Indigenous Rights and the Environment: Evolving International Law

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This paper explores the relationship between indigenous peoples' rights in international law and international environmental law. Two models underlie the protection of indigenous environmental rights. A "cultural integrity" model recognizes indigenous peoples' environmental rights as a corollary to the protection and preservation of indigenous culture. In the alternative "self-determination" model, indigenous peoples' environmental rights flow from their recognition as distinct communities with an inherent degree of autonomy and control over their own development.

Both models have the potential to transform international environmental law. Recognition of indigenous peoples' rights allows principles of international environmental law to pierce the veil of state sovereignty. The cultural integrity model offers the potential to broaden the legal framework of international environmental law through the inclusion of human rights instruments. The self-determination model may lead to indigenous peoples' independent participation in international agreements addressing environmental concerns. There is a crucial difference between the models.

The cultural integrity model incorporates a connection between indigenous rights and sustainable environmental management while the self-determination model is based on indigenous peoples' right to choose their own environmental policy. There is no inherent relationship between recognition of indigenous rights and sustainable environmental management in the latter model. The implications for international environmental law are more uncertain.

Cet article examine le lien entre les droits des peuples autochtones en matière du droit international et du droit international de l'environnement. Deux modèles servent de fondement à la protection des droits environnementaux des autochtones. Le modèle de « l'intégrité culturelle » reconnaît les droits environnementaux des peuples autochtones comme un corollaire de la protection et de la préservation de la culture autochtone. Par contre, selon le modèle de l'« autodétermination », les droits environnementaux des peuples autochtones découlent de la reconnaissance de ces peuples en tant que communautés distinctes jouissant d'un degré inhérent d'autonomie et de contrôle sur leur propre développement.

Ces deux modèles ont le potentiel de transformer le droit international de l'environnement. La reconnaissance des droits des peuples autochtones favorise la percée du voile de la souveraineté étatique par les principes du droit international de l'environnement. Le modèle de l'intégrité culturelle ouvre la voie à l'élargissement du cadre juridique en droit international de l'environnement de façon à inclure les instruments pour la protection des droits humains. Le modèle de l'autodétermination pourrait mener à la participation indépendante des peuples autochtones aux accords internationaux relatifs aux préoccupations environnementales. Il existe une différence importante entre ces deux modèles.

Le modèle de l'intégrité culturelle fait la connexion entre les droits autochtones et la gestion durable de l'environnement alors que le modèle de l'autodétermination est fondé sur le droit des peuples autochtones de choisir leurs propres politiques en matière d'environnement. Ce dernier modèle n'établit pas de lien inhérent entre les droits de peuples autochtones et la gestion durable de l'environnement comme dans le premier cas. Les répercussions pour le droit international de l'environnement sont plus incertaines.

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I. Introduction

RECENT YEARS HAVE WITNESSED the emergence of indigenous peoples, both as a focal point in international law and as participants in the international arena.[1] At the United Nations (UN), indigenous peoples have gone from being an object of study[2] to active participants in the process of developing

1. Although this paper deals with the rights of indigenous peoples, I do not attempt to construct or apply a single definition. In part this reflects the practical reality that the instruments considered do not share any common approach to defining indigenous peoples. See *International Labor Organization: Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, reprinted in 28 I.L.M. 1382 (1989) [*ILO 169*], which applies to peoples whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions. *ILO 169* also applies to peoples regarded as indigenous on account of their descent from the populations that inhabited a country at the time of conquest or colonization who retain some or all of their own social, economic, cultural and political institutions. Self-identification of a group as indigenous or tribal is regarded as a fundamental criterion. See *ILO 169, supra* at 1382-3 (art. 1). The *UN Draft Declaration, infra* note 3 is the key UN document addressing indigenous peoples' rights. It is, however, silent as to any definition of those peoples to whom it applies. In part, this reflects a failure to come to an agreement on a definition and in part a reluctance of indigenous participants to include one. Some commentators indicate that this would violate indigenous peoples' right to self-determination. See Julie Debeljak, "Barriers to the Recognition of Indigenous Peoples' Human Rights at the United Nations" (2000) 26 Monash U.L. Rev. 159 at 182–3 [Debeljak]. See also Irene Watson, "One Indigenous Perspective on Human Rights" in Sam Garkawe, Loretta Kelly & Warwick Fisher, eds., *Indigenous Human Rights* (Sydney: Sydney Institute of Criminology, 2001) 21 at 24–25. The applicability of international instruments that link indigenous rights to environmental concerns may depend on the group of affected individuals being able to qualify as indigenous peoples. Similarly, if norms regarding indigenous peoples' rights can operate to constrain state actions that have resource/environmental effects, states must be able to identify the groups which trigger these limits. The availability of mechanisms that would allow indigenous participation in decisions on development or environmental policy may also lead to attempts to define indigenous peoples in order to prevent dilution of their rights through illegitimate use of these tools by others. See *e.g.* Debeljak, *supra* at 181–184; Russel L. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?" (1994) 7 Harv. Hum. Rts. J. 33 at 81–82 [Barsh]. The issue of determining who indigenous peoples are will become more pressing as they attempt to access the environmental rights contained in the instruments surveyed.
2. See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, UN ESCOR, 36th Sess., UN Doc. E/CN.4/Sub.2/1983/21/Add. 8 (1983) at 2.

the *Draft United Nations Declaration on the Rights of Indigenous Peoples.*[3] A significant aspect of the emerging international prominence of indigenous peoples has been the recognition of indigenous rights with environmental components and the tailoring of international environmental law to take indigenous peoples' interests into account. Legally binding international instruments such as the *International Labor Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*[4] and the *Convention on Biological Diversity*[5] now recognize special rights of indigenous peoples in connection with their lands and the environment. With the establishment of the Arctic Council in 1996, indigenous groups gained status as permanent participants in an international inter-governmental forum for addressing environmental concerns affecting them and their ancestral lands.[6] The incorporation of indigenous rights and indigenous peoples has the potential to bring about significant structural and procedural change in international environmental law.

This paper examines a body of existing international instruments in order to establish the nature of the relationship between indigenous peoples' rights and environmental law.[7] The examination reveals two alternative principled approaches underlying the recognition of indigenous peo-

3. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1994/45, annex, August 26, 1994 [*UN Draft Declaration*]. Resolution 1994/45 adopted without changes the version proposed by the Working Group on Indigenous Populations., see *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 45th Sess., Agenda Item 14, UN Doc. E/CN.4/Sub.2/1993/29, Annex 1 (1993). Following its approval by the Sub-Commission, the UN Draft Declaration was submitted to the Commission on Human Rights for consideration and an intersessional working group has been established to consider the Draft Declaration prior to its anticipated submission to the General Assembly by the end of the Decade of Indigenous Peoples in 2004. See Debeljak, *supra* note 1 at 164.
4. *ILO 169, supra* note 1.
5. *Convention on Biological Diversity*, 5 June 1992, 1760 U.N.T.S. 79, Can. T.S. 1993 No. 24, 31 I.L.M. 818 [*Bio-diversity Convention*].
6. *Declaration on the Establishment of the Arctic Council*, Canada, Denmark, Finland, Iceland, Norway, Russian Federation, Sweden and United States, 19 September 1996, 35 I.L.M. 1387 [*Arctic Council Declaration*].
7. The instruments surveyed include *ILO 169, supra* note 1; *Bio-diversity Convention, supra* note 5; *United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*, 14 October 1994, 1954 U.N.T.S. 3, Can. T.S. 1996 No. 51, 33 I.L.M. 1332 [*Desertification Convention*]; *Rio Declaration on the Environment and Development*, United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/Conf.151/26/Rev.1(vol. 1) (1993) at 3, 31 I.L.M 876 [*Rio Declaration* cited to UN Doc. A/Conf.151/26/Rev.1(vol.1)] ; *Agenda 21*, United Nations Conference on Environment and Development, Annex, Resolution 1, UN Doc. A/conf.151/26/Rev.1(vol. 1) (1993) at 9 [*Agenda 21*]; UN Draft Declaration, *supra* note 3; OAS, Inter-American Commission on Human Rights, 95th Sess., *Proposed American Declaration on the Rights of Indigenous Peoples* (1997), OR OEA/Ser./L/V/II.95 Doc.6, [*OAS Draft Declaration*]. Other international sources and documents are examined, but the list above represents those that are considered to fall within the categories of binding and soft instruments in international law.

ples' environmental rights.[8]

The first approach, which will be referred to as the cultural integrity model, extends environmental rights to indigenous peoples as a necessary corollary to the protection and preservation of indigenous culture.[9] This model is potentially transformative in recognizing a more holistic framework for situating environmental concerns.[10] The model differs from the standard approach in international environmental law, in that it does not focus on isolated sources of environmental degradation or confine the consideration of the consequent effects to physical damage to the environment.[11] The cultural integrity model allows for the development of international environmental law based on a human rights approach to environmental quality. The cultural integrity model's association of indigenous environmental rights with human rights is also important because human rights norms can supersede state sovereignty. The development of environmental rights associated with cultural integrity for indigenous peoples creates the possibility that associated principles of environmental law will become operative within the state.

A closer look at the cultural integrity model indicates that the potential for this approach to bring about substantive changes to international environmental law is limited. Within the cultural integrity framework, indigenous peoples' rights are largely confined to the procedural realm. This weakens the potential influence of indigenous voice in environmental policy development and decision making. The idea that environmental rights may be based on the distinctive culture of indigenous peoples undermines the broad applicability of the associated holistic approach to the environ-

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8. Although this paper explores the intersection between indigenous peoples' rights in international law and international environmental law, the focus is on identifying the potential impact of indigenous peoples' rights on the development of international environmental law. Consequently, although the two models of indigenous peoples' rights are identified and discussed in terms of their implications for international environmental law, I have not attempted to assess in any detail the consequences of adopting either of the two models from the perspective of indigenous peoples' rights. This is an important issue that merits further independent exploration.
9. See *OAS Draft Declaration*, *supra* note 7 at 4. A right to cultural integrity is identified in Article 7. The content of an emerging right to cultural integrity for indigenous peoples is explored in S. James Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 98–104 [Anaya]. The cultural integrity model developed in this paper differs somewhat from the elaboration of the broader norm by Anaya. In particular, the cultural integrity model developed in this paper is a reflection of the construction of indigenous culture in the instruments surveyed. The model is thus descriptive to some extent, rather than an exploration of the possible scope of a right to cultural integrity for indigenous peoples.
10. See *e.g.* Patricia Fry, "A Social Biosphere: Environmental Impact Assessment, the Innu, and Their Environment" (1998) 56 U. of T. Fac. L. Rev. 177 at 186–190 where the author makes a connection between Innu rights to cultural integrity and a social biosphere model of environmental assessment that takes a broad view of the connection between environmental impacts and human society. The author suggests at 189 that the "holistic understanding of the environment" implicit in preserving Innu culture is a model that is transferable to other non-aboriginal contexts.
11. Existing international environmental law is largely composed of a body of treaties and international instruments that deal with specific problems in isolation. See *e.g.* Mahnoush H. Arsanjani, "Environmental Rights and Indigenous Wrongs" (1996) 9 St. Thomas L. Rev. 85 at 88 [Arsanjani].

ment. The model classifies indigenous peoples as a special case where human rights and the environment intersect, rather than supporting a general connection between the two. In addition, the cultural integrity model defines indigenous culture in terms of an environmentally harmonious relationship with lands and resources. In this context, even human-rights-based limitations on state sovereignty have limited scope to alter the principles that form the basis of international environmental law.

The alternative approach to indigenous environmental rights that emerges from the instruments is the self-determination model. In this model, indigenous rights with respect to the environment are recognized because indigenous peoples are accepted to have a right of self-determination. Indigenous peoples' existence as distinct communities supports an inherent degree of autonomy and control over their own development. The legitimacy of indigenous peoples' rights to make decisions regarding their lands and resources derives from this inherent right to determine the evolution of their own society.

