article 27

¹⁹⁸Anaya (1996), p. 100, The Human Rights Committee has in the case *Ominayak v. Canada* interpreted Article 27 to cover economic and social activities on which the Lubicon Lake Band of Cree Indians relied as a community; the Inter-American Commission on Human Rights of the Organization of American States, has emphasised the importance of ancestral and communal lands for protection of cultural integrity in the Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, O.A.S. Doc. OEA/Ser.L/V/II.62, doc. 10 rev. 3 (1983), doc. 26 (1984) (Case No. 7964 (Nicaragua)), at 81.

¹⁹⁹*Lovelace v. Canada*, Communication No. R.6/24, Report of the Human Rights Committee, U.N. GOAR, 36th Sess., Supp. No. 40, p. 166, U.N. Doc. A/36/40, Annex 18 (1977)

the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.”²⁰⁰ Similarly the Draft Declaration on the Rights of Indigenous Peoples calls for affirmative action to secure the cultural integrity and development of indigenous peoples.²⁰¹

Lands and Resources:

The single most important issue for indigenous peoples all over the world appears to be the rights to their ancestral lands and resources. Access to traditional lands is closely linked to the protection of indigenous culture and cultural survival. The importance of strategic land and usable natural resources has, and continues to be, a major threat to indigenous peoples everywhere. Displacement of indigenous peoples for the purpose of natural resource extraction is commonplace. For the same reasons, provisions regarding indigenous peoples’ land rights have not been incorporated into many international instruments. The right to own property has been recognized as an international human right.²⁰² The Universal Declaration of Human Rights and the American Convention on Human Rights includes provisions stating that: “[e]veryone has the right to own property alone as well as in association with others” and that “[n]o one shall be arbitrarily deprived of his property.”²⁰³ The two cases from the Inter-American Commission on Human Rights and the U.N. Human Rights Committee referred to in the previous section acknowledge how survival of indigenous cultures and peoples is dependent on land rights and rights to resources.²⁰⁴

Most notable among the instruments that have addressed indigenous peoples’ right to their lands and resources are the two ILO Conventions of 1957 and 1989. Although criticized by numerous indigenous groups for promoting assimilative ideas, the ILO Convention No. 107 of 1957 in Article 11 expresses that: “The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.”²⁰⁵ The Convention has proved to be useful by indigenous peoples asserting their rights to lands and resources through the ILO’s supervisory organ and has inspired an increased recognition of indigenous land rights in Convention 169 of 1989. Article 13(1) of this convention states that:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or

²⁰⁰Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 ILM 1382 (1989) (Entered into force Sept.5, 1991), Article 2(1)

²⁰¹U.N. Draft Declaration on the Rights of Indigenous Peoples, Articles 12, 13, 14, 15

²⁰²Anaya (1996), p. 105

²⁰³Universal Declaration of Human Rights, G.A. Res. 217 A (III), Dec. 10, 1948, art. 17, American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123, Article 21

²⁰⁴Anaya (1996), p. 104

²⁰⁵Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 U.N.T.S. 247 (entered into force June 2, 1959), Article 11

both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.²⁰⁶

The Convention fails to protect indigenous peoples' rights of to subsurface resources belonging to lands under their possession. According to Anaya, however, the principle of non-discrimination prohibits governments from denying indigenous peoples ownership to subsurface rights where such rights normally are granted landowners.²⁰⁷ This may in my opinion still not be sufficient protection. In many countries subsurface rights are not normally associated with simple ownership of land. Indigenous peoples own lands for different purposes and reasons than most other people and should therefore be entitled to a stronger kind of ownership.

Although Convention No. 169 has remained unratified by numerous states, it arguably represents a growing trend in international law to recognize rights by marginalized groups and in particular indigenous peoples. Before the drafting of the Convention, opinions on the issue of indigenous land rights were collected with a strong indication that governments in general favoured an increased protection of indigenous peoples land rights.²⁰⁸

Social Welfare and Development

The idea of self-determination seems to suggest a development that cuts clear of any solution that implies that indigenous peoples remain economically dependent on states. Social welfare and development in this case, however, represents remedies of past injustice. Indigenous communities have historically faced a plundering of their natural resources and lands, which has left them in a state where reliance on the land for survival is infeasible. At the same time they have often been discriminated against within their states because of their differences. This has had the effect that indigenous peoples around the world represent some of the poorest, and often live under the most unsatisfying conditions.²⁰⁹

