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Indigenous Peoples and their Land Rights

Domestic Implementation and Enforcement of International Legal Standards

The Case of the Inughuit in Northern Greenland

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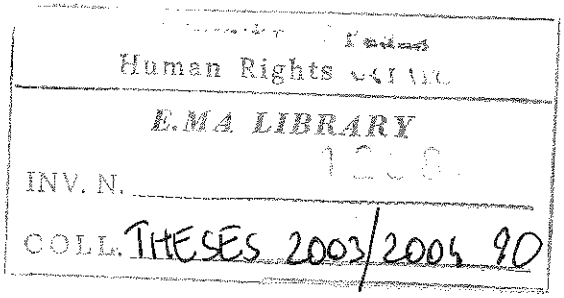

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I. Introduction

The future existence of the Polar Eskimos or as they call themselves: Inughuit (Great People) as a distinct indigenous entity is in jeopardy. For more than fifty years an American military base called the Thule Air Base has, based upon agreement between the United States and Denmark, been located on a central part of Inughuit territory in the Thule District in northern Greenland which they have occupied since time immemorial. The activities of the Thule Air Base have had and continue to have a negative impact on Inughuit culture and traditional patterns of living. A few years after the establishment of the base, the Inughuit were forcibly relocated to an area with sparse ecological resources which today is unable to provide the foundation necessary to economically sustain their traditional hunting culture. The Thule Tribe, consisting of 420 Inughuit, has now claimed their right to return to and use of the area from which they have been expelled as well as compensation for the historical and ongoing interferences with their territory. Their case was decided by the Danish Supreme Court in September 2003.

The gradual deterioration of Inughuit society in Greenland is caused by factors similar to those indigenous peoples face throughout the world. Here, forced evictions and displacements of indigenous peoples and expropriations of indigenous territory have taken place on a wide scale largely justified by States' economic agendas in pursuing developmental projects and exploitation of natural resources.[1] Regardless of the attitudes, doctrines and policies developed to justify interferences with and disturbance of indigenous territory, the consequences remain devastating; erosion of indigenous culture resulting in diminishing cultural diversity and ecological harmony of human kind. In order to reverse this development, respect must be paid to indigenous peoples' territorial rights as vital elements in their continued survival. As expressed by indigenous peoples themselves the "spiritual and material foundations of their cultural identities are sustained by their unique relationship to their territories."[2]

From a legal viewpoint, indigenous peoples have for long been disfavoured in pursuing their land and resource rights. Until recently, the doctrine of dispossession, *terra nullius*, holding indigenous lands as unoccupied or no man's land, has been upheld. Yet, things slowly began to

[1] Few examples hereof comprise the forced evictions in the Philippines of indigenous populations located in development zones, the logging, extraction of stones and construction of roads on Saami territory in Finland, and the exploitation of timber in Nicaragua on the lands of the Awas Tingni community. Below this thesis will refer further to these examples.

[2] As cited by Professor Robert A. Williams, in the Working Group on Indigenous Populations see Daes, Erica-Irene A. *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Indigenous Peoples and their Relationship to land.* See U.N. Doc. E/CN.4/Sub/2001/21(2001), para. 13.

change in 1975 when the international Court of Justice held that the doctrine had been wrongly and invalidly implemented towards the tribal peoples of the Western Sahara.[3] In 1984, an extensive study was undertaken by Special Rapporteur Martinez-Cobo concerning the situation of indigenous peoples worldwide.[4] The doctrine of *terra nullius* was fully denounced in 1992 when the High Court of Australia in the *Mabo v. Queensland* case ruled it to be an "unjust and discriminatory doctrine."[5] In matters of international standard-setting, Convention No. 169 on Indigenous and Tribal peoples (Convention No. 169) was adopted in 1989 providing a comprehensive framework for the protection of indigenous peoples.[6] Furthermore, the UN Working Group on Indigenous Peoples is currently undertaking deliberations for the purpose of the adoption of the UN Draft Declaration on the Rights of Indigenous Peoples (UN Draft Declaration), while similar undertakings are being made at the American regional level for the adoption of the Proposed American Declaration on the Rights of Indigenous Peoples (Proposed American Declaration).

However, to frame the protection necessary for the protection of indigenous land rights in legal terminology is not an easy task. It requires the legislators to pay due attention to the particular vulnerability of indigenous peoples' culture, their special relationship to their lands, their customary systems of tenure, the lack of formal recognition of their land rights, and their claim of return to traditionally occupied and owned territories when expelled. In addition, legislators face strong economic, political and security interests, and interests in preserving the integrity of national legal systems being advanced and articulated against this process. When international legal standards are finally adopted they are often neither effectively implemented nor enforced, or only implemented and enforced selectively. Again, it is the same set of interests that are obstructing indigenous peoples in enjoying and exercising their land rights. This is the situation even in States where indigenous peoples' land rights are afforded constitutional protection and special national laws provide for some degree of autonomy for their indigenous populations.