The self-determination model carries with it the potential for more radical change in international environmental law. This model of indigenous peoples' environmental rights creates substantive, enforceable rights for indigenous peoples in connection with their lands and resources, which operate to limit state sovereignty. To the extent that indigenous self-determination instruments recognize principles of environmental law, these principles will be become operational within the domestic sphere. In addition, the self-determination model mandates the full participation of indigenous peoples in international environmental policy development and standard-setting. The opportunity for a more holistic indigenous view of the environment and development to take root in international environmental law would be considerably enhanced.

The self-determination model poses some significant challenges for existing international environmental law. The recognition of groups within the state that enjoy environmental sovereignty rights potentially undermines the ability of existing instruments to produce certain solutions to the environmental problems they have been designed to address. The creation of a new equivalent-to-state player in the environmental sphere increases the number of parties who must come to consensus to form international environmental law by treaty. The existence of a distinctive indigenous voice may complicate the objectives and magnify the range of competing values and objectives such that international consensus becomes increasingly elusive. The current treaty-based framework of international environmental law is poorly equipped to accommodate non-state players with equivalent-to-state rights within the area of environmental management.

The survey of existing instruments recognizing indigenous environmental rights indicates that the cultural integrity model is the dominant approach. The self-determination model of indigenous environmental rights has yet to be generally accepted. This paper suggests that states' failure to embrace the self-determination model reflects a fear of the potential disadvantages associated with this model. The preference for the cultural integrity approach may reflect a desire to avoid uncertainty by protecting indigenous peoples' environmental rights in a way that is, by definition, consistent with the principles and structure of existing international environmental law. Rejection of the self-determination model may be a shortsighted response to a perceived risk of destabilization associated with recognizing indigenous environmental rights.

II. The Cultural Integrity Model

THE IDEA THAT INDIGENOUS CULTURES are worthy of protection to preserve their distinctive spiritual, social, cultural and institutional features is a common principle underlying both models of indigenous environmental rights outlined in this paper. The models differ crucially, however, in the way that this seminal norm is applied to determine the content of indigenous environmental rights.

At the heart of the cultural integrity model is a presumptive connection between indigenous culture and sustainable environmental practice. Cultural protection for indigenous peoples involves providing environmental guarantees that allow them to maintain the harmonious relationship with the earth that is central to their cultural survival. The other crucial aspect of the cultural integrity model is that the consideration of indigenous peoples' environmental interests takes place within the context of state sovereignty over lands and resources.

A. EXPRESSION OF THE CULTURAL INTEGRITY NORM

> [Indigenous] communities are the repositories of vast accumulations of traditional knowledge and experience that links humanity with its ancient origins. Their disappearance is a loss for the larger society which could learn a great deal from their traditional skills in sustainably managing very complex ecological systems....The starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life....[12]

These words, taken from the *Report of the World Commission on Environment and Development*, are perhaps the genesis of the ideological connection between indigenous cultures and environmental sustainability in international law. Even in this early expression of the norm, protection for

12. Gro Brundtland, *Our Common Future World Commission on Environment and Development* (Oxford: Oxford University Press, 1987) at 114–115.

indigenous environmental rights is extended on the basis that it is essential to the preservation of indigenous culture. Indigenous culture is described in terms of an ecologically harmonious relationship between indigenous peoples and the environment.

These ideas have been elaborated on in more recent instruments, the *Rio Declaration*[13] and *Agenda 21*,[14] the comprehensive plan of action associated with the *Rio Declaration*, which were products of the UN Conference on Environment and Development held in Rio de Janeiro in 1992.

The key provision of the *Rio Declaration* for indigenous peoples is Principle 22, set out below:

> 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.[15]

This provision clearly constructs the rationale for state support of indigenous rights based on the assumption that protection of indigenous culture will be conducive to achieving sustainable development. It implicitly defines indigenous culture, knowledge and traditional practices worthy of state protection as being those consistent with sustainable environmental policy.

Chapter 26 of *Agenda 21* expands on the relationship between indigenous peoples and sustainable development at the core of the *Rio Declaration*'s Principle 22. *Agenda 21* more explicitly links indigenous environmental concerns with a right to cultural integrity. The basis for action under this instrument includes ensuring that indigenous people "enjoy the full measure of human rights and fundamental freedoms" and recognizing the "interrelationship between the natural environment and its sustainable development and the cultural, social, economic and physical well-being of indigenous peoples."[16] *Agenda 21* exhorts governments "in full partnership with indigenous peoples" to aim at recognizing that indigenous lands should be protected from environmentally unsound activities, or activities which indigenous peoples consider to be culturally inappropriate.[17] Government recognition that "traditional and direct dependence on renewable resources and ecosystems" is central to the cultural and social integrity of indigenous communities is another objective.[18] The instrument further suggests that achieving these objectives and promoting sustainable development may require that

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13. *Rio Declaration*, *supra* note 7.
14. *Agenda 21*, *supra* note 7.
15. *Rio Declaration*, *supra* note 7 at 7.
16. *Agenda 21*, *supra* note 7 at 385 art. 26.1.
17. *Ibid.* at 385-6, art. 26(3), art. 26.3(a)(ii).
18. *Ibid.* art. 26.3(a)(iv).

indigenous peoples be granted greater control over their lands and the management of their resources. However, this increased control is to be conferred "in accordance with national legislation."[19]

Both the *Rio Declaration* Principle 22 and *Agenda 21* provide explicit international recognition of the symbiotic aspects of indigenous peoples' relationship to the natural world. Both documents recognize that the cultural significance of this relationship supports rights for indigenous peoples in connection with environmental and resource management. These rights are framed as obligations on the State to provide a minimal level of environmental protection to indigenous peoples to ensure the survival of their culture as an element of sustainable development policy.

The core elements of the cultural integrity model are also reflected in *ILO 169*, the only binding international instrument exclusively concerned with indigenous peoples.[20] The operational elements of the Convention are set against a backdrop of recognition for indigenous peoples' desire to exercise control over their societies' evolution and an awareness of the "distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind."[21] Governments are required to "safeguard" and "preserve and protect" the environment that indigenous peoples inhabit in order to fulfil their commitment to protect indigenous peoples as distinctive cultural communities within the state.[22] The Convention explicitly recognizes the "special importance for the cultures and spiritual values" of indigenous peoples of their relationship to the environment that they occupy or use.[23] *ILO 169* constructs the preservation of indigenous lands as a necessary condition for supporting indigenous peoples' survival as distinctive social groups. This distinctiveness is based, at least in part, on a "traditional" view of indigenous peoples' environmental stewardship.

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19. *Ibid.* at 386–7, art. 26.4.
20. *ILO 169*, *supra* note 1 is a revision of ILO Convention 107. See *International Labour Organization Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S. 248 (1959), which is now considered unacceptable due to its assimilationist overtones. See *e.g.* Sharon H. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton, B.C.: Theytus Books Ltd., 1998) at 69–71 [Venne]. *ILO 169* was adopted by the General Conference of the ILO in 1989. It entered into force in 1991. It has been ratified by 17 countries to date, including: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, the Netherlands, Norway, Paraguay, Peru and Venezuela. See International Labour Organization, "Database of International Labour Standards", online: <http://www.ilo.org/ilolex/english/convdisp1.htm>.
21. *ILO 169*, *supra* note 1, preamble.
22. *Ibid.* arts. 4(1), 7(4). The preamble clearly places the operation of the convention within the framework of state sovereignty. See also *ibid.* art. 1(3) which makes it explicit that use of the term "peoples" does not convey any rights of self-determination associated with the term under international law.
23. *Ibid.* art. 13(1).

The cultural integrity norm also appears in two widely binding conventions of international environmental law. The *Bio-diversity Convention*[24] includes a version in Article 8(j), which deals with indigenous peoples:

> [Countries shall] Subject to [their] national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.[25]

A direct connection between traditional lifestyles of indigenous communities and the objective of promoting the conservation and sustainable use of bio-diversity is the basis for extending protection to indigenous peoples under the *Bio-diversity Convention*. The state obligation to respect, preserve, and maintain indigenous practices may have a territorial component extending protection to the natural environment required to support such practices. It is clear that the protection afforded by the *Bio-diversity Convention* extends only to practices that can be directly linked to "traditional" lifestyles which maintain the appropriate connection to the sustainable use of bio-diversity. States are able to limit these rights through domestic legislation.[26]

The *Desertification Convention* also incorporates the cultural integrity norm in its protection of indigenous environmental rights.[27] This Convention conceptualizes indigenous practices as intellectual property

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24. The *Bio-diversity Convention, supra* note 5 was adopted in May of 1992 in Nairobi, Kenya. It was opened for signature during the UN Conference on Environment and Development [UNCED] in Rio de Janeiro in 1992. Over 150 countries signed at that time. The Convention entered into force on December 29 1993 and is legally binding. There are currently 187 Parties to the Convention. For details, see Secretariat of the Convention on Biological Diversity, "Parties to the Convention on Biological Diversity/Cartagena Protocol on Biosafety", online: <http://www.biodiv.org/world/parties.asp>. Article 1 sets out the Convention's objectives, which are the conservation and sustainable use of biological resources and the fair and equitable sharing of benefits that may be generated from the use of genetic resources.
25. *Ibid.* art. 8(j).
26. For a discussion of some of the considerations underlying the inclusion of this qualifier and consequences of its presence, see Gregory F. Maggio, "Recognizing the Vital Role of Local Communities in International Legal Instruments for Conserving Biodiversity" (1998) 16 UCLA J. Envtl. L. & Pol'y 179 at 211–213 [Maggio].
27. The *Desertification Convention, supra* note 7 was adopted in Paris in June 1994. It was signed by 115 countries and entered into force on December 26, 1996. There are currently 190 states that have become parties to the Convention by ratification, accession, or acceptance. For details, see Secretariat of the United Nations Convention to Combat Desertification, "Status of Ratification and Entry into Force of the UNCCD", online: United Nations Convention to Combat Desertification [*UNCCD*] <http://www.unccd.int/convention/ratif/doeif.php>. This Convention was the work of a UN intergovernmental negotiating committee and grew out of discussions begun at the UNCED Conference in Rio de Janeiro. It is an example of a convention that addresses a specific environmental problem and attempts to solve it through international cooperation.

related to ecological knowledge.[28] The main focus of the Convention is the problem of desertification; it consequently it extends protection only to "traditional and local technology, knowledge, know-how, and practices" that are relevant to combating desertification.[29] The Convention contains measures promoting the adaptation, protection, promotion and use of this indigenous environmental knowledge.[30] Under the Convention, states are obliged to ensure that such indigenous knowledge is adequately protected.[31] Further, no protection is afforded to indigenous practices where these practices are not consistent with the objective of the Convention.[32] Finally, the *Desertification Convention* allows states to limit their obligations through both domestic policy and legislation.[33]

The instruments above illustrate the main facets of the cultural integrity model. Indigenous environmental rights are both premised on and constructed to reflect a synergy between indigenous peoples' cultural integrity and sustainable environmental policy. Indigenous environmental rights are also firmly located within the framework of state sovereignty.

B. RIGHTS SPRINGING FROM THE CULTURAL INTEGRITY NORM

The cultural integrity model supports the principle that states should maintain a level of environmental quality sufficient for indigenous peoples to maintain their culturally harmonious relationship with the environment. This principle is carried out through the creation of three types of rights within the cultural integrity framework. The need to respect and incorporate indigenous values and knowledge in environmental decision-making supports a right of indigenous peoples to be consulted. Closely related to this right is the entitlement of indigenous peoples to participate in and benefit from the use of their lands, resources, environment and ecological knowledge. Finally, an entitlement to compensation arises where state sanctioned activity impinges on indigenous environmental rights.

