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The participation of indigenous peoples in international norm-making in the Arctic

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ABSTRACT Indigenous peoples regularly regard international law as a very important tool for the advancement of their political goals. This is most likely because in many nation-states their opportunities for influencing political development are rather limited. Even though international law seems to be an important means for indigenous peoples to advance their goals, these peoples should be aware of its inherent limitations. One such shortcoming is that international law seriously restricts indigenous peoples' opportunities to participate in the international law-making processes; that is treaty and customary law. The contention in this article is that the recent norm-making method of soft law provides indigenous peoples with a better opportunity for influential participation than is afforded them by traditional methods. If these peoples are to benefit from this opportunity, however, we must realise the revolutionary potential of the concept: a potential that is suffocated if the concept is understood only from the perspective of international law. A good example of indigenous peoples gaining a better standing in inter-governmental co-operation is the Arctic Council, which based its work on the soft-law approach from the outset. There would seem to be good prospects for adopting the Arctic Council's approach in other regions of the world in order to improve indigenous peoples' international representational status.

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Introduction

Indigenous peoples regularly regard international law as a very important tool for the advancement of their political goals. This is most likely because in many nation-states their opportunities for influencing political development are rather limited. In this light, it would seem to be a worthwhile strategy for them to try to influence the development of international law, which has the authority to impose legal obligations on all states (customary law) or states party to an international treaty. As many of the problems of today can be solved only at the global or regional level, indigenous peoples are also quite naturally interested in gaining access to the international treaty-making processes. In the case of many global and regional problems, be these associated with economic globalisation or the environment, indigenous peoples find themselves the recipients of developments that take place outside their sphere of influence.

In the Arctic, a region distant from where these developments originate, indigenous peoples suffer from various economic, social and environmental problems of a global and regional nature. Global environmental problems are a particular cause of concern, because the Arctic and its ecosystems are vulnerable when it comes to human-induced pollution. Some of the worst global environmental problems, for example persistent organic pollutants (POPs), ozone depletion and the greenhouse effect, pose serious threats particularly in the Arctic, which has not contributed to their existence. (Arctic Monitoring and Assessment Programme 2003; 2004). Therefore, it is not surprising that the Arctic indigenous peoples have been active in international environmental negotiation processes, in particular the making of the 2001 Stockholm POPs Convention but increasingly also with regard to the climate change regime (Flöjt 2003: 359–374; Watt-Cloutier 2001).

Even though international law seems to be an important means for indigenous peoples to advance their goals, we would argue that they should be aware of its inherent limitations. One such shortcoming, and the focus of this article, is that international law seriously restricts indigenous peoples' opportunities to participate in the international law-making processes, those of treaty and customary law. Our contention here will be that the recent norm-making method of soft law in fact provides indigenous peoples with a better opportunity for influential participation than is afforded to them by traditional methods.¹ If indigenous peoples, which already

have often resorted to soft law, are to benefit from this opportunity, we must realise the revolutionary potential of the concept, a potential often totally forgotten. A good example of indigenous peoples gaining a better standing in inter-governmental co-operation is the Arctic Council, which based its work on the soft law approach from the outset. There would seem to be good prospects for adopting the Arctic Council's approach in other regions of the world in order to improve indigenous peoples' international representational status.

Who can participate in the making of international law?

International legal rules and principles are created in two ways (Cassese 2005: 193–194).² In the first, customary law, norms are created when states develop a certain custom that gradually becomes seen as legally required. These norms can be general in nature, legally obligating all the states of the world, or regional in application, requiring certain behaviour within a particular area. The second source of norms is international treaties, which obligate only those states that are parties to them. In both cases, it is states that create the norms, reflecting the close connection between the norm-making process and the principle of state sovereignty. This is the basic premise of international law: since states are sovereign, they can only be legally bound by norms to which they voluntarily consent, either implicitly (customary law) or explicitly (treaties).

In international law, the doctrine of subjects (or legal persons) determines who may bear rights and obligations. Traditionally, the doctrine has been rather clear: states are the subjects of international law. Yet, increasingly, arguments have been put forward that new legal persons have come into existence. For example, organisations of states (inter-governmental organisations, IGOs) can acquire the status of a legal person in international law (International Court of Justice 1949), but developments seem to have gone even further than this.

