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in the Arctic Ocean Legal Order”**

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Indigenous Peoples and Norm Making in the Arctic Ocean Legal Order

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INTRODUCTION

International legal norms are developed in the effort to govern relationships between, and among, sovereign states; it is states that are the subjects of international law. States participating in international organizations allow the latter to create international law within specific spheres. However, in practice international law is not made solely by states and international organizations. There are other actors who play an increasingly influential role in the development of legal norms despite their not being recognized as subjects in international law. Particularly salient today in this regards are Indigenous peoples. More than anywhere else, in the Arctic they have emerged as significant actors who have gained a special status to partner with states in the process of trans-national and international norm building.¹ This brief article highlights the gradual recognition of Indigenous peoples as distinct entities in the international law-making process and the importance of this recognition in and to the Arctic. The paper first focuses on the struggles of Indigenous peoples to become engaged in international affairs, and the acknowledgement of their struggles in international human rights law. Given the peoples' increasing recognition in various international processes, the paper highlights some of the processes and proceeds to show how Indigenous peoples in the Arctic have been integrated into governance of the region. In this context the article briefly analyses the structure of the Arctic Council – the high-level inter-governmental

¹ The Arctic Council, for example, gives the Indigenous peoples in the Arctic a special status, “Permanent Participant”, which accords them a significant role in Arctic governance. See Arctic Council at: <http://www.arctic-council.org>.

forum of the eight circumpolar Arctic states – in which Indigenous peoples play a distinct role. It goes on to argue that the Arctic model and the unique role of the Arctic Indigenous peoples as “permanent participants” in the Council serves as an exemplar for integrating Indigenous voices and giving them a space in the process of norm building.

INDIGENOUS PEOPLES IN INTERNATIONAL LAW

International law does not provide any legal definition of “Indigenous people”. However, reference to Indigenous peoples is found in a number of legal documents, an example being the Declaration on the Rights of Indigenous Peoples (UNDRIP).² Despite the lack of a formal definition, Indigenous peoples are identified by virtue of their indigeneity, in other words their distinctness as unique peoples who share a common history, territory and culture. The United Nations Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Mr. Jose R. Martinez Cobo, has offered the following working definition of Indigenous peoples, widely known as the Cobo definition:

Indigenous communities, peoples and nations are those which, *having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on 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 system.* (emphasis added)³

International Labour Organization (ILO) Convention No. 169 of 1989 sets forth the objective criteria for identifying Indigenous peoples.⁴ Article 1(1) highlights that Indigenous peoples are those peoples who are descended from the population which inhabited the particular country or region at the time of conquest, colonization or

² The Declaration on the Rights of Indigenous Peoples, adopted in 2007 almost universally; only four states voted against it and these later endorsed it Declaration. The text of the Declaration is available at: http://www.iwgia.org/iwgia_files_publications_files/UNDRIP.pdf.

³ Cobo, J. M., Study of the Problem of Discrimination Against Indigenous Populations, 1986/7, UN Doc. E/CN.4/Sub.2/1983/21/Add.8 (Last Part), paras. 379-382 (30 September 1983) at: http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf.

⁴ The text of ILO Convention No. 169 (1989) is available at: <https://www.ulapland.fi/loader.aspx?id=55edc540-a2fa-447c-a4d9-3b63e99527a2>.

establishment of state boundaries and, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

In 2003, a working group under the African Commission on Human and Peoples' Rights (ACHPR) identified the following as characteristics of African Indigenous peoples: their cultures and ways of life differ considerably from those of the dominant society; their cultures are under threat, and in some cases on the verge of extinction; their particular ways of life depend on access and rights to their traditional land and resources; they often live in inaccessible, geographically isolated regions; they suffer from political and social marginalization; and they are subject to domination and exploitation within national political and economic structures.