The *Rio Declaration* and *Agenda 21* contribute to the articulation of indigenous rights of participation and consultation when state decisions have cultural implications through effects on indigenous lands and resources. Principle 22 of the *Rio Declaration* speaks of enabling the "effec-

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28. Indigenous peoples are not directly mentioned at all in the Convention, but are considered to be a subset of those possessing such knowledge. See *e.g.* Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to *Sui Generis* Intellectual Property Protection" (1999) 44 McGill L.J. 953 at 984–985 [Halewood] (in which the author considers the *Desertification Convention* applicable to indigenous peoples).
29. *Desertification Convention*, *supra* note 7, art. 18(2).
30. *Ibid.* art. 18(1).
31. *Ibid.* art. 16(g).
32. *Ibid.* art. 17(1)(c).
33. *Ibid.* art. 18(2).

tive participation" of indigenous peoples in sustainable development.[34] Similarly, *Agenda 21* seeks to advance the active participation of indigenous peoples in the formulation of national law and policy relating to resource management when it affects their interests.[35] *Agenda 21* fleshes out this participation in terms of a process of consultation between states and indigenous peoples, as set out in Article 26.6:

> Governments ... should, where appropriate ... [d]evelop or strengthen national arrangements to consult with indigenous people and their communities with a view to reflecting their needs and incorporating their values and traditional and other knowledge and practices in national policies and programmes in the field of natural resource management and conservation and other development programmes affecting them.[36]

The qualification "where appropriate" potentially weakens but does not eliminate the participatory and consultative rights of indigenous peoples under these instruments.

ILO 169 creates rights of indigenous peoples to be consulted about, and participate in, activities affecting their environment. *ILO 169* assumes that indigenous peoples have the right to determine their own priorities for development as it affects them and their lands, and also assumes that indigenous peoples should exercise some control over their own evolution as a society.[37] Further, there is a requirement that states should investigate, in co-operation with the indigenous peoples, any adverse effects their development activities might have on indigenous groups and take these effects into account when implementing their activities.[38] States are obliged to adopt measures in co-operation with indigenous peoples to preserve and protect the environment of the territories inhabited by indigenous communities.[39]

In terms of explicitly stated indigenous rights to their environment,[40] the most important provisions in the Convention are contained in Article 15:

> (1) The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management, and conservation of these resources.[41]

34. *Rio Declaration*, *supra* note 7 at 7.
35. *Agenda 21*, *supra* note 7, art. 26.3(b).
36. *Ibid.* art. 26.6(a).
37. *ILO 169*, *supra* note 1, art. 7(1).
38. *Ibid.* art. 7(3).
39. *Ibid.* art. 7(4).
40. *Ibid.* art. 13(2) indicates that the use of the term "lands" in Article 15 is to be construed as referring to the "total environment" of the territory.
41. *Ibid.* art. 15(1).

(2) [In cases where the state retains ownership of mineral or sub-surface resources or rights to other resources pertaining to lands] governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.[42]

Indigenous peoples have rights to actively participate in the management of their lands, even when this concerns the exploitation of resources to which the state retains ownership. Procedures through which the state and indigenous groups can consult are a requirement of the Convention. The cultural dependence of indigenous peoples on their environment is reflected by the principle that indigenous peoples should share in the benefits stemming from the exploitation of resources associated with their lands.

ILO 169 also incorporates the obligation to compensate indigenous groups for damage they suffer as a result of resource exploitation.

The *Bio-diversity Convention* provides some further support for the participation, consultation and compensation rights of indigenous peoples in connection with their traditional knowledge.[43] The core provision, Article 8(j), requires that states seek the "approval and involvement" of those who hold indigenous knowledge relevant to bio-diversity conservation before promoting its wider application.[44] The state must also "encourage the equitable sharing of the benefits" associated with the use of indigenous knowledge for bio-diversity conservation and management.[45] These rights are weakened by the opening qualifier, "subject to its national legislation", which permits states to limit their obligations under this provision.

The *Desertification Convention* provides that indigenous holders of traditional or local knowledge relevant to combating desertification should "benefit directly on an equitable basis" and as mutually agreed from commercial exploitation of that knowledge.[46] This appears to support relatively strong participatory rights for indigenous peoples, in addition to an entitlement to compensation for the "use" of their culturally-based environmental knowledge. The strength of these rights is diluted by the fact that they may

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42. *Ibid.* art. 15(2).
43. The creation of an intellectual property regime for indigenous ecological knowledge has been suggested as one way for states to realize their obligations under the *Bio-diversity Convention*. For a discussion of some of the practical concerns and limitations associated with this approach, see Halewood, *supra* note 28 at 975–983; Rosemary J. Coombe, "Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 Ind. J. Global Legal Stud. 59.
44. *Bio-diversity Convention*, *supra* note 5, art. 8(j).
45. *Ibid.*
46. *Desertification Convention*, *supra* note 7, art. 18(2)(b). Accord arts. 16(g), 17(1)(c).

be qualified by national legislation and policies.[47]

It is evident that these international instruments vary in the strength and scope of the rights they afford indigenous peoples to be consulted, to participate in decisions affecting their environment and to be compensated for harm resulting from environmental effects on their cultures. However, the consistent presence of these rights suggests that they form the essential means through which the cultural integrity norm is implemented. A problem for indigenous peoples attempting to assert these rights is that the instruments surveyed generally do not provide for enforcement mechanisms accessible to indigenous peoples.[48]

Indigenous peoples do not have standing under the formal complaint procedure established by the ILO. Only member organizations–states, employers' associations and workers' associations–have access.[49] While there is no internal procedure for challenging the implementation of the Convention, there is an associated reporting procedure that suggests, but does not require, that states consult with indigenous groups when composing and submitting their reports. It is possible for "authentic indigenous organizations" to submit information directly to the ILO for the purposes of comparison with government reports on the implementation of the Convention. However, these communications must contain official documents such as laws, regulations, or land titles in order to satisfy the requirement that information be verifiable.[50]

Indigenous peoples face a similar problem in trying to enforce any rights they have under the *Bio-diversity Convention*. The internal procedure for disputes arising out of the *Bio-diversity Convention*'s implementation gives standing to "Contracting Parties"–state signatories.[51] As indigenous peoples currently lack standing in international law, they cannot become contracting parties and are thus denied access to a mechanism through which they could hold states to their commitments under Article 8(j).[52]

It would also be difficult for indigenous peoples to attempt to enforce any rights they have under the *Desertification Convention*. The mechanism for

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47. *Ibid.*
48. Only binding instruments can provide indigenous peoples with directly enforceable rights, therefore the discussion is confined to: *ILO 169*, *supra* note 1; the *Bio-diversity Convention*, *supra* note 5; and the *Desertification Convention*, *supra* note 7. Non-binding instruments may contribute to establishing binding international customary law but are not in themselves a direct source of enforceable rights.
49. See Anaya, *supra* note 9 at 155–56, 161–62 for discussion of possible enforcement mechanisms under *ILO 169*.
50. See Laurie Sargent, "The Indigenous Peoples of Bolivia's Amazon Basin and ILO Convention No. 169: Real Rights or Rhetoric?" (1998) 29 U. Miami Inter-Am. L. Rev. 453 at 519–20 for a discussion of these shortcomings of *ILO 169* with respect to the protection of the indigenous peoples of Bolivia from environmental degradation associated with oil exploration on their traditional lands.
51. *Bio-diversity Convention*, *supra* note 5, art. 27.
52. But see Barsh, *supra* note 1 at 81–2, 85–6 which suggests that indigenous people may be moving towards acquiring status as "subjects" in international law in incremental steps.

dispute resolution regarding the Convention's implementation is accessible only to parties—state signatories. There are some opportunities for indigenous peoples to participate in the Convention of Parties (COP) the governing body of the Convention. If they are a "body or agency ... qualified in matters covered by the Convention" indigenous peoples can gain observer status at the COP.[53] The COP may also "request competent national and international organizations which have relevant expertise" to provide it with information regarding the provisions for the protection of indigenous knowledge discussed above.[54] It might be possible for an indigenous organization to use these mechanisms to point out violations of the Convention. Regardless, this lack of enforcement procedures may weaken the effect of indigenous peoples' rights under the cultural integrity model, should states fail to recognize them.

III. Implications of the Cultural Integrity Model

AS HAS BEEN EXPRESSED in the instruments considered, the cultural integrity model offers the possibility of structural and procedural change in international environmental law, but it does not substantially alter the state sovereignty principle which is at the core of existing international environmental law. One way in which the cultural integrity model may shape international environmental law is through the inclusion of indigenous peoples in the process of international environmental standard setting and policy formulation.

A. PROCEDURAL RIGHTS, INDIGENOUS VOICE AND A HOLISTIC APPROACH TO THE ENVIRONMENT

The creation of the Arctic Council represents the kind of structural and procedural innovation that flows naturally from the recognition of the cultural integrity norm and its associated indigenous environmental rights. This body was constituted in 1996 as a forum for international cooperation to address environmental issues affecting the Arctic region.[55] The category of permanent participant was created to "provide for active participation and full consultation with the Arctic indigenous representatives within the Arctic Council."[56] Provision was made for the admission of additional indigenous groups, provided that they had a "majority Arctic indigenous

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53. *Desertification Convention*, *supra* note 7, art. 22(7).
54. *Ibid.* art. 22(8). Information can be provided in reference to arts. 16(g), 17(1)(c) and 18(2)(b).
55. See *Arctic Council Declaration*, *supra* note 6. The Council is composed of Members (Canada, Denmark, Finland, Iceland, Norway, The Russian Federation, Sweden and the United States), Permanent Participants (Inuit Circumpolar Conference and the Association of Indigenous Members of the North, Saami Council, Siberia and the Far East of the Russian Federation) and Observers (*e.g.* non-Arctic governments, NGOs).
56. *Ibid.* art. 2.

constituency."[57] It was recognized that a single indigenous people could be resident in more than one Arctic State; however, this residency would be no barrier to participation in the Council as a single group.[58] Although they are not voting members of the Council, indigenous participants occupy a unique position that facilitates the expression and recognition of their perspective on Arctic environmental issues. Indigenous participants have direct input into the design and implementation of Arctic environmental protection strategies. Their voice is present in the determination of priorities by the Council. Indigenous peoples' interests are clearly accepted as being of central importance to the cooperative international resolution of Arctic environmental problems.

The incorporation of indigenous peoples within international fora, such as the Arctic Council, is a consequence of acknowledging their right to participate in the process of decision making and standard-setting when it affects them directly.[59] The presence of indigenous groups in this context is increasingly seen as integral to the legitimacy of the results.[60] New rules are being established which allow indigenous peoples to participate in the process of international standard setting and cooperative action.[61] These developments will facilitate the conveyance of an indigenous perspective on the environment.

The promotion of a more holistic approach to environmental problems may be one consequence of the inclusion of indigenous peoples in international environmental standard-setting through initiatives like the Arctic Council. Indigenous participants have stressed the all-encompassing effects of environmental degradation in the Arctic environment for their

57. *Ibid.*
58. *Ibid.* art. 2(a).
59. This right has been touched on in the discussion of the instruments such as *ILO 169*, *supra* note 4 and the *Bio-diversity Convention*, *supra* note 5, which include provisions requiring consultation with indigenous peoples.
60. See *e.g.* *Report of the Second Workshop on a Permanent Forum for Indigenous People within the United Nations System Held in Accordance with Commission on Human Rights Resolution* 1997/30, UN CHROR, 54th Sess., UN Doc. E/CN.4/1998/11 (1997) at 8-9 [*Permanent Forum Report*]. This report indicates the need for indigenous peoples' participation in the establishment of a permanent forum at the UN and discusses the possible form their participatory rights might take.
61. See *e.g.* Debeljak, *supra* note 1 at 164-165 for a discussion of the special procedure adopted by the UN Working Group on Indigenous Peoples to allow for increased direct participation of indigenous representatives without their having to satisfy the requirements for recognition as NGOs with ECOSOC consultative status.

societies.[62] The international consideration of Arctic environmental problems is broadened from the mitigation of damages for specific hazards, or crisis management, by the inclusion of this indigenous perspective. A foundational assumption of the cultural integrity model is that the inter-relationship between environmental degradation and broad societal and cultural effects is common to all indigenous communities. If this assumption accurately reflects indigenous peoples' relationship to the environment, their inclusion in international standard-setting is likely to promote a more expansive perspective on environmental harm.