This thesis set out to analyse the legal protection of indigenous peoples' land rights within one of these States, namely Denmark. The focus will be on the Inughuit in northern Greenland who remain subject Danish jurisdiction. From a *prima facie* point of view, the legal protection afforded to the land rights of the indigenous peoples living in Greenland seems adequate. Thus, the right to

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[3] Western Sahara, Advisory Opinion, 1975 I.C.J. 12.
[4] Martínez Cobo, J., *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7.
[5] *Mabo and others v. the State of Queensland*, Australian Court, 1992.
[6] Convention No. 169 was adopted the 27th of June 1989 by the General Conference of the International Labour Organisation at its 76th session and entered into force the 5th of September 1991.

hold a wide range of property interests, as enshrined in the Danish Constitution, apply to Greenlandic territory, and are supplied by provisions in Danish and international law prescribing this right to be ensured equally for all persons within Danish jurisdiction. Furthermore, a special Greenlandic Home Rule Act, adopted by the Danish Parliament, enshrines the Greenlandic population with "fundamental rights" to the natural resources in Greenland. In addition, Denmark has ratified Convention No. 169 containing extensive provisions on land rights together with a range of international human rights instruments which apply to Greenlandic territory and are relevant for the protection of indigenous land rights. Yet, the Danish government approves of the continuous presence and military activities of the Thule Air Base on Inughuit territory and does so with the approval of the Danish Supreme Court. The official Danish attitude seems to be that none of these provisions and instruments apply to the case of the Inughuit.

Outline of the Thesis

This thesis analyses the case of the Inughuit against the background of international law. The legal protection of indigenous land rights as found in existing and emerging international standards will serve as the point of reference in an examination of whether or not the Danish government is infringing upon the land rights of the Inughuit by allowing the continuous presence of the Thule Air Base on Inughuit territory.

For this purpose, Chapter Two investigates the international framework of the protection of indigenous land rights. In this chapter it is argued that the international community is increasingly taking into account the special relationship between indigenous peoples and their lands. The focal point will be on Convention No. 169 and its reflection in international human rights treaties of a general nature as interpreted by the international and regional human rights monitoring bodies. Chapter Three, in turn, will analyse to what extent these international standards are applicable to Greenland and their reflections in domestic law, and which legal entity is endowed with the responsibility of the implementation of indigenous land rights in Greenland. In the same chapter an analysis of the case of the Inughuit will be undertaken. In this connection, the analysis demands not only a detailed account of the historical facts surrounding the establishment of the Thule Air Base and its impact on the way of life of the Inughuit, but also an historical account of the domestic law applicable to northern Greenland at the time of the establishment of the Thule Air Base. Chapter Four will then evaluate the historical and present situation of the Inughuit against the international legal framework of the protection of indigenous land rights. In doing so, it will apply international

standards which have only briefly or not at all been taken into account in the recent decision handed down by the Danish Supreme Court in the case concerning the Inughuit. Domestic law will be referred to whenever relevant.

II. International Framework of Protection of Land Rights

1. Introduction

In contemporary international law a framework of the protection of indigenous peoples' land rights has emerged and is rapidly developing.[7] The international community has increasingly begun to respond to indigenous peoples with respect to their special relationship to their lands, territories and resources. Within this context positive state obligations of implementation and enforcement of indigenous peoples' land rights evolve and are being fixed in binding international treaties. Also, international human rights monitoring bodies are more and more applying the prevailing understanding of indigenous peoples' land rights as reflected in newly articulated standards. Taken together, these developments have provided for a framework of international law recognising *sui generis* indigenous peoples' land and resource rights against which State performances can be measured.

For the purpose of supporting and elaborating the abovementioned arguments, it is necessary first to refer to recently adopted and emerging special international instruments concerning indigenous peoples and secondly, to the provisions in general international human rights instruments applicable in the protection of indigenous peoples' land rights. To analyse to what extent these instruments apply in practice, it is thirdly necessary to examine the jurisprudence of the international monitoring bodies concerning disputes over land rights. By doing so, it is possible to show which standards of legal protection that with growing clarity must be accorded to the lands of indigenous peoples as a matter of international law.

2. Special International Instruments on Indigenous Peoples

2.1 Overview

The most comprehensive and up-to-date convention for the protection of indigenous peoples' land rights is Convention No. 169. It is drafted as a treaty and is legally binding upon ratification. Part II (articles 13-19) in this Convention is devoted specifically to issues concerning the land rights of indigenous peoples. These rights are supported and further elaborated in the UN draft Declaration and the Proposed American Declaration. As far as the two latter instruments are

[7] See Anaya, J. *Indigenous Peoples in International Law*, New York, Oxford University Press, 1996, p.105 and Daes, Erica-Irene A., *Supra* n. 2 at para. 12-20.

concerned, these are of a non-legally binding nature and have yet to be adopted. Nonetheless, they can be considered as *emerging law* and represent potential future standards in the protection of indigenous peoples. The strong language in the declarations ought to serve as guidelines and sources of reference for governments in their treatment of indigenous peoples.[8]

2.2 The Legal Concept of Property and Positive State Obligations

The provisions concerning land rights in Part II of Convention No. 169 commences in Article 13(1) with a reference to the obligation of governments to respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories." This provision, which must be regarded as a guideline of interpretation when applying the specific provisions on land in the Convention,[9] is in its mandatory language strongly prescribing that indigenous peoples' relationship to their lands must be respected under all circumstances. The effect should be that this special relationship with their lands must be preserved in any competition with other interests which State authorities may hold as legitimate in their interpretation or application of the Convention.[10]

From the outset it is thus clear that the land rights in Convention No. 169 are not aimed at the protection of individual property rights as traditionally understood in Western legal systems. Rather, the Convention is emphasising the protection of property as group rights or collective rights. To this extent, Article 13(1) provides that it is "in particular the collective aspects of this relationship" that must be protected while Article 14(1) is aiming to protect the "rights of ownership and possession of the peoples concerned." This collective dimension of ownership is an important element in the context of indigenous land rights, because a communitarian tradition exists among indigenous peoples regarding a common form of collective ownership of land.[11]

For indigenous land rights to exist, these do not need to be granted or identified by States. Article 14 demands that the ownership and possession of lands that indigenous peoples *traditionally occupy* shall be recognised. Accordingly, States have an obligation, as a matter of international law, to formally acknowledge *already existing* rights arising from traditional occupancy.