The doctrine as described in standard modern textbooks celebrates the fact that today international law contains an extensive number of obligations and rights that pertain to entities other than states, e.g., individuals, indigenous peoples, liberation movements, and companies (Malanczuk 1997). What the textbooks often fail to reveal, however, is that while these actors may have legal rights and obligations in international law, for example, where a treaty accords a human right to an individual, they cannot participate in the making of legal norms. In this respect, not much has changed: it is primarily states that are capable of creating international legal norms.

Might this situation change as new actors increasingly influence the international law-making processes? It is nowadays commonplace to say that the principle of sovereignty of states is in decline, the argument being that nation-states cannot exercise their freedom with the host of legal obligations that constrain their actions in almost all policy areas. Indeed, we might argue that the basic principle of international law, state sovereignty, is changing, a development that should be reflected in the question of who can participate in the international law-making process.

Although international law regards the principle of state sovereignty as a principle of customary law, and thus one that can change over time through the regular customary law process, it must be acknowledged that any change will be very slow, for the principle forms one of the building blocks of international society as we know it today. Indeed, international lawyers have sought to define the principle as a quasi-constitutional one, trying to capture the difference between deep, or constitutional, principles of international law and normal regulatory principles, which come and go with changes in the international political agenda (see Schrijver 1997: 1–3). Scholars of international relations have noted the resilience of the principle of state sovereignty, although many consider it a principle that should have passed into history (Holsti 2004: 28–72). It seems fairly clear that we cannot anticipate any rapid improvements in this respect in the foreseeable future.

On balance, it would seem that international law is not too promising an avenue for indigenous peoples, at least when it comes to participating in international law-making processes. Indigenous peoples do not constitute states. Few in fact have ambitions of statehood, with most working to establish some form of self-governance within existing nation-states. Without state status, however, indigenous peoples are excluded from international law-making processes. They are regularly categorised as non-governmental organisations (NGOs) along with the other groups participating in the international policy-making process, and have only very limited rights to participate in that process. This binary structure of representation leads to unjust and bizarre outcomes, with industrial and environmental associations put on the same footing as indigenous peoples.

It would seem fair to distinguish between indigenous peoples and other groups when it comes to representation in international law: if nothing else, indigenous peoples' organisations represent peoples, not interest-based constituencies such as the members of environmental organisations. On the other hand, indigenous peoples are not as yet perceived as being equal in status to peoples of recognised states but, rather, as possessing a measure of self-government within existing states. This intermediate position representing peoples, but within existing states, should be reflected in indigenous peoples' status in international treaty-making. One might well enquire concerning the kind of self-determination rights the present system of international law accords to indigenous peoples. It seems self-evident that the more rights of self-governance indigenous peoples possess, the more influence they should have in international treaty making.

In fact, indigenous peoples are the only general category of peoples that have demanded self-determination and to whom certain distinct collective rights have been accorded in international law (Kingsbury 2003: 211–254; International Labour Organisation 1989).³ This has also brought about an international movement of indigenous peoples, which was largely behind the push towards trying to adopt a declaration on the rights of indigenous peoples in the United Nations. In the words of the Draft United Nations Declaration on the Rights of Indigenous Peoples: ‘Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’ (United Nations High Commissioner for Human Rights 1994–95).⁴

State practice still varies as to what the status of indigenous peoples is in international law (Wiessner 2003).⁵ One emergent view has been that indigenous peoples do have a right to self-determination but not in the sense in which that concept was understood in the colonial context. The right to self-determination is seen as granting indigenous peoples internal self-determination, the right to determine their future within the existing nation-states, not the right to secede from existing nation-states. There is still disagreement as to which areas of policy are parts of the right to internal self-determination of indigenous peoples. At the moment, most international legal scholars are of the opinion that ‘soft’ areas of policy, such as cultural issues, are already part of the valid principle of internal self-determination, whereas ‘hard’ areas, such as land ownership and taxation, are not.⁶

The problem is that even though we might conclude that indigenous peoples should gain an improved status from their self-governance rights in international treaty-making, this has not happened in practice: indigenous peoples are regularly categorised as NGOs. Moreover, even though some soft and hard law instruments provide in quite straightforward terms that indigenous peoples should be entitled to participate in decision-making at all levels affecting them, this does not hold true at the international level.⁷