The right of all people to decent living conditions is expressed in Articles 55 and 56 of the U.N. Charter. From there the right has been expanded upon and incorporated into the International Covenant on Economic, Social and Cultural Rights. The rights that are emphasised in the covenant relates to health, education, and standard of living. In regards to the right to development P. Thornberry argues that: "the U.N. Global Consultation on Development has made it clear that development in particular intersects with self-determination."²¹⁰ The right to development is expressed in the U.N. Declaration on the Right to

²⁰⁶Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, (entered into force Sept. 5, 1991), Article 13(1)

²⁰⁷Anaya (1996), p. 106

²⁰⁸Ibid., p. 107

²⁰⁹Ibid., p. 108

²¹⁰P. Thornberry, *The Democratic or Internal Aspects of Self-Determination*, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 1993, p.103

Development. The ILO Convention No. 169 and the U.N. Draft Declaration on Indigenous Peoples, takes these rights one step further. The ILO Convention addresses the conditions of life and work and levels of health and education of indigenous peoples and dictates the use of affirmative action, in Cupertino with indigenous peoples, to bring about improvements within these areas.²¹¹ Similarly, the draft U.N. Declaration speaks of indigenous peoples' right to have access to "adequate financial and technical assistance, from states..."²¹² According to S. J. Anaya these two instruments represents a consensus that extends beyond the states that have adopted and ratified these agreements.²¹³

Self-Government and Autonomy

Self-government is one of the core concepts of self-determination. This is reflected by the use of the term 'non-self-governing territories' in U.N. instruments to denote the application of self-determination for the purpose of decolonization. When used in a strict sense self-government is often equated with internal self-determination. However, in a more general sense it represents the key essence of a right of self-determination, in other words the right of all peoples to govern their own matters, and hence to equality. Self-government as a concept serves to enable peoples to govern themselves and their own interests without undue influence of others. It also confronts oppressive or racist governments as well as the domination of foreign governments. When self-government is used within the framework of a sovereign state, it is often referred to as autonomy.

Neither self-government nor autonomy are well-defined absolute concepts. The different degrees of local autonomy can be measured by the amount of powers transferred from the state authorities to the institutions of the autonomous region.²¹⁴ Though autonomy does not have a clear meaning F. Harhoff argues that:

it signifies some level of political, economical or cultural independence vis-a-vis national authorities, based on differences mainly in culture and language, and established with a local institutional structure through legal provisions in the constitution, in national legislation or in particular agreements concluded with the national governments.²¹⁵

Beyond a certain point of transferred powers, a self-governing structure transforms from an autonomous construction to full-fledged self-determination. Thus, according to some, certain powers can not be transferred to an autonomous region without challenging the unity of the sovereign state.²¹⁶ These critical

²¹¹ILO Convention No.169, 1989, Article 7(2)

²¹²U.N. Draft Declaration on the Rights of Indigenous Peoples, Article 38

²¹³Anaya (1996), p. 109

²¹⁴Fredrik Harhoff, *Institutions of Autonomy*, in Nordic Journal of International Law, Vol. 55, 1986, 31-40, p. 31

²¹⁵*Ibid.*, p. 32

²¹⁶*Ibid.*, p. 34

powers include such areas as capacity to enter into international treaties, power to legislate in national defence and security matters, and as argued by some, the right to natural resources.²¹⁷ Even though nothing legally prevents a state from transferring these powers to an autonomous region, doing so may eventually lead to that region's legitimate claim of sovereignty. The powers that states are willing to transfer to indigenous autonomous regions are therefore of a limited scope.

Of international instruments dealing with self-government, the ILO Convention No.169 and the draft U.N. Declaration on the Right of Indigenous Populations stand at the forefront. The ILO Convention proclaims that indigenous peoples shall have the right to "retain their own customs and institutions", and to keep their customary methods of dealing with offences. A similar approach is taken in the draft U.N. Declaration where it is stated that: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive judicial customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards."²¹⁸ Although these instruments have not been ratified or adopted on a large scale, they represent a growing trend within the international community that indigenous peoples are entitled to make decisions in matters which are of their own concern.²¹⁹

