

# Indigenous Peoples and the Environment: Convergence from a Nordic Perspective

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“The central question here, as in all issues concerning indigenous rights, is *who* is in a position to control resources. It is question of *land rights*.”<sup>1</sup> Sami - Scandinavia

“To us Indians human rights is a matter of daily survival; it is the right to food, to firewood and to fresh water, but above all it is the right to our customs.”<sup>2</sup> Plains Cree – Canada

“Our history, identity, and tribal sovereignty are indistinguishable from the land. From time immemorial, it has always been so.”<sup>3</sup> Umatilla – United States

## INTRODUCTION

Since the Stocholm Declaration thirty years ago and particularly in the last decade, the rights and status of indigenous peo-

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1. Maria Sofia Aikio, *Tourism in the North and Sami Culture*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF THE SAMI* 87, 88-89 (Frank Horn ed., 1998).

2. Tom Svensson, *Right to Self-Determination: A Basic Human Right Concerning Cultural Survival*, *The Case of the Sami and the Scandinavian State*, in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 363, 364 (Abdullah Ahmed An-Na'im ed., 1992).

3. DAVID HURST THOMAS, *SKULL WARS* 254 (2000).

ples<sup>4</sup> have begun to secure a more widely recognized place in international law,<sup>5</sup> including international environmental law. As a result of the impact of several important conventions, the rights of indigenous peoples are increasingly defined. Parallel to these developments, commentators have contributed analysis to an

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4. The term "indigenous peoples" is often defined as:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Jose Martinez Cobo (UN Special Rapporteur), Study of the Problem of Discrimination Against Indigenous Populations UN Doc E/CN.4/Sub.2/1986/7 and add. 1-4.; Athanasia Spiliopoulou Akermark, JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW, 21, Iustus Forlag Uppsala (1997). For discussion of the difficulties with any definition see Patrick Thornberry, *Who Is Indigenous?*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF THE SAMI 1 (Frank Horn ed., 1998).

5. Note a Permanent Forum for Indigenous Peoples has now been created within the United Nations system. A resolution to appoint a Special Rapporteur on human rights and indigenous issues was approved on April 24, 2001. SWEET & MAXWELL, INTERNATIONAL HUMAN RIGHTS TEXT AND MATERIALS 104 (Rebecca Wallace & Kenneth Dale-Risk eds., 2001); John Borrow, *Domesticating Doctrines: Aboriginal Peoples After the Royal Commission*, 46 MCGILL L.J. 615 (2001) ("Aboriginal peoples have enjoyed some substantial gains with respect to aboriginal and treaty rights in recent years. There is a growing recognition in Canada and internationally that indigenous peoples are entitled to exercise fundamental responsibilities within their traditional territories. In Australia, the existence of aboriginal title has been recognized, and a debate about its contemporary survival has reached the legislatures, courts and general populace. In New Zealand, the binding nature of the Treaty of Waitangi has been acknowledged, and steps have been taken to ensure that the Maori have sufficient land to sustain their culture. In Guatemala, reconciliation with the indigenous Mayan population has begun through the findings of the Commission for Historical Clarification. In Malaysia, courts have accepted the principle that indigenous peoples have rights to the land and occupation of their traditional territories."); CHALLENGING POLITICS: INDIGENOUS PEOPLES EXPERIENCES WITH POLITICAL PARTIES AND ELECTIONS (Kathrin Wessendorf ed., International Work Group for Indigenous Affairs 2001). The launching of the Nunavut Agreement (1993) on April 1, 1999 in Canada recognized the creation of semi-autonomous Inuit territory with ownership of land, mineral rights and, trust fund for business, education and support after two decades of conflict. See Constance Hunt, *Legal Aspects Of Implementing Sustainable Development Canada's Northern Territories*, in THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT 269 (J. Owen Saunders ed., 1990) (including decision of *Calder et al v. A.G. B. C.* (1973), S.C.R. 313 by the Supreme Court of Canada and its subsequent Constitution Act, s. 35 (1982) (recognition of aboriginal rights)); Robert Petersen, *Home Rule in Greenland*, in SELF DETERMINATION AND INDIGENOUS PEOPLES: SAMI RIGHTS AND NORTHERN PERSPECTIVES 105 (International Work Group for Indigenous Affairs 1987)

emerging framework for protecting and enhancing the rights of indigenous peoples.<sup>6</sup>

In that same vein, the paradox is that indigenous peoples are confronted with increasing impacts from the demand for natural resources, development, population growth and international trade. These effects are particularly important because the culture of indigenous peoples is often directly dependent on natural resources and changes are likely to create long-lasting, even permanent environmental harm. Indigenous peoples are thus especially vulnerable to these forces from a cultural standpoint.<sup>7</sup>

Indigenous peoples are also found in some of the most sensitive areas of the world where, as in the Arctic and the Nordic region for example, the flora and fauna are extremely susceptible to irretrievable damage.<sup>8</sup> In this way, culture and the environ-

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6. See Benedict Kingsbury, *Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank, and Indigenous Peoples*, in *THE REALITY OF INTERNATIONAL LAW* 323 (Guy S. Goodwin-Gill & Stefan Talmon eds., 2001); DAN RUSSELL, *A PEOPLE'S DREAM, ABORIGINAL SELF GOVERNMENT IN CANADA* (2000); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996); Benedict Kingsbury, "*Indigenous Peoples*" as an *International Legal Concept*, in *INDIGENOUS PEOPLES OF ASIA* 13 (R.H. Barnes et al. eds., 1995); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 *STAN. J. INT'L L.* 255 (1996); Russel Lawrence Barsh, *The Challenge of Indigenous Self-Determination*, 26 *U. MICH. J. L. REF.* 277 (1993).

7. For example, 'adventure tourism' creates new pressures on natural resources in Finnmark, the Sami heartland in the north of Norway, where tradition and modernity meet, threatening a new form of colonization. Kirsti Pedersen & Arvid Viken, *From Sami Nomadism To Global Tourism*, in *PEOPLE AND TOURISM IN FRAGILE ENVIRONMENTS* 81-85 (Martin Price ed., 1996) ("There is no doubt that increasing pressure on natural resources is a result of the general growth in the tourist industry. So far, the potential problems connected to this development have not been on the agenda, whether in public debate or research. Instead, expectations about profits and employment from tourism are tremendous. Some critics can be heard; local people now not only have to fight for local resources with people from the growing urban centres and other parts of Norway, but also with the needs of people from all over the world. In such a perspective, the development of adventure tourism can be seen as another step in the colonization of Sapmi."); David Harrison & Martin Price, *Fragile Environments, Fragile Communities? An Introduction*, in *PEOPLE AND TOURISM IN FRAGILE ENVIRONMENTS* 81-85 (Martin Price ed., 1996) ("Perhaps more than any other industry, tourism is closely associated with globalization, of which it is both a cause and an effect. Improvements in transport . . . have brought the possibility of mass travel to virtually every part of the globe. In today's shrinking world, economic, social and cultural isolation are increasingly difficult to sustain . . ."); Jan Reynolds, *FAR NORTH, VANISHING CULTURES* (1992).

8. Valene Smith, *The Inuit as Hosts: Heritage and Wilderness Tourism in Nunavut*, in *PEOPLE AND TOURISM IN FRAGILE ENVIRONMENTS* 33, 49 (Martin Price ed., 1996) ("Although glaciers are powerful and the mountains seem so permanent, underfoot is the permafrost lying atop the granitic mass. In many places, the overlying tundra is barely an inch thick, and once disturbed by a foot, a shovel or a snowmobile, the scar

ment are intertwined and for many indigenous peoples, they are indivisible. Any harm to one is almost certain to damage the other and injury to both is a substantial threat to identity and therefore, even survival.

This article considers selected aspects of these impacts from a Nordic perspective, focusing on natural resources, the environment and the Sami (formerly referred to by others as the Lapps), found in the last wilderness of Europe. In light of the vast cultural diversity of indigenous peoples across the world, where it is estimated there are some 5,000 different groups in seventy different countries,<sup>9</sup> it is instructive to examine these impacts in a more specific context, in light of the heritage, belief systems and world view presented.<sup>10</sup> Further, by examining one group like the Sami through the lens of specific conflicts and issues relating to natural resources and the environment, analysis moves beyond theoretical constructs, addressing the challenge in implementing legal principles and standards and in creating and maintaining institutions for the protection of their rights.

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will remain fresh for decades. Regrowth is at least fifty years to the inch. Ecotourism could profitably push back the frontiers of present habitation . . . but leaves the polar desert forever marred.”); David VanderZwaag, *International Law and Arctic Marine Conservation and Protection: A Slushy, Shifting Seascape*, 9 GEO. INT’L ENVTL. L. REV. 303 (1997).

9. John Woodliffe, *Biodiversity and Indigenous Peoples in INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY* 256 (1996) (“Present estimates are that among the 250 million indigenous peoples spread over seventy – mainly developing – countries there are some 5,000 peoples distinguishable by culture, language and geographical separation. Only in a few of these countries are indigenous peoples numerically in a majority. What all these communities have in common is ”a profound relationship with the land . . . and respect for nature.”). At the same time, differences between groups are often profound. See, e.g., Shaheen Sardar Ali & Javid Rehman, *INDIGENOUS PEOPLES AND ETHNIC MINORITIES IN PAKISTAN* (2001).

10. For example, the issues in Burma and Indonesia are closely related to the role of foreign investment. See David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. REV. 626 (2001); See also Martin A. Geer, *Foreigners in Their Own Lands: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs*, 38 VA. J. INT’L L. 331 (1998); Similar issues arise in Bolivia but in a different context. See Laurie Sargent, *The Indigenous Peoples of Bolivia’s Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AMER. L. REV. 451 (1998). See also for Guatemala, Michael Holley, *Recognizing the Rights of Indigenous Peoples to Their Traditional Lands: A Case Study of an Internally Displaced Community in Guatemala*, 15 BERK. J. INT’L LAW 119 (1997). For other groups, the issues have unique elements. See Gail Osherenko, *Indigenous Rights in Russia: Is Title to Land Essential for Cultural Survival?*, 13 GEO. INT’L ENVTL. L. R. 695 (2001).

In that same vein, an informed understanding of the status of indigenous peoples in one context has value in providing insight into the broader framework of international and domestic law relating to indigenous peoples generally. By considering the context in a more empirical setting, scholarship has the prospect of contributing to a more pragmatic understanding of the issues related to indigenous peoples and the environment, and their rights and aspirations.

Part I of the article introduces the larger picture and the process of transition in which indigenous peoples like the Sami are found. The discussion focuses on both the convergence of legal systems generally which influence the protection of indigenous peoples in international and domestic law and the concomitant impacts related to the concentration of new forces from trade, technology and communications, or, in a word, globalization. These dynamics, in concert with the 'internationalization' of the environment, have special consequences for indigenous peoples.<sup>11</sup>

Part II considers the Sami heritage, prior to contemporary conflicts. The evolution of their status is highlighted with developments in the law at the domestic level. Part III moves from the past, considering the topography of the protection for indigenous peoples like the Sami in international conventions, emphasizing the emerging, shared perspective of states toward the special status of indigenous peoples. This includes the process of change in traditional notions of sovereignty as states recognize new imperatives on behalf of the environment, culture and human rights. Part IV shifts from consideration of the larger framework to its contemporary implementation in Norway concerning the Sami, natural resources and the environment. Part V examines the outcome of this process in a preliminary critique, assessing the implementation of the principles and standards for the protection

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11. Adrian Tanner, *Northern Indigenous Cultures In The Face Of Development, in THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT* 253, 258 (J. Owen Saunderson ed., 1990). ("There is an abundance of evidence worldwide that the development process has in general had, and continues to have, a devastating effect on indigenous minority peoples.") (citing ANASTASIA M. SHKILNYK, *A POISON STRONGER THAN LOVE: THE DESTRUCTION OF AN OJIBWA COMMUNITY* (1985)); JOHN H. BODLEY, *VICTIMS OF PROGRESS* (2d ed., 1982). A process of "cultural breakdown" is described including barriers to the group's pursuit of its subsistence economy (ecological degradation, land alienation, resource competition from newcomers, game laws), as well as obstacles to its participation in the wage economy, educational policy enforcing the dominant culture leading to high dropout rates and values reflected in film, television, videos and music.

of the Sami as well as the next stage in the resolution of issues relating to governance within the context of sovereignty and self-determination.

As a general guide, the analysis is informed by a conception of law as both prospective and retrospective. As Nicholas Robinson aptly described it, the law is like Janus who, in Greek mythology, was represented as looking both forward from one perspective and backward in another.<sup>12</sup> In order to address contemporary conflicts, it is necessary to understand the past. At the same time, such conflicts are often not resolved with precedent but rather, through new forms of adaptation in a process of transformation.<sup>13</sup> The adaptation may come slowly, even too slowly yet, as Henry David Thoreau observed, "What everybody echoes or in silence passes by as true today may turn out to be falsehood tomorrow, mere smoke of opinion, which some had trusted for a cloud that would sprinkle fertilizing rain on their fields."<sup>14</sup>

## I.

### CONVERGENCE: INTERNATIONAL AND DOMESTIC LAW

#### A. *Defining Convergence*

The point of departure for understanding convergence and its importance for indigenous peoples is determining a definition. In essence, convergence is the process in which the domestic law governing states tends to operate in similar ways while, quite often, simultaneously, principles of international law also stimulate the process by promoting commonly held norms. The result is a transformation in law at the domestic level.

This process is two-fold. On one level, domestic and international law are closely linked in specific areas and resemble one another in important ways. On another level, states with very different legal systems begin to share increasing similarities in spe-

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12. Nicholas Robinson, *A Legal Perspective On Sustainable Development*, in *THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT* 15 (J. Owen Saunders ed., 1990) ("As guardians of doors and gates, Janus presided over the beginning of new ventures . . . . The law, like Janus, is forever conservatively upholding the past and progressively ushering in the future.").

13. For example, in the context of environmental law in the United States see *Sierra Club v. Morton*, 405 U.S. 727 (1972) (Douglas, J., dissenting) (standing); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (historic preservation); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Brennan, J., dissenting) (coastal zone regulation).

14. HENRY DAVID THOREAU, *THOREAU: WALDEN AND OTHER WRITINGS* 111 (1962).

cific areas. Within this broad definition, the process of the transformation of law is a phenomenon encompassing actions at the international and domestic level as well as the regional level. Taken together, results in the creation and application of parallel legal standards.

Convergence therefore encompasses harmonization occurring both between states and groups of states as well as between states and principles established in international conventions and agreements. In this way, convergence is the outcome of a shared understanding of legal standards.<sup>15</sup>

### B. *Characteristics Of Convergence*

Convergence, first and foremost, arises between legal systems. The extent to which different legal systems function, including primarily the similarities between them, rests largely on a variety of legal actions in a traditional sense. Treaties, instruments, declarations, constitutional provisions, statutes, regulations and court decisions all play an important role.

Second, convergence is a dynamic process. The approval and adoption of an international convention does not necessarily create a domestic standard incorporating the treaty's provision in the law of a state.<sup>16</sup> Yet, even if it does, in contrast to such a mechanical formulation, convergence occurs through multiple actions of a state which trigger executive, judicial and legislative responses over many years.

Third, convergence reflects the diversity of the international community. Since harmonization takes place at the domestic level, each state places its own stamp on the implementation of

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15. Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65 (1996).

16. Hans Christian Bugge, "Constitution" and "Constitutional Law" in Norway, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS 293 (Eivind Smith ed., 1995). For example,

Norway applies the 'dualistic system': international customary and treaty law must be formally transformed or incorporated into Norwegian legislation to become ordinary Norwegian law. However, this is only the starting point. The principle is not applied in a strict sense. Even if an international rule has not been formally transformed into Norwegian law, it may influence court decisions and the law in general as an important element of interpretation – even as a supplement.

There is a "presumption" in principle that Norwegian law is in accordance with international law – both international customary law and treaty law. The courts will tend to interpret the Norwegian law in such a way that it is in accordance with the international rule.

*Id.* at 298.

norms and principles. This means that states with a civil law tradition may use an approach that both resembles and contrasts with those of a common law heritage and so on. The Asian<sup>17</sup> and Islamic countries,<sup>18</sup> of course, build on and adapt to these principles and norms within their own traditions.

Endangered species is a notable case in point. States that are parties to the Convention on Trade in Endangered Species ("CITES") agree to adopt legislation in conformity with the terms of the Convention.<sup>19</sup> Yet different states take different approaches to implementation, especially with respect to enforcement. For example, China's legislation provides for strict penalties and even the most severe criminal sanctions.<sup>20</sup> In contrast, criminal law is less prominent in enforcement in the United States. Implementation there is based on the Endangered Species Act and provides for the designation of habitat necessary for the survival of species.<sup>21</sup>

### C. *Distinguishing Convergence From Globalization*

From this discussion, a threshold question arises: how is convergence distinguished from globalization? The answer probably does not lend itself to precision at this stage but is multi-faceted. At a minimum, convergence and harmonization flow from the actions of decision-makers in legal systems regarding principles, norms and standards. Globalization, while it has direct and indirect impacts on legal systems and convergence, is perhaps best understood as a much broader process sweeping along vast economic and social developments arising from trade, technology and communications.

In distinguishing convergence from globalization, several formulations of the term 'globalization' are instructive. For example, globalization is characterized as:

- \* "[F]oremost an economic process" and one that has "expanded markets for international trade and opportunities for interna-

17. COMPARATIVE ASIAN ENVIRONMENTAL LAW ANTHOLOGY (Alexander J. Bolla & Ted L. McDorman eds., 1999).

18. Abubakr Ahmed Bageder et al., ENVIRONMENTAL PROTECTION IN ISLAM, (IUCN 1994); ABOU BAKR AHMED BAKADER, ISLAMIC PRINCIPLES FOR THE CONSERVATION OF THE NATURAL ENVIRONMENT (1983).

19. 12 I.L.M. 1055 (1973); 993 U.N.T.S. 243 (1971); SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 239, 240-41 (1985).

20. Lawrence Watters & Wang Xi, *The Protection of Wildlife and Endangered Species in China*, 14 GEO. INT'L ENVTL L. REV. 489 (2002).

21. 16 U.S.C. § 1531; *Babbitt v. Sweet Home*, 515 U.S. 687 (1995).

tional investment. Simultaneously, it has increased economic interdependency among nations and made nations economically vital to each other."<sup>22</sup>

- \* "[A] process in which economic markets, technologies, and communications gradually come to exhibit more "global" characteristics and less "national" or "local" ones."<sup>23</sup>
- \* "[M]ovement, diffusion and expansion from a local level and with local implications, to levels and implications that are worldwide, or, more usually that transcend national borders in some ways."<sup>24</sup>
- \* "[A] structural shift in the spatial organization of socio-economic and political activity towards transcontinental or inter-regional patterns of relations, interaction and the exercise of power."<sup>25</sup>
- \* "[T]he stretching, deepening and speeding up of global interconnectedness i.e., the multiplicity of networks, flows, transactions and relations which transcend the states and societies which constitute the contemporary global system."<sup>26</sup>

Others use globalization in a way that includes all manner of international developments. This encompasses the spread of freedom, the rise of democracy and the extension of human rights in many parts of the world.<sup>27</sup>

These views, while hardly exhaustive, are persuasive that globalization has direct impacts on the broadest possible level.<sup>28</sup>

22. Alex Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L. J. 429, 491 (1997).

23. *Globalization, Trade and Investment*, in OECD ENVIRONMENTAL OUTLOOK 47 (Organization for Economic Development and Cooperation 2001). ("Liberalisation of international trade regimes, financial market deregulation, intensified competition, as well as rapid technological changes, particularly in information, communication, and transportation technologies, are the main drivers of this process.").

24. Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347 (2001). "Globalization is economic. It is international business, international transactions, international buying and selling and dealmaking." *Id.* at 348.

25. Anthony McGrew, *Human Rights in a Global Age: Coming to Terms with Globalization*, in HUMAN RIGHTS FIFTY YEARS ON, A REAPPRAISAL 188, 191 (Tony Evans ed., 1998).

26. *Id.* at 189.

27. Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305 (2001).

28. For example, it is suggested globalization "has created new tensions over environmental responsibility." In certain cases, such as those in Bhopal and Guyana, globalization has resulted in an environmental recklessness of epidemic proportion. Thousands of inhabitants of Bhopal, India were killed or disabled in 1984 as a result of the release of methyl iso-cyanate from a Union Carbide plant. In Guyana, a 1995 cyanide spill in the Essequibo River has had a myriad of health hazards for the nearby community. The victims of the Bhopal and Guyana disasters have yet to see any imposition of civil or criminal liability upon the transnational corporations in-

Moreover, while these impacts contribute to convergence and appear to drive elements of it, especially with respect to trade and the work of the World Trade Organization ("WTO"),<sup>29</sup> convergence addresses the harmonization of legal systems in diverse ways, of which trade is only a part.

#### D. *Convergence In A General Sense*

The European Union ("EU") offers an illustration of the process of convergence at the regional level. In implementing the Treaty on European Union and the Single European Act,<sup>30</sup> fifteen states are working closely together to create and implement a uniform set of legal standards in selected areas.<sup>31</sup> Through legislation, executive actions and judicial proceedings, these standards result in increasing harmonization.<sup>32</sup>

This process is strengthened through EU institutions with the competence to make authoritative judicial pronouncements, particularly the European Court of Justice ("ECJ").<sup>33</sup> In this way, standards from the shipment of hazardous waste to trade in endangered species and the labelling of drugs are subject to uniform treatment in the process of integration.

Another example is the European Court of Human Rights ("ECHR"). The ECHR addresses procedural and substantive

involved. These corporations continue to enjoy *de facto* impunity and are immune from acts of criminal negligence. See also Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 311 (2001); Mahmood Monshipouri & Claude E. Welch, *The Search for International Human Rights and Justice: Coming to Terms with the New Global Realities*, 23 HUM. RTS. Q. 370, 383 (2001).

29. Supachai Panitchpakdi, *The Evolving Multilateral Trade System in the New Millennium*, 33 GEO. WASH. INT'L L. REV. 419 (2001). ("The WTO has to grasp the globalization issue. The WTO must be a global institution. In order to be a global institution, it cannot only have, like at the moment, 137 members . . . I hope by the time that I get to Geneva two years from now, we will have 170 members."); See also FIONA MACMILLAN, *WTO AND THE ENVIRONMENT* (2001).

30. O.J. C 224/1 (1992); O.J. L 169/1 (1987), 2 C. M. L. R. 741 (1987); Patrick Hugg, *Transnational Convergence: European Union and American Federalism*, 32 CORNELL INT'L L. J. 43 (1998); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L. J. 2403 (1991).

31. Paul Craig, *The Nature of the Community: Integration, Democracy, and Legitimacy*, in *THE EVOLUTION OF EU LAW* 1 (Paul Craig & Grainne De Burca eds., 1999).

32. Grainne De Burca, *The Institutional Development of the EU: A Constitutional Analysis* in *THE EVOLUTION OF EU LAW* 55 (Paul Craig & Grainne De Burca eds., 1999).

33. Martin Shapiro, *The European Court of Justice*, in *THE EVOLUTION OF EU LAW* 321 (Paul Craig & Grainne De Burca eds., 1999).

protection of human rights recognized across the Continent.<sup>34</sup> Standards of due process and equal protection are applied in a manner very similar to the U.S. Supreme Court.<sup>35</sup> Even rights concerning the environment are addressed.<sup>36</sup> This is part of the ongoing international human rights movement.<sup>37</sup> Similarly, France and Germany have recently proposed a new constitution for Europe.<sup>38</sup> Whatever the merits of the initiative, a constitution for the Continent has the potential to create a dramatic influence on states within the EU, and over time, the process of convergence in law.

On a global scale, with particular importance for indigenous peoples, convergence occurs through the UN human rights treaties where "the available evidence suggests that the treaties have had an enormous influence in shaping the present understanding throughout the world of what are to be regarded as basic human

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34. KAREN REID, *A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS* (1998). "Applying the Convention involves a special perspective distinct from national law. There is a set of interlocking principles governed by its international and human rights context. The Convention organs intend to lay down certain minimum international standards. They are not seeking to identify the most appropriate way to protect human rights, recognizing the diversity in the Contracting States." *Id.* at 31.

35. Douglass Cassell, *International Human Rights Law In Practice: Does International Human Rights Law Make A Difference?*, 2 CH. J. INT'L. L. 121 (2001). "By 1990 the European Court had come to play for Europe approximately the same role in safeguarding approximately the same set of basic rights, as the US Supreme Court plays in enforcing constitutional rights among the fifty states, with comparable substantive outcomes and degrees of compliance." *Id.* at 131-32; Sandra Day O'Connor, *Altered States: Federalism and Devolution at the "Real" Turn of the Millenium*, 60 C.L.J. 493, 507-08 (2001) ("Much attention has been devoted to the role that EU courts will play in the New Europe . . . The United Kingdom's 1998 incorporation of the European Convention on Human Rights enables the courts to declare Acts of Parliament to be incompatible with EU rights."); Gerard Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, 46 MCGILL L. J. 849 (2001). "In the short space of a decade, the European Union ("EU", "Union") – since 1992 the successor to the EEC – has become the single largest funder of human rights activities throughout the world. Successive waves of treaty revision have led to the accretion of human rights competences at the level of the Union. The EU presents a common front at major international forums dealing with human rights issues, including the United Nations Commission on Human Rights. It has a near-global diplomatic reach which, together with its trading prowess on the world stage, enables it to flex its diplomatic and economic muscle to leverage change." *Id.* at 849.

36. Mariana T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L. J. 437 (2000).

37. Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 3-4 (1999).

38. BBC, Nov. 25, 2001.

rights and the limits of these.”<sup>39</sup> Moreover, convergence takes place even in criminal law. For example, the procedures of the new International Criminal Court<sup>40</sup> draw on the approach of both the civil law and the common law tradition with respect to the role of the judges, prosecutors and defense counsel as well as the presentation of evidence.<sup>41</sup> This follows the work of the International Court for the Former Yugoslavia (“ICTY”) which blends features of both systems.<sup>42</sup>

### E. *Convergence, Environmental Law and Indigenous Peoples*

Convergence occurs in environmental law through conventions with especially wide application. Biodiversity, climate change, endangered species and the oceans are striking examples of the international framework implemented by states to advance and protect common interests.<sup>43</sup> Notably, the conventions impose specific obligations that are not only addressed to the parties. They are also concerned with equity and future generations.<sup>44</sup>

Environmental law represents a particularly dynamic form of convergence. In the time since the Stockholm Declaration in 1972, hundreds of other agreements devoted to nature, resources and the environment have been adopted at the international and

39. Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483 (2001). “The influence of the treaties is likely to increase in the future. The new generation of lawyers, government officials, and human rights activists are more aware of the treaties, and the conditions under which the treaties operate have improved dramatically over the last decade.” *Id.* at 487.

40. U. N. Doc. A/conf. 183/9, July 17, 1998; 37 ILM 999 (1998) (Rome Statute).

41. Lawrence Watters, *Convergence and the Procedures of the International Criminal Court: An International and Comparative Perspective*, 39 COLUM. J. TRANSNAT’L L. 419 (2002); CHRISTOPH J.M. SAFFERLING, *TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE* (2001); ILIAS BANTEKAS, SUSAN NASH, MARK MACKERAL, *INTERNATIONAL CRIMINAL LAW*, Cavendish (2001).

42. *ESSAYS ON ICTY PROCEDURE AND EVIDENCE*, (Richard May et al. eds., Kluwer 2001).

43. CONVENTION OF LAW OF THE SEA (1982); UNCLOS A7CONF 62/122; See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES, UNCLOS 1982 AND BEYOND*, (Clarendon Press 1994). See also Robinson, *supra* note 12, at 25-26. (“These illustrations of how law reaffirms the status quo or molds change and reform have cut across local, provincial, national and international lines. In environmental law, the dichotomy between municipal law and international law cannot be sustained.”).

44. *A Threatened Future*, in *The World Commission on Environment and Development OUR COMMON FUTURE*, 27 (1987); Per Ariansen, *Sustainability, Morality and Future Generations*, in *TOWARDS SUSTAINABLE DEVELOPMENT* 84 (1999).

regional level<sup>45</sup> and of course, a vast number of laws implemented by states at the domestic level.<sup>46</sup> From environmental impact assessment, an established legal process around the world,<sup>47</sup> to a 'cradle to grave' regime for the disposition of hazardous substances in Germany, modeled after the statutory approach in the United States,<sup>48</sup> the process of convergence is manifest in a variety of ways.

More and more, the environment is considered in light of the people dwelling within it, including particularly indigenous peoples and their status. Thus, the protection and enhancement of their rights overlap with the environment. For indigenous peoples, dependent on the natural environment for their culture, this is crucial to their existence.<sup>49</sup> In this way, convergence is increasingly reflected in conventions and domestic law where states acknowledge and address the profound links between environment, culture and rights of indigenous peoples.

## II.

### THE SAMI HERITAGE AND NORWAY

"What they are not familiar with people call barbarian."  
Montaigne<sup>50</sup>

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45. Jon Birger Skjaereth, *Sustainable Development: Caught Between National Sovereignty and International Challenges in TOWARDS SUSTAINABLE DEVELOPMENT* 137 (1999).

46. Robinson, *supra* note 12, at 29 ("A system of national environmental law is emerging in most countries. Not surprisingly, these laws look very similar. They deal with the same natural phenomena and very similar effects from industrial, agricultural, or other anthropogenic behavior.").

47. *Id.* at 21.

48. Lawrence Watters, *Understanding the Framework: Convergence and Environmental Law in an International and Comparative Context*, 14 *GEO. INT'L ENVTL. L. REV.* 161 (2001); See 42 U.S.C. § 6901 (1976) (Resource Conservation and Recovery Act ("RCRA")).

49. Lawrence Watters & Connie Dugger, *The Hunt For Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 *COLUM. J. ENVTL. L.* 319 (1997).

50. Norbert Rouland, *LEGAL ANTHROPOLOGY* ix (Athlone Press 1994). Early European adventurers established a pattern repeated around the world:

During the very first months of his New World adventure, then, Columbus had invented two classic stereotypes that would condition Euroamerican perceptions for the next five centuries. The peaceful Arawak continued their idyllic Garden of Eden existence even as they were menaced by the Carib monsters, vivid personifications of the Devil himself. The same Good Indian/Bad Indian imagery is peddled in many bookstores today.

THOMAS, *supra* note 3, at 6. In his Pulitzer Prize-winning *Admiral of the Ocean Sea*, published in 1942, and the subsequent *European Discovery of America* (1971-1974),

The analysis focuses on the Sami heritage and Norway for several reasons. While the Sami are found in four countries in the Arctic and sub-Arctic regions,<sup>51</sup> the bulk of the population, some 40,000, reside in Norway.<sup>52</sup> Of all the Nordic countries, Norway has contributed the most to the emerging jurisprudence relating to their rights and status.<sup>53</sup> Moreover, Norway's institutions offer especially interesting opportunities for comparison and contrast with other states where there are parallel developments concerning indigenous peoples, including Canada and the United States in North America as well as Australia and New Zealand. This includes the fundamental role of judicial review.<sup>54</sup> Norway is the only country other than the United States to have continuously exercised judicial review since the first part of the nineteenth century.<sup>55</sup>

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the Harvard historian Samuel Eliot Morison uncritically employed Bad Indians to lionize Columbus, his lifelong hero. *Id.*

51. Norway, Sweden, Finland and Russia. Kaisa Korpjiaakko, *Sami Land Law: Possible Or Impossible?*, in FIRST INTERNATIONAL CIRCUMPOLAR WORKSHOP, CHANGES IN CONTEMPORARY NORTHERN SOCIETIES 101 (1991).

52. TOM SVENSSON, INSTITUTE FOR COMPARATIVE RESEARCH IN HUMAN CULTURE, THE SAMI AND THEIR LAND 13 (1997).

53. Kristian Myntti, *The Nordic Sami Parliaments*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF DETERMINATION 203 (Pekka Aikio & Matin Scheinin eds., 2000). "Of the Sami populations, the legal rights and general situation of the Norwegian Sami are probably the most advanced." *Id.* at 211. Sweden has not recognized the Sami as indigenous peoples and has not ratified the International Labour Convention ("ILO") Convention. *Id.* at 169. Nanna Borchert, LAND IS LIFE: TRADITIONAL SAMI REINDEER GRAZING THREATENED IN NORTHERN SWEDEN (Svenska Samernas Riksförbund and World Wildlife Fund International 2001); Frank Orton & Hugo Beach, *A New Era For The Saami People Of Sweden*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 91 (Cynthia Price Cohen ed., 1998). Finland has recognized the Sami as indigenous peoples but has not adopted ILO Convention 169. See Eva Josefsen, *The Sami and the National Parliaments: Direct and Indirect Channels of Influence*, in CHALLENGING POLITICS: INDIGENOUS PEOPLES' EXPERIENCE WITH POLITICAL PARTIES AND ELECTIONS *supra* note 5, at 67. "Even though Sweden, Finland and Norway may appear to be relatively homogeneous when viewed from the outside, there are historic and cultural differences between them . . . Sweden and Finland have not yet had an in-depth social debate on the relations between the Sami and the state." *Id.* at 84-85.

54. Carsten Smith, *Judicial Review Based on Supreme Court Practice*, in LOVEN OG LIVET, Universitetsforlaget, 51 (1996).

55. Eivind Smith, *supra* note 16, at vii.

## A. *The Sami – Indigenous People Of Scandinavia*

### 1. Heritage

The Sami, while living within the contemporary political boundaries of the Nordic countries, are a distinct ethnic group,<sup>56</sup> with their own language and culture.<sup>57</sup> They have had the status of a minority, in one form or another, since the Middle Ages.<sup>58</sup> From time immemorial,<sup>59</sup> they were hunters and gatherers<sup>60</sup> who gradually split into subcultures that varied according to livelihood and ecological adaptation. From the sixteenth century on, it is possible to identify major groups.<sup>61</sup> There are the coastal and river Sami, where fishing is vital; the mountain Sami, semi-nomadic reindeer herders, also migrate long distances between the tundra and the taiga; the forest Sami; and, the eastern Sami. The last two groups migrating in the same ecological zone in a semi-nomadic pattern throughout the year.<sup>62</sup>

In addition to reindeer herding, the traditional activities of the Sami for subsistence based on collective use of the land include fishing, hunting, trapping and gathering berries.<sup>63</sup> At the present time, many Sami work outside of these categories and pursue a variety of occupations.<sup>64</sup> Yet reindeer herding remains an integral part of Sami life and is tied to extensive use of the land.<sup>65</sup>

56. Helge Salvesen, *Sami Aedan: Four States – One Nation?*, in *ETHNICITY AND NATION BUILDING IN THE NORDIC WORLD* 106 (Sven Tagin ed., 1995).

57. Myntti, *supra* note 53, at 210-11.

58. Salvesen, *supra* note 56, at 106.

59. BJORN AARSETH, *THE SAMI PAST AND PRESENT* 2 (1993) (“According to historic sources the Sami have inhabited these areas of the Scandinavian peninsula at least since the late Middle Ages. Archaeological sources indicate a probable Sami inhabitation here as early as 100-200 A.D.”); Sami Institute/Davvi Girji, *THE SAMI PEOPLE* (1990). “The earliest mention of the Sami by historians is thought to be that of the Roman historian Tacitus, who in the last chapter of his *Germania*, written in the year 98 A.D., mentions a people whom he calls the *fenni*.” *Id.* at 15.

60. For example, their skills in archery and skiing are described in chronicles from the 13<sup>th</sup> century. Sami Institute/Davvi Girji, *THE SAMI PEOPLE* 17 (1990).

61. They ranged from the White Sea to the Atlantic, from the Gulf of Bothnia to the Arctic Ocean – an area generally referred to as Fennoskandia. Salvesen, *supra* note 56, at 108.

62. SVENSSON, *supra* note 52, at 14.

63. *Id.* at 31-32.

64. *Id.* at 14.

65. Aarseth, *supra* note 59, at 14.

## 2. Belief Systems

The Sami religion was based on an animistic conception of the world that endowed nature with a soul.<sup>66</sup> Land and water formed the basis of their values and beliefs.<sup>67</sup> The notion of *Sapmi*, 'our land,' is reflected in their understanding of territory and an integral relationship to the land.<sup>68</sup> *Duovda* (landscape) means the land lived on and the land used for its resources, including sacred mountains and lakes, well known and relied on as geographic points of reference even today.<sup>69</sup>

For example, the sacred mountains in one area, *Frostviken*, are dispersed along both sides of the border between Norway and Sweden.<sup>70</sup> They are identified in oral history as places where the Sami traditionally made sacrifices (*sieidi*) to the gods and the spirit powers in maintaining "the man-nature-spirits relationship which was essential for their very existence."<sup>71</sup> Sacred sites were also connected to specific families in some cases and handed down from one generation to another following principles of inheritance, as with reindeer pastures and fishing areas.<sup>72</sup> A survey of these sacred sites was made in the 1940's and 1950's based on oral history. The names of the sites are used in the ordinary course of contemporary living.<sup>73</sup> Prehistoric works of art, primarily rock carvings, attest to a deep relationship with nature.<sup>74</sup> Rock pictures at Alta fjord, a World Heritage Site, depict subsistence use and the bonds between man, animals and nature.<sup>75</sup>

66. ODD MATHIS HAETTA, *THE ANCIENT RELIGIONS AND FOLK-BELIEFS OF THE SAMI* 7 (1994). ("[M]ountains and hills, boulders and lakes had a life and were able to help people who prayed to them and made sacrifices to them. The elemental forces were personified through the Wind Man, the Old Man of Thunder, the Alder Man and other nature gods.")

67. *Id.* at 13. ("Natural phenomena such as thunder, wind, the sun and the moon featured prominently in worship in the pre-Christian beliefs of the Sami. But it was generally not the natural phenomena themselves that were the object of virtue, but rather the power that manifested itself through them.")

68. SVENSSON *supra* note 52, at 9.

69. *Id.* at 9-10. The activities take place in three main ecological zones: the high mountains, the lower slopes and the forests.

70. *Id.*

71. *Id.* "Offerings were mostly pragmatic and made for the sake of good hunting, success in reindeer husbandry, good luck while travelling and also for a long life and good health." *Id.*

72. *Id.*

73. *Id.*

74. ODD MATHIS HAETTA, *THE SAMI, AN INDIGENOUS PEOPLE OF THE ARTIC* 15 (1993).

75. *Id.* The carvings date as far back as 6,000 years ago.