There is a clear movement towards internal self-determination in the Arctic: indigenous peoples in the region primarily strive for some sort of self-governance within existing states rather than attempting to secede from states. The only self-governance arrangement in which an indigenous people has occasionally expressed a desire for independence is that of the Inuit in Greenland. Two basic internal self-governance models that have been used in the Arctic are public government models, which give all the residents of a northern region a degree of self-government (for example, Nunavut and Greenland), and self-government based on indigenous membership only (for example, native tribal governments in Alaska) (Arctic Human Development Report 2004: chapters 5, 6). However, even the most ambitious internal self-governance structures in the Arctic, for example, Nunavut in Canada, cannot overcome the threat posed by global environmental and other problems reaching the Arctic: while an Arctic indigenous people may control local policy, it does not have competence in international affairs, the level of decision-making where global problems are managed (Heinämäki 2004: 240).⁸

Soft law as a new way of making international norms

Over the course of some 30 years, a new method of creating international norms, known as soft law, has seemingly become institutionalised in international society. The term refers to processes by which actors try to create norms, although the outcome of those processes is not a legally binding international treaty. Good examples are declarations and action programmes, which often contain very broad and vague normative guidance.⁹ There is no consensus as to whether soft law is accepted in international law as one of the sources of that law, and there is serious disagreement regarding the extent to which soft law norms are binding (Weil 1983; Klabbbers 1996; Chinkin 2000). Nevertheless, it seems that the method is now commonly used in international co-operation. The participants in this co-operation realise that while the norms adopted are not legally binding, they are binding in at least some manner.

Most scholars of international law understand soft law as referring to normative instruments adopted by states but without the intention of creating internationally legally binding norms. Soft law instruments and norms are thus understood as non-binding in international law but binding in some other manner, for instance, politically. They are mostly seen as the first step in the development of a norm that will, in time, mature into hard law, that is, treaty law or customary law (Shelton 2000). Yet, in our view there is more to the concept of soft law than merely the present consensus that it is non-binding in international law but binding in some other manner. The concept in fact contains the seeds of revolutionary change. Whether these take root is of course a matter that will be determined by general political developments, but the concept as such does have this potential.

Where is the revolutionary potential in soft law? Even though soft law is a hotly contested issue in international law, consensus is emerging as to its basic contents:

1. There is a means in international society (soft law) to create norms that are non-binding in international law.
2. These norms are binding in some other manner than they are in international law; politically, morally, or softly.

Together, these two basic elements, which seem to have been accepted, provide international society with a radically new method of norm-making. With the idea of soft law now institutionalised, there exists a norm-making procedure, at least in the minds of non-lawyers, that is not dependent on international law and its state-

based structures. (This does not hold true for international lawyers, who consider soft law instruments to be part of the operation of the international legal order.)

When an international treaty-making process is set in motion, numerous rules come into play. The customary law of treaties sets out rules as to who is competent to participate in the process (states and, in some cases, IGOs), what kinds of rights states have during the process, what their obligations are, where the treaty is silent on certain matters, and the like. The customary law of treaties, which for the most part is codified in the 1969 Vienna Convention on the Law of Treaties, is very much built on the deep principles of international law, that is, state sovereignty and the formal equality of states.¹⁰ It is also important to note that in some states the constitution requires at least some consultation with the national parliament before a treaty is signed and some form of approval by the parliament before it can be ratified. The treaty process is thus very much connected with the workings of the national legal systems of the states that are negotiating a treaty, making the conclusion of international treaties increasingly complicated and at the same time increasing the temptation to use soft-law instruments in international norm-making.

Clearly, if international actors set out to create something that will not be a treaty, for example a soft law instrument or a soft law organisation, the customary law of treaties will not provide them with any regulatory guidance. By the same token, the constitutional law of the participating states will not apply, and thus will not complicate the process. Herein lies the revolutionary nature of soft law:

1. If the norm-making process starts with the idea that the entire process operates outside of international law because it is non-legally binding, the possibility arises of expanding the range of participants in that co-operation (see Reinicke and Witte 2000);
2. Precisely because soft law is still considered to be binding in some other manner, it is an authoritative norm-making procedure that empowers non-state actors to take part in important regulatory activity in international society. (Koivurova 2002a)

The soft law method would seem to offer indigenous peoples more opportunities to influence the development of international norms than do the traditional law-making methods of international law. They would at least be able to participate in the international norm-making process with a status other than that of regular NGO, which carries very limited rights of influence. It is important to bear in mind that even though indigenous peoples are treated as NGOs in regular soft law making processes, the exception being the Arctic Council, as explained below, they have at least a better chance of participating with a status different from that given them in treaty-making processes.