The extent to which self-government and autonomy are recognized as rights in international law is unclear, at the best. In general, the trend within states with large groups of indigenous peoples has been towards increased recognition of self-government and autonomy rights.²²⁰ However, D. Sanders argues that this increased recognition of autonomy is generally connected to territorial aspects. Indigenous peoples without a distinct territorial basis do not usually benefit from this 'right'.²²¹ He further argues that recognition of such rights in regards to *territorially* based indigenous peoples "should not now be controversial".²²² Despite a positive trend, a general recognition of these 'rights' remains distant. Accordingly G. Alfredsson argues that "[a]utonomy in general terms is yet to be firmly anchored in international and regional human rights instruments".²²³ Furthermore, he argues that the reason why autonomy and self-government rights have not been more recognized may be because of the very fact that the term 'internal self-determination' has been utilized to describe these rights.²²⁴ In other words, the common reference to autonomy and self-government

²¹⁷Ibid.

²¹⁸U.N. Draft Declaration on the Rights of Indigenous Peoples, Article 33

²¹⁹Anaya (1996), p. 109 ff.

²²⁰See for instance discussion by D. Sanders, *Self-Determination and Indigenous Peoples*, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 55ff.

²²¹Ibid., p.70

²²²Ibid., p.81

²²³Alfredsson in Suksi (1998), p. 126

²²⁴Ibid., p. 136

as internal self-determination may have had the effect of deterring states from adhering to these concepts in the belief that acknowledging any kind of self-determination may eventually lead to an exclusive right to external self-determination. Indigenous peoples, however, do have a strong case to make in favour of rights to autonomy and self-government. Mainly on historical-legal grounds but also on grounds of cultural, religious, social, and territorial distinctiveness.

5 Self-Determination within the Context of Nunavut

5.1 Nunavut and External Self-Determination

As we have seen in previous chapters, the history of the Inuit is different from that of other indigenous peoples in Canada. The Inuit were never put on reservations, they never signed any treaties, and they did not interact to any considerable extent with the rest of present day Canada until the early 20th century. The Inuit were in many cases spared from the impact of the modern society up until only fifty or so years ago. However, the interests of the Inuit society and the Canadian state have intersected in that both compete for the resources offered by the northern lands and waters. The Inuit people have also been utilized to assert Canadian sovereignty in the north. By moving the Inuit to new areas, sovereignty over these areas could be claimed. This could, of course, only have been the result if it was pre-assumed that for the purpose of international relations the Inuit were 'property' of the Canadian state. On the other hand, I would argue, some sort of sovereignty must have been assumed over Inuit territory if they were to be considered as Canadian in the first place.

The resulting question then becomes: from where did this sovereignty over Inuit territory arise? Because of the climate, lack of fertile grounds, and lack of easily extractable natural resources, few Euro-Canadians have, as seen in chapter 2, been interested in settling within these areas. Even today, 'southerners' make out a fairly small part of the population of Nunavut. Instead, the areas have been much more attractive to Euro-Canadians for fishing, hunting, lumbering, and mining. In other words, the Canadian interest in the territory of Nunavut has not been an interest in the land for settling purposes but rather for the purpose of natural resource extraction. Thus in many ways the situation of Nunavut resembles in my opinion that of a 'classic' colony in that the interest of the colonizing state has been predominately an economical interest.

This contention should, I would argue, be of importance when assessing the entitlement of the Inuit to self-determination. Indeed it is argued by Alexis Heraclides that:

if a territory is geographically fairly distinct and territorial integrity is in effect a 'mask' for 'alien domination and exploitation', then these peoples are entitled to exercise the right of self-determination, or can at least make a case worthy of more than passing examination.²²⁵

The right of peoples to natural resources existing on their territories have been articulated in several international instruments including articles 1(2), and 47 of the International Covenant of Civil and Political Rights and articles 1(2) and 25 of the International Covenant on Economic, Social and Cultural Rights. A claim of sovereignty over indigenous peoples' traditional territories based on a use of these territories for the purpose of exploitation or other economical benefits thus seems to violate the basic principle of equality of peoples inherent in international human rights law as well as the legitimate right of these peoples to the

²²⁵ Alexis Heraclides, *The Self-Determination of Minorities in International Policies*, Frank Cass & Co Ltd., London GB, 1991, p. 29

resources found within their territories.