### 3. Threats To Culture And Environment

Over the last 150 years, development encroached on the traditional region of the Sami.<sup>76</sup> This occurred while they faced a parallel loss in authority.<sup>77</sup> As a result of both forces, their way of life, dependent on access to land and water, became vulnerable.<sup>78</sup> The traditional customs and the collective use of resources, even the sacred sites where they had gathered, were increasingly threatened.<sup>79</sup> In the twentieth century, dramatic change came with the occupation of Norway by Nazi Germany in April 1940.<sup>80</sup> Much of the fiercest action took place in Finnish Lapland and Norwegian Finnmark as the German army withdrew in April 1945.<sup>81</sup> Reconstruction took many years.<sup>82</sup>

In addition, significant impacts arose from agriculture, mining, timber harvesting and expansion of hydro-power.<sup>83</sup> Development brought new roads, rail lines, airports, towns<sup>84</sup> and large-scale tourism.<sup>85</sup> Over time, external forces created pressures on an

76. SVENSSON, *supra* note 52, at 10.

77. *Id.*

78. *Id.*

79. *Id.*; The Sami were subject to intense pressure to assimilate from missionaries with antipathy to traditional belief systems in a manner similar to tribes in the United States. Sami Institute/Davvi Girji, *THE SAMI PEOPLE*, *supra* note 60, at 119-29. See Howard Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites*, 41 *SANTA CLARA L. REV.* 757 (2001).

80. LENNARD SILLANPAA, *POLITICAL AND ADMINISTRATIVE RESPONSES TO SAMI SELF-DETERMINATION* 55 (1994).

81. *Id.*

82. *Id.*

83. SVENSSON, *supra* note 52, at 32.

84. JAN REYNOLDS, *FAR NORTH: VANISHING CULTURES* (1992). ("For thousands of years, the Samis have followed the migration of the reindeer across the plateaus and up into the mountains in the summer then back down to the plateaus in the winter. Following the natural cycle of the seasons, they believe that nature will always care for them. But this ancient way of life is disappearing as new roads and towns change the landscape, and helicopters and snowmobiles replace the Samis' traditional methods of reindeer herding.")

85. Pedersen & Viken, *supra* note 7, at 80. ("Everyday life is regulated according to the recreational opportunities that nature offers in each season. Yet many Sami have experienced a major change: from being the only ones who utilized these resources, many others now compete for them. New roads and longer vacations have resulted in a stream of people from the coastal towns and fishing villages to the inland. The principle of common access to the countryside has become not only a theory but a reality for thousands of people. This has resulted in a race for the best fishing areas and hunting grounds, and pressure on, or even suppression of, the old Sami rights to harvest according to kin-group (*sii'da*) agreements. Sami protests against this encroachment of their old rights were not heard, and as a minority they had no power to defend their old common rights.")

ecosystem that had always supported a pastoral culture and the sustainable use of resources.<sup>86</sup> In turn, the land the Sami had used collectively was placed in jeopardy within the legal system itself, established by the state for the dominant society, similar to developments in other countries, notably the United States, Australia and New Zealand.<sup>87</sup>

Moreover, in the past, organization, use of land, disposition of resources and rights of inheritance were dealt with by the Sami as a community.<sup>88</sup> Disputes were settled by a council (*sii'da*) and later, by a district court. This assured continuity in community rights to land<sup>89</sup> within a tradition that prevailed until at least the 1760s, as clearly documented in court records.<sup>90</sup>

Yet the unity of environment, culture, economy and subsistence that characterized Sami life was changing. New uses with new impacts, based on the values of the dominant society, em-

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86. Stig Karlstad, *Coping With Social Problems and Sustainable Development in Reindeer and Sami Societies* in *COPING STRATEGIES IN THE NORTH: LOCAL PRACTICES IN THE CONTEXT OF GLOBAL RESTRUCTURING* 107 (Most ed., 1998). ("The Sami societies, having reindeer industry as an important means of subsistence in the Northern regions, have been exposed to radical forces of economic, technological and environmental change during the last 15-30 years—especially in the Nordic countries. These forces provide new constraints and opportunities for economic growth, and they also pose threats to cultural traditions and contribute to an increasing socio-economic differentiation (welfare, education, way of living etc.). As a result of these and other factors, the reindeer societies are exposed to increasing challenges like the overgrazing of pastures, weakened economic sustainability and problems of social marginalizing of redundant reindeer households.").

87. For example, in what is now Oregon and northern California in the United States, environmental degradation and the destruction of Native American culture began with the first settlers in the area:

What had been a land of abundance endured significant upset. Settlers' hogs rooted out and devoured camas bulbs. Pioneers, fearing for their split-rail fences and log cabins, suppressed the Indian fire ecology, which had produced a bounty of seeds and open forest understorey. The newcomers' guns took a heavy toll on the deer and elk. Farmers' plows turned under the fields of seeds and lilies. The work of hundreds of miners turning over gravel bars to find gold in the crevices and potholes unleashed a torrent of mud that clogged the streams and disrupted the runs of life-sustaining fish. In less than three years the twin plagues of settlement and mining drove the Indians from their homes and to the brink of starvation.

STEPHEN D. BECKHAM, *REQUIEM FOR A PEOPLE: THE ROGUE INDIANS AND THE FRONTIERSMEN* ix (1996).

88. SVENSSON, *supra* note 52 at 10.

89. Reynolds, *supra* note 84. ("The physical boundaries of the Samis' land and the rhythm of their lives are set by natural forces and the instinctive migration of the reindeer, not by politics and economics.").

90. SVENSSON, *supra* note 52, at 10.

phasized technology and exploitation.<sup>91</sup> Individual ownership reflected a material conception of progress and an emphasis on physical acquisition that was alien to the Sami. The ethos of community and collective stewardship with nature, which the Sami had maintained from time immemorial, increasingly gave way to new forces. Communal use of resources and the pastoral tradition<sup>92</sup> were threatened by competition<sup>93</sup> and industrial use.<sup>94</sup> The integrity of nature itself, as a system with which man co-existed, yielded to change. The carrying-capacity of the region diminished as conflicts arose.<sup>95</sup> From a holistic, nature-centered world view, the Sami were forced to confront the forces of development brought by outsiders.<sup>96</sup>

### C. *The Status Of The Sami*

#### 1. Early Agreements and Limited Recognition (1751- 1896)

Over the centuries, two kingdoms expanded northward to encompass *Sapmi*.<sup>97</sup> The Danish-Norwegian and the Swedish-Finnish asserted claims the Sami belonged to them.<sup>98</sup> These states fixed their frontiers in Nordkalotten, the area generally north of

91. This marked a shift from nomadism to permanent settlement, from self-sufficiency to mechanization and dependence on consumer goods. HAETTA, *supra* note 74, at 46-48.

92. AARSETH, *supra* note 59, at 3. ("Hunting and fishing grounds were distributed by the *si'ida* council (made up of heads of families) so as to meet the needs of the families and still guard against over-exploitation. Trapping of both beaver and reindeer, using extensive systems of fences and pitfalls, seems to have been a joint concern of the *si'ida* with collective ownership of the trapping systems.")

93. Stig Karlstad, *supra* note 86 at 107; Gestur Hovgaard, *Coping With Exclusion – A North Atlantic Perspective*, 45, 61-62. ("The social context of the local community has been understood in terms of traditionality and homogeneity: A sense of common history, common norms and values, and as units of egalitarianism, conformity and face-to-face relations. These "old" trends have now been replaced by individualization, heterogeneity, specialization and competition that are concepts we . . . do not combine with living in local peripheral communities.")

94. Tanner, *supra* note 11, at 258. ("Industrial development is characterized not merely by development, but by the continual process of launching newer and newer development projects. This plurality of projects is significant because of the basic fact of competition between projects . . . . Competition between projects implies a continual tendency to expand production up to the physical ecological limits . . . . The frequent result is ecological crisis in some form.")

95. Johannes Falkenberg, *From Nomadism to Permanent Settlement Among the Sami of the Roros Regions (1890s-1940s)* in RIEPMOCALA: ESSAYS IN HONOUR OF KNUT BERGSLAND 34 (Bernt Brendemoen et al. eds., 1984).

96. SVENSSON, *supra* note 52, at 10.

97. SVENSSON, *supra* note 52, at 10.

98. *Id.*

the Arctic Circle, in treaties in 1751.<sup>99</sup> This included an addendum, generally referred to as the "Sami Codicil," between Denmark-Norway and Sweden-Finland.<sup>100</sup>

The Sami Codicil appeared to confirm their special status as an ethnic minority and "their future existence as a distinct people as expressed by two nation states" involved in the treaty.<sup>101</sup> The states also agreed to make the border immaterial so the Sami could continue their nomadic pursuit of reindeer herding, using the land and water of the region as they always had, including for trade, regardless of national boundaries.<sup>102</sup> Further, the Codicil seemed to guarantee a legal right to land and water.<sup>103</sup>

Where did these rights come from? They were "based on ancient usage and customs and implied full rights to reindeer pasture, fishing and hunting."<sup>104</sup> In many ways, the Sami had the equivalent of ownership in their own country and rights of seasonal use in the one adjacent to them.<sup>105</sup> In addition, the Codicil provided that each local Sami community held the rights. In this way, the Codicil is reasonably understood as confirming ancient group rights, rights that both states acknowledged in the text of the agreements.<sup>106</sup>

During the nineteenth century, the agreements were followed by conflicts involving the Nordic Countries. They arose in conjunction with the economic growth outlined above especially between reindeer-herding Sami and agricultural, forestry and mining interests.<sup>107</sup> This led to a joint Norwegian-Swedish commission in 1866 that proposed changes to the Codicil.<sup>108</sup>

The potential changes and the status of the Sami drew the attention of Torkel Aschehoug, a law professor in Norway at the time, whose major work on the constitution of the country provided a summary of Sami rights and his interpretation of the

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99. *Id.*

100. *Id.*

101. SVENSSON, *supra* note 52, at 42.

102. Minde, *supra* note 97, at 113.

103. SVENSSON, *supra* note 52, at 42; Salvesen, *supra* note 56, at 110. "[T]he codicil guaranteed a legal right to land and water on the basis of customary practice." He also asserts that the Codicil "contains rules concerning neutrality in the case of war; internal Sami administration, including a limited administration of justice, together with the legal confirmation of ancient Sami customs." *Id.* at 122.

104. SVENSSON, *supra* note 52, at 42.

105. *Id.*

106. Salvesen, *supra* note 56, at 110, 122-23.

107. *Id.* at 43-44.

108. Minde, *supra* note 97, at 113.

Codicil.<sup>109</sup> He found the right of free movement within Norway, even for the Sami from Sweden, a part of the earlier treaty itself and concluded the Codicil was not subject to arbitrary modification or termination by one state or the other.<sup>110</sup>

More importantly, he dealt with the question of the status of the Sami if the Codicil was cancelled in its entirety.<sup>111</sup> He determined that the prior legal position, existing before the adoption of, the Codicil, became applicable and “was thus revived or brought back to life.”<sup>112</sup> Aschehoug therefore traced

the source of Sami rights not only to actual laws, but in the last instance to the uncodified legal situation before the Codicil. The Sami right to graze their reindeer on privately owned land had been described by the 1866 commission as something of a “split property right.” However Aschehoug goes further than the Commission in that he clearly and unambiguously regards the Codicil as a codification of an already existing legal position.<sup>113</sup>

In this way, even in the nineteenth century, against the backdrop of nationalist aims and a policy of education and assimilation to ‘civilize’ minorities, similar to the process taking place with Native Americans in the United States<sup>114</sup> as well as in other countries, Aschehoug challenged the perspective of contemporary political interests. He recognized the primacy of custom that “springs out of the Samis’ way of life and the natural conditions where they dwell.”<sup>115</sup> He expressed these views in his book in 1875 and re-asserted them in a revised edition in 1891.<sup>116</sup>

At the same time, the right of the Sami to natural resources was not actually addressed. A real property textbook from that period merely noted that Finnmark, the traditional heartland of the Sami in the north of Norway, was the property of the “Nor-

109. 1 T.H. ASCHEHOUG, *NORGES NUVAERENDE STATSFORFATNING* [NORWAY'S CONSTITUTION TODAY] (Christiana, Trykt Hos H. Tønsberg 1875).

110. Minde, *supra* note 97, at 114.

111. *Id.*

112. *Id.*

113. *Id.*

114. For Native Americans, “assimilation” was but another form of conquest. As Justice Reed wrote in a decision of the U.S. Supreme Court: “Every schoolboy knows that the savage tribes of this continent were deprived of their ancestral range by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conqueror’s will that deprived them of their land.” *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955).

115. Minde, *supra* note 97, at 115.

116. *Id.* at 117.

wegian state” as part of colonization by immigrants.<sup>117</sup> Yet the views of Aschehoug were not alone. A contemporary in Sweden, Johan Nordstrom, who was also a professor of jurisprudence before entering Parliament, concluded the Sami held rights even under the law of property:

Their right to the Lappmark in the kingdom whose subjects they are is thus a historically-based right of property and their rights in the Lappmark of the other kingdom is a form of restricted covenant, though a property right nonetheless.<sup>118</sup>

For Nordstrom, this status was consistent with what he referred to as “the general international law between Christian states,” principles that had their roots in natural law.<sup>119</sup> He also relied on the Codicil and custom in support of ownership rights for the Sami.<sup>120</sup> He emphasized these rights were held collectively “due to the Sami land-use pattern”<sup>121</sup> based primarily on “ancient usage.”<sup>122</sup>

In this way, custom and traditional use were recognized by experts, acknowledging the special legal status of the Sami was based on these sources as well as on treaties. At the time, however, this view was not widespread and many years were to pass before its legitimacy was recognized.

## 2. Expansion, Control And The Denial Of Rights (1897-1970)

The drive for expansion and development continued in the region traditionally inhabited by the Sami. Pre-existing customs and rights were considered simply a “historical carryover” and a “drag on the development of more deserving and appropriate social interests.”<sup>123</sup> The policy of Norway, reflected in commission proceedings in 1897 and a subsequent report published in 1904, denied the Sami had “the right to exist as a cultural and social

117. *Id.* at 116. (“Characteristically enough the question had not received much attention from Frederik Brandt who was professor of real property law. In a textbook that appeared in 1867 he noted briefly that Finnmark was ‘the property of the Norwegian state’ because it had been colonized by immigrants who were not owners of the land.”).

118. *Id.*

119. *Id.* at 117.

120. SVENSSON, *supra* note 52, at 40.

121. *Id.*

122. *Id.* (“In order to secure the future existence of the Sami ‘tribe’ (as he phrased it), he also maintained that their traditional way of life, their economy, and their ancient rights should be protected.”).

123. Minde, *supra* note 97, at 119.

entity.”<sup>124</sup> The Commission’s objective, and therefore the government’s, was the limitation of reindeer herding in favor of agriculture<sup>125</sup> and, more broadly, assimilation.<sup>126</sup>

The government encouraged this view and retained experts in jurisprudence to advance the cause.<sup>127</sup> The jurists were requested to prepare legal analysis that bolstered the nationalist policy, eviscerating the position of the earlier scholars, confirming a position of domination by the majority.<sup>128</sup>

This corresponded with an emphasis on legal positivism and written law as the source of rights.<sup>129</sup> In this way, the place of reindeer herding, hunting and fishing in the economic, social and cultural life of the Sami was negated.<sup>130</sup> A narrow construction of the Sami Codicil and other instruments lead to a *de minimis* perspective on their rights and particularly, termination of common ownership in the process of exercising sovereignty.

These views, effectively eliminating the significance of custom and use, were applied to undermine any claim of property rights. The dominant perspective of the state characterized what the Sami held as, at most, a right of use like a servitude.<sup>131</sup> In this way, the paradox was complete:

124. *Id.*

125. *Id.* One commentator characterized it as “aggressive agricultural colonization.” Salvesen, *supra* note 56, at 125-26; *see also* NO BEGINNING, NO END: THE SAMI SPEAK UP 20 (Elina Helindar & Kaarino Kailo eds., 1998); Tom Svensson, *Education and the Struggle for Adequate Cultural Competence in the Modern World: The Sami Case*, in EDUCATION AND CULTURAL DIFFERENCES: NEW PERSPECTIVES 47 (Douglas Ray & Deo Poonwsassie eds., 1992). From another significant perspective, however, the process of assimilation was related to Norway’s recent emergence as an independent nation in 1905, eager to solidify its position in the north, with historic dimensions relating to its immediate neighbors, especially Sweden and Russia. OLAV RISTE, *THE FOREIGN POLICY OF NORWAY 84-85* (2001) (“Consolidation of the work of Norwegian independence, and nationalist self-assertion, were also the motives behind the efforts to ‘nationalize’ northern Norway . . . Both national sovereignty and national security were seen to be at stake in the area unless the rights of foreigners and the influence of an alien culture could be curbed. But racist views of the Sami as a primitive and inferior ethnic group also played a role.”).

126. AARSETH, *supra* note 59, at 17; Salvesen, *supra* note 56, at 126-37; HAETTA, *supra* note 66, at 20, 40. With important parallels to Native Americans, Sami culture was denigrated by missionaries and government officials. Sami children were sent to boarding schools but teaching the Sami language was prohibited. A 1925 government report stated that Sami culture was “something non-existent.” HAETTA, *supra* note 66, at 45.

127. Minde, *supra* note 97, at 119.

128. *Id.*

129. *Id.* at 120-21.

130. *Id.*

131. *Id.* at 122.

[t]he logical consequence was that, to all intents and purposes, the legal position of the Sami was seen as the result of legal developments *outside* Sami society, since it was understood that Sami rights were explicitly and wholly given by the authorities.<sup>132</sup>

Finnmark, the traditional Sami heartland, was thus simply “not occupied” in much the same way that the U.S. Supreme Court had justified a similar approach concerning Native Americans.<sup>133</sup> Any rights that might exist, whatever they were, arose from decisions of the government. To that end, the Lapp Commission of 1897 proposed that the Sami should not even have access to the courts to appeal administrative decisions “on the grounds of ancient custom.”<sup>134</sup>

Colonization of the region was encouraged.<sup>135</sup> Yet the state granted land only to Norwegian speaking farmers as part of the assimilation policy and registered the rest (about ninety-five per cent) as government property.<sup>136</sup> Later, even the legislative history of the Reindeer Herding Act of 1978 provided the right to conduct it is “based entirely on the law itself” and the Sami have only exercised “a *de facto* use without any form of a property right or any legally-based authority for their activity.”<sup>137</sup> Accordingly, the rights of the Sami in their own region were little different from those of Norwegians in general.<sup>138</sup> This conception of law continued to shape the general policy of the state throughout most of the twentieth century.

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132. *Id.*

133. See CRAIG, *supra* note 31; see also P.S. Deloria, *Indian Natural Resource Issues in an Orderly System*, 41 NAT. RESOURCES. J. 549, 552 (2001) (“From the very beginning, Indian tribes were dealt with as sovereign entities and were promised, more or less explicitly, a permanent political, social, and governmental existence. At the same time, the very same officials, from the President on down who were telling the tribes what they wanted to hear, were publicly doubting the advisability and viability of permanent tribal existence and planning and implementing various schemes for extermination, removal, acculturation, and assimilation, often in the most dishonorable terms. These contradictory policies were communicated to the society at large and in many respects mirrored the views of that society.”).

134. Minde, *supra* note 97, at 123.

135. Pedersen & Viken, *supra* note 7, at 71 (“The Norwegian colonization of *Sapmi* had three stages: taking over the fisheries in the thirteenth century; the regulation of trade; and taking over the land for traditional farming.”); HAETTA, *supra* note 74, at 20; Solbakk, *supra* note 60, at 62.