An interesting example in this regard is the Arctic-wide co-operation process that started with the signing in 1991 of the Declaration on the Protection of the Arctic Environment and the Arctic Environmental Protection Strategy (AEPS) by the eight states of the region (the five Nordic states, Canada, the United States and the Russian Federation) (Arctic Council website: <<http://www.arctic-council.org/en/main/infopage/6>; also see Rothwell 1996: 221–257; Koivurova 2002b: 69–94). In this first phase of co-operation, generally referred to as AEPS co-operation, the framework organisations of the Arctic indigenous peoples were entitled to some position, as provided in the AEPS: ‘In order to facilitate the participation of Arctic indigenous peoples the following organizations will be invited as observers: the Inuit Circumpolar Conference, the Nordic Saami Council and the U.S.S.R. Association of Small Peoples of the North.’¹¹

Yet, it was the establishment of the Arctic Council in 1996 that really clarified and enhanced the status of the Arctic indigenous peoples. The first paragraph of the founding declaration of the Council, which was to continue AEPS co-operation, provides: ‘The Arctic Council is established as a high level forum to: provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.’

In contrast to earlier policy, in which indigenous peoples’ organisations participated as observers, the Declaration created the new category of permanent participant. Paragraph 2 provides: ‘The Inuit Circumpolar Conference, the Saami Council and the Association of Indigenous Minorities in the Far North, Siberia, the Far East of the Russian Federation are Permanent Participants in the Arctic Council. Permanent participation is equally open to other Arctic organizations of indigenous peoples with majority Arctic indigenous constituency.’¹²

It was also very important that the category of permanent participant was distinguished from that of observer, defined in paragraph 3 of the Declaration, and that it was created ‘to provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council.’ (Arctic Council 1996).

Hence, even though the eight Arctic states are the members proper of the Council, framework organisations of Arctic indigenous peoples have been given an unprecedented status in its work: they are permanent participants, which negotiate at the same table with the Arctic states and may table proposals for decision (Arctic Council 1998). Even though final decisions are made by the Arctic states in consensus, the permanent participants must, according to the Declaration, be fully consulted, which is close to a *de facto* power of veto should they all reject a particular proposal.

From its inception, the Arctic states have not formalised the co-operation through an international treaty.¹³ AEPS co-operation began with the signing of the Declaration and Strategy, and the Arctic Council was established through a signed declaration. Various views have been presented as to the legal status of the Arctic Council, the most common being that it is a soft law organisation operating outside international law (Bloom 1999: 712–722). Even though no one seems to be able to determine what it means in practical terms that the Council is a soft law organisation, it appears that the current consensus among both scholars and the participants in the co-operation is to treat the Council as such an organisation (Koivurova 2002b: 69–94). It is hard to see how the framework organisations of Arctic indigenous peoples could have gained such an influential position if a treaty had been concluded.¹⁴

Well into the final moments of the negotiations on the future form of the Arctic Council, the status of indigenous peoples as permanent participants was threatened, particularly by the United States. As Scrivener (1999: 54) observes:

Concern about the potential emasculation of the permanent participant category was heightened by the request of the Northern Forum and SCPAR that their future observer roles in the Council be given an element of ‘permanency’. It was also fuelled by a US suggestion that a special category of observers might be appropriate for certain non-Arctic states active in the region — for example, the UK — distinct from other observers, such as international organisations and nongovernmental groups. The permanent participant issue was partially resolved in the Council Declaration by confirming the status of the existing three IPO’s...However, during the subsequent debate over the Council’s rules of procedure there were signs that the US still preferred to equate the permanent participants with observers.¹⁵