The holistic influence of indigenous environmental rights could extend to reshaping the content of existing principles of international environmental law. This possible effect can be illustrated by considering the rights to compensation associated with the cultural integrity model.

The idea that financial incentives can be used to limit environmental degradation is reflected in two related principles of international environmental law, the "Polluter Pays" principle and the "internalization of environmental costs" principle.[63] Simply stated, the former deals with the distribution of environmental costs and places the burden on the party generating the adverse environmental effect. The latter principle stands for the proposition that environmental costs should be considered broadly and not be limited to effects that can be valued in terms of market prices. These principles have been interpreted somewhat narrowly. The Polluter Pays principle has been limited to interpreting market costs associated with avoiding pollution and largely applied to prevent the distortion of international trade through the subsidization of pollution avoidance costs. The internalization principle has been expressed mainly in terms of establishing values equivalent to market prices for biological aspects of environmental assets (*e.g.* value of forests as carbon sinks).[64]

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62. See *e.g.* Aqqaluk Lynge, President, Inuit Circumpolar Conference, "Remarks to the United Nations Commission for Sustainable Development" (April 1997) [unpublished] [Aqqaluk Lynge, Remarks]. In his remarks, Mr. Lynge identifies the close connection between Inuit traditional culture and lifestyle and the "natural rhythms of the climate and the environment." He goes on to discuss the impact of environmental contaminants on Inuit food supply and health, and also identifies climate change as a factor causing changes in the Arctic environment at a pace the Inuit will not be able to adapt to. See also the Kuujjuaq Declaration, on the Occasion of the 9th General Assembly of the Inuit Circumpolar Conference (ICC), August 15, 2002 [Kuujjuaq Declaration], online: Inuit Circumpolar Conference <http://www.inuit.org/index.asp?lang=eng&num=220>. This declaration by the ICC confirms the priority given to preserving the Arctic environment from persistent pollutants, and rapid climate change, among other environmental hazards, as part of a sustainable development policy.
63. See OECD, *Environment Principles and Concepts*, Working Paper No. 84, Doc. No. COM/ENV/TD(93)117/Rev.1 (1993) at paras. 29-38 [*OECD Principles*]. The discussion of the principles and their application which follows is based on this document, which provides a consensus summary of environmental principles gleaned from a survey of over 900 agreements in addition to resolutions and declarations of international agencies such as the OECD, UN, etc.
64. *Ibid.*

The compensation right associated with the cultural integrity model reflects these two principles but considerably expands the context in which they are understood to apply and the nature of the associated costs. This expansion is most clearly illustrated by recalling that *ILO 169* provides a right of compensation for "any damages which [indigenous peoples]...may sustain" when state-owned resources on indigenous lands are exploited.[65] The Convention clearly delineates the social, cultural, spiritual and economic significance of indigenous peoples' lands in other provisions.[66] This delineation suggests that the evaluation of any damages would necessarily require an inquiry into the inter-relationship between environmental degradation and the broader cultural consequences for indigenous peoples. It would not simply be a matter of providing restitution for lost resource revenues, or damages equivalent to the market value of comparable land. The calculation of environmental damages based on broader social effects in the context of indigenous environmental rights may support a general expansion of the environmental principles themselves.

It is questionable whether expansion of the Polluter Pays and the internalization principles to include cultural damage associated with environmental harm is an entirely positive development. In some ways, this expansion suggests that the kind of spiritual and cultural harm experienced by indigenous peoples can be treated as a "cost of business." It is worth considering whether attempting to place a price on cultural harm undermines the value of the cultural integrity norm by transforming culture into a fungible commodity from the perspective of the "polluter."[67] For indigenous peoples, the loss of culture is immeasurable.[68]

B. THE CULTURAL INTERGRITY MODEL AND STATE SOVEREIGNTY

The location of indigenous peoples' rights under the cultural integrity model within a framework of State sovereignty has been alluded to above. The Arctic Council provides a good example of the cultural integrity model's implications for state sovereignty. State sovereignty is qualified by the existence of indigenous peoples' procedural entitlements to develop and express their own views, have access to information, and to be consulted about the potential impact of environmental policy on their communities.

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65. *ILO 169*, *supra* note 1, art. 15(2).
66. *Ibid.* arts. 5(a), 7(1), 7(2), 13(1), 14(1).
67. See *e.g.* Eduardo M. Penalver, "Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Global Warming" (1998) 38 Nat. Res. J. 563 at 595 for a discussion of this problem of "reductionism" in a tort law framework.
68. See *e.g.* *Charter of the Indigenous and Tribal Peoples of the Tropical Forests*, International Alliance of the Indigenous-Tribal Peoples of the Tropical Forests, Malaysia (1992) [*IAIP Charter*], art. 3, online: <http://www.gn.apc.org/iaip/char/char3.html>, which states that "[o]ur territories and forests are to us ... life itself and have an integral and spiritual value for our communities. They are fundamental to our social, cultural, spiritual, economic, and political survival as distinct peoples."

Arctic states cannot legitimately respond to environmental problems that implicate indigenous communities without allowing these peoples to exercise their rights to be consulted and participate.[69] The model stops short, however, of granting indigenous peoples any substantive rights in the process of formulating domestic or international environmental policy. In the end, indigenous peoples are only "participants" and not voting members of the Council.[70]

Indigenous peoples' cultural integrity-based environmental needs amount to an interest which must be recognized and respected, but they are not determinative of environmental standards or policy. The cultural integrity model supports states' ability to formulate domestic resource management policy or enter into binding international environmental agreements, so long as indigenous peoples' procedural rights and interests are taken into account.

C. INDIGNEOUS CULTURAL INTEGRITY AND A HUMAN RIGHTS APPROACH TO THE ENVIRONMENT

By elaborating a connection between indigenous peoples' cultural survival and their physical connection with their lands and resources, the cultural integrity model may be "opening the door" to a human rights approach to international environmental law.

Existing human rights instruments do protect rights to cultural

69. *Arctic Council Declaration*, *supra* note 6.

70. *Ibid.* There is, however, a question as to what "consultation" requires. In the landmark case of *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 168, 153 D.L.R. (4th) 193, Chief Justice Lamer (as he then was) for the majority of the Supreme Court of Canada held that in conjunction with aboriginal title:

> There is always a duty of consultation ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, ... this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation....

This sliding scale of consultation effectively corresponds to a spectrum of indigenous peoples' involvement in standard setting and policy formulation when aboriginal interests are involved. At the extreme endpoint, where consent is required, consultation approaches self-determination. S. James Anaya and Robert A. Williams Jr., in "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System" (2001), 14 Harv. Hum. Rts. J. 33 at 78 [Anaya & Williams Jr.] state that, "[a]t its core, self-determination means that human beings, inividually and collectively, have a right to be in control of their own destinies under conditions of equality. For indigenous peoples, the principle of self-determination establishes a right to control their own lands and natural resources and to be genuinely involved in all decision-making processes that affect them." Benedict Kingsbury, in "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002), 52 Univ. of Toronto L.J. 101 at 110, notes that, "the concept of self-determination is increasingly extended to autonomy or substantial involvement in decision making by indigenous peoples or other groups within states...."

integrity.[71] The symbiotic relationship between indigenous cultures and their lands has led to successful attempts to use international human rights instruments in order to protect their environment. The Yanomami of Brazil were successful in a decision of the Inter-American Commission of Human Rights (IACHR) which found that the construction of a road through their Amazon homelands violated their rights to life, and the preservation of health and well-being due to its negative environmental and social effects.[72] The Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana on behalf of the Huaorani peoples of the Ecuadoran Amazon petitioned the IACHR, claiming that oil exploration operations were leading to environmental degradation which was threatening their right to life and well-being.[73] The IACHR consequently visited Ecuador and issued a communiqué supporting the indigenous peoples' claims that there were serious environmental problems and indicating state culpability in the failure to address them.[74] The UN Human Rights Commission found a violation of Article 27 of the ICCPR in the *Lubicon Lake Band* case.[75] Here, the failure of the Canadian government to adequately address the Band's need for a stable land base in combination with the granting of large-scale resource development concessions threatened the Band's way of life and culture.[76]

Most recently, the Mayagna aboriginal community of Awas Tingni on the Nicaraguan Atlantic Coast was successful in stopping logging concessions from being granted on its lands, in a judgment of the IACHR.[77] The Awas Tingni petition claimed the logging threatened religious sites and the

71. See *e.g. International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 999 U.N.T.S. 3, arts. 1.1, 1.2, 15.1, 15.2, 6 I.L.M. 260 [*ICESCR*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Arts. 1.1, 27, 6 I.L.M. 368 [*ICCPR*]. It should be noted, however, that the protections in some of these articles attach to "peoples," so that arguments might be advanced that indigenous peoples do not fall within the accepted international definition for these guarantees of cultural freedom and protection to apply to them.
72. See *Brazil* (1985) Inter-Am. Comm. H.R. No. 7615, *Annual Report of the Inter-American Commission on Human Rights: 1984–85*, OEA/Ser.L/V/II.66/doc. 10 rev. 1 [*Yanomami*]. The rights violated are found in the *American Declaration of the Rights and Duties of Man*, OR OEA/Ser.L/V/I.4 Rev. 9 (1948).
73. See Adriana Fabra, "Indigenous Peoples, Environmental Degradation and Human Rights: A Case Study" in A. Boyle and M. Anderson, eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) 245 at 259–261. The alleged environmental consequences included the pollution of water and wildlife with toxic chemicals, the disruption of the behaviour of wild game relied on by the Huaorani, and road building that promoted infiltration of their traditional territories by settlers.
74. *Ibid.* at 260–261.
75. See Communication No. 167/1984: *Canada. 10/05/90.* U.N. Doc. CCPR/C/38/D/167/1984 (Decision of Meeting 26 March 1990) [*Lubicon Lake Band*].
76. This was only a partial victory for the Band, as the decision simply stated that the remedy proposed by the Canadian government was adequate. The remedy subsequently provided was a unilateral offer of financial compensation, which was unacceptable to the Band. See Anaya, *supra* note 9 at 165.
77. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua Case* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 79 online: <http://www.corteidh.or.cr/seriecing/seriecing/serie_c_79_ing.html> [*Awas Tingni Ruling*].

habitat relied on to support traditional subsistence practices.[78] It was specifically alleged that the state's failure to consult with, and obtain permission from, the Mayagna before engaging in resource exploitation on their lands was an actionable violation of their rights as indigenous peoples. Arguments in support of the Mayagna relied on principles found in the international instruments discussed above, as well as the Organization of American States' own Draft Declaration.[79] The Court found that the failure to address indigenous land claims before granting the concessions violated the rights of the Mayagna to their property. In making this ruling, the Court explicitly recognized the intimate connection between indigenous land rights and their cultural survival.[80]

The use of human rights instruments to enforce indigenous peoples' rights under the cultural integrity model has a number of implications. It gives indigenous peoples access to an enforcement mechanism for rights embodied in the instruments discussed above.[81] Moreover, international human rights law is designed to pierce the veil of state sovereignty.[82] To the extent that indigenous peoples' environmental rights under the cultural integrity model are captured by established human rights, states' ability to derogate from the rights through domestic legislation is limited.