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[8] The Proposed American Declaration is similar in scope to the UN draft Declaration and will, due to the lack of space of this thesis, not be further discussed.
[9] As stated in Article 13 it must be observed "[i]n applying the provisions of this Part of the Convention."
[10] See Thornberry, P., *Indigenous Peoples and Human Rights*, Manchester, Manchester University Press, 2002, p. 351.
[11] Below this thesis will refer to such form of ownership with regard to the Inughuit in northern Greenland.

Moreover, "traditionally occupy" should not be interpreted as requiring indigenous peoples' patterns of occupation only in a "traditional manner". Indigenous peoples may develop according to their wishes and prevailing circumstances, and must be given the opportunity to change lifestyle and traditions.[12] Additionally, Article 14 demands that in the case indigenous peoples use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, governments shall, in appropriate cases, provide for measures safeguarding the right to use these lands. This provision has been adopted in order to ensure and strengthen indigenous peoples' rights to subsistence activities, such as hunting and gathering on lands over which they have not been given any formal title. In cases where other activities take place on indigenous peoples lands, this provision prescribes that indigenous peoples' rights of use must prevail over these activities and for governments to take steps towards recognising such rights.[13]

Furthermore, according to Article 14 (2) governments are obliged to take steps to identify the lands traditionally occupied by indigenous peoples and "guarantee their effective protection of their rights of ownership and possession." It is obvious that States are not only obliged to demarcate and title indigenous peoples' lands, but also to guarantee their *effective* enjoyment of their rights to ownership and possession. This means that if these rights are to have any substance, States must abstain from arbitrarily depriving indigenous peoples of these rights. Thus, according to the Guide to ILO Convention No. 169 (*Guide*), the word "effective" means that there "has to be real and practical protection and not just protection in law."[14]

Article 15 of the Convention No. 169 is equally important for safeguarding indigenous peoples' special relationship with their lands. This provision prescribes governments to specially safeguard the natural resources pertaining to indigenous lands. According to Article 13(2) the term "lands" is to be interpreted as encompassing the total environment of the areas that the peoples occupy or otherwise use. Considering the natural resources context of Article 15 and that one of the underlying purpose of the Convention is to provide for a stable base for economic undertakings as an element for indigenous peoples' future survival, this provision must be read as prescribing a duty

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[12] Tomei, M. and Swepston, L, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (Geneva, International Labour Office, 1996), p. 19. [Hereinafter the *Guide*]
[13] *Idem*, p. 19.
[14] *Idem*, at p. 18. Referring to a discussion prior to the adoption of the Convention No. 169 in where it was held that "the right to possession and use of the land would satisfy the conditions laid down in the Convention, as long as there was a firm assurance that these rights would continue".

for governments to also safeguard indigenous peoples' subsistence activities at the sea level which are vital to the survival for some traditional cultures.[15]

2.3 The Time Span for Traditional Occupation and the Right to Return when Relocated

The time span for "traditional occupation" is decisive for when indigenous peoples may claim back their lands and territories they have been deprived of in the past. On this issue the *Guide* is clearly interpreting the term "traditionally occupy" as not indicating that the occupation must be continued into the present in order for Article 14 to come into play. Rather, it is suggested that "there should be some connection to the present – a relatively recent expulsion from these lands, for example, or a recent loss of title."[16] Accordingly, while Article 14 does not encompass a right to lands whenever occupied, the provision can be used to address recent historical wrongs of unjust taking of land. As stated by Patrick Thornberry,

> "If a right is to mean anything, it should mean the right to claim back when expelled from traditional territories; international law should at least have the capacity to address cases of historically recent grievance."[17]

To further delimit the time span for traditional occupancy James Anaya has identified the continued cultural attachment of indigenous peoples to their lands as a decisive element in this matter. In the light of Article 13's requirement of respect for cultural values related to land, Anaya argues that possessive rights in Article 14 come into play if

> "a sufficient present connection with lost lands may be established by a continuing cultural attachment to them, particular if dispossession occurred recently."[18]

These statements find further support when read in conjunction with Article 14 (3) which requires States to provide for adequate procedures to address indigenous peoples' land claims without any

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[15] See *Guide, Supra* n. 12 at p. 17. Thornberry argues concurrently that if land in Article 14 may include traditional freshwater resource exploitation, then Article 15 should be interpreted as encompassing sea areas. See Thornberry, *Supra* note 10 at p. 356.
[16] *Guide, Supra* n. 12 at p. 18.
[17] Thornberry, *Supra* n. 10 at p. 356.
[18] Anaya, *Supra* n. 7 at p. 106.

limitation in time regarding the facts that such claims may concern. Concurrently, Article 27 of the UN draft declaration simply provides for a general right to restitution of indigenous peoples' lands that have been confiscated, occupied, used or damaged.