Problems and possibilities

Even though the soft law method contains the potential outlined above, one should bear in mind that if international law and lawyers can dictate how this norm-making method is to be understood, not much will change. In international law, the mainstream understanding considers soft law instruments and forms of co-operation as things waiting to become hard law, that is treaty law or customary law. In other words, soft law is only the first step, and it is only when soft law rules and principles become accepted in international treaties that they have their true impact. In addition, and importantly, international law and lawyers normally consider only state-driven instruments and co-operation processes to be examples of soft law: even now there are various scholarly proposals to apply the customary law of treaties by analogy to soft law instruments (Hilgenberg 1999). The revolutionary possibilities of soft law are stifled quite easily in the hands of international lawyers, who are part of an age-old intellectual tradition that has sheltered the state-based paradigm of international society.

It is important to recognise the power of institutionalised traditions of thought, such as international law, in the conduct of international relations. The power of international law in international relations is many times mistakenly thought of in terms of how the specific behavioural rules of international law are observed. Yet, international law plays a more influential role in the way it defines the basic rules of the game: who the basic actors in international society are (the criteria for becoming a state, sovereignty of states), what their relationship is to each other (for example non-interference in internal affairs of other states) and in what ways competent international actors (states and their organisations) may create legally binding rules (international treaties and customary law). It is this structure that exerts enormous influence on how we conceive of international politics and who can take part in it.¹⁶

Since the mainstream of international law, in contrast to certain of its specialised fields,¹⁷ protects the existence of international society based primarily on states and their organisations, it is clear that the revolutionary potential of soft law will not materialise easily. Then again, it is important to remember that everything changes. According to basic social constructivist thinking, international society re-creates itself every time the old structure is confirmed in an individual act, for example, when states conclude an international treaty. But it is also possible for the actors in international society to create new ways of interacting which, in time, may challenge the structures in that society today (Onuf 1994). This might happen with the increasing use of soft-law instruments that involve parties other than states as members.

Even though the soft law method can be interpreted, as international lawyers do, in a very constraining manner, it does have the potential to revolutionise how international norms are made, that is, who creates them and under what basic rules. In each situation where the actors in international society are aware that soft law is being created, there is a chance that they will come up with innovative ways to structure the co-operation. For example, it is always possible that indigenous peoples will be able to participate with a status other than that of NGO but in the current international law-making process, this is very unlikely.¹⁸

The Arctic Council, with its unique model of participation, could well serve as a new model enabling indigenous peoples to find a more reasonable status than that of NGO. At present, indigenous peoples are increasingly seen as the only distinct category of peoples other than nation-states that are entitled to self-determination. However, as mentioned above, this right does not as yet extend to a full right to secede from an existing state; rather, indigenous peoples are entitled to govern their own affairs within states. Nevertheless, self-determination should grant indigenous peoples a better status in international policy-making, given that they

have no control over global problems via national and local self-governance structures. Here, the soft law model of the Arctic Council might lead the way, as it does not equate indigenous peoples with NGOs or states but gives them a kind of intermediate position with permanent participant status but no formal decision-making power. As the work of the Arctic Council is based on soft law, states could be more willing than if its work was based on hard law to grant the indigenous peoples a status that better reflects their status nationally.

The indigenous peoples' movement has in fact explicitly referred to the Arctic Council as a model that could be used in other regions of the world. In preparation for the 2002 World Summit on Sustainable Development (WSSD), the Indigenous Peoples' Caucus Statement for the Multi-Stakeholder Dialogue on Governance, Partnerships and Capacity-Building promoted sustainable development governance at all levels, in particular: 'models for Environmental and Sustainable Development Governance, such as the Arctic Council which incorporate principles of genuine partnership between States and Indigenous Peoples, ecosystem approaches, collaboration between scientific and traditional knowledge, and local, national and regional implementation plans' (Indigenous Peoples' Caucus Statement for the Multi-Stakeholder Dialogue on Governance, Partnerships and Capacity-Building 2002).

If the Arctic Council model were increasingly used, it would, according to constructivist thinking, in time challenge the traditional rules of who can participate in the making of international law and with what status. It might challenge the current anomaly that indigenous peoples participate as NGOs to international treaty-making processes and thus possibly accommodate indigenous peoples as peoples with more powers than NGOs but fewer than states. In this way, the structures of international law could be adapted to provide a more nuanced solution to the problem of international representation of indigenous peoples.