The traditional modality of international environmental law has consisted of a framework of treaties, addressing specific environmental problems in particular contexts, and focusing on the management of relations between state parties.[83] The principle of state sovereignty has remained dominant, so that international environmental law is only engaged when activities have effects outside a state's boundaries.[84] This has left a gap in

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78. See S. James Anaya, "The Awas Tingni Petition to the Interamerican Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua" (1996) 9 St. Thomas L.Rev. 157.
79. See "Complaint of the Inter-American Commission on Human Rights, Submitted to the Inter-American Court of Human Rights in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community against the Republic of Nicaragua" (2002), 19 Ariz. J Int'l & Comp. Law 17 for an English text of the petition on behalf of the indigenous community involved. See also the *Amicus Curiae* Brief filed in the case by the Center for International Environmental Law, online: http://www.ciel.org/Hre/hrecomponent2.html link to Brief at Item 3, Awas Tingni Amicus Curiae Brief, 31 May 1999 (date accessed: 10 February 2003).
80. See *Awas Tingni Ruling*, *supra* note 77 at para. 149.
81. See *e.g.* Alan Boyle, "The Role of International Human Rights Law in the Protection of the Environment" in A. Boyle & M. Anderson eds., *Human Rights Approaches to Environmental Protection* (Oxford: Clarendon Press, 1996) 43 at 47 for a brief discussion of the enforcement structure under various human rights instruments [Boyle].
82. See *e.g.* Arsanjani, *supra* note 11 at 91.
83. *Ibid.* at 88–89.
84. See *e.g.* *OECD Principles*, *supra* note 64 at paras. 16–20, 22–24. There are some recognized qualifications to the state sovereignty principle, but these are limited to the case of transboundary effects (activity which directly affects a neighbour State) and the global commons (no single State has a sovereign presence). See also Thomas O'Connor, "'We Are Part of Nature': Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin" (1994) 5 Colo. J. Int. Envtl. L. & Pol'y 193 at 205.

international environmental law. Individuals within a state have no right to a level of environmental quality sufficient "to allow for the realization of a life of dignity and well-being."[85] This vulnerability creates the possibility that other recognized human rights will be undermined, as illustrated by the successful claims of indigenous peoples discussed above. By advancing claims for environmental protection rooted in human rights, indigenous peoples raise questions about the connection between human rights and the environment at a more general level. Does the recognition of a human rights-based guarantee of minimum environmental quality for indigenous peoples support the emergence of a general human right to the environment?

The existence of a human right to the environment is the subject of considerable debate.[86] Some scholars support the recognition of such an independent right, on the basis that a minimum level of environmental quality is necessary to support the realization of other human rights.[87] Others take the view that any environmental rights corollary to the realization of existing human rights may be considered to form part of those rights as a matter of interpretation.[88] The emergence of a recognized general claim to environmental quality in either form would significantly change the framework of international environmental law. It would give individuals within a state the power to invoke international law when dealing with environmental concerns which had only domestic effects. This holds out the possibility that principles of international environmental law, as reflected in international human rights instruments, would apply to the determination of domestic environmental policy. It "renders domestic environmental issues subject to international monitoring."[89] A rights-based approach offers one way to overcome the resistance of states to agree to international management of environmental issues, where this compromises sovereign control over state resources.

The cultural integrity model appears to support the existence of a human right to environmental quality for indigenous peoples, but it is unlikely to lead to a more generalized human rights approach to the environment. Indigenous peoples' environmental interests rise to the level of a

85. Luis E. Rodriguez-Rivera, "Is the Human Right to Environment Recognized Under International Law? It Depends on the Source" (2001) 12 Colo. J. Int'l Envtl. L. & Pol'y 1 at 10 [Rodriguez-Rivera].
86. See *Draft Principles on Human Rights and the Environment in Human Rights and the Environment, Final Report of the Special Rapporteur*, UN Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., E/CN.4/Sub.2/1994/9 (6 July1994) for an elaboration of a human right to environmental quality. For a critical analysis of this concept see Boyle, *supra* note 81. Currently, state recognition of such a right exists only indirectly via acceptance of established "higher order" human rights to which environmental rights are corollary.
87. See *e.g.* Rodriguez-Rivera, *supra* note 85 at 16–18.
88. See *e.g.* Boyle, *supra* note 81.
89. See Arsanjani, *supra* note 11 at 91.

human right based on the uniqueness of indigenous peoples' relationship to their lands.[90] It is the distinctiveness of this relationship that lies at the heart of the cultural integrity model's conception of indigenous peoples and elevates the need to protect their environment and lands to a right to protect indigenous peoples as an identifiable group. This both justifies a human rights approach and limits its reach.

In the end, a broadly-based human rights approach to international environmental law may not be desirable. In the case of indigenous peoples, the culturally-based approach to environmental human rights is appropriate, because these rights are necessary to protect indigenous peoples as vulnerable minorities within the state.[91] This fulfillment of cultural identity is key to the maintenance of a vibrant and "healthy" state. In the case of indigenous peoples' environmental rights, deference to state sovereignty over resources should be attenuated. In the case of more general domestic environmental concerns, it is not so clear that a human rights approach and the corresponding limits on state sovereignty are appropriate. Domestic decisions concerning environmental policy often involve complex, polycentric balancing between groups within the state. [92] This balancing may implicate multiple individual rights identifiable as third generation human rights, such as rights to the environment, development, or health. In this context, the traditional deference shown to state sovereignty in international environmental law seems necessary.

The recognition of indigenous peoples' environmental rights as a component of human rights claims expands the traditional framework of international environmental law. The potential influence of this development is, however, limited because indigenous peoples' environmental rights are rooted in the distinctiveness of their culture and unique relationship to the environment. Nevertheless, recognition of indigenous peoples' human rights has some potential to influence international environmental law in a positive manner. It can, for example, help ensure that the collective voice of indigenous peoples is present in international and domestic environmental standard setting, by providing a mechanism for indigenous peoples to access the participatory rights they enjoy under the cultural integrity model. This will foster indigenous environmental rights' contribution to a more holistic international environmental law.

Recognition of indigenous human rights to the environment under the cultural integrity model is unlikely to destabilize existing international environmental law. This is in part because under the cultural integrity model, indigenous peoples' environmental rights are defined in terms large-

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90. See *e.g. Awas Tingni Ruling, supra* note 77 at para. 149.
91. See *e.g.* Arsanjani, *supra* note 11at 88–89.
92. See Boyle, *supra* note 81 at 64.

ly consistent with the principles and objectives which form the substructure of international environmental law itself.[93] In effect, the cultural integrity model and the view of indigenous environmental rights it embraces define away the possibility that human rights recognition of indigenous peoples' claims has the potential to restrict state sovereignty or to disturb international environmental law in a profound way. In this way, the cultural integrity model, even within a human rights context, stands in stark contrast to the self-determination model.

From the perspective of indigenous peoples, the rights offered by the cultural integrity model appear to risk "freezing" the development of indigenous peoples' relationship to their lands and resources. Structuring indigenous peoples' rights in terms of "traditional," "ecologically harmonious" or "subsistence" practices preserves a somewhat stereotypical picture of aboriginal culture. As noted by Brian Slattery in his discussion of aboriginal title in Canadian law:

> We must guard against the notion that native societies are essentially static in nature, that the only true aboriginal land uses are those that were practised "aboriginally." In fact, of course, native societies have never been static, and have often been characterized by an ability to adapt to shifting circumstances in a highly flexible manner. Without this flexibility they would have had little chance of survival.[94]

Indigenous communities, without abandoning the cultural centrality of their relationship to their lands, may wish to pursue development of their resources in ways which stretch beyond the "traditional" uses protected by the cultural integrity model of indigenous rights.[95] For example, the *Charter*

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93. For example, Principle 22 of the *Rio Declaration*, *supra* note 7 constructs a right to State recognition and protection of indigenous peoples communities based on their potential contribution to sustainable development through preservation of indigenous communities' knowledge and traditional practices. This links the rights of indigenous peoples to the core concept of sustainable development. A similar structure is apparent in Article 8(j) of the *Bio-diversity Convention*, *supra* note 5.

94. Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727 at 747. The need for a dynamic approach to aboriginal rights under Canadian law has also been recognized by the Supreme Court of Canada (S.C.C.), in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289. The majority noted, at para. 64, that the aboriginal rights protected by s. 35(1) of the Canadian *Constitution* must be "interpreted flexibly so as to permit their evolution over time," citing *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 at 397 at 1093; this would avoid the limitations of a "frozen rights" approach. Justice L'Heureux-Dubé in her dissenting judgment noted at para. 179 that, "distinctive aboriginal culture is not a reality of the past, preserved and exhibited in a museum, but a characteristic which has evolved with the natives as they have changed, modernized and flourished over time, along with the rest of Canadian society." The majority decision of the S.C.C. in this case has been criticized as taking too restrictive a view of aboriginal culture, in requiring practices "integral to the distinctive culture" of aboriginal rights to be traceable to the pre-contact period of a group's existence. See *e.g.* Chilwin C. Cheng, "Touring the Museum: A Comment on *R. v. Van der Peet*" (1997) 55 U.T. Fac. L. Rev. 419.

95. See *e.g.* S. James, Anaya, "Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests" (1999) 7 Buff. Envtl. L.J. 1 at 10–11. In this article, Anaya posits a scenario where an indigenous community wishes to promote a mining development on its lands, with environmental controls it designs, weighing the benefits of environmental harm against developmental benefits to the community.

of the Indigenous and Tribal Peoples of the Tropical Forests[96] describes the importance of indigenous peoples' relationship to their lands in Article 3:

> Our territories and forests are to us more than an economic resource. For us, they are life itself and have an integral and spiritual value for our communities. They are fundamental to our social, cultural, spiritual, economic and political survival as distinct peoples.

Article 34 goes on to develop the indigenous peoples' concept of an acceptable development policy:

> Our policy of development is based, first, on guaranteeing our self-sufficiency and material welfare, as well as that of our neighbours; a full social and cultural development based on the values of equity, justice, solidarity and reciprocity, and a balance with nature. Thereafter, the generation of a surplus for the market must come from a rational and creative use of natural resources developing our own traditional technologies and selecting appropriate new ones.

A risk associated with the cultural integrity model is that indigenous peoples may experience difficulty in accessing even the participatory rights it provides where a more "dynamic" relationship to their environment exists. This may limit indigenous peoples' ability to introduce their evolving cultural understanding of the environment into international environmental standard setting and policy formulation.

IV. The Self-Determination Model

IT SHOULD BE EMPHASIZED that the self-determination referred to here is with respect to indigenous lands, resources and environmental policy. None of the instruments surveyed adopts a view of self-determination so broad that indigenous peoples are elevated to "peoples" at international law, or recognized as discrete political communities with equivalent-to-nation status. Rather, this model recognizes a limited form of self-determination in which indigenous peoples have internal sovereignty rights over their own cultural, social and economic development, including the exclusive ability to control and manage indigenous lands and resources.

A. EXPRESSION OF THE SELF-DETERMINATION NORM

The key element of the self-determination norm is indigenous peoples' right to exercise control over their own cultural, economic, and social development, which supports a right of control over their lands and resources.