In addition, Article 16 (3) specifically establishes the right for displaced indigenous peoples to return, whenever possible, to their traditional lands as soon as the grounds for relocation no longer exist. This provision is directly addressing the coercive and abusive actions taken by governments in the past to remove indigenous peoples from their traditional lands and territories without their informed consent or approval. It applies to cases in which indigenous peoples in emergency situations or in connection with a war or conflict has been removed from their lands. Taken together, Article 16 (3) requires governments to provide for the return of peoples to their lands if these have been unlawfully or unjustly taken in the past, or in cases in which certain compelling State interests, which made relocation of the peoples necessary, have ceased to exist.

In situations when such return is not possible, Article 16 (4) prescribes an obligation for governments to provide the relocated peoples with lands of *at least* equal quality and legal status as the lands they previously occupied. The yardstick for the quality of their "new" lands is that they must be suitable for their "present needs and future development." Again, reading this requirement in conjunction with the underlying purpose of the Convention recognising indigenous peoples' special relationship to their lands, the provided lands must be able to sustain the economic, social and cultural undertakings and development of the peoples concerned in order to secure the preservation of their way of life and identities.[19]

2.4 Non-discrimination

The Convention No. 169 not only prescribes positive governmental actions to overcome past injustices done to indigenous peoples, but also to secure the general principles of equal enjoyment of all human rights and non-discrimination. The reference to these principles is important, since present discriminatory attitudes and patterns in some governments' action may prevent indigenous peoples from their equal enjoyment of rights compared with the majority population or other indigenous peoples. Some governments are in this context, for example, failing to recognise the existence of indigenous peoples or to recognise some and not others.[20]

[19] Compare *Guide, Supra* n. 12 at p. 17 and the Preamble of Convention No. 169, para. 6.
[20] This thesis will later point to the case of Denmark in this respect.

The duty for governments to comply with the principle of non-discrimination can be deduced from the Preamble to the Convention which recalls a number of international instruments on the prevention of discrimination. In support hereof, Article 3(1) further provides that indigenous peoples "shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." Accordingly, if this provision is to have any substance, positive State action is required to remove obstacles that may be hindering the enjoyment of rights and freedoms. Implementation of special measures may in this matter be required for groups to enjoy equality in fact and not just in law. As a step towards reaching this result, Article 4 (1) prescribes governments to adopt special measures for safeguarding "the persons, institutions, property, labour, culture and environment" of the indigenous peoples. Generally, Article 8(3) establishes that indigenous peoples shall not be prevented from enjoying the same rights as all other national citizens enjoy.

2.5 Participation and Decision-making

An element in securing the enjoyment and exercise of indigenous peoples' land rights in fact and not just in law, is found in Convention 169's prescription to governments to allow indigenous peoples to independently be in charge of the destiny of their lands through consultation, self-control and participation in decision-making.

As far as consultation is concerned, Article 6(1)(a) demands that indigenous peoples shall be consulted whenever governments consider taking legislative or administrative measures "which may affect them directly." Accordingly, any agreement deciding upon different use or extension of existing installations on indigenous peoples' lands would therefore require a previous consultation of the concerned peoples. The form of consultation is according to Article 6(2) to be undertaken in "good faith" and must pursue to achieve "agreement or consent" of the peoples concerned, presupposing an acceptable solution for governmental authorities as well as for the peoples. A guideline of interpretation in this matter is provided for in Article 28 of the UN draft Declaration. Referring to military activities, this provision prescribes that such activities must only take place on lands and territories of indigenous peoples if these are "freely agreed upon by the peoples concerned."

With regard to the element of control, the Preamble of Convention No. 169 recognises the aspirations of indigenous peoples to exercise control over their ways of life and maintain and

develop their identities.[21] Already at this point, it is obvious that the Convention calls for indigenous peoples to exercise control over their lands since their lifestyles and development of cultural identity are dependent on their special relationship to their lands. What this right more specifically contains is developed in Article 7(1) and must be read as an extensive self-control over lands of peoples. Thus, Article 7(1) provides that peoples shall "decide their *own priorities* for the process of development as it affects [...] the lands they occupy or otherwise use."[22]

Concerning indigenous peoples' right to participate in decision-making processes, Article 7(1) further provides for peoples to participate in the formulation, implementation as well as the evaluation of regional and national plans and programmes "which may affect them directly."[23] This, as a minimum, means that peoples must in practice have a say in plans affecting them. As stated by Gudmundur Alfredsson, the participation must amount to a "meaningful participation".[24] The end to be reached in this connection is prescribed in Article 30 of the UN draft Declaration which requires that States obtain indigenous peoples' "free and informed consent prior to the approval of any project affecting their lands, territories and resources..."

2.6 Land Rights and Protection of Cultural Diversity

Besides the purpose of ensuring the respect and exercise for indigenous peoples' human rights, Convention No. 169 serves the interrelated purpose of preserving "the distinctive contributions of indigenous peoples to the cultural diversity and social and ecological harmony of human kind".[25] If it is recalled that the prerequisite for the continued existence and survival of indigenous peoples is their access to lands, territories and resources, then depriving peoples of such access is in this perspective tantamount to extinguishing their culture. In other words, Convention No. 169 prescribes States to sustain cultural diversity and harmony of human kind which presupposes the protection of indigenous peoples' land rights.[26]

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[21] See the Preamble of Convention No. 169, para. 6.
[22] Italics added. For a similar viewpoint see Alfredsson, G, *Indigenous Peoples and Autonomy*, in M. Suksi (ed.), *Autonomy, Applications and Implications*, The Hague, Boston, London, Kluwer Law International, 1998, pp. 125-137 (p. 128).
[23] Particularly concerning the natural resources pertaining to their lands, Article 15 of Convention No. 169 provides for the right of peoples to participate in use, management and conservation of the concerned resources.
[24] Alfredsson, G, *Supra* n. 22 at p. 128.
[25] See the Preamble of Convention No. 169, para 8.
[26] See also Universal Declaration on Cultural Diversity Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001.