Nunavut remains even today a fairly inaccessible territory. The only access from southern Canada is by air. Similarly, travelling between locations within Nunavut can only be accomplished by air (except for those occasions when a snowmobile would do). The difficulties in reaching and moving around within the territory can easily be equated to those of reaching territories separated by oceans from metropolitan states, thus refuting the relevance of the salt-water theory. The fact that the elements separating the two areas are of different composition than those separating traditional colonial territories from colonial states should not affect the application of a presumably rational legal criterion. In other words, the salt-water theory, as it has been utilized, does not, in my opinion, refer to any unique circumstances which would justify a unique treatment of overseas territories as opposed to territories separated by vast tracts of unwieldy lands. Therefore, a strict upholding of a salt-water criteria despite the fact that this criterion does not signify any apparent unique circumstances implies, I contend, that this aspect of the law of self-determination has the questionable impediment of not being general in its application. Historical facts as well as modern day realities all support the fact that even though the territory is not separated from the rest of Canada by water, Nunavut is, in terms of accessibility and geographical location, territorially separate from southern Canada.

The Inuit of the high Arctic share a distinct culture and traditional way of living. The Inuktitut language is, as explained above, one of the most well conserved and well-used native languages in Canada. The Inuit inhabit areas surrounding the Arctic from east to west and are intimately connected to their land base. Their distinctiveness from the societies within which they have been incorporated is undeniable. Furthermore, they have never been given the opportunity to choose their political status. Instead they have been assumed to 'belong' to the closest nearby state or an occupying state. Unless the term 'peoples' is to be interpreted in a circular fashion with 'peoples' being only those groups who fit the categories of subjects entitled to self-determination under the decolonization process, the Inuit must in all aspects be regarded as a people. Denying them this right would again imply that certain aspects of the law of self-determination is not general in their application but established to suit only some certain situations, primarily those of the decolonizing of former European colonies. It would also constitute, I would argue, a breach of the principle of non-discrimination since apparently the only reason why they would not be classified as a people is that this does not serve the idea of the world divided into sovereign states according to western political theory. The Inuit are thus denied rights that would normally be accorded a similar people under the same factual circumstances, presumably if it were not for the fact that these rights go against the economical interests of a sovereign state.

It has been made evident throughout this paper that the Inuit of Nunavut have so far not been given an opportunity to freely choose their political future. It has also been explained how they have been subjected to control by the Canadian state for the purpose of economical and security reasons without consideration of their own desires. Whether the Inuit are mistreated or not, or whether they have a political voice or not should, in my opinion, not matter. What matters, I would argue, is the fact that one people governs another people for the purpose of maintaining access to tracts of lands traditionally associated with the governed people. Except for a post-Westphalian view of all territories and tracts of land on this planet as belonging

to a sovereign state, nothing speaks, in my view, for the fact that the Inuit should be subjected to the domination of a foreign people.

Despite these arguments against the legitimacy of a Canadian domination over the Inuit of Nunavut, international law is not, as we have seen in chapter 4, conclusive in ascribing the Inuit a right of external self-determination. The obvious difficulty is the reluctance of sovereign states to support a development that may in the end threaten their integrity, no matter how unjust the extent of their territorial sovereignty may seem. This obstacle may stand in the way of every rational and convincing attempt to grant indigenous peoples a right of self-determination. For this reason C. Tomuschat asks the question "...whether it may be at all possible, against the background of present day international law, to define certain criteria for legitimizing claims directed against the political and territorial integrity of an existing state."²²⁶ Self-determination may at the moment only be a viable option for those peoples facing such extreme oppression from the state they live in that the surrounding world has no option but to react. The fact remains that international law originated as a set of rules governing the relationship between states and has only during the last century begun to open its eyes towards issues of human rights and rights of individuals and groups within existing states. In other words, the Inuit of Nunavut can, presently, not make a valid claim of a right of external self-determination under international law.

I would argue, however, that despite the arguments that a general right of self-determination will increase political instability and promote secessionist moves by minorities around the world, political stability can never be the result of an unjust system which denies indigenous and other peoples the right to determine their own political future. The problem that in the long run will follow an extreme insistence on state integrity and sovereignty in the face of oppression of indigenous and other peoples is, in my opinion, an increased political instability and polarization. The ability of states to deal with pressing human right and environmental issues in a world that increasingly focuses on economical growth and corporate globalization is fairly limited. R. Falk argues that:

It is becoming much more clearly understood in all parts of the world that unless economic growth takes place under the auspices of natural political communities, it can have the effect of accentuating and extending structures of exploitation and domination that exists in societies, whatever their state of development in relation to productive technology.²²⁷