Notes

1. Thus far, this new soft method of law-making has been most prominent in environmental issues and the sustainable development processes.
2. According to the accepted doctrine of sources in international law, which is codified in Article 38 of the Statute of the International Court of Justice, there is also a third source, that is, 'the general principles of law recognized by civilized nations', which has caused considerable disagreement. The principles are more properly seen as a source that can be used by international courts when resolving disputes where no treaty or customary law norms can be applied.
3. Evidently, there are also minority groups within the existing states that pursue self-governance, even independence, but in legal terms it is only indigenous peoples that have gained increasing recognition of their collective rights. It is thus no wonder that many minority groups have started to define themselves as indigenous peoples, especially because there is no clear consensus on which peoples can be treated as indigenous peoples in international law. On the other hand, the core of what constitutes an indigenous people is clear, with all the Arctic indigenous peoples, for instance, clearly belonging to this category.
4. The process of completing the draft has been a protracted one. In 1982, the United Nations Economic and Social Council (UNESCO) established a working group on indigenous populations charged with the task of drafting a universal declaration on the rights of indigenous populations. The working group agreed on a draft declaration in 1993, coinciding with the UN International Year of the World's Indigenous People. The draft was quite advanced in content, probably because it had been written primarily by experts and indigenous peoples. It accorded extensive internal self-determination to indigenous peoples, which would have had a strong impact on the rights of indigenous peoples. Unfortunately, when the document was forwarded to the Commission on Human Rights, before the state representatives, the agreement broke down; as yet there is no agreed text to be dealt with by the United Nations General Assembly. The Assembly requested that the declaration be ready by the end of the UN Decade of the World's Indigenous People, that is, by the end of 2004, but no consensus could be reached on the issue. The mandate of the working group under the Commission on Rights trying to complete the draft was continued, and its work continues.
5. Kingsbury (2005: 69–110) identifies five competing conceptual structures by which various states deal with their indigenous peoples: human rights and non-discrimination claims; minority claims; self-determination claims; historical sovereignty claims; and claims as indigenous peoples, including claims based on treaties or other agreements between indigenous peoples and states.
6. On the other hand, there are examples of self-government agreements between a state and an indigenous people under which the people in question have been granted quite extensive powers pertaining to taxation, for example, many Yukon first nations in Canada. For the Yukon First Nations Umbrella Final Agreement and self-government agreements of individual first nations, see Umbrella Final Agreement c.1993. Environmental issues, on the other hand, can be seen as falling into the 'soft area of politics' and are dealt with in internal self-government agreements. Provisions concerning the use, management and protection of the environment mostly refer to particular lands where indigenous peoples have been granted certain rights. However, as mentioned in the Introduction, many important environmental questions are often managed by global or regional governance regimes. Participation by indigenous peoples in international negotiations can be seen as an external element of self-determination (Henriksen 2001: 10) and as thus falling into the 'hard' area of politics. This important fact appears to have been forgotten almost totally in the discussion of self-government, nor has it found a place in self-government agreements.