136. Pedersen & Viken, *supra* note 7, at 72.

137. Minde, *supra* note 97, at 127.

138. *Id.*

## III.

INDIGENOUS PEOPLES AND THE TOPOGRAPHY OF THE  
EMERGING INTERNATIONAL FRAMEWORK

Indigenous peoples moving “from object to subject in international law.”

Russell Lawrence Barsh<sup>139</sup>

A. *The Pre-1972 Framework*

While the Sami and indigenous peoples in general languished within the domain of domestic law, international law gradually began to reveal recognition of the special place of indigenous peoples in the world.<sup>140</sup> From the adoption of the UN Charter (1945)<sup>141</sup> and the Universal Declaration on Human Rights,<sup>142</sup> the

139. Russel Lawrence Barsh, *Indigenous Peoples in the 1990's: From Object to Subject in International Law?*, 7 HARV. HUM RTS. J. 33, 35 (1994) (“Arguing that they are ‘peoples’ under the United Nations Charter, indigenous peoples have been struggling for the explicit recognition of their unqualified right to self-determination. Such recognition would establish that indigenous peoples are members of the international community who have legal personality under international law—‘subjects’ of international legal rights and duties rather than mere ‘objects’ of international concern.”).

140. Lee Swepston, *Economic, Social and Cultural Rights Under the 1989 ILO Convention*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF THE SAMI 41, 44-15 (Frank Horn, ed., 1998) (“The basic question has to be put, as it often is: why should indigenous and tribal peoples get better treatment than other parts of the national population? That is because of the special relationship many of these groups have to the land itself, often a spiritual relationship to a particular area, to trees and rocks and streams. Most other people can carry out their lives in any place of comparable quality, but many indigenous peoples cannot.”).

141. 1 U.N.T.S. xvi (1945); Krzysztof Drzewicki, *The UN Charter and the Universal Declaration of Human Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 68 (Rajja Hanski & Markku Suksi, eds., 2d rev. ed., 1999) (“One of the innovative approaches reflected in the human rights provisions of the Charter is their formulation in an interdependent context as one of the pre-requisites for international peace and security, friendly relations among nations, welfare of peoples, and other socioeconomic objectives. Human rights were thus placed against a broader background of political, economic and social aspects.”).

142. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); Drzewicki, *supra* note 141, at 73. (“All in all, the adoption and content of the Universal Declaration has been a great success. The Declaration constitutes the first internationally adopted catalogue, and in this sense, definition of human rights. From the perspective of the normative maturity of formulations of human rights, it may be submitted that the Universal Declaration is one of the best legal instruments on human rights ever adopted.”); ANTONIO CASSESE, *INTERNATIONAL LAW* 358 (2001) (“In spite of its limitations, the Declaration was, however, of great importance in stimulating and directing the international promotion of human rights. It formulated a unitary and universally valid concept of what values all States should cherish within their own domestic borders.”).

modern foundation was laid. The UN Charter acknowledged self-determination.<sup>143</sup> The Declaration reiterated this language and, as a resolution, it is applicable to all members.<sup>144</sup> A legal framework, albeit in an embryonic form, began to emerge, recognizing the rights, not merely of minorities but of *indigenous peoples*.<sup>145</sup> As Russell Barsh poignantly expressed it, indigenous peoples moved from object to subject in international law.<sup>146</sup>

Landmark developments continued in 1957 with the adoption of the International Labor Organization's ("ILO") Convention 107 on the Protection of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.<sup>147</sup> While encompassing a process of assimilation, the ILO's work was a link in the chain and at least identified the significance of indigenous peoples, elevated the subject in international law and shed light on important issues.<sup>148</sup> In effect, indigenous peoples were placed on the agenda of the international community.

In 1966, the UN adopted the Convention on the Elimination of all Forms of Racial Discrimination.<sup>149</sup> That same year, the International Covenant on Civil and Political Rights ("ICCPR") was also adopted by the UN. The Convention provided a codification of human rights, and, importantly, recognized rights to which "all

143. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255 (1996). One commentator has referred to it as the first and "clearest example of a peoples' right." *The Rights of Peoples: Some Conclusions*, in THE RIGHTS OF PEOPLES 164 (James Crawford, ed., 1988). "[T]he right of self-determination, where it exists, is vested in the people in question as a group." *Id.* at 165.

144. The status of the Declaration is considered by some as customary law while others hold to the contrary. One observer has suggested that "these endless disputes are, to a large extent, futile scholarly exercises since the Declaration itself has proved its fundamental importance without necessarily being recognized as a part of customary international law." Drzewicki, *supra* note 141, at 74.

145. SPILIOPOULOU AKERMARK, *supra* note 4, at 21 ("What is characteristic here is the prerequisite of a historical continuity with pre-invasion and pre-colonial societies. Obviously, there exists a grey area between what is a 'minority' and what is an 'indigenous people.' An element which is strong in the international discourse concerning indigenous peoples is that of restitution for past grievances, an element which is not as central in the discourse concerning minorities.").

146. Barsh, *supra* note 139, at 35. The concept of "human rights" "is based on the idea that certain human values and interests are of a universal and fundamental nature and should be respected and fulfilled by all states." Hans Christian Bugge, *Human Rights, the Environment and Sustainable Development*, in ENVIRONMENT AND DEVELOPMENT IN DEVELOPING COUNTRIES: NATIONAL AND INTERNATIONAL LAW 137 (Inge Lorange et al., eds., 1994).

147. 328 U.N.T.S. 247-69 (1957).

148. Swepston, *supra* note 140, at 38.

149. 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force 1969).

peoples" are entitled. These essential guarantees, mostly of process and participation, sometimes referred to as "first generation" rights,<sup>150</sup> protect individuals from unjust government interference with their lives.<sup>151</sup>

The Convention encompasses self-determination<sup>152</sup> and control over natural resources including: "[i]n no case may a people be deprived of its own means of subsistence."<sup>153</sup> Further, Article 27 commands that

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.<sup>154</sup>

This provision, the right to enjoy a particular culture, takes on special meaning in the context of indigenous peoples since, as noted, 'culture' and 'environment' are interwoven and in fact indivisible. A way of life, indeed *survival*, is integrated with the territory, land, natural resources and patterns of use of indigenous peoples that long preceded modern regimes.<sup>155</sup>

The significance of ICCPR is revealed in the work of the Human Rights Committee through its General Comments and in its legal opinions interpreting Article 27. For example, the

General Comment on Article 27 touches also upon the manifestations of culture. The right to enjoy a particular culture may consist . . . in a way of life which is closely associated with territory and use of resources, especially as regards indigenous peoples.<sup>156</sup>

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150. Manfred Nowak, *The International Covenant on Civil and Political Rights, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS*, *supra* note 141, at 79. "The obligation to respect in Article 2(1) of the CCPR indicates the negative character of civil and political rights. It means that States Parties must refrain from restricting the exercise of these rights where such is not expressly allowed. The concrete substance of this duty of forbearance depends on the formulation of the given right . . . . The obligation to ensure in Article 2(1) of the CCPR indicates the positive character of civil and political rights. It means, as in the case of economic, social and cultural rights, that States Parties must take positive steps to give effect to the Covenant rights and to enable individuals to enjoy their rights." *Id.* at 87.

151. *Id.*

152. 660 U.N.T.S. 195, *supra* note 149, art. 1.

153. *Id.*, art. 2.

154. *Id.*, art. 27.

155. The General Comment on Article 27 addresses this element; SPILIOPOULOU AKERMARK, *supra* note 4, at 82.

156. *Id.*

Moreover, the legal opinions of the Human Rights Committee, referred to as communications, follow a judicial pattern and are recognized as within the competence of the members of the Committee.<sup>157</sup> They include opinions in cases regarding the issues of culture and protection as matters of survival for indigenous peoples, notably *Lubicon Lake Band v. Canada*<sup>158</sup> and two cases involving the Sami, *Kitok v. Sweden*<sup>159</sup> and *Lansman v. Finland*.<sup>160</sup>

The International Covenant on Economic, Social and Cultural Rights ("ICESCR") was also adopted in 1966. ICESCR is the only international human rights instrument that deals extensively with economic, social and cultural rights.<sup>161</sup> These rights, sometimes characterized as "second generation," "contribute mainly through substantive standards of human well-being."<sup>162</sup> They are "conceptually closer to environmental matters than first generation rights."<sup>163</sup> The government must take steps to promote these rights, in contrast to merely the avoidance of interference under ICCPR.<sup>164</sup>

157. *Id.* at 155.

158. Communication No. 167/1984, U.N. GAOR, Hum. Rts. Comm., 45th Sess., Supp. No. 40, vol. 2, at 10, U.N. Doc. A/45/40, Annex IX(A) (1990); see Andrew Huff, *Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada*, 10 COLO. J. INT'L ENVTL. & POL'Y 161 (1999).

159. Communication No. 197/1985, U.N. GAOR, Hum. Rts. Comm., 43rd Sess., Supp. No. 40, at 207, U.N. Doc. A/43/40, Annex 7(G) (1988).

160. Communication No. 511/1992, U.N. GAOR, Hum. Rts. Comm., 50th Sess., Supp. No. 40, vol. 1, at 66, U.N. Doc. A/50/40 (1994).

161. MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 23-24 (1998) ("Of the other universal human rights instruments, a number do make reference to economic, social and cultural rights but generally the range of protection for economic, social and cultural rights is limited in its scope.").

162. HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 6 (Alan Boyle & Michael Anderson eds., 1996) ("Like civil and political rights, the second generation rights offer considerable promise, particularly since international supervision of economic, social and cultural rights involves the monitoring of general policies with regard to human welfare.").

163. *Id.* at 5.

164. Yet an important distinction remains: "Unlike the ICCPR which requires States to 'respect and ensure' the rights recognized, article 2(I) of the ICESCR merely obliges States 'to take steps . . . with a view to achieving progressively the full realization of the rights.' The terms of article 2(I) of the ICESCR reflect the belief held during the drafting of the Covenant that the implementation of economic, social, and cultural rights could only be undertaken progressively, as full and immediate realization of all the rights was beyond the resources of many States." CRAVEN, *supra* note 161, at 26.

While the economic, social and cultural rights of ICESCR were subject to implementation over time, in contrast with the immediacy of ICCPR, the process was also different from ICCPR. A system of individual and state complaints was anticipated for ICCPR while ICESCR was implemented only through reporting, under supervision of the UN, not by a committee of independent experts.<sup>165</sup> At the same time, the Preamble “underscores the ‘indivisible’ and ‘interdependent’ nature of all human rights and suggests the two Covenants should be taken as a package.”<sup>166</sup> Notably, ICESCR prohibits discrimination of any kind based on race, sex, language, religion or other status.<sup>167</sup>

Further, both Covenants, part of the International Bill of Human Rights,<sup>168</sup> use identical language recognizing the rights of “all peoples” and, therefore, indigenous peoples. This includes:

All peoples have the right of self-determination . . . ; and,<sup>169</sup>

165. *Id.* By treating the entire collection of rights in two separate Covenants, a condition of the split was that as many provisions as possible would remain the same in each.

166. *Id.* at 103. (“In fact the vast majority of States Parties have accepted this idea; only six States which have ratified the CCPR have failed to ratify the CESCR.”); The interpretation of Article 27 by the Human Rights Committee “shows a recognition that the article includes certain economic and social rights of persons belonging to minorities, namely when such economic and social activities are essential to the culture of the entire community. This also establishes the interdependency between civil and political rights on the one hand, and economic, social and cultural rights on the other.”); Anne-Christine Bloch, *Minorities and Indigenous Peoples, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 373, 379 (Asbjorn Eide et al. eds., 2001).

167. Art. 2(2).

168. JACK DONNELLY, *INTERNATIONAL HUMAN RIGHTS* (1993). (“The Covenants, together with the Universal Declaration, represent an authoritative statement of international human rights norms, standards of behavior to which all states should aspire. These three documents, which are sometimes referred to collectively as the International Bill of Human Rights, present a summary statement of the minimum social and political guarantees internationally recognized as necessary for a life of dignity in the contemporary world.”) *Id.* at 10.

169. Art. 1, pt. 1. Self-determination, recognized in both Covenants in the same terms, provides the basis for a measure of political and economic autonomy for indigenous peoples. In this way, instead of absolute sovereignty, indigenous peoples are entitled to significant, meaningful participation shaping the policies that impact their natural and cultural environment. *See* Bloch, *supra* note 166, at 374-75. *See also* Hans Christian Bugge, *Human Rights and Resource Management – An Overview, in LAW AND THE GOVERNANCE OF RENEWABLE RESOURCES* (1998). “In talking about ‘peoples,’ these articles [Article 1] differ from the other articles of the two covenants, which mainly deal with individual rights. They are directly linked to the principles of peoples’ right to self-determination, expressed in article 1, paragraph 1 of the two covenants: “All peoples have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.” *Id.* at 97-98.

All peoples may, for their own needs, freely dispose of their natural wealth and resources . . . In no case may a people be *deprived of its own means of subsistence*.<sup>170</sup>

In the same year the Covenants were adopted, the UNESCO Declaration of the Principles of International Cultural Cooperation (1966) provided explicit recognition for cultural diversity:

1. Each culture has a dignity and value which must be protected and preserved.
2. Every people has the right and the duty to develop in culture.
3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind.<sup>171</sup>

### B. *The Stockholm Declaration, The Post – 1972 Framework And Beyond*

In 1972, the Stockholm Declaration provided new impetus to acknowledging the status of indigenous peoples, with its emphasis on the “fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being.”<sup>172</sup> 1972 was also the year the

170. Art. 1., pt. 2. Note however there is a widespread perception that economic, social and cultural rights are not justiciable and therefore not suitable or capable of invocation by domestic courts. Craven, *supra* note 157 at 28. One commentator has written however that “The increasing international recognition of economic, social and cultural rights is also evidenced by a recent landmark ruling by the Supreme Constitutional Court of South Africa in *Government of South Africa v. Irene Grootboom*, which recognized the right to shelter . . . .” Padideh Ala’I, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT’L L. REV. 537, 544-45 (2001).

171. Article I, UNESCO Declaration of the Principles of International Cultural Cooperation, UNESCO Doc. 14C/8.I., Nov. 4, 1966. (“In spite of all its vagueness, the importance of the Declaration lies in that it recognizes the values of culture, of all cultures, as such, and that it also recognizes the value of cultural diversity. The intrinsic value of culture is also recognized in the various treaties, global and regional, protecting cultural property.”) Spiliopoulou Akermark, *supra* note 4, at 80. This includes, for example, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, 249 UNTS 215. *Id.* at 80. (Other treaties collected).

172. Art. 1; Louis Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harv. Int’l L. J. 423 (1973); “The 1972 UN Conference on the Human Environment brought the industrialized and developing nations together to delineate the ‘rights’ of the human family to a healthy and productive environment.” OUR COMMON FUTURE, World Commission on Environment and Development, Oxford, xi (1987). Note however the subsequent ambivalence:

Since 1972, however, international environmental instruments generally have been reluctant to recognize such a human right to a sound or healthy environment. In the 1992 Rio Declaration, for example, Article 1 does not explicitly mention a

World Heritage Convention was adopted, the most widely ratified agreement on the preservation of natural and cultural heritage.<sup>173</sup> Under the Convention, the United Nations Education, Scientific and Cultural Organization (“UNESCO”) implements a program for safeguarding nature conservation and preservation of cultural sites “as part of the world heritage of mankind as a whole.”<sup>174</sup> Through the listing of heritage sites, recognition of endangered areas and financial support for maintaining and restoring them, UNESCO works with states and the international community.

The World Heritage Convention complements the Covenants as well as a number of other instruments which provide a firm basis for cultural rights. These rights, broadly summarized by Lyndel Prott, include the right to participate in the cultural life of the community, the right to develop a culture, the right of a people to its own cultural wealth and the right of a people not to have an alien culture imposed on it.<sup>175</sup> In this way, the rights of individuals and the rights of peoples parallel one another.<sup>176</sup>

In 1981, the African Charter on Human and Peoples’ Rights was adopted.<sup>177</sup> The Charter addresses cross-cutting rights that facilitate the exercise of both civil and political rights and eco-

right to a healthy environment: “Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

David Hunter, James Salzman, Durwood Zaelke, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* (1998).

173. Convention for the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151.

174. *Id.* Preamble.

175. Lyndel Prott, *Cultural Rights as Peoples’ Rights in International Law*, in *THE RIGHTS OF PEOPLES* 96-97 (James Crawford ed., 1988).

176. Lyndel Prott has written that cultural rights “have been present implicitly, if not explicitly, in human rights thought from the start. Freedom to express one’s view, to adhere to one’s religion, to associate with others for peaceful purposes, are all essential to the maintenance and development of any culture. Though these rights were certainly not designed for this purpose, their existence is a necessary prerequisite for the protection of culture, especially for the culture of minorities.” *Id.* at 95. Note, UNESCO also has an additional role in promoting and protecting human rights. Its main purpose is to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, the rule of law, human rights and fundamental freedoms. UNESCO Constitution, Article I(1). 4 UNTS 275. Coomans, *supra* note 141, at 219; Philip Alston, *UNESCO’s Procedure for Dealing with Human Rights Violations*, 20 SANTA CLARA L. REV. 665 (1980).

177. African Charter on Human and Peoples’ Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (entered into force Oct. 21, 1986), 21 I.L.M. 59 (1982).

conomic, social and cultural rights.<sup>178</sup> The Charter, in guaranteeing the equality of all peoples, includes the right of peoples to existence, to self-determination and to sovereignty over their natural resources.<sup>179</sup> The innovation in including collective rights arose from the heritage of Europe's creation of arbitrary boundaries for most of the states in the nineteenth century. These communities were never provided with any opportunity to take part in or agree to "political association in a state."<sup>180</sup> Their legitimacy derived not from internal African consent but from agreements made at a conference in Germany in 1884-1885.<sup>181</sup>

The World Charter for Nature forged another link in the framework in 1982, transcending the artificial dichotomy between people and environment. The Charter provides that "mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients . . ." <sup>182</sup> Moreover, in 1987, the UN World Commission on Environment and Development published *Our Common Future* (the "Brundtland Commission Report"), probably the single most significant environmental analysis ever prepared. The Report emphasized the importance of special consideration for indigenous peoples noting "forces of economic development disrupt their traditional lifestyles – lifestyles that can offer modern societies many lessons in the management of resources in complex forest, mountain and dryland ecosystems. Some are threatened with virtual extinction by insensitive development over which they have no control."<sup>183</sup> The Report called for recognition of their traditional rights and substantial participation in

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178. Chidi Anselm Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights*, 23 HUM. RTS. Q. 327, 337 (2001); Cees Flinterman & Catherine Henderson, *The African Charter on Human and Peoples' Rights*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 68 (Raija Hanski & Markku Suksi, eds., 2d rev. ed., 1999).

179. Art. 19; art. 20; art. 21; art. 22(1). The Charter also guarantees the right of peoples to a general satisfactory environment "favourable to their development." art. 24.

180. Odinkalu, *supra* note 178, at 345.

181. The Berlin Conference resulted in borders defined "not by African political facts or geography, but rather by international rules of continental partition and occupation established for that purpose." *Id.* at 345-46.