Moreover, if indigenous peoples are denied their land rights and thereby the material base necessary to sustain their culture, this may not only amount to violations of collective and individual human rights, it may also amount to a crime of cultural genocide. Thus, the San José Declaration as adopted by UNESCO in 1981 provides that if a group is under a condition in which it is denied the right to enjoy, develop and transmit its own culture, then this amounts to cultural genocide and constitutes a violation of international law equivalent to genocide.[27] The San José Declaration finds support in emerging international law. Hence, Article 7 of the UN draft Declaration provides for a right of indigenous peoples not to be subjected to cultural genocide, including prevention and redress for

> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

Accordingly, in cases where States interfere or allow for action that interferes with the lands of indigenous peoples that in effect deprive or dispossess them of their land, territories and resources, and thereby preventing them from enjoying their culture, then this may, with reference to the San Jose Declaration and the UN Draft Declaration, be characterised as cultural genocide. That the States do not intend or aim to commit cultural genocide, is according to the UN draft Declaration of no importance since it includes aims as well as effects.

2.7 Summary

Convention No. 169 contains a wide range of legally binding standards necessary for an adequate protection of indigenous peoples' land and resource rights. The Convention recognises the special relationship between indigenous peoples and their lands and their rights to participate in decision-making processes. It addresses in particular the collective ownership and possession of lands as a prerequisite for the enjoyment and exercise of indigenous culture; indigenous culture is, in turn, recognised for its contributions to the sustainability of cultural diversity and ecological

[27] See Technical Review of the draft Declaration, E/CN.4/Sub.2/1994/2, para. 36 in Thornberry, *Supra* n. 10 at p. 387.

nature of human kind. The Convention specifically addresses the necessity for indigenous peoples to equally enjoy their rights when compared with other national citizens and their right to return to their traditional occupied territories when expelled. The UN draft declaration is even more progressive in language and provides for strong guidelines in governments protection of indigenous land rights.

However, some obstacles hinder the effective implementation of Convention No. 169 in national legislations. Firstly, it has so far only been ratified by 17 States.[28] Secondly, the wording of the Convention seems at some points vague and unclear. Thus, positive State action is in some provisions prescribed to be taken only in "appropriate cases" or in cases "appropriate to the circumstances".[29] Also, Article 34 especially allows for States to apply the Convention in a "flexible manner" which to some extent seems to negate the enshrined standards of protection and aims of the Convention.[30] Finally, the monitoring body established within the ILO supervisory system, which may receive complaints regarding non-compliance of the Convention, is political in nature rather than legal, and its decisions are not of the same objective character as those provided for in other international monitoring bodies consisting only of legal experts.[31]

These shortcomings demand further examination of possible systems of protection of indigenous peoples' land rights. The following section will therefore refer to international and regional instruments relevant for the protection of indigenous land rights to illustrate whether these support the standards of protection enshrined in Convention No. 169. Due to limited space and for the purpose of the later undertaken case-study in the present work, the focus will be on instruments applicable to Europe, although American instruments will be referred to in relevant connections.

3. International and Regional Instruments of a General Nature

3.1 Introduction

A significant number of universal and regional standards apply in the protection of indigenous peoples' land rights. Provisions especially providing for the protection of indigenous peoples' property rights as well as provisions that protect their cultural integrity, way of life and physical well-being, are relevant in this matter. While the relevance of the former group of provisions is

[28] For a list of ratifications see http://webfusion.ilo.org.
[29] See Articles 14(1) and 6(2).
[30] Below this problem will be dealt with in Chapter Four section 3.5.
[31] For an overview of the ILO supervisory system see Hanski, R., Suksi, M. (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*, Åbo, Åbo Akademi University, 1999, pp. 185-218.

dependent upon their capacity to protect property as a matter of collective land or group rights, the enjoyment of the latter group of provisions is preconditioned upon the enjoyment of the former group in the sense that indigenous peoples' culture, lifestyle and well-being are dependent upon their enjoyment of land rights. Also, to secure the implementation of these provisions, standards of non-discrimination, equality before law and equal protection of law are relevant for the effective implementation of indigenous peoples' land rights in that they provide for indigenous peoples to enjoy and exercise these rights on an equal footing compared with the rest of the population within the jurisdiction of a given State.

3.2 Universal Instruments

3.2.1 The Right to Property

With reference to the first internationally adopted catalogue of human rights, indigenous peoples' property rights must be protected as a matter of their human rights. Thus, Article 17(1) of the Universal Declaration of Human Rights (UDHR)[32] states that

> 1. Everyone has the rights to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property.