While not all of the circumstances detailed above will be equally applicable to Indigenous peoples across the globe, the peoples do share some characteristics. They are non-dominant groups of people living in a territory occupied by (foreign) settlers, making them marginalized on their own traditional lands. The political processes led by the settlers have historically excluded the people in their own territories, impacting many aspects of their lives and livelihoods. They have become marginalized in their everyday life in political, socio-cultural and environmental spheres and are on the verge of losing their identity as distinct peoples. As a result, even though the Indigenous movement started back in the early 1900s, it has taken quite a long time to gain some sort of recognition within the realm of international law. The following section briefly illustrates the historical evolution of the Indigenous rights movement.

INDIGENOUS STRUGGLES: GAINING A PLACE IN INTERNATIONAL HUMAN RIGHTS LAW

As early as in the 1920s and 1930s a number of Indigenous leaders approached the League of Nations to address the issue of their being recognized as independent peoples. However, such a course of action was not particularly welcome at the time, given what was an unclear understanding of the distinctness of these peoples in concrete terms. Moreover, Indigenous peoples were not yet well enough organized to put forward their concerns clearly and coherently. Nevertheless, Indigenous movements have continued their efforts, albeit with a very low profile and in a sporadic manner. The issue of Indigenous peoples was raised during the creation of the United Nations (UN) in 1945. The UN established an organ – the Trusteeship Council – to deal with the issue of self-determination of non-self-governing territories. Although Indigenous peoples made their voices heard, they were not recognized

within this framework. Their issues were largely characterized as internal to the states in which they lived and hence as falling outside the realm of inter-state relationships. The Eurocentric development of international law, with its focus on inter-state relationships, had not found a place in which Indigenous peoples could be included as actors. An entity achieves a clear right to self-determination within the framework of the UN only when it receives the status of “non-self-governing territory”. Indigenous peoples do not form such entities and thus were not recognized as groups holding such a status.⁵

There are practical problems as well, for self-determination is a right associated with a people who are not only culturally and politically identifiable, but also identifiable by clear external and internal borders. Indigenous peoples argue for their right to lands in their traditional territories and disregard claims of occupation put forward by foreign settlers in the name of *terra nullius*. The Westphalian notion of sovereignty, connected to today’s notion of statehood, was also unknown to many Indigenous peoples. They have lived by their customary norms, which have prevailed in their territories generation after generation with a historical continuity. The UN perceived norms concerning non-self-governing territories as applying to territories which were colonized by foreign powers but in which, before colonization, the peoples were identified as distinct nations having socio-political and cultural status and clear geographical borders. The notion of self-determination in the context of the decolonization process that started following World War Two included rights of groups of people who were economically or politically subordinate, culturally or geographically distinct from the administering state, and whose social hierarchy was comparable to that of a territory which is “non-self-governing” because it was colonized by external forces.⁶ Even though they have been colonized throughout history, Indigenous peoples and their lands do not meet the criteria set for “non-self-governing territory” status. While the socio-cultural and political uniqueness of Indigenous peoples can be established, in most cases they suffer from living within readily identifiable geographical borders in the respective states. This makes it

⁵ See generally, e.g. Hossain, K. (2013). How great can a “greater say” be? Exploring the aspirations of Arctic Indigenous peoples for a stronger engagement in decision-making, *The Polar Journal*, pp. 316-332.

⁶ See Alfredsson, G. (2005). “Minorities, Indigenous and Tribal Peoples, and Peoples: Definition of Terms as a matter of international law”, in *Minorities, Peoples and Self Determination: Essays in honour of Patrick Thornberry*, ed. Nazila Ghanea and Alexandra Xanthaki (Martinus Nijhoff Publishers), 170.

impossible to identify them as independent entities for the purpose of claiming a right to self-determination under general international law.