182. G. A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, Preamble, para. 3(a), at 17 U.N. Doc. A/37/51 (1982).

183. OUR COMMON FUTURE, *supra* note 172, at 12.

resource policies.<sup>184</sup> With remarkable foresight, the Report remains, fifteen years after its publication, an eloquent testament for advancing environmental protection, rights, including those of indigenous peoples, and sustainable development.<sup>185</sup> Indeed it is not too much to say the Commission's formulation of sustainable development remains the most widely recognized, unifying theme in environmental protection in the international community: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>186</sup>

After the Brundtland Commission Report, the International Labour Organization formulated a new conception of the status of indigenous peoples in 1989, updating, revising and moving beyond the prior version from 1957.<sup>187</sup> The Convention is now "one of the most far-reaching international instruments ratified by the International Labour Organization."<sup>188</sup> After a broad but important preamble,<sup>189</sup> the Convention confirms special measures shall be adopted as appropriate "for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned."<sup>190</sup> The Convention provides indigenous peoples shall have "the right to decide their own priorities for the process of development as it affects their lives" and "*the lands they occupy or otherwise use*" and "*to exercise control, to the extent possible, over their economic, social and cultural development.*"<sup>191</sup>

184. *Id.* ("Their traditional rights should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas.")

185. *Id.* at 43.

186. *Id.* ("It contains within it two key concepts: the concept of 'needs,' in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.")

187. 28 I.L.M. 1382 (1989); Swepston, *supra* note 140, at 41.

188. Hunter, Salzman & Zaelke, *supra* note 172, at 1338.

189. The General Conference of the (ILO), . . .

*Recognizing* the aspirations of (indigenous and tribal peoples) to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and . . .

*Calling* attention to the distinct contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, . . .

Adopts . . . the following Convention . . . .

190. Art. 4; Article 2 also reaffirms specific measures are required to ensure non-discrimination and "adds that a special sensitivity towards indigenous culture and identity is necessary." Bloch, *supra* note 162, at 383.

191. Art. 7, pt. 1.

Further, "they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly."<sup>192</sup>

Importantly, the Convention also provides: "Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit."<sup>193</sup> In applying these provisions, states "shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use . . ."<sup>194</sup> Article 14 expressly provides the "*rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized . . . . Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.*"<sup>195</sup>

The importance of the Convention is well-established and "whatever its shortcomings, it succeeds in affirming the value of indigenous communities and cultures and in setting forth a series of basic precepts in that regard."<sup>196</sup> Equally significant, it "embodies a *convergence* of normative understanding and expectation . . . constitutive of customary law."<sup>197</sup> In addition, the Convention recognizes the measures for enhancing the implementation of the principles vary depending on the circumstances of the state in question.<sup>198</sup> This principle of adaptability holds promise for consultation, negotiations, collaborative decision-making, dispute resolution and governance in virtually all contexts.<sup>199</sup>

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192. *Id.* pt. 1.

193. *Id.* pt. 4.

194. Art. 13, pt. 1.

195. Art. 14, pt. 1 (rights); Pt. 2 (identify and guarantee protection); Pt. 3 (procedures to resolve land claims).

196. S. James Anaya, *Indigenous Rights Norms In Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 29 (1991).

197. *Id.* ("The convergence of international opinion about the content of indigenous rights implies a convergence of subjectivities of obligation and expectation attendant upon the rights, regardless of any treaty ratification or other formal act of assent to the articulated norms.")

198. *Id.*

199. *Id.* at 1032. Note the criticism that states have clearly established duties but the Convention does not necessarily provide actual rights to indigenous peoples. Michael Anderson, *Human Rights Approaches to Environmental Protection: An Overview*; R. R. Churchill, *Environmental Rights In Existing Human Rights Treaties*, 89 in Boyle & Anderson, *supra* note 162, at 1, 7, 89, 107.

In 1992, the Earth Summit further recognized indigenous peoples in a significant ways. First, it was a milestone because it involved participation on a scale far beyond any previous international forum addressing law and the environment. Second, Principle 22 of the Rio Declaration acknowledged the "vital role" of "indigenous peoples . . . and other local communities" in environmental management and development.<sup>200</sup> States should recognize and support the "identity, culture and interests" of these communities and "enable their effective participation in the achievement of sustainable development."<sup>201</sup>

Indigenous peoples are also included in the Biodiversity Convention,<sup>202</sup> the first global accord focusing on biodiversity with specific consideration of the role and status of traditional communities.<sup>203</sup> Notably, indigenous peoples play a special part in the conservation of biological diversity.<sup>204</sup> Many of the most genetically rich and biologically diverse areas in the world are inhabited by indigenous peoples.<sup>205</sup> Through their culture and traditional knowledge, they have acted as stewards of the environment by employing practices that often conserve biological resources and contribute to sustainable use.<sup>206</sup>

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200. Rio Declaration on Environment and Development, 33 I.L.M. 874, 880 (1992).

201. *Id.* See also the Vienna Declaration and Programme of Action, 32 I.L.M. 1661 (1993). Paragraph 20 provides "States should ensure the full and free participation of indigenous people in all aspects of society, in particular in matters of concern to them." *Id.* at 1668.

202. 31 I.L.M. 818 (1992) (entered into force December 29, 1993).

203. Gregory F. Maggio, *Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity*, 16 UCLA J. ENVTL. L. & POL'Y 179 (1997-1998). "The majority of existing international instruments have failed to provide a supportive legal environment for local resource dependent populations that would enable these populations to manage in a sustainable manner forests and other components of biodiversity which they utilize or over which they exercise effective control. This state of affairs . . . has interfered with the overall effectiveness of conservation regimes." *Id.* at 179-80.

204. Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 928 (1996).

205. *Id.*

206. See David R. Downes, *How Intellectual Property Could Be a Tool to Protect Traditional Knowledge*, 25 COLUM. J. ENVTL. L. 253 (2000). "The knowledge, innovations, and practices of indigenous and local communities that are developed and passed on through traditional culture are closely linked to the conservation and sustainable use of biodiversity. This "traditional knowledge" is a valuable heritage for the communities and cultures that develop and maintain it, as well as for other societies and the world as a whole." *Id.* at 254.

For example, Article 8, providing for "*In-Situ* Conservation" subject to national legislation, directs parties to preserve and maintain knowledge of indigenous and local communities "embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity," promoting the wider application of such knowledge, with the "approval and involvement of the holders of such knowledge," while encouraging "the equitable sharing of benefits."<sup>207</sup>

Even though these obligations are soft, Article 8 highlights the relationship between biodiversity, sustainable use and traditional knowledge, stressing participation by the holders of such knowledge, while encouraging the equitable sharing of benefits.<sup>208</sup> Note, however, that the Convention uses the term "indigenous and local communities" even though other instruments at the Rio Conference, although not binding, refer to "indigenous peoples."<sup>209</sup>

Agenda 21, following the Earth Summit, set forth a perspective that shifts from discussing the rights of indigenous peoples to the means for protecting those rights. In a chapter entitled "Recognizing And Strengthening The Role Of Indigenous People And Their Communities,"<sup>210</sup> Agenda 21 cuts to the heart of the matter:

In view of the interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous people, national and international efforts to implement environmentally sound and sustainable

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207. Article 8, *supra* note 202, at 825-26. Downes, *supra* note 206 at 255. ("[t]raditional knowledge is important to its holders as an integral part of their cultural heritage, and, in this sense, its protection is important for ensuring the enjoyment of the right to maintain and take part in cultural life, as recognized under international human rights instruments, as well as the emerging right to control and protect this traditional knowledge as a form of intellectual property, as recognized in the U.N. Draft Declaration on Indigenous Rights.").

208. John Woodliffe, *Biodiversity and Indigenous Peoples*, in *INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY* 266-67 (Michael Bowman & Catherine Redgwell, eds., 1996). The question remains: "who determines access to resources and on what terms." Note the use of "biodiversity prospecting" contracts like Merck and the National Biodiversity Institute of Costa Rica as one approach for providing benefits to indigenous peoples.

209. *Id.* at 265. Further, one commentator has written that many of the governments of developing countries are following a "Western industrialized model of development that in the past has been destructive of the values of indigenous people." *Id.* at 269.

210. AGENDA 21: EARTH'S ACTION PLAN, ch. 26, 507 (1993).

development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.<sup>211</sup>

This aspiration is followed with objectives contemplating “full partnership with indigenous people” to adopt policies and legal instruments at the national level.<sup>212</sup> These include protection of lands as well as communities of indigenous peoples, recognition of their values, traditional knowledge and resource management practices to promote sustainable development, creation of dispute resolution processes, enhancement of capacity building, strengthening means of participation in the formulation of national policy and law and, involvement in resource management and conservation.<sup>213</sup>

Further, specific points of action are provided. They include the adoption of existing international conventions relevant to indigenous peoples along with legal instruments to protect intellectual and cultural property and focused efforts by the UN, other international organizations and states for consultation and participation in policy-making and program management.<sup>214</sup>

In 1993, the UN Working Group completed the Draft Declaration on the Rights of Indigenous Peoples with a new formulation of collective rights.<sup>215</sup> The Draft Declaration, the subject of extensive discussion,<sup>216</sup> drew further attention to the creation of the text based on direct, longstanding participation by indigenous peoples themselves. Lengthy debate and many working sessions resulted in a more comprehensive perspective. The document addresses self-determination, the protection of culture, state responsibility and control over lands, providing indigenous peoples

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211. *Id.*

212. *Id.* at 508.

213. *Id.* at 508-09.

214. *Id.* at 509-10.

215. Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, UN DocE/CN.4/Sub.2/1993/29 (1993).

216. For a recent appraisal see Anna Meijknecht, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW, Intersentia, 152-167 (2001) (“The collective approach is not uncontested. On the one hand, indigenous representatives emphasize the importance of recognizing the collective rights of indigenous peoples, such as those pertaining to land, language and education and, in particular, the right to self-determination. Further, they state that group rights are not in opposition nor a threat to individual rights. On the other hand, states like the US, Japan, and France have difficulties with accepting collective rights of indigenous peoples and refer to indigenous peoples exclusively in terms of ‘persons belonging to indigenous groups.’” *Id.* at 155-56; See also Raidza Torres Wick, *Commentaries on Raidza Torres, The Rights of Indigenous Populations: The Emerging International Norm*, 25 YALE J. INT’L L. 291 (2000).

the right to "strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used."<sup>217</sup>

Since then, other initiatives at the international and regional level have contributed to the framework of the rights of indigenous peoples,<sup>218</sup> supported by the work of non-governmental organizations as well as scholarship.<sup>219</sup> With these developments, international law continues to evolve in a way that is especially important for indigenous peoples. This includes an understanding that the aim of law is the well-being of individuals and not simply abstract values.<sup>220</sup> The recognition of dignity and the rights which derive from it are, as one commentator has indicated, the "basis of justice and therefore, the basis of every legal system which claims to be just."<sup>221</sup> But these rights do not arise from merely the will of the majority or a structure of uniformity. The recogni-

217. Art. 25, Draft Declaration, *supra* note 215.

218. For example, the creation of the Arctic Council in 1996. Declaration on the Establishment of the Arctic Council, 35 I.L.M. 1387, Sept. 19, 1996; The Arctic states are Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States. The Arctic Council Declaration provides:

Affirming our commitment to the well-being of the inhabitants of the Arctic, including recognition of the special relationship and unique contributions to the Arctic of indigenous peoples and their communities;

Affirming our commitment to sustainable development in the Arctic region, including economic and social development, improved health conditions and cultural well-being;

Affirming concurrently our commitment to the protection of the Arctic environment, including the health of Arctic ecosystems, maintenance of biodiversity in the Arctic region, and conservation and sustainable use of natural resources . . . .

*Id.*

See Evan T. Bloom, *Establishment of the Arctic Council*, 93 A.J.I.L. 712 (1999); Jennifer McIver, *Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?*, 10 GEO. INT'L ENVTL. L. R. 147 (1997). ("The structure of the Arctic Council, with permanent participation of indigenous representatives, is evidence that even the Arctic States view the role of indigenous people in achieving effective environmental management of the region as critical.") *Id.* at 154.

219. See note 6.

220. Marek Piechowiak, *What Are Human Rights? The Concept Of Human Rights And Their Extra-Legal Justification*, in AN INTRODUCTION TO THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 3 (Rajja Hanski & Markku Suksi, eds., 2d rev. ed. 1999).

221. *Id.* at 9.

tion of these rights means both their protection<sup>222</sup> and “the realization of *plurality*.”<sup>223</sup>

In this way, the interaction between environment, culture and human rights is dynamic and continues to evolve. This intersection forms the crucible of the status of indigenous peoples like the Sami. At its core, there are common objectives. As Dinah Shelton has pointed out, in many societies “the basic concept that environment should be preserved and that each person should benefit from it already exists.”<sup>224</sup> The point is that whether the source is environmental law, human rights law or more reasonably, a combination of both in the process of developing environmental human rights, indigenous peoples are entitled to special protection.

In sum, principles of human rights that have especially important aspects of environmental protection include:

1. The right to self-determination with sovereignty over natural resources;
2. The right to health including the right to freedom from health-threatening environmental degradation;
3. The right to information about the environment;
4. The right to participate in environmental decision-making;
5. The right to free association;
6. The right to preservation and the use of the environment for cultural purposes;
7. The right to freedom from discrimination and the right of equal protection of the law.<sup>225</sup>

Environmental protection and human rights are thus two of the most fundamental concerns of contemporary international law which directly impact indigenous peoples.

They represent different but overlapping social values with a core of common goals. Efforts on behalf of both seek to achieve and maintain the highest quality of human life. In this regard,

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222. *Id.* at 12. (“Human rights law, both international and domestic, aims at grasping the relations constituting human rights in their existential aspect, and at creating instruments of protection of these rights.”).

223. *Id.*

224. Dinah Shelton, *Human Rights, Environmental Rights and the Right to Environment*, 28 *STAN. J. INT’L L.* 103, 135 (1991).

225. See also Carl Bruch, Wole Coker & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 *COLUM. J. ENVTL. L.* 131 (2001); Ryan K. Gravelle, *Enforcing the Elusive: Environmental Rights in East European Constitutions*, 16 *VA. ENVTL. L. J.* 633 (1997); Neil A.F. Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 *STAN. ENVTL. L. J.* 338, 351-53 (1996).

human rights depend on environmental protection, and environmental protection depends on the exercise of existing human rights such as the right to information and the right to political participation.

Despite this common core, the two topics remain distinct. Environmental protection cannot be wholly incorporated into the human rights agenda . . . environmental regulation should proceed as an independent and separate goal which ultimately reinforces the goals of human rights.<sup>226</sup>

Moreover, the analysis of a right to environment, emphasizing a perspective derived from human rights, continues. Advocates<sup>227</sup> and critics,<sup>228</sup> as well as those taking a more intermediate position emphasizing the manner in which they complement one another,<sup>229</sup> have much to contribute. But for indigenous peoples,

226. Shelton, *supra* note 224, at 138.

227. *Id.*; See also John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283 (2000); Nina M. Eejima, *Sustainable Development and the Search for a Better Environment, a Better World: A Work in Progress*, 18 UCLA J. ENVTL. L. & POL'Y 99 (1999/2000); Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309 (1998); Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996); United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of further development in fields with which the Sub-Commission has been concerned: Human rights and the environment, Final Report prepared by Mrs Fatma Zohra Ksentini, Special Rapporteur, UN doc. E/CN.4/Sub.2/1994/9, July 6, 1994. (Ksentini, Final Report).

228. Gunther Handl, *Human Rights And Protection Of The Environment*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 303 (2001) ("Today it is generally accepted that there exists a direct functional relationship between protection of the environment and the protection and promotion of human rights. Yet, the relationship is a complex one that is often misunderstood, indeed, at times, misrepresented. Thus contrary to a frequently voiced opinion, it is far from clear that the objectives underlying human rights and environmental protection norms are either fully complementary or truly indivisible. Similarly, the proposition that the individual or collective interest in environmental protection should be conceptually subsumable under a substantive international 'environmental human right' or that as a matter of current international law there exists today a human right to a clean environment, is a questionable one."); Marc Pallemerts, *International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process*, 15 J.L. & COM. 623 (1996). For the classic ecocentric view see Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1 (1985); Christopher D. Stone, *Should Trees Have Standing? - Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

229. See Bugge, *supra* note 146, at 140. Human rights including the right to life, to health and to an adequate standard of living have important links to the environment and thus both are complementary in many ways. "However, an enforceable "right to environment" has not been recognized in *international law*. . . the notion of

environment, culture and rights remain intertwined. As a member of the Plains Cree from Canada makes clear:

To us Indians human rights is a matter of daily survival; it is the right to food, to firewood and to fresh water, but above all it is the right to our customs. If we are denied these rights we are denied human rights, the way we see it.<sup>230</sup>

In this way, there are several strands in the rope constituting human rights.<sup>231</sup> The central strand is the global growth in human rights consciousness. It is joined with other strands, especially domestic law which increasingly incorporates international norms, extending the rule of law.<sup>232</sup> While a process of convergence and mutual reinforcement occurs<sup>233</sup> between domestic and international law the contribution of international law remains distinctive because it provides a common language,<sup>234</sup> reinforces the universality of rights<sup>235</sup> and assists in providing juridical precision.<sup>236</sup> This process is particularly visible in the way in which the response of domestic law<sup>237</sup> has focused on fulfillment of these

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human rights is not necessarily the best starting point for meeting the legal challenges in the field of environmental protection at all. For example, its anthropocentric character overlooks nature's value in itself. It provides little guidance when the interests of present and future generations have to be weighed against each other." *Id.* at 143.

230. Svensson, *supra* note 2 at 363-64.

231. Cassel, *supra* note 35, at 121. ("Where rights have been strengthened the cause is usually not so much individual factors acting independently – whether in law, politics, technology, economics, or consciousness – but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple, interwoven strands.") *Id.* at 123.

232. *Id.* ("Constitutional courts increasingly look to international treaties and the jurisprudence of international courts in interpreting national constitutional rights.") *Id.* at 126; See also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INTL & COMP. L. 287 (1995-96).

233. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997).

234. Cassell, *supra* note 235, at 127. ("Three quarters or more of all governments accept the main international human rights treaties: the International Covenant on Civil and Political Rights; UN treaties on rights of women and children and against racial discrimination; basic ILO treaties on labor rights; and the Geneva Conventions and Protocols on international humanitarian law. The numbers grow every year.")

235. *Id.* ("Such broad participation in formally binding international instruments reinforces the claim that human rights are universal.")

236. *Id.* at 128-29.

237. Henkin, *supra* note 37, at 12-13. ("The fact is that human rights and the human rights movement depend on governments and on the state system . . . for those who care about human rights, the need is to work to make the state system more human rights-friendly. . . .") *Id.* at 7.

norms through implementation in its institutions and systems, its actions and decisions.<sup>238</sup> This implementation for purposes of indigenous people and a Nordic perspective is the focus here.<sup>239</sup>

## V.

### THE SAMI – ‘ALTA’ AND THE NEW JURISPRUDENCE

“The land has been used from time immemorial for reindeer . . .  
”<sup>240</sup>

Kirsti Strom Bull

#### A. *The ‘ALTA’ Era*

##### 1. The Beginning Of Change

While the conventions and instruments important for indigenous peoples at the international level were developing, the traditional status of the Sami in Norway began to evolve in several ways. From the 1960s on, they responded in keeping with the nascent emphasis on the environment and the developing rights of minorities, provided with a new impetus from increasing threats to their traditional areas and use of natural resources.<sup>241</sup> This coincided with a growing sense of what Lawrence Friedman has thoughtfully characterized as the rise of “expressive individu-

238. Note the expanding application of human rights law to not only individuals and states but to multinational corporations as well. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L. J.* 443 (2001). (“The last decade has witnessed a striking new phenomenon in strategies to protect human rights: a shift by global actors concerned about human rights from nearly exclusive attention on the abuses committed by governments to close scrutiny of the activities of business enterprises, in particular multinational corporations.”) *Id.* at 446; See also the intersection of human rights and trade in Padideh Ala’i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 *GEO. WASH. INT’L L. REV.* 537 (2001).