According to the wording of this provision, it protects both individual property as traditionally understood in Western legal systems and property owned collectively or on a group basis. The group element is particular relevant for the protection of indigenous peoples' property since property among them, is according to tradition, owned on a collective basis. Yet, the right to property is not an absolute one. It may be deprived in certain situations, but this must not be done "arbitrarily". While any precise and agreed upon definition of the term "arbitrarily" cannot be deduced from the preparatory documents, Alfredsson has suggested that it includes "unreasonable interferences by States and taking of property without compensation."[33]

Closely related to the wording of Article 17 in the UDHR, Article 5(d)(v) of the International Convention on the Elimination of All forms of Racial Discrimination (ICERD)[34] prescribes States

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[32] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
[33] Alfredsson, G., *Article 17*, in Eide, A., et. al., *The Universal Declaration of Human Rights: A Commentary*, London, Oxford University Press, 1992, p. 256.
[34] Adopted and opened for signature and ratification by General Assembly resolution 2106 A (XX) of 21 December 1965.

to guarantee equality before law in the enjoyment of the right to own property individually as well as collectively. While the ICERD does not mention the term "indigenous", indigenous peoples nonetheless clearly fall within its ambit as possible victims of racial discrimination. Thus, General Recommendation XXIII of the CERD Committee recognises the fact that in,

> "many regions of the world indigenous peoples *have been, and are still being*, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists [...] Consequently, the preservation of their culture and their historical identity *has been and still is jeopardised.*"[35]

In line with Articles 14 and 16 in Convention No. 169, the Committee then calls upon States

> "to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and where they have been *deprived of their lands and territories* traditionally owned or otherwise inhabited or used *without their free and informed consent*, to take steps to return those lands and territories."[36]

These statements prescribe alone and when read in conjunction with Article 2(2) of the ICERD, according to which States must take measures to adequately ensure the protection of racial groups', human rights and fundamental freedoms, that States must to take positive action to eliminate discriminatory patterns existing because of past injustices. This obligation more precisely rests with States in which indigenous peoples' land and territories have been taken in the past without their "free and informed consent" and without meeting their claim for return, while these States at the same time afford protection of property to other citizens within their jurisdiction.[37] Until such a discriminatory pattern has been eliminated, its existence will continue to deprive the peoples

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[35] General Recommendation No. XXIII on Indigenous Peoples, adopted August 18, 1997, 51st session, para 3. Italics added.
[36] *Idem*, para 5. Italics added.
[37] See Article 1(2) of the ICERD in which it is provided that the Convention does not apply to distinctions between citizens and non-citizens.

concerned of their possibility to preserve their culture and historical identity together with their human rights to enjoy and exercise ownership of property.[38]

3.2.2. The Right to Culture, Privacy and Family Life

Apart from the CERD Committee, the Human Rights Committee (HRC) as the treaty monitoring body of the International Covenant on Civil and Political Rights (ICCPR)[39] has delivered important contributions to the protection of indigenous peoples' land rights. These encompass the protection of the members of indigenous communities' use of land and resources as a prerequisite for them to enjoy their particular culture and way of life. Thus, in its General Comment No. 23 on the exercise of the cultural rights protected under Article 27 of the ICCPR, the HRC observed

> "that culture manifest itself in many forms, including a *particular way of life associated with the use of land resources*, especially in the case of indigenous peoples. That [cultural] right may include such *traditional activities as fishing or hunting* and the right to live in reserves protected by law. The enjoyment of those rights may require *positive legal measures* of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[40]

Accordingly, Article 27 of the ICCPR does not only protect the material base necessary for maintaining, exercising and developing indigenous way of life, including the use of land resources for subsistence activities such as fishing and hunting, as a matter of their cultural protection. Article 27 also requires States to adopt "positive legal measures" ensuring the effective enjoyment of cultural rights by the indigenous peoples and their members.

In addition, Articles 17 and 23 of the ICCPR afford protection to the lands of indigenous peoples. The HRC have applied these provisions which respectively protect the right to privacy and family life, for the protection of the cultural and spiritual attachment indigenous peoples have to

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[38] In cases where States are unwilling to comply with these obligations, Article 14 of the CERD provides for bringing group communications to the attention of the CERD Committee claiming for the return of lands and territories forcibly taken in the past without due process of law.

[39] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) pf 16 December 1966.

[40] HRC, *General Comment No. 23 (Art. 27)*, adopted April 6, 1994, para. 7. Italics added.

their lands, specifically to their burial grounds. Below jurisprudence representative hereof will be referred to.[41]

3.2.3 Non-discrimination

The cultural rights as well as the rights to privacy and family life in the ICCPR could not be considered universally applicable if States freely could decide to afford protection to only some groups of their respective populations and not to others. Article 2(1) of the ICCPR therefore prescribes States to ensure that all individuals within their jurisdiction, including persons belonging to indigenous peoples, shall equally enjoy the rights under the ICCPR.[42] Accordingly, the rights to culture, privacy and family life of the members belonging to indigenous peoples must be protected on an equal basis when compared with other individuals, even though the material base necessary for enjoying and exercising these rights, such as access to traditionally owned or occupied land, may require special treatment of these peoples. The fact that States are required not only to respect the rights of indigenous peoples as a negative obligation of non-interference with their rights, but also to take positive steps to ensure their equal enjoyment of these rights in fact, follows from the wording of Article 2(1) which requires States to both "respect" and "ensure" the rights contained in the ICCPR.[43]

In addition, Article 26 extends the principle of non-discrimination to the exercise of all rights, regardless of whether such rights are contained in the ICCPR or not. Article 26 contains the right to equality before the law, equal protection of the law, and non-discrimination regarding both the rights granted by and the obligations imposed on States. [44] In General Comment No. 18, the Human Rights Committee has with regard to Article 26 more specifically stated that

> "It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party it must comply with the requirement of article 26 that its content should not be discriminatory."[45]

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[41] See this chapter section 4.2.2.2.
[42] HRC, *Supra* n. 40 at para. 4.
[43] See Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel Verlag 1993, p. 36.
[44] *Idem.*
[45] HRC, *General Comment No. 18: Non-discrimination, adopted 10 November 1989*, para 12.