This being the case, Indigenous peoples failed to bring attention to their concerns at the international level. However, as the development of human rights law under the auspices of the UN began during the 1950s and 1960s, the Indigenous peoples' movement started receiving a place within the human rights regime. The events of the post-Cold War period yielded newer elements that became relevant for the peoples. They started claiming to be "peoples" to achieve a right to self-determination under the human rights framework as set out in common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). With reference to human rights law, Indigenous peoples approached dominant ruling groups in their respective countries to address their issues, first by recognizing their distinctness as groups of peoples and then by including them in the process of decision-making on issues that concern them. The inclusion that they sought consisted of their being offered a place within national system to negotiate and be consulted, at least in matters of direct concern to them.⁷

To promote this agenda, Indigenous peoples started mobilizing more intensively in the early 1950s, shortly after the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. They convened regional and international conferences to form greater union amongst themselves. The movement achieved remarkable influence from the early 1970s onwards. For example, the 1973 Arctic Peoples' Conference marked the first step towards acknowledging and addressing common issues and rights that seemed relevant to the Indigenous peoples of Greenland, Canada and Scandinavia. The pan-Arctic meeting in 1977 convened by the Arctic Indigenous leaders culminated in the establishment of the Inuit Circumpolar Council (ICC), which represents approximately 150,000 Inuit people in Alaska, Canada, Russia, and Greenland. In a similar development, the Sámi Council – a non-governmental organization comprising Sámi member organizations in Finland, Russia, Norway and Sweden – was established in 1956. Continuing the trend, the International Working Group for Indigenous Affairs (IWGIA) was founded in 1968, followed in 1974 by the World Council of Indigenous Peoples (WCIP). The aims of these organizations were to promote broader understanding on the rights of Indigenous peoples and to lobby for recognition of their rights at the global level.

⁷ Hossain, K. (2013), above.

The movement eventually led to the formation of a working group in the UN. In 1982 the Working Group on Indigenous Peoples (WGIP) was established by Indigenous organizations and UN member states. WGIP was created in order to oversee the promotion and protection of human rights and the fundamental freedoms of Indigenous peoples, as well as to further development of international standards concerning Indigenous rights. Meanwhile, in 1989, the first international treaty clearly recognizing the rights of Indigenous and tribal peoples – ILO Convention No. 169 – was endorsed. In a comparable process, in 1994 the UN WGIP drafted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which was later adopted in 2007. The Declaration has a clear significance given that almost all the states have endorsed the instrument, which provides normative legal guidance in regard to the rights of Indigenous peoples. Since the adoption of the Declaration, the WGIP has been replaced by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), a subsidiary body of the Human Rights Council. The Expert Mechanism provides the Human Rights Council with thematic advice, in the form of studies and research, on the rights of Indigenous peoples.

In 2000, a new body known as the UN Permanent Forum on Indigenous Issues (UNPFII) was established. The aim of the Forum was to promote effective Indigenous participation at the UN level, its members being appointed by Indigenous organizations and states. Today, Indigenous peoples worldwide, now better connected at the national, regional and international levels, are more united and share a common understanding that they are entitled to claim greater rights – in collective form – to maintain and preserve their unique identity as distinct peoples.

RECOGNITION OF INDIGENOUS RIGHTS IN INTERNATIONAL LAW

Indigenous peoples and their rights are well acknowledged in international law today. Various international legal processes, not only in the realm of human rights but also in the area of environmental issues, clearly articulate the rights and role of Indigenous peoples, offering them a place in the making of legal norms. This section highlights some of the developments in international law that have explicitly acknowledged Indigenous peoples as actors in partnership with states in the making of legal norms.

Indigenous peoples in mainstream human rights law

As indicated above, Indigenous peoples' rights are presented mostly as collective rights, the basis for this position being found within the mainstream international

human rights treaties. Despite there being no mention of the notion of collective rights or the concept “Indigenous peoples” in the human rights treaties, the provisions of the treaties well present the collective component of individual rights applicable to Indigenous peoples. The two Covenants cited above – the ICCPR and the ICESCR – highlight the rights belonging to Indigenous peoples. Indigenous individuals in a given state, like all other citizens, are protected as to their enjoyment of all civil, political, economic, social and cultural rights. At the same time, some Indigenous rights are so unique that their protection requires special measures by states that take into account the collective nature of the rights. One example is the right to practice culture, which a group as a whole enjoys “in community with other” members in a given society. ICCPR article 27 describes the collective component of the rights to be enjoyed by a group. The article reads as follows:

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.