239. Jonathan Charney, *Self-Determination: Chechnya, Kosovo and East Timor*, 34 *VAND. J. TRANS’L L.* 455 (2001) (noting the challenge in moving from the classical incarnation of self-determination to implementation); *OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION* (Pekka Aikio & Martin Scheinin eds., 2000).

240. *The Right to Herd Reindeer in the Light of the Report of the Sami Law Committee* (paper on file with the author).

241. Anaya, *supra* note 196, at 4. (“The subject groups are themselves largely responsible for the mobilization of the international human rights program in their favor. During the 1970’s, indigenous peoples organized and extended their efforts internationally to secure legal protection for their continued survival as distinct communities with historically based cultures, political institutions and entitlements to land.”).

for electricity on the Alta River in the traditional Sami heartland. Advocates for conservation challenged the action, pointing to its impact on salmon within Europe's deepest canyon, harm to botanical sites and threats to habitat for the primary resource of the Sami, reindeer.<sup>245</sup> What began primarily as an environmental challenge brought by a conservation group evolved over time into an escalation of the Sami interests at stake. The district court ruled in favor of the government, holding the affected residents were only entitled to damages.<sup>246</sup> On appeal, the Supreme Court agreed with the position of the government, concurring that the local court was not the proper forum for the proceedings,<sup>247</sup> only approving compensation for the anticipated loss of twenty-one reindeer.<sup>248</sup> The Sami and the conservation group thus did not prevail<sup>249</sup> and construction of the dam proceeded.

Yet the Court's decision resulted in an important guide to standing, clearly assisting new proceedings in the proper forum.<sup>250</sup> The Court acknowledged a plaintiff may show sufficient legal interest even if his rights are not immediately affected. Moreover, the collective interest of an organization may result in standing even where an individual member does not have it. The Court also suggested the conservation group had standing (although it was not part of the final disposition of the case) and confirmed the availability of judicial review of an administrative licensing decision.<sup>251</sup>

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245. Inge Lorange Backer, *Legal Standing in Environmental Cases – Norwegian Practice, in THE LEGAL STATUS OF THE INDIVIDUAL IN NORDIC ENVIRONMENTAL LAW* 132-34 (1994); Fae L. Korsmo, *Nordic Security and the Saami Minority: Territorial Rights in Northern Fennoscandia*, 10 HUM. RTS. Q. 509 (1988). This included impacts to endangered species. ("The attorney for the Saami plaintiffs, Leif Dunfield, demonstrated that the reindeer breeding area that would be destroyed by the dam and access road was already pressed by a man-made reservoir, power lines, and tourist cabins. He presented the planned dam construction as one of a series of destructive intrusions into Saami culture. In other words, *Alta* involved more than a single instance of expropriation.") *Id.* at 518.

246. Korsmo, *supra* note 245, at 518.

247. NRt. 1980 at 569.

248. Korsmo, *supra* note 245, at 519.

249. The Norwegian Association for the Conservation of Nature argued the approval was void or voidable because of factual errors in the administrative decision, the case was not sufficiently examined and those concerned were asked to express their views before all the impact statements were complete. Backer, *supra* note 240, at 134.

250. *Id.* at 132-34.

251. A later case, this time a claim for restoration of the marine environment of the Oslo fjord due to emissions from pulp industries, followed this direction. The Court found there was standing for both the local branch of a Swedish conservation

alism”<sup>242</sup> and a more assertive view toward the status quo. Over time, the focus of the Sami was increasingly on rights, especially to land.

## 2. Early Decisions Of The Supreme Court of Norway

Two early decisions of the Supreme Court of Norway contributed to the new momentum, precursors of what was to come. The cases reflected the very kinds of conflicts regarding natural resources that, although dormant for some time, began to assume prominence.

### i. The *Brekan* Case (1968) – Reindeer Herding and Grazing Rights

In the *Brekan* case, a written agreement from 1873 between the Sami *sii'das* and a government agency, relating to grazing rights, was in dispute.<sup>243</sup> In upholding the position of the Sami, the Supreme Court determined the agreement included, by necessary implication, the right of the Sami to engage in their traditional activities in the present. This included hunting, fishing and berry-picking, the uses they had always pursued on the land in the area.

### ii. The *Altevann II* Case (1968) – Grazing and Fishing Rights

In the *Altevann II* case, the government had dammed a lake resulting in the loss of grazing and fishing sites.<sup>244</sup> The Sami had used the lake during the summer from time immemorial. The government had accepted the use as the Sami crossed over from Sweden each year. In affirming the position of the Sami, the Supreme Court determined they were entitled to damages as compensation for their loss.

## 3. The ‘*Alta*’ Case (1980) – Dam Construction

In the *Alta* case, the gathering forces met head-on, with lasting results. The government approved construction of a large dam

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242. Lawrence Friedman, *supra* note 15, at 82-83. (“It exalts the right and duty of each individual to realize his or her potential, and to develop his or her own unique and special qualities. In Western nations, there is tremendous physical, social and cultural mobility . . . In this cultural atmosphere, notions of individual rights, inherent rights and personality rights have enormous personal and political appeal. Demands for vindication and support of these rights have accordingly increased in many countries.”).

243. RT 1968: 394, at 401 jo. 405-406.

244. RT 1968: 429, at 437 jo. 440-441.

On another level, the results of the *Alta* case were even more far-reaching. For the first time, international law relating to indigenous peoples and human rights was condensed by the Court through the advocacy of the Sami.<sup>252</sup> In recognizing the Sami as a distinct people entitled to special rights, the Court applied Article 27 of the Covenant on Civil and Political Rights.<sup>253</sup> For this reason, while the outcome disappointed the plaintiffs, the case "played a major role in the government of Norway's subsequent decision to re-evaluate Sami rights under national and international law."<sup>254</sup> In addition, the Court considered the role of custom in the law, a landmark step, and, at the same time, appeared to recognize the validity of an interdisciplinary approach to legal analysis that included anthropology and cultural heritage.<sup>255</sup>

On one hand, in recognizing the Sami's legal arguments, the Court seemed to presage a realization that the narrow precedent of the past, based almost entirely on assumptions of assimilation and majoritarian dictates, would not address the environmental, cultural and human rights issues presented in the future, nor would that precedent withstand scrutiny. On the other hand, the significance of the case extended well-beyond the courtroom. The Sami used the litigation to draw international attention to the issues. As a symbol, the conflict stimulated an entirely new perspective on natural resources, rights and, ultimately, the place of the Sami in contemporary society.

In this way, the *Alta* case largely precipitated a new dynamic in government-Sami relations. While imperceptible at first, the parties increasingly dealt with each other in new ways, aware the

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organization as well as for a Norwegian association whose purposes, to promote global justice, was much broader. RT 1992: 1618. *Id.* at 134-35.

252. Svensson, *supra* note 2, at 363-64.

253. *Id.* at 374. ("As the Norwegian expert on international law, Professor Carsten Smith, former chairman of the Sami Rights Committee has said, the verdict is not precedent for the proposition that international law is superior to national law in cases of conflict in which cultural difference is the issue. It is primarily a declaration of principle that opens up new vistas in legal practice, that is to say, from now on international law is considered relevant; furthermore, the authority of this declaration is strengthened considerably by the fact that the entire Supreme Court in full assembly (eighteen justices) reached this conclusion.").

254. Korsmo, *supra* note 245, at 519.

255. Note the Supreme Court of Canada dealt with the issue of oral history as evidence of land occupancy in *R. v. Van der Peet* [1996] S.C.R. 507 where Chief Justice Lamer wrote that common law rules of evidence should be adapted to take into account the unique nature of indigenous rights. *See also* *R. v. Delgamuukw*, [1997] S.C.R. 1010, regarding the expansion of the rules of evidence to incorporate oral history.

status quo was changing and perhaps becoming a relic of the past, consigned to oblivion. In many respects this paralleled the process occurring in the United States where Native Americans, as *citizens*, were invoking rights guaranteed to them under the law, including treaties and the special trust relationship that existed between tribes and the government.<sup>256</sup>

## B. *The New Jurisprudence*

### 1. Structural Changes In The Law

#### a. *The Sami Rights Committee And The Constitution*

As a result of the *Alta* case, the Sami Rights Committee was appointed in 1980 by the *Storting* (Parliament) to consider the status of the Sami and changes in government policy. The committee issued its first report in 1984 and recommended amending the Constitution to address Sami rights.<sup>257</sup> In 1988, after lengthy debate, the *Storting* followed the Commission's proposal and adopted a new provision in the Constitution that provided: "It is the responsibility of the State to create conditions enabling the Sami people to preserve and to develop their language, culture and way of life."<sup>258</sup>

With this constitutional amendment, the *Storting* advanced the process of reforming the legal structure of government-Sami relations. Under the new section, the state's responsibility is paramount and the command of the law a fundamental principle of governance. The phrase "create conditions" encompasses a wide spectrum of actions with legal, cultural, economic and social dimensions.

The phrase "to preserve and to develop" requires affirmative steps, creating a dynamic obligation for the government in its capacity as landowner, manager, administrator, decision-maker and partner. All of these actions of the government enable the Sami

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256. See *Morton v. Mancari*, 417 U.S. 535 (1974); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

257. In an overview of the work of the Commission, the Chairman wrote: "The Sami are a distinct people living in Norway who must be provided with the necessary means to enhance and develop their own culture. This ought to be the *guiding tenet* in all work on Sami rights and Sami policy. During the 1980s the Sami Rights Committee has endeavoured to function as an instrument for this type of legal and political work." Carsten Smith, *The Sami Rights Committee: An Exposition*, in SELF-DETERMINATION AND INDIGENOUS PEOPLES, SAMI RIGHTS AND NORTHER PERSPECTIVES 15 (1987) (emphasis added).

258. Section 110(a).

to flourish and prosper in an evolving context, as distinguished from “freezing” them in a museum-like approach to preservation.<sup>259</sup>

The phrase “culture and way of life,” read together with the government’s responsibility, includes the legal and social status of the Sami, their relationship to natural resources and the land, and, therefore, their economic well-being. Environment, culture and rights are thus intertwined within the text of the amendment. As Carsten Smith described the basis for the change in the Constitution:<sup>260</sup>

The Sami are without question one of the ethnic groups that are embraced by the cultural protection of Article 27 [Convention on Civil and Political Rights]. Therefore they have the *right* to support from the Norwegian state in the expression of their culture. Furthermore, the Sami are *an ethnic group whose culture is to a great extent founded on a traditional use of natural resources*. They will thus very likely be able to claim that their traditional occupations are to some extent also protected by Article 27. This is supported by an old tradition in international law acknowledging a particular form of legislative protection of “indigenous people.” The Report deals with the basis of such special rights for indigenous people, and the link between Article 27 and particular sources on indigenous people is underlined.<sup>261</sup> (emphasis added)

In this way, the Sami Rights Committee specifically drew on international law in its deliberations and relied on it. The state then had the opportunity, as Carsten Smith explained, in following the recommendations of the report, to acknowledge its international responsibility.<sup>262</sup> In relying on the Convention on Civil

259. *Id.* at 29; As Lyndel Prott has pointed out: “Culture is not a static concept: cultures change all the time . . .” Prott, *Cultural Rights as Peoples’ Rights in International Law*, in *THE RIGHTS OF PEOPLES* 95 (James Crawford ed., 1988).

260. Carsten Smith was a professor in the Institute of Public and International Law, Faculty of Law, University of Oslo at the time. He is now Chief Justice of the Supreme Court of Norway.

261. Smith, *supra* note 256, at 26-27. (“[T]he Norwegian Sami have firstly, the right to a certain degree of self-determination in matters of culture, secondly, the right to state support for the expression of their culture . . . the concept of culture . . . refers to the *material basis of the culture* of the ethnic minority. In this instance the occupational and other economic factors should be included in so far as they are *decisive for an ethnic group to maintain and further develop its own culture.*”) *Id.* at 26. (emphasis added).

262. *Id.* at 54. (“In my view the most important aspect of the Report of the Sami Rights Committee lies in the fact that a process has been started in which Norwegian Sami policies are evaluated not as a collection of individual measures but rather as a whole and where public decisions are no longer seen merely as measures of economic and cultural support, but are instead seen to be *the honouring of legal obliga-*

and Political Rights (as well as earlier guidelines from the League of Nations), the Committee prepared the way for using international law as the basis for initiating the most significant legal changes ever made regarding the status of the Sami, changes endorsed by the *Storting* in the Constitution.<sup>263</sup>

*b. The Sami Rights Committee And The New Legislation*

In 1989, the *Storting* adopted new legislation to implement the objectives of the constitutional amendment. A Sami Parliament was authorized, providing for representatives elected by the Sami alone, with the authority to address all matters of concern to the Sami people according to its own judgment.<sup>264</sup> While not granted direct legislative power, the Parliament was authorized to take initiatives and exercise administrative controls.<sup>265</sup> At the same time, all public authorities were required to provide the Parliament with an opportunity for consultation before taking actions relating to the interests of the Sami.<sup>266</sup>

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*tions to the Sami* by the Norwegian state. If our political authorities follow the report, the most important consequences will be that the state acknowledges a great *international responsibility*, that a constitutional basis will be provided for Sami policies, and that special Sami democratic bodies will be established.”) (emphasis added).

263. *Id.* at 55. (“Previously – and especially during the period between the two World Wars – Norway was grossly out of step with the development of international law on minority protection. As a consequence of this, Sami culture is less widespread and more vulnerable today than it would have been if this country had chosen to follow the guidelines concerning minorities drawn up by the League of Nations. Since this was not the case, it is vital for Norwegian authorities actively to encourage the Sami to “enjoy their own culture” – that is to enhance and develop it – in accordance with the stipulations of the Human Rights Convention on Civil and Political Rights.”).

264. Myntti, *supra* note 53, at 212-15.

265. *Id.* at 214. There are four Sami administrative Councils: cultural affairs, languages, livelihoods and memorials.

266. *Id.* The approach of New Zealand, guaranteeing Maori seats in elections for Parliament since 1867, is now augmented by allowing them to vote for either a general constituency seat or for one of the five separate Maori seats. In 1996, the Maori achieved representation that for the first time was equivalent to their representation in the population as a whole. Five were elected through separate seats in addition to ten others. See Trevor Knight, *Electoral Justice for Aboriginal People in Canada*, 46 MCGILL L. J. 1063, 1073-75 (2001). “Until 1960 status Indians living on reserves did not have the right to vote in Canadian elections unless they gave up their treaty status and any rights and privileges associated with that status . . . Aboriginal people have, throughout history, consistently been under-represented in the House of Commons. As of 1990 Aboriginal people were underrepresented in all provincial legislatures as well, but did constitute a quarter of the legislature in the Yukon and a majority of the legislature in the Northwest Territories. The serious under-representation of a significant minority within Parliament represents a *prima facie* cause for

The following year, in 1990, Norway ratified ILO Convention 169, the first ILO member state in the world to do so, and the convention came into force in 1991.<sup>267</sup> ICCPR and ICESCR were previously adopted and with the approval of all three conventions, the government acknowledged a more congruent approach to the Sami in merging international and domestic law on their behalf.

In addition, on a different front, the government also submitted a proposal to the *Storting* in 1990 for the Sami Language Act, guaranteeing the right to use it officially in *Sapmi*.<sup>268</sup> The legislation was approved and became law in 1992. There was very little opposition.

With these enactments regarding representation and language, the law began to reflect structural changes with the potential for far-reaching consequences. While certainly symbolic, they also represented an acknowledgment of the 'new era' in the post-assimilation period. Notably, at the opening of the Sami Parliament in 1997, the King of Norway formally declared "[t]he Norwegian state is founded on the territories of two peoples – Norwegians and Sami."<sup>269</sup>

### c. *The Sami Rights Committee And Claims to Land*

Land rights are the key to self-determination. For the Sami, these rights do not necessarily compel complete ownership.<sup>270</sup> At a minimum, however, meaningful rights require control. Without

concern for the Canadian state about the disconnection between Aboriginal people and the Canadian political order." *Id.* at 1066-67.

267. International Labor Organization Convention 169: Indigenous and Tribal Peoples Convention, available at <http://ilolex.ilo.ch.1567/cgi-lex/ratifice.pl?C169> (last visited Oct. 24, 2001); see also Myntti, *supra* note 53 at 211, n.17. Sweden, Finland and Russia have not adopted the ILO treaty. The countries that have ratified it are: Argentina, Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Paraguay and Peru. *Id.*

268. Kjell Kemi, Nordic Sami Institute, *The Sami Language Act in Norway, in CHANGES IN CONTEMPORARY NORTHERN SOCIETIES* 37, 39 (Ludger Muller-Wille & Linna Weber-Wille eds., 1993).

269. Eva Josefson, *The Sami and the National Parliaments: Direct and Indirect Channels of Influence, in CHALLENGING POLITICS: INDIGENOUS PEOPLES' EXPERIENCE WITH POLITICAL PARTIES AND ELECTIONS*, *supra* note 5, at 68.

270. Tom Svensson, *The Land Claims Issue and the Sami – Reflections On Contemporary Legal Struggle*, 4 *GEOGRAPHICA HELVETICA* 184, 187 (1988). ("[A]s Erik Solem has maintained, the control of territory need not be identical with ownership right (1933). To the Sami it has always been essential to claim sovereign, unassailable rights to pasture reindeer, to hunt and to fish, etc; by comparison, ownership rights to a delimited area of land contains little meaning for them.").

control, self-determination remains, as one observer described it, a chimera.<sup>271</sup>

The idea of land rights not only refers to definite areas of land one wishes to protect and transfer to future generations; it has just as much to do with rights to a specific way of life, an objective which is steadily more difficult to realize in the strained situation these people are facing at present.<sup>272</sup>

At an earlier stage of its work, even the Sami Rights Committee stated that if their "unique culture is extinguished they will cease to exist as a people."<sup>273</sup> This applies with special force to their relationship to the land. Thus, these claims and their resolution are the testing ground for forging a permanent legal framework in order to overcome the longstanding conflict of the past.

In that regard, the Sami Rights Committee continued its work and, in 1997, issued a report dealing with claims to land. The Committee proposed creation of a new agency for the administration of land and non-renewable natural resources in Finnmark, with decision-making authority over the region as a whole.<sup>274</sup> The proposal would result in formation of the Finnmark Land Administration Agency composed of four members from the Sami Assembly and four from the County Council.<sup>275</sup> Further, the Committee urged changes in the law for:

- \* ensuring the "land and natural resources in Finnmark shall be used and administered in the best interests of the inhabitants and in particular as a foundation for Sami culture . . .";<sup>276</sup>
- \* providing a statutory right to reindeer husbandry (even though the courts have recognized its legal basis independent of legislation);<sup>277</sup>
- \* approving compensation for any infringement on the right to herd reindeer;<sup>278</sup> and,
- \* granting a right of refusal for a specific period of time, exercised by the Sami Parliament, concerning any measure that may lead to significant encroachment on the natural environment (for ex-

271. *Id.* at 185.