This norm finds its clearest expression in the *UN Draft Declaration on*

96. *Supra* note 68.

the Rights of Indigenous Peoples.[97] Article 3 states that indigenous peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development."[98] This statement of the right tracks the language in "higher order" human rights instruments of universal application.[99] The *UN Draft Declaration* carries this unqualified general right of self-determination into the area of control over indigenous peoples' lands and resources. The most important articles concerning indigenous peoples' control over their lands and environment are Articles 26 and 30:

> 26. Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.
>
> 30. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands...including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands...particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The *UN Draft Declaration* provides the strongest statement of indigenous peoples' rights in an international instrument. The assertion of these rights rests on the premise that they are necessary to guard the "political, economic and social structures and...cultures, spiritual traditions, histories and philosophies" of indigenous peoples.[100] The *UN Draft Declaration* also explicitly connects these indigenous peoples' "existence" rights to control over their lands, territories and resources.[101] The Draft Declaration recognizes that indigenous peoples' knowledge, cultures and traditional practices contribute to sustainable development and effective environmental management.[102] In this respect, the *UN Draft Declaration* tracks the characteristics associated with the cultural integrity model. The difference is that in the

97. The *UN Draft Declaration* was produced through the efforts of the UN Working Group on Indigenous Peoples over the period from 1985–1993, see Venne, *supra* note 19 at 107. The Declaration is unique in that it is the only international instrument concerning indigenous rights which indigenous peoples themselves have directly participated in formulating. See *e.g.* Barsh, *supra* note 1 at 52–58 for a discussion of the interaction between indigenous participants and others involved in the process of developing the *UN Draft Declaration.*

98. *UN Draft Declaration, supra* note 3, art. 3.

99. See *ICESCR*, art. 1.1 and *ICCPR*, art. 1.1, *supra* note 71.

100. *UN Draft Declaration, supra* note 3, preamble, pt. 6.

101. *Ibid.*

102. *Ibid.* preamble, pt. 9.

UN Draft Declaration, indigenous peoples' rights over their lands and resources flow from their inherent right to control their own development.

The *UN Draft Declaration* also contains indigenous cultural rights which have implications for resource and environmental management. Article 21 provides indigenous peoples the right "to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."[103] Article 24 confirms their "right to their traditional medicines and health practices... including the right to the protection of vital medicinal plants, animals, and minerals."[104] Article 29 recognizes a right to "full ownership, control and protection of their cultural and intellectual property", which includes measures to protect genetic resources and knowledge of fauna and flora.[105] All of these rights could be asserted as a means of securing environmental protection for the land or resources that are necessary to support them.

Once again, these rights bear a *superficial* similarity to aspects of the cultural integrity model. There are two crucial differences. First, these rights spring from indigenous peoples' right to exercise control over their social, cultural and economic development. Second, and perhaps consequently, there is no presumptive connection between the cultural rights outlined above and sustainable environmental policy. Indigenous peoples have the right to define their own cultural relationship with their environment under the self-determination model. Although the notion that indigenous peoples have traditionally had a positive and sustainable relationship with the environment is present, it does not constrain the nature of their future cultural relationship with their lands, resources or indigenous knowledge. The protection of their rights under the self-determination model is not defined in terms of this traditional connection.

The self-determination model is also apparent in a somewhat weaker form in the *OAS Draft Declaration on the Rights of Indigenous People*.[106] The key provision in this regard is Article 15, which recognizes that indigenous peoples have the "right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development". This article goes on to recognize a consequent right of indigenous peoples "to autonomy or self-government" and enumerates a list of specific areas with regard to which indigenous peoples would exercise this right, including "economic

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103. *Ibid.* art. 21.
104. *Ibid.* art. 24.
105. *Ibid.* art. 29.
106. *OAS Draft Declaration*, *supra* note 7.

activities, land and resource management, [and] the environment."[107] Article 18 confirms the ownership rights of indigenous peoples to their lands and provides that indigenous peoples rights to natural resources on their lands include "the ability to use, manage, and conserve such resources". The self-determination rights of indigenous peoples appear more limited under the *OAS Draft Declaration* than the *UN Draft Declaration* because they are couched in terms of autonomy, or self-government, with respect to a specific list of subjects. There is also some indication that self-government rights may be construed as being limited to purely local or internal affairs.[108] Moreover, the OAS Draft also explicitly attempts to limit the range of its self-determination provision through the definition of indigenous peoples. It states in Article 1 that the use of the term indigenous "peoples," "shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law."[109] The OAS Draft does still, however, recognize a right of indigenous peoples to direct the control and evolution of their own societies, which extends to management of their lands and resources.

B. RIGHTS FLOWING FROM SELF-DETERMINATION

The self-determination model differs from the cultural integrity model in that it provides indigenous peoples with a broader range of substantive environmental rights. Indigenous peoples have a right of control over their lands which requires that states seek their consent in order to implement policies in connection with indigenous lands. Indigenous groups have the right to formulate their own environmental law and policy, applicable to their lands. Indigenous peoples also have the right to the enforcement of their environmental rights.

These rights are apparent in the *UN Draft Declaration*. Rather than an obligation to consult indigenous peoples about their interests when

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107. In an earlier draft, this article was limited to autonomy or self-government with respect to "internal and local affairs." See draft approved by IACHR, 1278th Sess., 18 Sept., 1995, OAS Doc., OEA/Ser./L/Rev.1 (21 September, 1995). This explicit limitation has been dropped in the current text, but there is continuing uncertainty over the form this provision will ultimately take. The United States has proposed a draft of the provision which would re-introduce the limitation. The Chair of the Working Group has also proposed a draft text containing the limitation, and noted that the outcome regarding the self-determination provision hinged on the outcome of the form of the draft regarding the definition of indigenous peoples. See OAS, Permanent Council of the OAS, Committee on Juridical and Political Affairs, *Draft American Declaration on the Rights of Indigenous Peoples—Working Document Comparing the Original Draft of the Inter-American Commission of Human Rights, Proposals by the States and Indigenous Representatives,* as well as the *Proposed Draft by the Chair of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples*, OAS Doc. OEA/Ser.K/XVI/GT/DADIN/doc.53/02 (9 January, 2002).

108. *Ibid.*

109. This aspect of the *OAS Draft Declaration* has been criticized by indigenous peoples. Indigenous peoples view any limitation of self-determination that would confine it to internal and local affairs as similarly inadequate. See *e.g.* Venne, *supra* note 19 at 37–39. Indigenous peoples also object to the fact that the *OAS Draft Declaration* was composed initially by a panel of experts without any input from indigenous peoples.

resource exploitation takes place on their lands, the *UN Draft Declaration* requires the free and informed consent of the peoples concerned. It effectively grants indigenous groups a veto over state activity that affects indigenous lands. Indigenous groups have the right to self-government of their economic activities, lands and resource management, and the environment as an element of their right to self-determination.[110] The *UN Draft Declaration* includes a right to the adjudication and enforcement of the rights of indigenous peoples that it recognizes:

> Indigenous peoples have the right to have access to and prompt decisions through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.[111]

Although the *UN Draft Declaration* does not go as far as providing for the specific manner in which this right would be realized, this is not really the function of a declaration of rights. It is, however, significant that the essential right to an enforcement mechanism is recognized in the Draft.[112]

Rights of control over indigenous territories and the ability to formulate environmental law and policy are also reflected in the *OAS Draft Declaration*, although in a more attenuated form. As previously noted, article 15(1) provides indigenous peoples a right to autonomy over matters including culture, religion, economic activities, land and resource management, and the environment. Indigenous peoples do not have the ability to veto every state activity that affects their lands under this Declaration, but always have the right to participate and be consulted.[113] Article 21(2) provides that indigenous people must give their "free and informed consent" to any development proposal affecting the rights or living conditions of indigenous people, unless "exceptional circumstances so warrant in the public interest." Article 16 confirms indigenous peoples' right to formulate and apply their own indigenous law and to apply it to matters within their own communities. The article also provides that indigenous law shall be recognized as part of states' legal systems. Article 16 thus appears to be capable of embracing recognition of indigenous law relating to the management of their lands. The *OAS Draft Declaration* does not include a broad, explicit right to enforce-

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110. *UN Draft Declaration*, *supra* note 3, art. 31.

111. *Ibid.*, art. 39.

112. The development of a permanent forum for indigenous peoples at the UN may provide a mechanism through which this enforcement could take place. The proposed mandate of the forum includes dealing with the human rights of indigenous peoples, acting as an interface between indigenous peoples and States, hearing complaints from indigenous groups, assisting with the resolution of conflicts, and numerous other activities. The suggested legal framework is the *UN Draft Declaration on the Rights of Indigenous Peoples*, along with other existing international instruments recognizing indigenous rights. See *Permanent Forum Report*, *supra* note 50.

113. *OAS Draft Declaration*, *supra* note 7, arts. 13, 18.

ment of indigenous rights as found in the *UN Draft Declaration*. Article 18(4) does provide that indigenous peoples have a right to "an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources". The OAS Commission on Human Rights has been receptive to claims from indigenous peoples concerning their lands, so the omission of a broad enforceability provision may not be a crucial stumbling block to accessing indigenous peoples' rights if the *OAS Draft Declaration* is adopted.[114]

V. Implications of the Self-Determination Model

THE RECOGNITION of indigenous peoples' environmental rights under the self-determination model has important implications for international environmental law. This model of indigenous environmental rights essentially creates new participants in the formation of international environmental law, who must be incorporated as "equivalent-to-state" parties. This follows from the creation of enforceable rights of indigenous peoples to control and direct environmental policy as it affects their lands within the domestic sphere.

These rights create a gap in state capacity to commit to international environmental agreements that require domestic action. Inclusion of indigenous peoples in the process of forming international environmental law provides the only way to fill this gap directly. Where indigenous peoples have exclusive rights of control over lands and resources, their participation must go beyond consultation. Indigenous peoples must be incorporated as consensual partners in the formation of international environmental law affecting their interests. This may amplify the beneficial effects of incorporating indigenous peoples' voices in the formation of international environmental law that have already been discussed. The more holistic approach to the environment espoused by indigenous peoples may be directly incorporated in international environmental agreements. International environmental law may become less targeted to remedying specific types of biophysical and economic damage, and more focused on the general inter-relationship between human society and the environment.

In addition, recognition of indigenous peoples' environmental sovereignty rights may allow international environmental law to "pierce the veil" of state sovereignty. This may occur in one of two ways. Indigenous peoples may adopt core principles of international environmental law, such as the 'polluter pays' principle, discussed above, in formulating their own environmental policy. Alternatively, indigenous peoples may choose to accede to

114. See discussion of Huaroni peoples' case and Awas Tingni Ruling, above note 77. However, it should be noted that access to IACHR was achieved largely on the basis of threats to cultural survival of indigenous peoples. It is not clear that access would be secured where self-determination rights with respect to their resources were at issue but "cultural survival" not threatened.

international environmental agreements, to which their "home" states are not parties.[115] Under either of these scenarios, the effect would be to apply international environmental law principles and agreements to the resolution of environmental problems within the state, having only domestic effects. This might be viewed as a positive step in international environmental law, as state sovereignty over domestic resources has been a barrier to using international law to address environmental problems which do not have effects outside the "offending" state.[116] In this way, indigenous peoples' environmental sovereignty rights may operate in a manner that is similar to cultural integrity-based human rights claims.[117]

An advantage that the self-determination approach holds over the cultural integrity model is that it does not construct indigenous peoples' environmental rights based on a potentially limiting, stereotypical picture of indigenous culture. Indigenous peoples' rights to be involved in decisions concerning their environment are not restricted to instances in which their traditional cultural practices are threatened. Indigenous peoples have a broader ability under the self-determination model to assist in formulating development policy when the balancing of indigenous peoples' particular non-material relationship to the land with the material needs of their communities is involved. The legitimacy of indigenous peoples' ideas concerning this balance is not confined to a set of responses consistent only with a traditional, largely subsistence existence, as it is under the cultural integrity

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115. This assumes that indigenous peoples would be recognized for the purpose of accession to an international agreement on the basis of "subject-like" status in international law where the agreement concerns their environmental sovereignty rights. Non-state parties are recognized under some international agreements, where their recognition is confined to the specific issues dealt with under the agreement, an example is workers associations under *ILO 169*, *supra* note 1. Indigenous peoples may not need to be subjects at international law for all purposes in order to be accorded limited "subject-like" status with regard to their particular rights. The incorporation of indigenous peoples' organizations in the work of the UN Working Group establishing a permanent forum is an example of such limited recognition. See *e.g.* Barsh, *supra* note 1.