Indigenous peoples in most countries form minorities, clearly putting them under the protection regime of article 27 despite the lack of a clear mention of “Indigenous peoples” in the treaty itself. It is argued that the enjoyment of group rights, for example the right to culture, also requires special attention since the enjoyment of such rights is dependent on the right to self-determination found in common article 1 of the two Covenants. While Indigenous peoples’ right to self-determination is considered complicated in general international law, as distinct peoples they argue for a right to self-determination (of peoples) under the human rights framework, in particular as regards the rights to dispose of resources. Today it is clear that the concept of self-determination as understood in human rights law does not entail receiving statehood but rather pertains to the right of a “people”; a state may be composed of one or more peoples, which might include an Indigenous people. The Norwegian Constitution, for example, clearly declares that the country is composed of two peoples – the Norwegians and the Sámi.

The monitoring bodies of the two Covenants – the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) – have provided authoritative statements in the form of General Comments on how to interpret the treaty provisions. As mentioned, the treaties themselves do not clearly

refer to “Indigenous peoples”, but the General Comments do make specific reference to Indigenous peoples, their uniqueness and enjoyment of the collective component of rights, in particular in the practice of culture. Thus, in General Comment 23 (1994) on article 27 of the ICCPR,⁸ the HRC, while elaborating on the manifestation of culture, highlights that Indigenous culture includes a particular way of life associated with the use of land resources and traditional activities such as fishing and hunting. The HRC has also acknowledged that a state must ensure effective participation of these groups of peoples in the protection and promotion of rights guaranteed under the article. Similar references are found in General Comment 21 (2009) of the CESCR on article 15 (1) of the ICESCR concerning an individual’s right to exercise cultural rights.⁹ Moreover, in a number of communications interpreting article 27 (in response to complaints brought to the HRC) the Committee has referred to the collective component of Indigenous peoples’ rights.

In addition to the mainstream human rights treaties, referred to earlier, ILO Convention No. 169 (1989) is of great significance for Indigenous peoples. It is the only legally binding treaty addressing the rights of Indigenous peoples that recognizes the aspirations of the peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions in the states in which they live. The Convention provides for specific rights by which Indigenous peoples may develop their own institutions and take part in decision-making processes. At the same time, states ensure consultations with Indigenous peoples in the matters that concern them.

Indigenous peoples in environmental norm-building processes

The uniqueness of most Indigenous peoples is that they live in their traditional territory with strong links to nature. Their physical and cultural sustenance are connected to the surrounding natural environment. Most Indigenous peoples who inhabit their traditional territory are in one way or another engaged in nature-based livelihoods. They enjoy a spiritual, cultural and economic relationship with their traditional lands. This relationship is maintained by virtue of special customary norms that they uphold in their everyday life. These norms provide guidance in regard to their responsibility for preserving the integrity and sustainability of the environment,

⁸ The General Comment No. 23, The rights of minorities (article 27), (Fiftieth session, 1994), available at: https://slmc.uottawa.ca/?q=int_rights_un_comment.

⁹ General comment No. 21. Committee on Economic, Social and Cultural Rights Forty-third session, 2–20 November 2009. United Nations E/C.12/GC/21.

which they wish to leave for use by future generations. Ironically, however, the traditional lands on which these peoples live are in most cases rich in natural resources, and attract exploitation by their national governments, resulting in a tension when it comes to maintaining environmental sustainability. Indigenous peoples' knowledge on the environmental sustainability of their lands is today well recognized. International legal processes robustly recognize the stewardship role of Indigenous peoples in the sustainable management of their lands and natural resources.