Accordingly, if a State confers the right to property by law on individuals, then this right must in practice be conferred to all individuals under its jurisdiction, regardless whether or not they belong to indigenous peoples. That States are thus obliged in accordance to both Article 2(1) and 26 to eliminate *de facto* discrimination is particularly relevant to cases in which individuals under law are afforded protection of their rights, while they in practice are deprived from exercising them.

Articles 2(1) and 26 do not hinder States under certain circumstances to treat persons differently. Yet, this must only be done on reasonable and objective grounds,[46] and if such treatment pursues a legitimate aim under the ICCPR. Also, it is a condition that a reasonable relationship between the means employed and the legitimate aim sought to be realised exists.[47]

3.2.4 The UN-Charter and Indigenous Peoples

The duty for States to observe the principle of non-discrimination has not only been a matter of binding international law since the ICCPR entered into force. Rather, this duty has been binding on States since 1945 with the adoption of the United Nations Charter (UN-Charter).[48] So, Article 1(3) of the UN-Charter provides States to promote and encourage the "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Also, and especially concerned with the creation of conditions of stability and well-being of *peoples*, Article 55 (c) of the UN-Charter requires States to promote the principle of equal rights and self-determination of peoples, including the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Since the UN-Charter entered into force, all members of the international community have thus been and remain obliged to promote and encourage all human rights without discrimination. This obligation must be observed towards indigenous peoples as they indeed are to be considered as *peoples* within the meaning of Article 55.[49] Yet, the UN-Charter itself does not provide for any definition of the human rights and must therefore be interpreted in the light of the comprehensive catalogues of rights contained in the United Nations instruments adopted later in time such as the

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[46] See Nowak, *Supra* n. 44 at p. 43.
[47] *Idem.* p. 473.
[48] The UN-Charter was signed on 26 June 1945 at the UN Conference on International Organisation and came into force on 24 October 1945.
[49] See Anaya, J., *The Contours of Self-determination and its Implementation: Implications of Development Concerning Indigenous Peoples,* in Alfredsson, G., Stavropoulou (eds.), <*Jusice Pending: Indigenous peoples and Other Good Causes*>, Netherlands, Kluwer Law International, 2002, (pp. 5-14), p. 10.

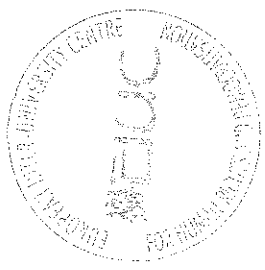
UDHR, ICCPR and ICERD.[50] Hence, the protection of the universal rights contained in these instruments should have been promoted and encouraged from the time they entered into force and subsequently by all States as a matter of international binding rules of law, including the right to property, culture and freedom from discrimination.

Moreover, and closely related to the obligation to encourage and promote all human rights, States which previously in time administered territories in which peoples had not attained the full measure of self-government, accepted according to Article 73 of the UN Charter a "*sacred trust to promote to the utmost the well-being*" of the inhabitants of these territories. Among other obligations, States were "to ensure, with due *respect for the culture* of the peoples concerned, their political, economic, social, and educational advancement, their *just treatment, and their protection against abuses.*"[51]

Recalling indigenous peoples' special relationship to their lands, this latter provision would only be of substance for them, if it as a minimum required States not to interfere with their lands and resources, since these elements are prerequisites for peoples' well-being and cultural existence. Accordingly, in taking or expropriating peoples' lands in such administered territories, States have since 1945 been under legal obligations to carry out these actions while promoting all human rights without discrimination, the well-being of the peoples, paying due respect to their culture and just treatment, and protecting these peoples against abuses.

Furthermore, under all circumstance, the obligations of States contained in the UN-Charter prevail in any competition of other obligations that may rest with States. Thus, Article 103 provides

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."



[50] See Hanski, *Supra* n. 31 at pp. 68-69.
[51] See UN-Charter Article 73(e). Italics added.

3.3. Regional Instruments

3.3.1. The Right to Enjoy all Human Rights

In 1949 the Council of Europe was set up as a peaceful organisation devoted to justice, democracy and the rule of law. According to the Preamble of the organisation's Statute[52] the member States affirm their unquestionable commitment to the rule of law as a fundamental element in any true democracy. Moreover, Article 1 in Chapter One lays down the purpose of achieving a greater unity between the member States by "the maintenance and further realisation of human rights and fundamental freedoms."[53] As a matter of State obligations, Article 3 further states that,

> "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

The outcome of these commitments was the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[54] in which the Contracting Parties in Article 1 undertake the obligation to ensure everyone within their jurisdiction the rights and freedoms contained in this Convention, including the rights and freedoms of additional Protocols to the Convention.