272. *Id.* at 184.

273. Svensson, *supra* note 2, at 375.

274. The proposal parallels similar approaches in Canada. See Borrows, *supra* note 5, at 616, 622.

275. See Strom Bull, *supra* note 239, at 4.

276. *Id.* at 3.

277. *Id.* at 2.

278. *Id.* at 3.

ample, extraction of minerals), thereby causing injury to Sami culture.<sup>279</sup>

The discussion regarding these measures continues. Work is underway to move to implementation in the coming year. As the debate proceeds, one scholar, Kirsti Strom Bull, has raised three basic concerns about the recommendations. One is that reindeer herding requires even more protection due to its nomadic character, viewed by some as an activity more akin to a nuisance.<sup>280</sup> By merely authorizing reindeer herding in a statute, the potential for action in the future to withdraw it is always possible. Another objection is that reindeer herders may become subject to the authority of multiple agencies as they move from one area to another in their seasonal patterns, leaving them subject to onerous and inconsistent regulation.<sup>281</sup> Finally, the curtailment of grazing rights, which may occur in certain circumstances, justifies compensation under the Constitution – it is a protected use – but that use, based on custom, is currently too vulnerable to administrative action.<sup>282</sup> These and other related issues arising from the recommendations remain. They are likely to come before the *Storting* in the near future.

## 2. The Application Of The Law

With the amendment to the Constitution, the adoption of new legislation, the approval of international conventions applicable to indigenous peoples and the creation of the Sami Parliament, evidence of significant progress clearly existed in the *post-Alta* era. The Sami achieved a measure of success in their quest for participation, representation, cultural integrity, internal autonomy and other hallmarks of self-determination. These changes, solidified in the structure of the law, remained for implementa-

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279. *Id.*

280. *Id.* at 5. (“Clustering together in the winter and spreading over a more vast territory in the summer has long been asserted as basic to Saami culture.”). Korsmo, *supra* note 245, at 517.

281. *Id.* at 7.

282. *Id.* at 7-8. Note also the administrative framework in the proposal does not apply to land that is not enclosed. For the regulation of those lands, each municipality or local land use area retains control. Under the proposal, the local population may receive a preferential right to hunt, fish and pick berries. The pressure on these land is “the background against which the formation of such rights has arisen through custom and legislation. The natural environment does not allow for all the inhabitants of the country to have equal rights to hunt and fish in the areas of unenclosed land.” *Id.*

tion. The meaning of these advances and their interpretation thus comes to the fore.

In understanding these changes and the new jurisprudence, several examples of subsequent decisions of courts are illustrative. The decisions of courts are the keystone to institutionalizing law and especially, international law.<sup>283</sup> Moreover, court decisions in Norway establish precedent just as they do in the United States. In contrast to the traditional civil law approach, the pronouncements of the courts of Norway are binding.<sup>284</sup> Further, Norway's Constitution, adopted in 1814 and the second oldest in the world, is a critical feature of judicial review.<sup>285</sup> The adoption of Section 110(a) in the Constitution regarding the Sami, its application by courts, as well as the new legislation, provide a more empirical approach to considering the 'geology of the law' in greater depth as it relates to the Sami and to the larger process of convergence of international and domestic law.

*a. Recent Decisions Of The Supreme Court Of Norway*

*i. The Selbu Case (2001) - Reindeer Herding and Grazing Rights*

In the *Selbu* case, the Supreme Court dealt with a conflict over Sami reindeer herding on private land in central Norway near Trondheim.<sup>286</sup> Preceded by a series of earlier cases that created ambiguity, the Court clarified the law in *Selbu*. In addressing the claims of the reindeer herders, the Court upheld their position, establishing the principle that private title *per se* does not defeat such claims. Rather, the Court found that the determination of rights depends on the facts, including prior use that is demonstrated. For the Sami reindeer herders in *Selbu*, longstanding use superseded mere record title.

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283. At the same time, one study has shown that the international system regarding human rights "has had its greatest impact where treaty norms have been made part of domestic law" through constitutional and legislative reform, not as a result of enforcement. Heyns, *supra* note 39, at 487.

284. Per Hagelian & Marie Vonen, *THE NORWEGIAN LEGAL SYSTEM* 13 (1994). These pronouncements are reinforced by the reports of the Sami Rights Committee which contain remarkably in-depth analysis of the applicable international law and the special place of the Sami within the law.

285. *The Emergence of Judicial Review of National Legislation, in CONSTITUTIONAL JUSTICE UNDER OLD CONSTITUTIONS* 3 (Eivind Smith ed., 1995).

286. June 21, 2001, Inr.4B/2001.

ii. The *Svartskogen* Case (2001) - Land And Natural Resources

Shortly after the *Selbu* decision, the Supreme Court took up another conflict concerning Sami control of natural resources. The Court considered the *Svartskogen* case arising south of Finnmark.<sup>287</sup> In *Svartskogen*, the upper portion of a small valley near a fjord in the area was used by the Sami for grazing, fishing and hunting over the years. The Sami based their claim to the land on continuous use. The government responded by pointing to its record title.

The case indirectly touches on one of the most important features of Finnmark from a legal perspective. The government's assertion of ownership is based mainly on an early version of the theory of *terra nullius*, that is, the land was not occupied and thus was subject to a general claim by the state as the modern regime was fashioned in the nineteenth century. The validity of this control, involving over 96% of Finnmark, lies at the heart of the conflict regarding Sami rights to the land.

Yet in *Svartskogen*, the property in question did not quite fall within the Finnmark region and thus the scope of the *terra nullius* theory. The property was also unique in that it was actually purchased by the government from a prior owner at an earlier date. In response, however, the Sami questioned what the government could have purchased. They had always used the area and they were not aware of the purchase, even assuming the land was in fact subject to acquisition.

With use and custom on one hand, relied on by the Sami, and purchase and record title on the other, presented by the government, the Court upheld the Sami position. The Court confirmed the importance of custom which long preceded positive law. The Court interpreted the law in *Svartskogen* in a way that recognized and followed custom, vindicating the view espoused by Professor Aschehoug on behalf of the Sami well over a century before.

b. *Economic Development - Natural Resources*

In 2001, a proposal was made to extract valuable stone in a quarry operation near Kautokeino, in Finnmark, revealing another clash over natural resources with cultural ramifications. The municipality wanted to use the stone in road building. The

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287. Oct. 5, 2001.

Sami reindeer herders in the vicinity opposed it, pointing to the heritage of the area and their traditional use.

The Sami Parliament expressed its support for the reindeer herders. They explained their position was not one of opposition to economic development. Rather, as a principle, the Parliament could not concur in new industrial development pending the larger resolution of their claims to the region as a whole.

While this conflict did not result in litigation, it underscores the uncertainty inherent in administration, natural resource management and planning, as well as in investment and economic development, in Finnmark, where the question of Sami claims remain without resolution.

### *c. Repatriation of Human Remains*

The seizure of human remains and the cultural property of indigenous peoples in earlier times by the dominant society, an experience common to indigenous groups in many parts of the world,<sup>288</sup> presents an additional dimension concerning Sami rights and culture. For many years, the state maintained a collection of Sami remains.

In the United States, this widespread activity and grave-robbing in general, practiced by renowned institutions across the country,<sup>289</sup> provided the stimulus for the Native American Graves and Repatriation Act ("NAGPRA") which requires museums and other organizations to document remains and objects in their possession and return them to the tribes they were taken

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288. The Maori carvings taken from New Zealand to England, *Attorney-General for New Zealand v. Ortiz*, [1983] 2 All ER 93 (HL), *aff'g* [1982] 3 All ER 432 (CA) and the Aranda artifacts removed from Australia are notable examples. See Protz, *supra* note 175, at 100.

289. Thomas, *supra* note 3. This included Franz Boas, who later taught at Columbia University and as one commentator described it: "[s]everal of the country's new museums – especially Harvard, the Field Museum, the Smithsonian Institution, and the American Museum of Natural History – were vying for control of American archaeology . . ." *Id.* at 62; see also *id.* at 59, 97, 213, 216-17. Boas, for example, came out to the west coast of North America to pursue a British and Canadian project:

While digging in a burial ground near Victoria, British Columbia, Boas used a photographer to distract the Indians while he was doing his grave-robbing. On June 6, 1888, he wrote in frustration that "someone had stolen all the skulls, but we found a complete skeleton without head. I hope to get another one either today or tomorrow . . . It is most unpleasant work to steal bones from a grave, but what is the use, someone has to do it. . ." *Id.* at 59.

See also Richard Herz, *Legal Protection For Indigenous Cultures: Sacred Sites and Communal Rights*, 79 VA. L. REV. 691 (1993).

from.<sup>290</sup> The Act has resulted in enormous progress in the return of remains and cultural property, a rejection of the era of colonial degradation of indigenous practices.<sup>291</sup>

While the law in Norway does not precisely address this problem, the Sami requested return of the remains in question. The government concurred.

## V.

### THE WAY FORWARD — A PRELIMINARY ASSESSMENT

“The Sami lived here long before the formation of our state.”  
Carsten Smith<sup>292</sup>

The quest for Sami governance has reached a defining stage. In common with indigenous peoples everywhere “they demand some form of influence or autonomy to decide what use should be made of their land. This is the most crucial point in their endeavor to protect their identity and their future.”<sup>293</sup>

The recommendations of the Sami Rights Committee, the response of the government and, particularly, the *Storting*, is likely to establish the definitive legal framework far into the future. At the same time, on another track, comprehensive review of land use planning requirements for the country is also now underway. The recommendations of the Land Use Commission will have direct, substantial consequences for the Sami. On the eve of these new developments, while it is not possible to describe the precise shape of things to come, there are discernible trends.<sup>294</sup>

290. 25 U.S.C. § 3001 (2001).

291. More recently, the legislation has also triggered litigation over the proposed analysis of the The Ancient One, often referred to as “Kennewick Man,” a very old skeleton the study of which is sought by anthropologists and opposed by tribes in the Pacific Northwest. *See* *Bonnichsen v. United States*, 969 F. Supp. 628 (D. Or. 1997); *see also* Thomas, *supra* note 3, at 231.

292. Carsten Smith, *supra* note 257, at 16.

293. Arne Arnesen, *Theory and Practice, in SELF DETERMINATION AND INDIGENOUS, SAMI RIGHTS AND NORTHERN PERSPECTIVES* 151 (1987).

294. The government has convened a working group involving representatives from several ministries, local government and the Sami parliament. They will consider how to address the next stage in proposals to address the claims to land and governance. For background considering Sami claims to land in the context of Norway, Sweden and Finland at an earlier stage *see* Sillanpaa, *supra* note 80, at 154. “Developments in international law, as well as events taking pace within the three countries, indicate that Sami land title, based on aboriginal title, has become a significant issue. The Sami have clearly positioned themselves on this issue and have achieved a considerable degree of recognition and acceptance from the three Nordic states as to the legitimacy of their demands.” *Id.* at 161.

### A. *Convergence, Direct Effects and Self-Determination*

The evolution of the domestic law in Norway illustrates the remarkable influence of international law and the process of convergence. In providing for representation, participation and consultation relating to the Sami, the state has recognized their special status. The *post-Alta* period reflects each of these aspects of self-determination as rights are transformed from the abstract to the concrete.

Through new institutions, a measure of internal authority has grown, embracing the dualism of two cultures within one state. In this way, the political process, shaped by principles of law, is developing to protect the status of the Sami in society. The result is the existence of more opportunities to vindicate rights and enlarge the rule of law to implement increasing protection for their environment and culture in the new jurisprudence.

From the perspective of the environment, court decisions reveal a trend toward acknowledging custom and greater scrutiny of broad government claims. Under the aegis of reforms in the last twenty years, the law reflects significant, tangible progress and, under the Constitution, the foundation exists for an expanding scope of protection.

From the standpoint of culture, specific measures are firmly in place that have brought funding for parliamentary and administrative functions, thereby advancing new cultural initiatives. An important feature of these efforts is the protection of the Sami language. In fact, even before the language legislation in 1992 and the constitutional amendment, state policy facilitated its use and every Sami student is allowed to choose it as one of their languages in school.<sup>295</sup>

In terms of the environment and culture together, significant links are advanced and strengthened in a framework that marks a new era in legislative, executive and judicial actions, in concert with human rights. While much work remains, especially with respect to the most critical phase – the disposition of claims to land

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295. Tom Svensson, *Education and the Struggle for Adequate Cultural Competence in the Modern World: The Sami Case*, in EDUCATION AND CULTURAL DIFFERENCES 45, 52 (1992). This has occurred over the past four decades. "Learning an extra Norwegian language with its peculiar grammar and vocabulary was replaced by a more thorough training in their own language for every young Sami who wished it." *Id.* Similarly, the Nordic Sami Institute, established in 1973 and staffed by Sami personnel, promote cultural programs in a variety of ways. *Id.*

- the momentum exists for more complete realization of these rights.

In sum, the direct effects of international law are principles and trends emerging in domestic law in new ways. The full reach of these principles and trends remains for determination. Moreover, the principles are not always explicitly relied on, as in the *Selbu* and *Svartskogen* cases, where the Supreme Court found a natural basis for resolution within domestic doctrine. Yet even in *Selbu* and *Svartskogen*, the recognition of custom is a striking example of how far the law has come since the *Alta* case.

The *Alta* case marked a watershed in the jurisprudence of the country and, arguably, the vitality of international law. This is directly in line with trends elsewhere which include not only the influence of international law but also, potential consideration of the law of another state as a logical consequence of convergence. In the future, the Supreme Court of Norway may even look to the law of another state that addresses indigenous peoples – considering *both* that states interpretation of international law and its domestic law relating to indigenous peoples.<sup>296</sup> For example, as Justice Michael Kirby of Australia has noted:

Increasingly a court such as the High Court of Australia looks beyond its traditional sources when solving a problem. Its traditional source was the law of England, and maybe it would look to Canada and the United States. But now we will take information from the Supreme Court of India, or the Court of Appeal of New Zealand, or the Constitutional Court of South Africa. Mainly English speaking countries because they tend to be common law countries and they tend to write their decisions in the English language. But, where relevant, we will look beyond that.<sup>297</sup>

In this same way, the Supreme Court of Norway has the opportunity to draw on expertise that exists and precedent that has

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296. For a discussion of the Canadian approach see Gordon Christie, *Delgamuukw and the Protection of Aboriginal Land Interests*, 32 OTTAWA L. REV. 85 (2000-01). For an Australian perspective see Cheryl Saunders, *The Implications of Federalism for Indigenous Australians*, in AUTONOMY AND ETHNICITY 266 (Yash Ghai, ed., 2000); see also R.D. Mulholland, *The Maori and New Zealand*, in INTRODUCTION TO THE NEW ZEALAND LEGAL SYSTEM 11 (1999); see also Benjamin Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L L. 49 (1999); IAN BROWNLIE, TREATIES AND INDIGENOUS PEOPLES (1992).

297. Michael Kirby, *Dialogue: Think Globally*, 4 GREEN BAG 2d 287 (2001).

value relating to indigenous peoples in other states, as another aspect of convergence.<sup>298</sup>

### B. *Convergence, Indirect Effects and Self-Determination*

Less visible yet significant, the impact of international law has indirect effects as well. A process of mutual reinforcement is evident as the applicable conventions and treaties contribute to legitimize claims of right, indicate the will of the international community and increase expectations of compliance and encourage judicial enforcement.<sup>299</sup> For Norway, within the framework of domestic law, as a larger political and cultural understanding is emerging, the dualism reflects a new conception of values. These values, based on a fundamental respect for diversity,<sup>300</sup> are largely defined by the legal discourse and the new jurisprudence. The evidence available suggests a high level of cooperation and a search for solutions through the work of the Sami Rights Committee and new legislation based on consensus.

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298. At the same time, caution is in order. See TINSLEY YARBOROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* (2001). As David Getches has demonstrated in regard to the U.S. Supreme Court and Native Americans, the trend in decisions is not promising. See David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) "The Supreme Court has made radical departures from the established principles of Indian law. The Court ignores precedent, construing statutes, treaties, and the Constitution liberally to reach results that comport with a majority of the Justices' attitudes about federalism, minority rights, and protection of mainstream values . . . The Rehnquist Court seems oblivious to the discrete body of Indian law that is based on solid judicial traditions tracing back to the nation's founding."; Moreover, S. James Anaya has suggested the Supreme Court seems ready to sweep aside not only history but the prospect of a shared discourse. See S. James Anaya *Therapeutic Jurisprudence: Issues, Analysis and Applications: the United States Supreme Court and Indigenous Peoples*, 24 SEATTLE U. L. REV. 229 (2000).

299. Cassell, *supra* note 35, at 123.

300. See James A.S. Musisi, *Cultural Diversity and Environment: The Case for Indigenous People*, in *ENVIRONMENT AND DEVELOPING COUNTRIES: NATIONAL AND INTERNATIONAL LAW* 150 (1994). The ideals of the Enlightenment take on practical significance. Alexander von Humboldt's formulation, relied on by John Stuart Mill, emphasizes diversity: "The grand, leading principle, towards which every argument in these pages directly converges, is the absolute and essential importance of human development in its richest diversity." *Sphere and Duties of Government*, in *ON LIBERTY* (1956). As Carsten Smith observed: "In the last analysis, legislation in this field is based upon a fundamental conception of value. As we recognize that the individual human being is valuable in him/herself, so we must also respect the particular value of each individual *culture*. The right of indigenous peoples to enjoy their own culture must now be included among the most basic of human rights." *The Sami Rights Commission: An Exposition*, *supra* note 257, at 55.

### C. Indeterminate Effects

Several areas of difficulty remain for further analysis in the future. These aspects of the debate all play an important role. Understanding them contributes to the prospect of success while ignoring them threatens the definitive resolution. A proverb from the Gola in Africa is apt in that regard: "Law is chameleon-like. It varies from from place to place, and only those who know it well can tame it."<sup>301</sup>

#### 1. Interdisciplinary Study

The first area of difficulty is the interdisciplinary study of the issues. Understanding the Sami claims to land and self-determination requires recognition that, much like environmental law in general, related fields of study are crucial in order to fashion solutions.<sup>302</sup> Anthropology, ecology and history are all important. Empirical studies are necessary to enlarge the analysis of the Sami claims more fully. The Supreme Court implicitly recognized the role of anthropology in the *Alta* case and opened the door to acknowledging its contribution. As Anne Hellum has written:

The existing Norwegian legislation is not moulded on the life situation and life experience of the Sami population . . . In competition with Norwegian law Sami practices, experiences and values tend to lose out . . . Legislators, administrators and judges are unfamiliar with the living values, customs and practices of the Sami population.<sup>303</sup>

Based on this assessment, she has concluded:

What in my view is needed . . . is detailed research into both the general characteristics and unique features of social and legal relations . . . The identification of similarities may make it possible to make generalizations concerning the Sami common interests, values and customs. . . .<sup>304</sup>

301. NORBERT ROULAND, *LEGAL ANTHROPOLOGY* ix (1994).

302. See WILLIAM RODGERS, *ENVIRONMENTAL LAW* 26 (1996).

303. *How To Improve the Doctrinal Analysis of Legal Pluralism: A Comparison of the Legal Doctrine About Custom and Local Law in Zimbabwe and Norway*, 8 *RETFÆRD* 40, 53 (2000). A commitment to land and cultural heritage has dimensions in common with many different groups and traditional communities. See Carol Raish, Alice McSweeney, *Livestock Ranching and Traditional Culture in Northern New Mexico*, 41 *NAT. RES. J.* 713 (2001).