These issues are further enhanced by the increased attention to multilateral trade agreements which limit the ability of states to deal with critical human rights, environmental and social issues. At the moment of writing, Canada has just signed a commitment to negotiate an agreement on a free trade area of the Americas. An eventual agreement will most likely include provisions restricting the measures available to states for

²²⁶Tomuschat (1993), p.8

²²⁷Richard Falk, *The Struggles of Indigenous Peoples and the Promise of National Political Communities*, in Ruth Thompson (ed.), *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination*, University of Saskatchewan, Native Law Centre, 1983, p. 61

regulating resource development, investment and employment standards. Such an agreement has to be taken into account when Canada's ability to meet the demand of the Inuit and the other indigenous peoples is being assessed.

5.2 Nunavut and Internal Self-Determination

In the absence of a general acceptance of a right of indigenous peoples to external self-determination, and in the light of state reluctance towards political change that threatens to limit the integrity of sovereign states, measures of internal self-determination may be the best possibility for indigenous peoples that want to take charge of their own matters and affairs.

As argued by G. Alfredsson; "Self-government or self-control by a group over its internal affairs is probably the most effective means of protecting group identity, group equality and group dignity within States."²²⁸ At the same time, I would argue, unless a self-government construction is designed to facilitate the maintenance of traditional institutions, way of life, culture and customs, it may have the effect of speeding up assimilation and integration of indigenous peoples. For instance, self-government in the form of high indigenous representation in an otherwise ordinary legislative assembly may require a general change of lifestyle far beyond the mere participation in the legislative process. In order for this kind of self-governing institution to function, the particular indigenous people would, as the developments in Nunavut already have made apparent, have to prioritize education over traditional practices. This would, I contend, eventually lead to a need for the indigenous community to develop more of the modern methods of subsistence and may finally have the effect of transforming the entire society into a fully integrated part of the state. This contention is supported by Special Rapporteur Jose R. Martinez Cobo who in his 1983 report argues that:

Respect and support for the internal organization of indigenous peoples and their cultural expressions constitute an essential consideration for any arrangement aimed at securing appropriate participation by indigenous communities in all affairs which affect them. Consequently, Governments must abandon their policies of intervening in the organization and development of indigenous peoples, and must grant them autonomy, together with the capacity for controlling the relevant economic processes in *whatever way they themselves* consider to be in keeping with their interests and needs.²²⁹

On the other hand a self-governing institution should not be constructed in such a way as to exclude the particular indigenous people from participating on an equal footing with the rest of the state. Thus an emphasis on a clear and free choice for the indigenous people in determining their political autonomy is, I would argue, a necessity for internal self-determination if this terminology is to remain meaningful at all.

²²⁸ Alfredsson in Suksi (1998), p. 125

²²⁹ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Adds. 1-4, (Jose R. Martinez Cobo, Special Rapporteur)(1986), 5 UN Indigenous Study, p. 20, (my italics)

I contend that while a self-governing institution may be subject to change and may, as we have seen in chapter 4, vary within a spectrum of delegated powers, in order for it to qualify as a measure of internal self-determination more rigorous standards have to be met. Although the goal of self-determination in both its external and internal form should be the actual process and not a particular outcome, a self-governing structure that is open to change by federal legislation or future events outside the control of the indigenous people may not easily meet this standard. I would argue that even if the people deliberately chose a limited form of self-government there has to be some sort of guarantee for its continuation for it to qualify as internal self-determination.

Nunavut is, as outlined in chapter 3, a new territory within the federal state of Canada. Unlike the Canadian provinces the Nunavut government lacks its own constitution and relies instead on a delegated legislative authority. The Land Claim Agreement conditions the creation of a Nunavut government while the delegated legislative authority is a product of the Nunavut Act itself. Thus, while the Land Claim Agreement regulates matters such as land rights and harvesting rights, the authority of the Nunavut legislator to regulate matters such as administration of justice, education, health and so on, is delegated through federal legislation. Furthermore, the constitutional protection of Nunavut and the Land Claim Agreement is, as explained in Chapter 3, of an uncertain nature. At the same time the Nunavut government is not an ethnic government but a public government in a territory where the Inuit presently make out a large majority of the constituency. It will thus remain an Inuit government only for as long as the Inuit constitute a majority in the territory. Inuit influence in matters such as wildlife management and resource development is ensured through the joint participation in co-management boards, such as the NWMB, where they share the seats with government officials. The Land Claim Agreement ensures Inuit ownership to a large share of the lands of the territory, but only to ten percent of the sub-surface rights to these lands. The control over mineral and non-renewable resource development is thus in the hands of the federal government.