116. See O'Connor, *supra* note 84 at 205.

117. The existence of an indigenous peoples' human right to self-determination, even confined to decisions regarding the use of their lands and resources, is much more uncertain than cultural integrity based environmental human rights. The human rights decisions discussed above all base the protection of indigenous peoples' rights on cultural integrity guarantees; for instance in the *Lubicon Lake Band* case, *supra* note 75, the cultural rights protection under art. 27 of the *ICCPR*, *supra* note 71, was extended to cover economic and social activities associated with Cree lands and resources. It seems unlikely that the self-determination model of indigenous environmental rights could, at this point in time, support access to human rights instruments, either as a means of encapsulating these environmental sovereignty rights or enforcing them.

model.[118] The self-determination approach permits a more complex indigenous cultural connection between the environment and development to become part of the debate in the formation of environmental law and policy. Indigenous peoples have a distinctive view of their relationship to the environment, and the presence of this perspective may enrich the consideration of possible courses for environmental policy. The self-determination approach avoids the possibility that indigenous peoples' views will be marginalized as an historical relic, preserved for the enrichment of the broader community with protection extended to sufficient lands and resources to support the equivalent of "cultural reserves."[119]

The recognition of indigenous peoples' environmental rights under the self-determination model is crucially different from the cultural integrity model, as it is the right *of indigenous peoples* to choose their own path to cultural and economic development that is guaranteed. This may or may not lead to the positive developments in international environmental law identified above. The right of indigenous peoples to "freely pursue their economic and social development"[120] and to set priorities for the use and management of their lands includes the right to depart from traditional principles governing the relationship between indigenous peoples and their environment. While the self-determination model adverts to the ecologically sound "traditional" relationship between indigenous peoples and the environment, the environmental rights developed within this framework are not contingent on this relationship. Indigenous peoples may choose not to incorporate principles of international environmental law in the management of

118. A question that arises, once indigenous peoples rights are no longer confined to the set of possibilities associated with their traditional, distinctive cultural practices is why they are entitled to more significant protection of their rights, relative to other sub-communities within the general population, such as linguistic minorities. Even under the self-determination model, the existence of indigenous peoples as a distinctive community provides a rationale for their protection (under a contingent rights model) or the source of their rights (under an inherent rights approach). A line between "indigenousness" and "otherness" is implicit in setting the boundaries of indigenous rights. A similar tension has been recognized in the case of aboriginal title under Canadian constitutional jurisprudence. In *Delgamuukw, supra* note 70 at 1083, 1089, Lamer C.J.C. (as he then was) noted that the content of aboriginal title included the right to exclusive use and occupation of land for a variety of purposes which were not limited to traditional aboriginal activities; however, it did not extend to uses of the land which were "irreconcilable with the nature of the groups attachment to the land." The rationale is that such a use undermines the cultural replication which is central to the aboriginal group and threatens their future existence as a distinctive society—one of the foundational elements supporting their unique rights. A similar argument could be made regarding indigenous rights and environmental concerns in the international context.

119. Indigenous peoples have themselves expressed a concern that preservation of their culture is approached in this way. See Indigenous Peoples' Earth Charter, Kari-Oca Conference (25-30 May 1992), online: <http://www.dialoguebetweennations.com/IR/english/KariOcaKimberley/KOCharter.html> [*Indigenous Peoples' Earth Charter*], which was developed at an indigenous peoples' conference held at the same time as the UN Rio Conference. Point 59 of the *Indigenous Peoples' Earth Charter* states, "[w]e value the efforts of protection of biodiversity but we reject to be included as part of an inert diversity which pretends to be maintained for scientific and folkloric purposes."

120. *UN Draft Declaration, supra* note 3, art. 3.

their lands and resources; they may not wish to be bound by international agreements that force them to place the environment ahead of the developmental needs of their own communities.[121]

There is a possibility that recognition of indigenous peoples' environmental self-determination rights will lead to the destabilization of the existing framework of international environmental law. If indigenous peoples choose to pursue environmental policy that is inconsistent with state commitments under existing agreements, there will be little that states can do to ensure compliance.[122] Indigenous peoples' right to choose policy goals independent of state priorities is recognized in self-determination instruments.[123] The existence of "equivalent-to-state" status for indigenous peoples may, therefore, weaken and dilute the effect of existing international environmental agreements.

There is, however, little in the participation of indigenous peoples in environmental debates to date which suggests that any fear they will pursue environmentally damaging development strategies is well-founded. In a UN study on indigenous peoples' relationship to their lands, a theme that emerged throughout indigenous peoples' participation over the years was:

> [T]he fundamental issue of their relationship to their homelands...in the context of the urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance of their lands, territories and resources for their continued survival and vitality.[124]

If anything, indigenous peoples generally appear to advocate stricter standards for environmental assessment and protection than currently exist. For example, in the *IAIP Charter*, indigenous peoples called for a halt to mining concessions, in order to formulate policies that prioritized "rational management and a balance with the environment."[125] Similarly, Article 38 of the *IAIP Charter* calls for the prioritization of reforestation programs on

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121. See Aqqaluk Lynge Remarks, *supra* note 62, in which he asserts that restrictions on Inuit rights to hunt, fish, and trap are a threat to their survival and impair the achievement of sustainable development in the Arctic. The statement goes on to suggest that bans on seal pelts and furs from animals caught in leg-hold traps, and the U.S. *Marine Mammal Protection Act* should accommodate Inuit *commercial* exploitation as a way to preserve the Arctic environment. See also *Kuujjuaq Declaration, supra* note 62 which calls for the promotion of removal of international trade barriers affecting Inuit livelihood, enhancing the financial benefits of development, and studying how best to address "global forces, such as the 'animal rights' and other destructive movements that aim to destroy Inuit sustainable use of living resources..."

122. That is, states will be deprived of the ability to coerce compliance by indigenous peoples. Techniques such as the use of state financial incentives and moral suasion would still be available, however.

123. See *e.g. OAS Draft Declaration, supra* note 7, art. 21, which guarantees indigenous peoples the right to decide "what values, objectives, priorities and strategies will govern and steer their development course, even where they are different from those adopted by the national government...."

124. *Indigenous Peoples and their relationship to land: Second progress report on the working paper* prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1999/18 (June 1999) at para. 10, cited in Anaya & Williams Jr., *supra* note 70 at 49.

125. *IAIP Charter, supra* note 68, art. 26.

degraded land, "giving priority to the regeneration of native forests, including the recovery of all the functions of tropical forests, and not being restricted only to timber values". Indigenous peoples appear to integrate environmental concerns directly in their articulation of development strategies:

> Any development strategy should prioritize the elimination of poverty, the climactic guarantee, the sustainable manageability of natural resources, the continuity of democratic societies and the respect of cultural differences.[126]

In light of the statements of indigenous peoples themselves, it does not appear that the recognition of indigenous peoples' environmental sovereignty rights would undercut the protections currently offered by international environmental law.

Recognition of indigenous peoples' self-determination rights would add another layer to the currently state-based process of establishing international solutions to environmental problems. Even if indigenous peoples continue to adhere to their ecologically harmonious, traditional relationships with their lands and resources, their presence as independent participants may render consensus more elusive. Indigenous peoples' approach to their relationship with the environment is a unique element of their distinctive culture. The priorities and policy prescriptions that follow may not coincide with those based on the more anthropocentric, development-based approach that reflects consensus in existing international environmental law.[127] In fact, achieving consensual solutions to transnational environmental problems becomes increasingly elusive as the number of affected parties increases.[128] Paradoxically, many environmental problems are also made worse by the existence of multiple, independent decision-makers.[129] The recognition of indigenous peoples' environmental sovereignty rights may exacerbate these problems in international environmental law, and create them within the domestic sphere. Consensus in itself is not a desirable outcome, however, when important aspects of human welfare are not incorporated in environmental law and policy formulation. The current market-based, anthropocentric approach to environmental regulation has its non-

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126. *Indigenous Peoples' Earth Charter*, *supra* note 119, Development Strategies, point 64.

127. See *e.g.* *OECD Principles*, *supra* note 64 paras. 5–8, which describe these consensus elements of sustainable development.

128. The difficulty surrounding the establishment and ratification of the Kyoto protocol on global warming is a good example of this phenomenon.

129. This is the 'Tragedy of the Commons' phenomenon, identified in the influential article by Garrett Hardin, "The Tragedy of the Commons" (1968) 162 Science 1243. The existence of independent decision makers using a common resource who are unable to coordinate their responses, leads to the overexploitation of the shared resource. Ocean fisheries provide a classic example of a common resource devastated by overuse as a consequence of failing to establish overarching regulatory norms. See *e.g.* H. Scott Gordon, "The Economic Theory of a Common Property Resource: The Fishery" (1954) 62 The Journal of Political Economy 124.

indigenous critics.[130] Indigenous peoples do not accept the current analytical framework for assessing environmental concerns in a development context as adequate. Moreover, indigenous peoples advocate for a reconstruction of the concept of economic development, incorporating aspects of their unique knowledge and worldview of the human relationship to the environment:

> The concept of development has meant the destruction of our lands. We reject the current definition of development as being useful to our peoples. Our cultures are not static and we keep our identity through a permanent recreation of our life conditions; but all of this is obstructed in the name of so called developments.
>
> Recognizing Indigenous Peoples' harmonious relationship with nature, indigenous sustainable development models, development strategies and cultural values must be respected as distinct and vital sources of knowledge.[131]

Indigenous peoples have not only articulated such views in the abstract, but have focussed similar criticisms at particular international agreements with implications for environmental policy and management:

> We believe that the whole philosophy underpinning the WTO Agreements and the principles and policies it promotes contradict our core values, spirituality and worldviews, as well as our concepts and practices of development, trade and environmental protection. Therefore, we challenge the WTO to redefine its principles and practices toward a "sustainable communities" paradigm, and to recognize and allow for the continuation of other worldviews and models of development.
>
> Indigenous peoples...can offer viable alternatives to the dominant economic growth, export-oriented development model.[132]

The inclusion of indigenous peoples in the formation of international environmental law may lead to the loss of a consensus view, as compared with the "consensus" now embodied in the existing framework of international environmental law. The statements of indigenous peoples indicate that the result might be a process in which the balance between environmental concerns and economic imperatives is re-examined, with the benefit of indigenous peoples' unique views. This may lead to creative new devel-

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130. The development of "ecological economics"—an approach to environmental regulation based on comprehensive, interacting biological and human systems—as an alternative to traditional, neo-classical "environmental economics" is one example of a development propelled by such criticism.

131. *Indigenous Peoples' Earth Charter*, *supra* note 119, Development Strategies, points 66–67.

132. *Indigenous Peoples' Seattle Declaration*, on the occasion of the Third Ministerial Meeting of the World Trade Organization, November 30-December 3, 1999, online: <http://www.biodiv.org/programmes/socio-eco/traditional/instruments.asp#STA> (follow the link to the declaration from the section headed, "Statements made by Representatives of Indigenous and Local Communities"). See also *IAIP Charter*, *supra* note 68, art. 29, calling for a "redirection of the development process away from large-scale projects toward the promotion of small-scale initiatives" controlled by indigenous peoples.

opments in international environmental law, such as a fusion of indigenous and non-indigenous ideas and objectives.[133]

The involvement of indigenous peoples as consensual partners in international environmental law-making is a consequence that follows naturally from recognition of their rights under a self-determination model. It would bring about profound changes in the way international environmental law is formed, since the process would no longer be confined to state parties, and the foundational principle of state sovereignty would be compromised. As noted above, this might lead to positive evolution in international environmental law through the adoption of a more holistic approach and increased focus on environmental concerns while concerns remain contained within state boundaries. It might also destabilize both the effectiveness of existing international environmental law and the process of forming new law. While there is great potential for the development of international environmental law associated with recognition of indigenous peoples' rights under a self-determination framework, there is also considerable uncertainty surrounding the outcome.