As regards the knowledge held by Indigenous peoples, the foremost document -the one which has created the basis for modern international environmental law - is the UN Declaration on Environment and Development (the Rio Declaration of 1992), which proposes the following:

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.¹⁰

The recognition and value of Indigenous knowledge has been further integrated into international environmental legal instruments. The Convention on Biological Diversity (CBD), for example, recognizes the dependency of Indigenous and local communities on biological diversity and the unique role of Indigenous and local communities in conserving life on Earth. This recognition is found in the preamble as well as in article 8j of the Convention. Article 8j upholds states parties' commitment not only to respect, preserve and maintain the knowledge, innovations and practices of Indigenous peoples and local communities, but also to promote their wider application for the conservation of biological diversity. The article also highlights the requirement that approval of the knowledge holders must be received before the knowledge is used and that the benefits from that use must be shared.¹¹ In order to better implement the provisions of article 8j, the Conference of the Parties (CoP) established a working group on article 8j in 1998, at its fourth meeting. One of the results produced by the working group's efforts has been the adoption of the Akwé:

¹⁰ Principle 22 of the UN Declaration on Environment and Development (the Rio Declaration) of 1992. Available at:

<http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf>.

¹¹ See Article 8j of the Convention on Biological Diversity (1992). The text of the Convention is available at: <https://www.cbd.int/convention/text/>.

Kon Guidelines (2004) for the conduct of cultural, environmental and social impact assessments of proposed developments that will take place on or are likely to impact sacred sites and lands and waters traditionally occupied or used by Indigenous and local communities. Even though the Guidelines are not legally binding, countries such as Finland apply them to the Sámi homeland under section 4 of the Act on Metsähallitus (Forest Administration Authority). The guidelines provide for cooperation between Sámi stakeholders and authorities to ensure appropriate conditions for practicing Sámi culture.

UN Declaration on the Rights of Indigenous Peoples: building the guiding legal norms

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007, is a universal document setting forth all aspects of the rights of Indigenous peoples. The document was adopted almost unanimously. Four countries voted against it – Australia, Canada, New Zealand and the US – but later endorsed it. The Declaration emphasizes the collective nature of human rights and their links to the environment of the lands on which Indigenous peoples live. The Declaration also offers a rather concrete meaning of the right to self-determination that Indigenous peoples claim for themselves: participation in the process of decision making, as well as being subjects in the process of consultation and in giving consent concerning the matters that exclusively affect their lives, surrounding environment and their identity as a whole. The Declaration is not a legally binding document, however, but its importance is increasingly reflected in international jurisprudence in many ways, giving it the status of a guiding legal document. For example, the concept of self-determination reflected in the Declaration can be interpreted as guaranteeing the peoples' right to be informed, to be consulted and to have their consent required in decisions affecting them. The concept is connected to the so-called principle of “free, prior and informed consent (FPIC)” embodied in the Declaration in a number of provisions. The principle has been invoked in the relevant case law. In *Saramaka people v. Suriname*, for example, the Inter-American Court of Human Rights has referred to the Declaration, in particular its article 32, as a legal source.¹² Article 32 requires that states consult and cooperate with Indigenous peoples in order to obtain their free and prior consent for any projects affecting the peoples' lands, territories and other resources. In another

¹² Inter-American Court of Human Rights, Judgment of November 28, 2007, available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

instance, in 2009 the HRC in *Ángela Poma v. Peru* applied the principle of free, prior and informed consent for the first time.¹³