Judged by the above standard, it is obvious that the Nunavut territory represents some sort of Inuit self-government. The Inuit have through the Nunavut Legislative Assembly acquired powers to make decisions of particular relevance to themselves and their communities. They own the rights to substantial amounts of the land mass constituting the territory and have through management boards substantial influential power in issues such as wildlife management and harvesting within the area of Nunavut. Despite this, Nunavut may, in my opinion, fall short of constituting a true expression of internal self-determination. I would argue that the Nunavut construction does not entail enough safeguards to ensure a continued Inuit governance in the territory in the far future. Even though the Inuit make out a large percentage of the population, a fairly small number of people is inhabiting Nunavut which means that only a small number of 'southerners' have to move there to bereave the Inuit of their majority. Furthermore, the delegation of legislative powers is subject to the discretion of the federal government and may be subject to change if conflicting interests arise.

In addition, the Inuit have not been given the sole authority to manage wildlife and harvesting within their territory which, in my opinion, is a necessary requirement if Nunavut shall amount to internal self-determination. This is in particular true because of the Inuits' traditional reliance on the land for survival. Similarly, ninety percent of the subsurface rights in Nunavut still belong to the Crown and safeguards are

incorporated into the Agreement to ensure that developers have access to the lands.

As we have seen in chapter 3, provisions do exist to limit the extent to which Inuit land can be expropriated for the sake of resource development, and generally only a maximum of twelve percent of Inuit Owned Lands can remain expropriated at the same time, provided the DIO has not accepted compensating land. However, twelve percent of an area the size of the Inuit Owned Lands is a very large area and leaves the Inuit lands open for several large-scale resource development businesses beyond their control. The federal government has in my opinion made a great effort to maintain the control over resource development and related aspects within the area, and, in doing that, yet again limited the Inuit people's right to control their own lands and waters.

Although Nunavut represents a way for the Inuit to take charge of their own affairs and future development, there are still, in my opinion, several limitations. It has been stated above in chapter 3 that the government of Nunavut is not an ethnic government but a public government and that, according to some scholars, this is one of the reasons why the Inuit were successful in negotiating the creation of an Inuit territory in the first place. This fact implies that the conditions under which Nunavut was created limited the Inuit negotiators' ability to freely choose what type of government Nunavut would possess. If the option was only that of a public government the Inuit were not, I would argue, given any right to internal self-determination.

Aspects such as assimilation also have to be addressed when examining the Nunavut construction. As explained above, a public government in Nunavut will, I contend, require a more rapid adaptation to a wage-based living style. This is, for instance, evident from talks that numerous Inuks will have to be educated to fill government positions in order for the Nunavut government to function within the federal state of Canada, without having to resort to brought in labour to a considerable extent. In other words, a transformation of the Nunavut society is, I would argue, necessary to meet the growing demands of a public government.

Thus, in reflecting over the statement by Jose R. Martinez Cobo quoted above, the Canadian government has not, in my mind, abandoned their policies of intervening in the organization and development of the Inuit, they have not granted the Inuit autonomy and a capacity for controlling the relevant economic process in whatever way they themselves consider to be in keeping with their interests and needs, considering the fact that the Inuit peoples' connection to the land is of vital importance.

Accordingly, the self-governing structure of Nunavut may fail to protect the cultural integrity -as stated in chapter 4 as one of the important aspects of 'ongoing' self-determination- of the Inuit, and although no internationally accepted legal standard exists that accredits indigenous peoples with more substantial land rights, the control over traditional lands and resources attributed to the Nunavut Inuit is in my opinion not sufficient to amount to true internal self-determination.

6. Conclusion

In my view, the basic essence of the principle of self-determination arises from an evolving concern of

human rights and an understanding that all peoples are created equal and that no peoples are superior to others. From this should follow that all peoples have the right to an equal opportunity to determine their own political, economical, and cultural future without interference from others. This right is, of course, limited in the sense that a right may not be exercised in a way that adversely affects other peoples. In this sense self-determination is recognized in the principle of state-sovereignty and non-intervention. A state does not have the right to interfere in the internal matters of another sovereign state and vice versa. Similarly, a people which is entitled to a right of self-determination should, according to the same basic principles of equality, be free to exercise this right without interference from other peoples or states. This contention implies that the importance of a just right of self-determination lies not in the way a people decides to exercise this right but in the fact that it is free to exercise this right, without interference from other peoples or states. In other words, the importance of a right of self-determination is, I would argue, the absence of rules, regulations and limitations imposed by a surrounding world on a people entitled to the right of self-determination.