VI. Indigenous Rights in International Environmental Law: Current Position and Future Directions

WHETHER THE RECOGNITION of indigenous rights with respect to the environment translates into the potential for substantial change in international environmental law, depends on which of the two models of indigenous rights outlined above emerges as the dominant paradigm. Current practice appears to favour the cultural integrity model. The instruments embodying this model include currently enforceable obligations—some widely accepted. For example, both the *Desertification Convention* and the *Bio-Diversity Convention* currently have 187 nations as parties.[134] The cultural integrity model is also reflected in widely-adopted declarations, although these are not enforceable *per se*: the *Rio Declaration* and *Agenda 21* were adopted by

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133. See *e.g. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, online: The Convention on Biological Diversity <http://www.biodiv.org/programmes/socio-eco/traditional/instruments.asp>. The declaration was produced during a conference held in Whakatane, New Zealand, 12–18 June, 1993, involving over 150 delegates with indigenous representatives from over 14 countries. Article 2.5 provides a recommendation that states develop in full cooperation with indigenous peoples an "additional cultural and intellectual property rights regime." The proposed regime includes features such as collective ownership and origin of such property, a co-operative rather than competitive framework, and a multi-generational coverage span. The declaration retains the concept that owners of commercially valuable intellectual property should derive economic benefit from it, and that a protective legal regime is required to prevent unauthorized expropriation of cultural and intellectual property.

134. See *supra* notes 5 and 7.

over 178 states at the UN conference in Rio de Janeiro.[135] *ILO 169*, which specifically targets states' obligations to indigenous peoples, has been adopted by 17 countries to date.[136] In contrast, the self-determination model finds expression in the UN and OAS Draft Declarations. These declaratory instruments, even if eventually adopted, are not directly enforceable.[137]

The reasons behind the broader acceptance of the cultural integrity model are not entirely clear. There appears to be a concern on the part of states that accepting self-determination rights for indigenous peoples poses a risk to their territorial integrity, and undermines state sovereignty.[138] States' ability to unilaterally limit their obligations to indigenous peoples in instruments such as the *Bio-Diversity Convention* and the *Desertification Convention* may help to explain these Conventions' broader adoption.[139] The prominence of the cultural integrity model may reflect a desire to "define away" the risk of potential destabilization associated with indigenous peoples' environmental self-determination rights, by limiting indigenous rights to those that are consistent with the objectives and principles of international environmental law. It may also simply reflect a belief that the cultural integrity model captures the core of indigenous environmental rights.[140]

The inherent tension between the alternative views of indigenous rights, based on the models developed in this paper, is reflected in responses to the activities of the International Whaling Commission (I.W.C.). In 1972, the I.W.C. decided to grant the bowhead whale "protection status" and repealed an indigenous peoples' exemption to the ban on harvesting. In the face of indigenous peoples' protests, the I.W.C. established a new policy that included "enabling indigenous peoples to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements."[141]

The application of the Makah peoples for a culturally-based exemption to the I.W.C. whaling moratorium in 1997 provoked concern that such a right could destabilize the restrictions on harvesting. Some argued that a

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135. *Rio Declaration*, *supra* note 7; see also *Agenda 21*, *supra* note 7.

136. *ILO 169*, *supra* note 1.

137. It has been suggested that they may nonetheless contribute to establishing *opinio juris* supporting the existence of a parallel norm in customary international law, that would be enforceable. See *e.g.* Anaya, *supra* note 9 at 49–58.

138. See *e.g.* United Nations Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, UNESCOR, 59th Sess., UN Doc. E/CN.4/2003/92 (2003), indicating proposed alternatives of Canada, Norway and the United States to current art. 3 of the *UN Draft Declaration*, which provides for a right of self-determination and a corresponding right of indigenous peoples to freely pursue their economic, social and cultural development.

139. *Supra* note 7, art. 8(j); Maggio, *supra* note 26; *Desertification Convention*, *supra* note 7, arts. 16(g), 17(1)(c), 18(2).

140. See Rupa Gupta, "Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process" (1999) 74 N.Y.U. L. Rev. 1741 [Gupta].

141. See Jennifer McIver, "Environmental Protection, Indigenous Rights and the Arctic Council: Rock, Paper, Scissors on the Ice?" (1997) 10 Geo. Int'l Envt'l L. Rev. 147 at 159.

broadly-defined indigenous cultural right to whale might lead to commercial harvesting outside the scope of the I.W.C. ban.[142] Others have suggested that the idea of a dichotomy between indigenous rights and the protection of whales is misleading, as their survival is necessarily mutual. The structure of indigenous society and norms precludes the kind of commercially-based extinction that the I.W.C. ban is designed to address.[143] The impact of recognizing an indigenous cultural right to harvest whales depends on how the content of indigenous culture is constructed. If indigenous peoples are free to choose economic exploitation as culturally appropriate harvesting, this may undermine the structure and effect of the I.W.C. management regime.

It should not be assumed that, given a choice, indigenous peoples will always pursue development and cultural change in a way that conforms with a traditional view of their relationship to the environment. Indigenous norms concerning their ecological responsibilities and spiritual connection to the natural world were largely self-enforcing when they attached to subsistence societies dependent on this environmental balance for survival.[144] It is not obvious that these norms will remain impervious to change as indigenous peoples gain increased control over their lands and resources, as well as the ability to use them to support social and economic development.[145] In the case of the Huaorani, for example, discussed above, some indigenous groups gave approval for petroleum development on their lands.[146] Similarly, representatives of indigenous participants in the Arctic Council have argued that restrictions on indigenous peoples' commercial hunting and trapping rights are a barrier to sustainable development of the Arctic.[147] Indeed, the history of Canadian indigenous peoples' involvement in the fur trade suggests that they are not immune from participating in environmentally unsound practices.[148] Finally, a presumption that indigenous people do not have this freedom to choose the path for their own cultural and eco-

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142. See Leesteffy Jenkins & Cara Romanzo, "Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?" (1998) 9 Colo. J. Int'l Envt'l. L. & Pol. 71.
143. Gupta, *supra* note 140.
144. See *e.g.* Ann M. Carlos & Frank D. Lewis, "Property Rights, Competition, and Depletion in the Eighteenth-Century Canadian Fur Trade: The Role of the European Market" (1999) 32 Canadian Journal of Economics 705 [Carlos & Lewis].
145. But see Jose Paolo Kastrup "The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 Tex. Int'l. L. J. 97 at 122, who suggests that shifts in indigenous environmental norms may be the result of state policies (*e.g.* relocation) that disrupt their "respect for an ecosystem once considered sacred."
146. See *e.g.* O'Connor, *supra* note 84 at 205. It is suggested that there is some question as to the legitimacy of the agreement. See also Fabra, *supra* note 63 at 249 where he indicates that some Huaorani, groups agreed to oil exploration on their territories in exchange for "development promises and gifts."
147. See Aqqaluk Lynge, Remarks, and Kuujjuaq Declaration, *supra* note 62.
148. See Carlos & Lewis, *supra* note 144, who suggest that aboriginal harvesters in the fur trade responded to increases in the price of beaver by harvesting larger numbers, despite serious depletion of the beaver population. The authors suggest that any conservation measures were traceable to the Hudson's Bay Co. rather than to indigenous peoples.

nomic development is contradicted by their own contributions to the development of indigenous rights.[149] Even without abandoning the cultural importance of their relationship to their lands, a right to self-determination gives indigenous peoples the freedom to re-evaluate this relationship constantly, balancing spiritual and material concerns.

The extent to which the recognition of a self-determination model will destabilize international environmental law will depend on how closely independent indigenous participants adhere to the existing framework. An indication of indigenous peoples' approach to international environmental law may, however, be gleaned by examining self-determination instruments in terms of their reflection of accepted principles of international environmental law.

The *UN Draft Declaration* includes a number of principles of international environmental law formulated in terms of indigenous rights and their lands.[150] The "polluter pays" and "cost internalization" principles, discussed above, are incorporated through requirements that indigenous people receive "just and fair compensation" for damage to their lands or exploitation of their resources.[151] The concept of intergenerational equity is also invoked: this is a core concept in international environmental law that provides that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".[152] In the *UN Draft Declaration*, for instance, indigenous peoples claim a right to manage their environment and resources in a way that provides for the intergenerational transmission and maintenance of their "distinctive spiritual and material relationship" to the environment.[153] The concept of intergenerational equity is also prevalent in indigenous peoples' own declarations concerning the environment. For example, the Kari-Oca declaration provides for an "ongoing responsibility to pass" indigenous peoples' lands and territories and all their resources "onto future generations".[154]

The formulation of indigenous environmental rights in a manner consistent with principles of international environmental law in the *UN Draft*

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149. See *e.g.* United Nations Commission on Human Rights, "Indigenous Issues: Written Statement Submitted by the Indian Movement Tupaj Amaru and the Indigenous World Association, Non-governmental Organizations in Special Consultative Status" UNCHROR., 54th Sess., UN Doc. E/CN.4/1998/NGO/31 (18 Feb, 1998). This document proposes changes to the *UN Draft Declaration* (*supra* note 3) which make just such a right explicit.

150. I will use the term "lands" to refer to the more broadly defined environment that is dealt with in the UN Draft Declaration.

151. *UN Draft Declaration*, *supra* note 3, arts. 21, 27 and 30.

152. See *OECD Principles*, *supra* note 64 at paras. 11–12 citing principle 3 of the *Rio Declaration*, *supra* note 7.

153. *UN Draft Declaration*, *supra* note 3, art. 25.

154. *Kari-Oca Declaration*, signed at Kari-Oca, Brazil, May 30, 1992, reaffirmed at Bali, Indonesia, June 4, 2002, online: The Convention on Biological Diversity <http://www.biodiv.org/programmes/socio-eco/traditional/instruments.asp>.

Declaration is particularly significant: it is the only instrument in whose formulation indigenous peoples have participated extensively. The appearance of core principles in indigenous peoples' own declarations is no less revealing. Both lend support to a view that indigenous peoples' participation in the formulation of international environmental law on a state-like basis is unlikely to be disruptive of the existing framework.

In the final analysis, attempts to limit the "risk" associated with indigenous peoples' rights in relation to their lands and resources may prove futile. Indeed there is a false dichotomy between indigenous environmental rights as a corollary to cultural integrity and as an element of self-determination: if a right to cultural integrity is to be recognized as an international norm, this right must extend surely to the ability of the group concerned to construct the content of their own culture. Attempts to extend cultural-integrity-based environmental rights to indigenous peoples which are "frozen" in terms of traditional relationships between indigenous peoples and their environment, are inherently flawed. For indigenous peoples' cultural integrity to be fully respected and promoted, indigenous peoples must be able to control and direct the evolution of their relationship with their lands and resources. This requires more that the procedural rights or compensation offered under the cultural-integrity model: indigenous peoples must also be able to exercise some control over their environment, through the existence of substantive rights. The words of the IACHR, in reference to the Mayagna of Awas Tingni illustrate the fundamental inseparability of cultural integrity and self-determination:

> Indigenous groups by the fact of their very existence have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production, but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[155]

There may or may not be a synergy between indigenous peoples' cultural development, broadly cast, and environmental protection. The existence of this risk cannot legitimize attempts to define it away for fear of destabilizing the existing international environmental order. International environmental law should be formed recognizing that indigenous peoples must be full participants in the process. Incorporating indigenous peoples in this way is ultimately the only effective means to answer questions about how the recognition of their interests will shape international environmental law.

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155. *Awas Tingni Ruling*, *supra* note 77 at para. 149.