7. The Draft United Nations Declaration on the Rights of Indigenous Peoples contains a provision, Article 19, which can be interpreted as entitling indigenous peoples to participate in international management: 'Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions'. See also the 'international treaty' that indigenous peoples have negotiated themselves (International Covenant on the Rights of Indigenous Nations 1994), para. 17 of which provides: 'Indigenous Nations have the right to participate fully at all levels of decision-making in matters which may affect their rights, lives or destinies by direct popular participation or through representatives chosen by themselves in accordance with their own customs'. Articles 6 and 7 of the International Labour Organisation Convention on Indigenous and Tribal Peoples in Independent Countries can be interpreted as providing similar rights of participation (International Labour Organisation 1989).
8. With regard to Nunavut, it should be pointed out that the Nunavut Agreement contains a provision giving the Inuit at least a limited role in international environmental issues. It prescribes: 'the Government of Canada shall include Inuit representation in discussions leading to the formulation of government position in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area, which discussions shall extend beyond those discussions generally available to non-governmental organizations' (Nunavut Agreement 1992).
9. On the other hand, as pointed out by Shelton, in some cases soft-law norms can have a very detailed and specific normative content that is 'harder' than the soft commitments in treaties (Shelton 2000: 4). Furthermore, the perceived softness or non-binding nature of the instrument sometimes allows the parties to move into more detailed regulation in a speedier fashion.
10. The customary law of treaties protects the equality of all states, big or small, by according each and every one the power to decide whether it will participate in a treaty-making process, whether it will sign the outcome of the negotiations, and whether it will ultimately ratify the treaty.
11. See page 42 of the Arctic Environmental Protection Strategy. Three organisations have since been accepted as permanent participants in the work of the Arctic Council: the Aleut International Association, the Gwich'in Council International, and the Arctic Athabaskan Council.
12. More specific rules are laid out that define the selection criteria for the indigenous peoples' organisations referred to in paragraph 2. In order to be eligible to become a permanent participant, an organisation must be 'representing: a. single indigenous people resident in more than one Arctic State; or b. more than one Arctic indigenous people resident in a single Arctic State'. In addition, according to the same paragraph, the determination that such an organisation has met this criterion is to be made by a decision of the Council. At any given time, the number of permanent participants should be fewer than the number of members in the Council, that is, eight. Currently, there are six framework organisations of Arctic indigenous peoples that have the status of permanent participant.
13. There have been some recent challenges by the observers to the Arctic Council as to its soft-law nature. The World Conservation Union (IUCN) has studied whether it would be possible to draw lessons from the other polar regime, the Antarctic Treaty System (ATS). On the basis of Nowlan's study, the IUCN convened an expert meeting in 2004 to consider whether the ATS could provide the needed input for the development of environmental protection in the Arctic, and also whether the Arctic co-operation should be formalised. The expert meeting was divided over the way environmental protection should and could be developed. The main approach to Arctic governance identified at the meeting was not to borrow from the Antarctic experience but to study which environmental protection issues should be addressed at which level, that is, universal (global treaties and processes), regional (the Arctic Council), bilateral, national, and sub-national (Nowlan 2001; Smith 2004).
14. It should be emphasised, however, that this is not due to constraints laid down by the customary law of treaties. According to that body of law, states would have been perfectly free to create a treaty permitting the participation of indigenous peoples as permanent participants who must be consulted before actual decision-making by the member states. The biggest obstacle to establishing participation rights for indigenous peoples in a treaty would have arisen from the factual setting. When an international treaty is concluded, different officials are involved than when a soft-law instrument is created. Foreign ministries and their legal offices would have been involved, and their views would in all likelihood have resulted in indigenous peoples' being given the status they normally have in international treaties, that of NGO. Another possible obstacle would have been the involvement of national parliaments, which might also have challenged the position of indigenous peoples.
15. Scrivener continues: 'Canada and the ICC were quick to notice the extent to which the early US drafts of the rules of procedure, while correctly emphasising the intergovernmental nature of the Council, intentionally clawed back the advantages of the permanent participants relative to the status in the Council of Observers, in essence equating the former with the latter. With the exception of Russia, the other Arctic states supported Canada in re-asserting the 'specialness' of the permanent participants and their right to be fully consulted before the member governments reach collective decisions' (Scrivener 1999: 56).
16. For an interesting argument that international law is the prime ideology of the international political system, see Scott (1994).

17. The specialised fields of international law, such as the developing law relating to indigenous peoples, tend to view the classical system of international law critically; see, for example, Anaya (1996).
18. Another way in which the indigenous peoples have tried to achieve a better status in international law and politics is legal action against states, exemplified by the possible Inuit Circumpolar Conference human rights petition against the United States (Heinämäki and Koivurova 2005). An even more radical method employed by indigenous peoples is to conclude international 'treaties' among themselves. After 17 years of discussions, meetings and negotiations, the Covenant on the Rights of Indigenous Nations was initialled in Geneva, Switzerland, on 28 July 1994 by representatives of indigenous nations only. By virtue of this agreement, the new International Covenant would remain open for ratification, for at least the twelve months from the date of the agreement, by the world's more than 5000 indigenous nations. However, it seems that this 'international treaty' between indigenous peoples has not been received with much enthusiasm, and it is likely to remain a pioneering initiative with potential impact in the distant future (International Covenant on the Rights of Indigenous Nations 1994).

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