One can argue that human rights have become recognized under international law despite the fact that the vast majority of states have, on a regular basis, in one way or another, violated these same rights. Thus the question arises that, considering the fact that few states have openly objected to a right of self-determination of all peoples, -for instance only India put in a reservation to the use of the term in the two human rights covenants- should the international community not be able to recognize such a right despite the fact that previous state practice has not.

What stands in the way of this happening is the idea of state sovereignty and the importance associated with this concept in maintaining world peace. However, state sovereignty, I would argue, is not and has never been an absolute concept and instability is already occurring in most countries where an indigenous population is treated unjustly. Does world peace and stability concepts only concern themselves with the lives of dominant groups of peoples? In numerous countries the principle of non-intervention and state sovereignty is apparently utilized to protect the continuation of state oppression of indigenous peoples and cultures. Numerous states draw and have drawn upon the right to integrity to displace and murder indigenous peoples for the purpose of exploiting natural resources. Other states have done such a good job at destroying indigenous culture, traditions and sense of identity that indigenous peoples in these states face the highest suicide rates in the world. Thus the world is *already* unstable, although this may only be in the eyes of the affected, i.e. the indigenous peoples.

The Inuit people distinguishes themselves by living in an area which has not yet been subject to the extensive resource exploitation that has destroyed indigenous cultures around the world over the last centuries. They form a very unique people and share unique languages that are still very much in use today. At the same time their traditional territories are almost exclusively inhabited by themselves. Southern people who find their way up to these latitudes usually only stay for a limited number of years.

Despite this the Inuit are still today, in our post-colonial world, considered to be part of whatever nation state they happen to be geographically closest to. Furthermore, in most cases this is arguably for the two sole purposes of possible natural resource extraction and strategic opportunities. This is in my opinion

unacceptable in today's world where human rights have gained general recognition through numerous international instruments. Little or no consideration has been given to the fact that the Inuit form a different people with different culture, traditions, way of life, and subsistence, and should rightfully be entitled to determine the political future of themselves and their lands.

According to the principles accompanying this concept of the "nation-state", states themselves are the primary actors on the international arena. States set the legal framework for international dealings and states make decisions on who the subjects of international law are. At the same time, the concept of "nation-state" evolved after centuries of wars, fought to secure access to lands and waters associated with treasurable natural resources. Accordingly, I would argue that one of the primary focuses of the state has been and continues to be that of maintaining access to lands and natural resources, thus the importance of territorial integrity. However, in denying indigenous peoples a right to determine their own political future the goals of access to territory and resources are effectively prioritized over human rights principles such as the equality of all peoples. This is in my opinion particularly true when peoples such as the Inuit are denied a right of self-determination despite the fact that they inhabit a geographically distinct territory. Thus if the Inuit of Nunavut can not be accorded a right of external self-determination since they do not meet the requirements of international law, they must at the very least be entitled to determine their political, cultural and economical future within the federal state of Canada, if human rights principles are not to be compromised for material goals.

Nunavut has in my opinion not lived up to this requirement. Nunavut constitute an opportunity for the Inuit to govern their area while adhering to the rules set up by the Canadian federation, thus forming a fairly conventional jurisdiction within the Canadian federal state through the institutionalizing of a public government. This situation and outcome was not chosen by the Inuit but negotiated as arguably the only possible opportunity for 'self-government'. The Inuit also had, as we have seen in chapter 2, to give up any future claims to land for this opportunity. Furthermore, the federal government retains the right to most of the sub-surface rights on the Inuit Owned Lands, reinforcing the contention that the Inuit do not live on their own territories but rather on potential natural-resource "gold mines". The Nunavut construction thus emphasises in my view that territorial aspects such as access to natural resources are still more important than the well fare of human beings. However, I contend that until human rights values are prioritized before material resources and monetary wealth the world will continue to be an unstable place and indigenous peoples will remain colonized. As M. E. Turpel puts it: "Institutionally, the international trusteeship and decolonization process did not address indigenous claims. Indigenous peoples, especially in the Americas, have yet to witness political decolonization."²³⁰

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