Participation of Indigenous peoples in other international legal processes

Today, Indigenous peoples, represented by their respective organizations both globally and regionally, participate in important forums where norm making takes places. The UN Environmental Assembly (UNEA), for example, is a recent addition. The Assembly was created under the auspices of the United Nations – in particular by the UN Environmental Programme (UNEP) – and meets once every two years with a view to promoting a healthy environment for both present and future generation. The Assembly, which represents the world’s highest-level decision-making body on the environment, recently (May 2016) concluded its second session, in Nairobi, Kenya, under the overarching theme of “Delivering on the environmental dimension of the 2030 Agenda for Sustainable Development”. As UNEP, in its coordinating environmental policies, recognizes the role of Indigenous peoples’ knowledge and their input in environmental management, it accepts Indigenous peoples as a major group of actors whose contribution is integrated into the management and promotion of environmental policy. Indigenous peoples also are well acknowledged in the process of norm building in the UN climate change regime. They participate in the negotiation process with observer status. They have established the International Indigenous Peoples’ Forum on Climate Change (IIPFCC), a joint Indigenous peoples’ caucus that coordinates Indigenous peoples’ efforts and activities related to the UNFCCC process. Their participation allows them to lobby the states parties to adopt a robust human rights approach and take into consideration Indigenous peoples’ special vulnerabilities to climate change impacts as well as their valuable contributions to climate change adaptation and mitigation strategies as reflected in the Paris Agreement. In sum, the influence of Indigenous peoples and enhanced recognition of their rights are increasingly reflected in international and regional governance structures. In this context the following section goes on describe the Arctic model of governance, in which Indigenous peoples are freely included as actors who partner with states in the decision-making processes.

¹³ The Human Rights Committee, Communication No. 1457 / 2006. Doc. CCPR/C/95/D/1457/2006 of 27 March 2009.

INDIGENOUS PEOPLES IN ARCTIC GOVERNANCE

The Arctic is a region surrounded by eight states, the countries that have formed the Arctic Council. The region as a whole is peripheral, comprising the northern parts of each of these countries, which in each state are governed from capitals in the south, outside the region. Accordingly, the regions have more in common with one another transnationally than with the southern parts of their respective countries. In addition to national regulations, the region is governed by overarching international regulations that apply elsewhere on the globe. However, given its uniqueness in terms of regional characteristics, the presence of diverse Indigenous peoples being one, the regional governance structure of the Arctic demands a more integrated approach that accommodates the participation of regional actors. The region is vulnerable to climate change; for example, the melting of sea ice is on the rise, resulting in environmental change. The effect of climate change on eco-system services, maintenance of the natural ecological balance, gradual loss of biodiversity, an increase in persistent organic pollutants, introduction of invasive species, and new forms of economic and human activities have led to adverse impacts on the human communities in the region. The Indigenous peoples who have lived in the Arctic for thousands of years have a rich knowledge on how to treat the surrounding environment, which they have maintained throughout the generations. This knowledge offers significant guidance on sustainable ecological processes, which are now increasingly jeopardized with the rapid transformation of the region and expansion of globalization.

The governance model of the Arctic has been regarded as an innovative approach in that it integrates Indigenous peoples, a rather unknown arrangement in international law. The structural model of the Arctic Council – the primary body having all the Arctic states on board – incorporates three sets of actors: members (the Arctic states); permanent participants (Indigenous peoples' organizations); and observers (both non-Arctic states and other non-state actors). Of these three groups only the first two – members and permanent participants – sit together in the decision-making process. Decision-making within the framework of the Arctic Council mainly occurs at the ministerial meeting held every second year. However, the Council works through six working groups in which both members and permanent participants engage in a clear partnership in shaping decisions. It is also important to mention that the observers, who include non-Arctic states, do not possess any real power to directly influence the decision-making. This arrangement has led some scholars to argue that within the Arctic Council Indigenous peoples, as permanent participants, possess more power

than some of the state actors, for example the non-Arctic states. This is indeed unique.¹⁴ However, it has to be noted that the Arctic Council is not an inter-governmental organization having the legal status of an international organization and hence failing to fulfil the criterion for becoming a formal subject of international law. Moreover, the role of Indigenous peoples in decision-making does not go beyond the traditional state-centric approach given that the permanent participants are not entitled to vote in the Council's decision making; only state representatives have that right. Yet, it should be highlighted that in practice no decisions are taken without properly consulting the permanent participants, and without giving them the chance to voice their opinions since any decisions taken for the Arctic may have an effect on these peoples. Also worthy of note is that the two legally binding agreements adopted under the auspices of the Arctic Council – the Search and Rescue Agreement and the Oil Spills Agreement – reflect specific cases in which Indigenous voices have been accommodated.