304. *Id.* "In my view, empirical investigations that provide a nuanced picture of custom and 'local law' as a site of diverse and contested practices and viewpoints would put judges, administrators, law-makers and reconciliators in a better position to consider which direction legal development is taking than the established legal doctrine." *Id.* at 60.

This recommendation complements the extensive research by Kirsti Strom Bull and the Nordic Sami Research Institute exploring the history of the Sami in the context of private law<sup>305</sup> as well as Jon Johnsen's pioneering analysis of Sami legal aid.<sup>306</sup> The goal, as Roscoe Pound expressed it, is to focus on 'living law.'<sup>307</sup> This approach, preceded by Fredrik Stang<sup>308</sup> and other legal scholars in Norway in the past, illuminates the way in a manner especially important to the Sami where custom and culture define their heritage.

For example, as Kirsti Strom Bull has pointed out concerning the Reindeer Herding Act, the reason the recommendations for change "[f]rom the Sami Law Committee do not to a sufficient degree safeguard the interests of the reindeer herders, is due to two factors: (1) The way the reindeer industry is conducted and (2) The legal basis of reindeer husbandry. The fact that reindeer husbandry entails movements across vast areas, a nomadic way of life, means that it is in a unique position in relation to other industries."<sup>309</sup>

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305. Kirsti Strom Bull et. al., *Reindriften i Finnmark*, Cappelen Akademisk Forlag (2001). Note for example her critical analysis of the Supreme Court's decision in the *Aursund* case that Sami use of a grazing area did not qualify as customary law based on a ruling from 1897. Lov og rett nr. 6/1998 (Bull 1998).

306. This study is based on the evaluation of five-hundred cases involving the Sami and their contact with legal aid. Sami tradition concerning inheritance, ownership of property, marital dissolution and reindeer ownership was found to conflict with the state's requirements in many respects. JON JOHNSEN, *SAMISK RETTSHJELP* (1997).

307. ROSCOE POUND, *INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922). As Anne Hellum points out, Roscoe Pound was directly influenced by EUGEN EHR- LICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1913). See Hellum, *supra* note 297, at 43.

308. A professor at the Faculty of Law at the University of Oslo at the turn of the last century, Stang published a book, *Trading Customs*, "based on an empirical study of customs and practices in trade relationships with particular emphasis on the practice of established trade organizations." FREDRIK STANG, *TRADING CUSTOMS* (1908).

309. Strom Bull, *supra* note 304, at 4. "That we so often see conflicts of interest arising between the enlargement of built-up areas and reindeer husbandry, and similarly between the building of log cabins and reindeer husbandry or between reindeer herding and agriculture, is usually precisely due to the fact that the conflict is between parties who are not residents of the same municipality. In its 'summer municipality' reindeer herding is viewed – if not as a foreign element – at least something that is a nuisance. The vulnerable position of reindeer husbandry through its nomadic form means that it must be ensured special protection, especially when it is outside the municipality to which the tax is payable." *Id.* at 5.

## 2. Incremental Change

A second area of difficulty, incremental change, is more subtle. Each instance of the degradation of nature in the traditional heartland and each incursion in rights may occur over a period of time, leading inexorably to the slow demise of environment and culture. The cumulative effect of countless individual actions by agencies, municipalities and the private sector results in step by step destruction. The Supreme Court's conclusion in the *Alta* decision, appearing to require a significant level of harm in a specific conflict, thus requires reconsideration.<sup>310</sup>

What may seem like one independent action – the approval of a quarry, construction of a resort, a permit for a new housing development - is likely, over time, to tear apart the fragile fabric of Finnmark and the north. The necessary response to this severe threat includes ecosystem planning and management,<sup>311</sup> allowing for a more holistic approach to the protection of resources and stewardship, with the direct participation of the Sami as emphasized in international environmental law in the the Brundtland Commission Report, ILO Convention 169 and the Biodiversity Convention.<sup>312</sup>

## 3. Decision-making

A third area of difficulty is decision-making. Where is the authority in the government decision-making structure with respect to Sami interests? The process of implementing the law in the myriad aspects of administration and governance of the modern state, in all its functions, compels understanding yet the answer to this question remains elusive. This is true for agencies at the national, county and local level but especially where natural re-

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310. Sillanpaa, *supra* note 80, at 137. Note also Justice Brennan's far-sighted dissent when faced with a similar issue concerning the cumulative impact from residential development along the California coast in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (Brennan, J., dissenting).

311. See Jon Welner, *Natural Communities Conservation Planning: An Ecosystem Approach to Protecting Endangered Species*, 47 STAN. L. REV. 319 (1995).

312. See Tracy Dobson, *Community Participation in Natural Resources Management in Malawi: Charting a New Course for Sustainability*, 1998 COLO. J. INT'L L. & POL'Y 153 (1998); Sean McAllister, *Community Based Conservation: Restructuring Institutions to Involve Local Communities in a Meaningful Way*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 195 (1999); Neil Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENVTL. L. REV. 683 (1993); David Wirth, *Public Participation in International Processes: Environmental Case Studies at the National and International Levels*, 7 COLO. J. INTER. ENVTL. L. & POL'Y 1 (1996).

sources, development, planning and related matters are involved.<sup>313</sup>

In other words, beyond blackletter law, how do the Sami actually exercise any form of control over their region? It is important to reflect on the primacy of this inquiry, and in considering contemporary experience, acknowledge the difference between theory and practice. Several examples are illustrative.

### *Biodiversity*

There is no more important element in biodiversity than the protection of habitat. Yet one of the primary tenets of the Biodiversity Convention is the consideration of the knowledge and heritage of traditional communities. There are instances where the state's interest in protecting wildlife will not only benefit from the participation of the Sami but, even in some circumstances, must yield to the Sami interest in its conception of use. There are times when taking a bird, a fish or an animal is a natural adjunct to Sami heritage, even perhaps with a threatened species. Quite often, planning and resource management may diminish such conflicts<sup>314</sup> but again, this requires the participation of the Sami. The successful protection of biodiversity mandated by agency directives without the involvement of local inhabitants is doubtful.

### *Construction and Development*

At its most basic level, construction and development is exemplified by road-building which has numerous impacts on air and water, flora and fauna, increasing access and the relentless drive for more intense uses. Yet planning and resource management, in addition to decision-making authority, is exercised by agencies

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313. See Sillanpaa, *supra* note 80. "Until only very recently, the Sami have never been consulted by the authorities in decisions involving land use planning and resource allocations. National and local bureaucracies served as the tool of non-Sami residents and of outside interests; rarely, if ever, were any attempts made at protecting the aboriginal rights of the Sami. Today, the situation on Sami rights confronting politicians and bureaucrats in all three Nordic countries is the result of countless such earlier administrative actions dating back some two centuries or more." *Id.* at 224.

314. For example, implementation of the Endangered Species Act in the United States encompasses a significant consultation process. Hannah Gosnell, *Section 7 of the Endangered Species Act and the Art of Compromise: The Evolution of a Reasonable and Prudent Alternative for the Animas-La Plata Project*, 41 Nat. Res. J. 561 (2001).

where the integration of Sami requirements in the review process remains ambiguous.

### *Fisheries*

The Tana River in Finnmark is the largest salmon river in Europe, forming part of the border between Norway and Finland. From time immemorial, the Sami have taken fish there. Yet, in the 1980's the threat of extinction became real. The Sami pointed to over-exploitation and offshore driftnet fishing as important problems. Driftnet fishing was curtailed but more work remains and it is reported there are new efforts to reopen the use of driftnets with pressure coming from the south of the country.<sup>315</sup> Once again, the integration of decision-making authority related to fisheries and the Sami is not clear.

### *Mineral Extraction*

The northern region may contain valuable minerals beneath its surface. Mining creates numerous environmental impacts and may represent a use in conflict with the interests of the Sami. Is a claim for extraction by commercial interests superior to Sami heritage that by definition requires preservation of the land and thoughtful consideration of any significant changes?

### *Military Installations*

The expansion of a military testing ground or a "shooting range," in potential conflict with reindeer herders in the north, is now underway. This follows the opposition of the Sami to a large underground storage facility planned by the military in Troms County and resolved in favor of the state in litigation. Even if the opportunity for consultation is provided, does the state's interest in regard to the siting of these installations take precedence over the traditional use, livelihood and well-being of the Sami?<sup>316</sup>

### *Pollution Control*

A report on the state of the Arctic environment addressed chemicals that accumulate in animals used as traditional foods and found:

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315. Leif Halonen, *Demands to Protect the Environment in ECONOMIC, SOCIAL AND CULTURAL RIGHTS OF THE SAMI* 81, 83 (Frank Horn ed., 1998).

316. *Id.* at 85; See also Lassi Heinen, *Military Presence and Action in the Arctic: A Potential Conflict of Interest?*, *supra* note 266, at 133. The dumping of nuclear waste and dismantled nuclear reactors of submarines and icebreakers into the Barents and Kara Sea, by the former Soviet Union, is but one example.

Several groups of people in the Arctic are highly exposed to environmental contaminants . . . Exposure to persistent organic pollutants ("POPs") is the primary concern. People are most exposed to PCBs and certain pesticides through the long food webs which result in high concentrations of these pollutants in mammals, birds and, to a lesser extent fish. The use of different foods determines contaminant intake. Some indigenous groups are exposed to levels that exceed established tolerable intake levels.<sup>317</sup>

The implications for decision-making in relation to this issue are far-reaching and crucial to state-Sami relations.

### *Sacred Sites*

Mountains and other high points in the traditional heartland are used for radio links and communication facilities. In some instances, portions of the land are sacred sites for the Sami.<sup>318</sup> The extent to which their history and traditions are affected implicates environmental considerations but also, directly impacts their belief systems. What steps are taken in the development review process to address these interests?

### *Wilderness*

The beauty and solitude of the north offers many opportunities for recreation. Yet pressure arises through the expansion of tourism. Over time, does tourism justify these impacts or is there a fundamental baseline which limits expansion in order to ensure the very existence of the last wilderness in Europe?

In each one of these examples, one may turn to existing legal authority to support and protect the pervasive Sami interests at stake. The provisions of the Convention on Civil and Political Rights, ILO Convention 169 and the Biodiversity Convention are clear. Moreover, section 110(a) of the Constitution applies concerning the Sami specifically, as well as 110 (b) providing the

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317. Halonen, *supra* note 314, at 81, citing THE ARCTIC COUNCIL, *THE STATE OF THE ARCTIC ENVIRONMENT* (1997).

318. *Id.* at 85; In the United States, a notable example of planning to protect sacred sites and cultural property is found in the Columbia River region based on federal legislation approving a regional approach to governance with direct participation by the four Native American tribes in the region. See Columbia River Gorge National Scenic Area Act, 16 U.S.C. § 544 (1987); see also Lawrence Watters, *The Columbia River Gorge National Scenic Area Act*, 23 ENVTL. L. 1127 (1993); see also Kristine Olson Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741 (1993).

right to enjoy a healthy environment.<sup>319</sup> Further, 110 (c), concerning the duty of the state to ensure human rights, is important.

These concerns highlight the necessity for the state to examine its decision-making processes, with an emphasis on shared governance and participation, while ensuring access to justice through administrative and judicial review. It is only by institutionalizing governance and participation, especially in agency decision-making, that rights retain meaning. Moreover, it is the duty of the state to meet these standards. The burden is not on the Sami to justify them.

The divergence between 'law on the books' and 'living law' in governance and decision-making is a fundamental matter that justifies the most careful attention. The viability of sustainable development is only possible in partnership with those who have always lived in the region and who possess the most intimate knowledge of it.<sup>320</sup>

#### 4. Time

A fourth and final area of difficulty is time. From the standpoint of the state, a great deal of progress has been made to address the status and place of the Sami in society. Through new institutions and the law, there are notable accomplishments. From the perspective of the traditional communities, however, it is a very long time in coming. Moreover, a case parallel to *Alta* concerning the Sami in Sweden, *Taxed Mountain*, lasted fifteen years.<sup>321</sup> From the Sami Codicil in 1751 to the most recent legislation in Norway, the law has not yet addressed the Sami claims to their traditional heartland, the land they have always used from time immemorial and the land the state continues to assert control over. The resolution of this conflict will not wait forever.

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319. See Bugge, *supra* note 16, at 301 n.14. ("[T]he *Storting* recently adopted a new article in *Grunnloven* (art. 110 b) concerning protection of the environment. It states a general right for the citizen to enjoy a healthy environment, and a right to environmental information.").

320. See Kai Lee, *Searching For Sustainability in the New Century*, 27 *ECOL. L. Q.* 913 (2001); see also John Harte, *Land Use, Biodiversity and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System*, 27 *ECOL. L. Q.* 929 (2001).

321. TOM SVENSSON, *THE SAMI AND THEIR LAND* (1997) The case was brought by the Sami in 1966 and the Supreme Court of Sweden handed down its decision in 1981. They sought confirmation of ownership rights based on ancient usage to reindeer pastures, hunting and fishing together with some other resources related to their core areas of livelihood, i.e., primarily in the mountainous area. The Court upheld lower court rulings against the claims.

#### D. *The Next Stage*

The strong relationship between international law, especially international environmental law and domestic law, is manifest in the actions of Norway in examples independent of the Sami. The work of the UN Commission on Environment and Development through the Brundtland Commission, lead by Gro Brundtland, Norway's former prime minister, resulted in the global focus on sustainable development.<sup>322</sup> The emphasis on in-depth scientific analysis laid the foundation for a more complete and informed understanding of the whale population and the implementation of the International Whaling Convention.<sup>323</sup> A collaborative effort with other states lead to the development of new controls and clean-up in response to the Soviet-era dumping of nuclear waste in the Arctic.<sup>324</sup>

In all three cases,<sup>325</sup> the influence of international environmental law is notably direct. In turn, the actions taken by Norway in response further define the nature and content of domestic law while simultaneously, impacting international environmental law in a process of mutuality and interdependence.<sup>326</sup> These examples of leadership have much in common with the links between environment, culture and rights and the status of the Sami. As the Brundtland Report stated, some indigenous peoples "are

322. OUR COMMON FUTURE, *supra* note 44, at 8.

323. Steiner Andresen, *The Making and Implementation of Whaling Policies: Does Participation Make a Difference?* in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 431 (David Victor, et al. eds., 1998). "Although they have reacted differently to the IWC's decision to halt commercial whaling, there are some striking similarities between the two processes in the two countries [Norway and Iceland]. In both, the links between the international and the domestic levels have been strong and direct, and international reactions have triggered a strong increase in domestic participation in both these societies." *Id.* at 432.

324. Olav Schram Stokke, *Nuclear Dumping in Arctic Seas: Russian Implementation of the London Convention*, in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 475. "[T]he shift in emphasis from the regulatory to the programmatic activities of the regime was conditioned on the fact that Western partners, especially, the USA, Norway, and the European Union, were ready to define nuclear contamination of Arctic seas as a high-priority issue worth significant financial investment." *Id.* at 506.

325. From a different perspective, Norway's governance of Svalbard is another illustration of the adaptability of law to address areas of special concern. See GEIR ULFSTEIN, *THE SVALBARD TREATY* (1995).

326. For a critical view of the performance of the Nordic countries more generally see Gudmundur Alfredsson, *The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries*, 14 HEIDELBERG J. INT'L L. 529 (1999).

threatened with virtual extinction by insensitive development over which they have no control."<sup>327</sup> A focus on governance in the context of decision-making and access to justice is the imperative at hand.

Conflicts involving indigenous peoples and the environment require special efforts to advance common interests. Experience counsels the necessity for greater understanding in the intersection of environment, culture and rights. A framework for governance compels a focus on cooperation based on interdependence.<sup>328</sup> Like conflicts over natural resources and indigenous peoples in general,<sup>329</sup> problem-solving is the challenge in the law,<sup>330</sup> especially concerning the integration of indigenous peoples in governance in order to exercise authority over the resources they have always used.

#### CONCLUSION

Three decades after the Stockholm Declaration in 1972 and fifteen years after the Brundtland Commission Report in 1987 emphasizing the special status of indigenous peoples, international law continues to evolve in stimulating convergence and the framework for recognizing and enhancing the rights of indigenous peoples. This process of convergence and recognition encompasses significant advances.

International law has stimulated the process and the domestic law of Norway has followed, reinforcing the protection the Sami are entitled to with fundamental changes. In this way, the domestic law of Norway reflects the influence of international law and the larger process of convergence. The mutuality and interdependence of both sources of law is manifest.

In the developing jurisprudence of indigenous peoples, the Nordic perspective illustrates the profound relationship between principles and norms applicable to environment, culture and rights. In this way, the adaptability of domestic law continues and the result is less a set of commands and more a framework. While the framework is by no means complete, either at the international level or in Norway, the syngersism of the forces described

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327. OUR COMMON FUTURE, *supra* note 44, at 12.

328. See Deloria, *supra* note 133.

329. See, e.g., Watters, *supra* note 49.

330. See Kristin Wiebe, *The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation*, 41 NAT. RESOURCES J. 731 (2001).

and the convergence of sources of law reveals remarkably concrete and far-reaching results, influencing the way forward.

In sustainable development, science as the foundation for marine policy and measures to address nuclear waste in the Arctic, Norway has made a singular contribution to international environmental law. These achievements parallel a steadfast commitment to justice and security in the Middle East in the Oslo Process as well as, over the last one-hundred years, the Nobel Peace Prize award. The vision in these areas serves as inspiration and precedent for the issues relating to the Sami, their claims to land and governance.

The traditional Sami heartland remains the last wilderness in Europe. Within the region, the Alta River now includes the dam, the subject of the 1980 litigation. As the dam permanently altered the landscape of the region, the *Alta* decision of the Supreme Court transformed the topography of domestic law. Two decades after the decision, the Sami stand on the threshold of their quest for a measure of autonomy embracing their traditional heartland and the unity of environment, culture and rights. Long before contemporary formulations of biodiversity, ecosystem management and sustainable development, Sami customs recognized stewardship as a relationship between man and nature. While the explicit recognition of their language has substantive and symbolic importance, their relationship to the land is the measure of their survival.

Two and a half centuries after the Sami Codicil, it is not possible to turn the clock back and return to a completely pastoral way of life yet the underlying protection for the Sami recognized in that international agreement retains renewed vitality in contemporary jurisprudence. The fusion of international law and domestic law provides a firm basis for both new legislation, executive action and judicial interpretation guaranteeing a dualism that retains sovereignty but protects the peoples who have lived in *Sapmi* from time immemorial.<sup>331</sup>

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331. Oliver Wendell Holmes, in his own copy of *THE COMMON LAW*, included a note with the passage: "As Ibsen picturesquely puts it: Truths are by no means the wiry methuselahs some people think them." Mark DeWolf Howe, *Introduction to OLIVER WENDELL HOLMES, THE COMMON LAW*, at xii (1963). In capturing the adaptability of law, this perspective underscores the evolving place of the Sami where claims to land and sovereignty are not in absolute conflict when the state uses its resources to finally establish a durable framework for diversity. See Lawrence Rosenn, *The Right To Be Different: Indigenous Peoples and the Quest for a Unified Theory*, 107 *YALE L.J.* 227 (1997).