The structure of the Barents Euro-Arctic Council (BEAC) – the inter-governmental body focusing on the European Arctic region – has also given a clear role to Indigenous peoples. While the BEAC, unlike the Arctic Council, does not offer Indigenous peoples any particular status (such as permanent participant), it clearly gives them an explicit role: it regards them as an independent sub-organ – the working group of Indigenous peoples (WGIP) – and at the same time integrates them into joint working groups on several of the issue-areas that the BEAC addresses. Like the Arctic Council, the BEAC is not a body capable of adopting binding law; rather, the aim of the organization is to promote cooperation with a clear focus on regional governance of the environment, human health, culture, education, energy, youth issues and tourism; Indigenous peoples participate in both shaping the agenda and making the decisions.¹⁵

One other important example of the role of Indigenous peoples in norm building is their participation in the international law-making process. Following the establishment of three Sámi Parliaments in the three Nordic countries in the mid-1990s, work began on drafting the Nordic Sámi Convention. A six-member expert group, with vice-members, was formed to prepare the draft text of the Convention, with two

¹⁴ See in Koivurova, T. (2008). Alternatives for an Arctic Treaty – Evaluation and a New Proposal. *Review of European Community & International Environmental Law* vol.17 (1), 14–26.

¹⁵ See. Barents Euro-Arctic Council. Available at: http://www.barentsinfo.fi/beac/docs/459_doc_KirkenesDeclaration.pdf.

representatives from each of the three countries. Interestingly, the two consisted of a government representative (designated by the country's Ministry of Foreign Affairs) and a Sámi representative (designated by the respective Sámi Parliament), hence ensuring equal representation of both state and Sámi authorities.¹⁶ Following a long process of negotiation on the draft text, the Convention is now in its final stages, awaiting adoption by the three states – Finland, Norway and Sweden. The Convention represents a clear case where both states and the Sámi as an Indigenous people have acted as partners to create legal rules in a process that will probably signal a broader role for Indigenous peoples in the future development of norm making under international law.

CONCLUSION

International law is still state-centric: the state is the primary actor in making legal rules in the international sphere. However, as discussed in this article, over the years Indigenous peoples have gained some recognition as unique actors, in particular within the framework of human rights law. They have a pre-historic presence on the lands which they inhabit; they observe some sort of customary norms traditionally developed and generated from their ancestors; their relationship with the surrounding environment is unique as in most cases they rely on nature-based livelihood practices; and they intend to preserve their culture- and nature-based identity, which they have maintained for many generations. These aspects of their way of life make them distinct, and this distinctness has been acknowledged in many other international processes, such as that associated with the CBD. Yet, despite Indigenous peoples being represented by their respective organizations both nationally and internationally, it is difficult to find a place for them in any formal international norm-building process. As sub-state actors, Indigenous peoples receive legitimacy for their actions within a state. By granting specific authority to Indigenous peoples, and by including them in national, regional and international processes where the processes relate to Indigenous concerns, states may accommodate Indigenous voices. The processes taking place in the Arctic serve as a model of regional governance in this regard. Prominent examples are the inclusion of Indigenous peoples in the operation of the Arctic Council and the BEAC as well as in the adoption of the Nordic Sámi Convention. Integrating Indigenous voices this way can ensure democratic practices in the creation of

¹⁶ See Koivurova, T. (2006-7). The Draft for a Nordic Saami Convention. *European Yearbook of Minority Issues* Vol 6, pp. 103-136.

international norms without challenging the state-centric approach to international law making.