3.3.2. The Right to Property

Different from the ICCPR, the ECHR contains a specific clause on the right to property. Article 1 of Protocol No. 1 of the ECHR[55] reads:

> Every natural person or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

While it by the terms used in this provision is difficult to deduce any substantive guarantees for the protection of property, it clearly assumes, in similarity with Article 17 of the UDHR, that no one

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[52] The Statute of the European Council was adopted on 5 June 1949 and entered into force the same 3 August.
[53] See Articles 1(a) and 1(b).
[54] The ECHR was adopted on 4 November 1950 and entered into force 3 September 1953.
[55] Hereinafter Article 1 of P1.

should be arbitrarily deprived of his possessions or property. However, while Article 17 of the UDHR does not provide for the circumstances under which persons may be deprived their property[56], Article 1 of P1 demands that such interference may only take place if so provided for by national law.[57]

The more precise content of this latter criterion of "national law" must be construed in the light of the Preamble of the ECHR which, in concurrence with the Preamble of the Statute for the Council of Europe, affirms the Contracting States' obligation to observe the principle of rule of law. The content of this principle is, however, not authoritatively defined, but is best understood in connection to with its contrast, namely the "rule of man". Thus, while a "rule of man" contains no protection against arbitrariness and abuse of power, the interference with individual rights in a State which is devoted to the "rule of law" must only take place in accordance to law.[58]

As such, Article 1 of P1 may be characterised as providing for a developed regional implementation of Article 17 of the UDHR and has moreover a wide parallel in Article 21 of the American Convention on Human Rights (ACHR), which equally is based upon Article 17 of the UDHR.[59] The protection afforded by Article 1 of P1 should in this perspective be construed in the light of Article 17 of the UDHR, which protects individual as well as collective property, and, as a source of interpretive inspiration, in the light of Article 21 of the ACHR.

In practice the European Court of Human Rights (ECtHR) has taken a broad view of what constitutes "possessions". Any suggestion of a narrow interpretation of this term is refuted by the word "*biens*" in the French text of the provision which indicates that a broad range of property interests were intended to be protected.[60] Accordingly, the ECtHR has held that the term "possessions" encompasses all "vested rights" that an applicant may establish.[61] As will be mentioned below, the European Commission on Human Rights (Commission) as well as the Inter-American Court of Human Rights (Inter-American Court) have interpreted the term "possessions" to encompass indigenous peoples' subsistence activities within the meaning of Article 1 of the P1 of the ECHR and Article 21 of the ACHR respectively.

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[56] See above section 3.2.1. this chapter.
[57] The "general principles of law" are concerned only with taken of property of Aliens; See Lorenzen, Peer., *Den Europæiske Menneskerettighedskonvention*, Haslev, DJØF, 2003, p. 460.
[58] *Idem*, p. 49.
[59] See the Preamble of the UDHR. The American Convention on Human Rights was adopted at the Inter-American Specialised Conference on Human Rights, San José, Costa Rica, 22 November 1969.
[60] Harris, D.J., O'Boyle, M. Warbrick C, *Law of the European Convention on Human Right*, Butterworth 1995, p. 517.
[61] Gomien, D, Harris, D J, Zwaak, Leo, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strassburg, Coe, 1996, p. 313.

3.3.3. The Right to Private and Family Life and Home

The universal rights to privacy and family life as provided for in Article 17 and 23 of the ICCPR are regionally implemented at the European level by Article 8 the ECHR. This provision affords protection to indigenous peoples' land rights insofar as these are important for maintaining and freely exercising their characteristic ways of private and family life and home. Article 8 states that "Everyone has the right to respect for his private and family life, his home and his correspondence." In line with the rule of law-principle the provision further states that "There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law..." As will be referred to below, the ECtHR has held that indigenous peoples are entitled to claim the right to respect of their particular way of life under Article 8 in relation of both private life and family life as well as of their home.

3.3.4. Non-discrimination

The ECHR does not contain a general right to equality before the law or equal protection of the law. It prohibits according to Article 14 only discrimination in relation to the rights and freedoms enshrined in the Convention and its additional Protocols.[62] As provided for in the *Inze Case*[63] Article 14 becomes relevant if the facts of a given case falls within the ambit or scope of other provisions contained in the ECHR. The provision is in both scope and wording closely related to Article 2 of the ICCPR, but is significantly different from Article 26 of the ICCPR which, as mentioned above, applies independently of any other provisions.

To which situations Article 14 more precisely apply was by the ECtHR answered in the case of *The Sunday Times v. United Kingdom.*[64] In this case the ECtHR held that Article 14 "...affords protection against different treatment, without an objective and reasonable justification, of persons

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[62] Article 14 of the ECHR reads in its entirety: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

[63] *Inze v. Austria*, para 36. In this case the Court considered a possible violation of Article 14 even though no violation of another Article of the ECHR was established. See also *Abdulaziz, Cabales and Balkani v. United Kingdom*, para 71. Whether a given claim falls within the ambit of Article is dealt with in *Powel and Rayner v. United Kingdom*, para 33: "In principle [Article 27 (2)] should set the same threshold in regard to the parallel notion of "arguability" under Article 13. See also Article 27 (2) of the ECHR. While the ambit or scope of each Article in the ECHR is difficult to delimit some guidance is found in that for a claim to be considered before the Court it has to be an "arguable claim" or not considered as "manifestly ill-founded", cf. Article 27 (2) of the ECHR.

[64] *The Sunday Times v. United Kingdom*

in similar situations."[65] As far as this criteria that persons must be "in a similar situations" is concerned, it to applies to "analogous"[66] situations and where persons are "in relevantly similar situations".[67] The applicant of a violation of Article 14 will need to identify the group, which is treated differently. In the *Fredin Case* the ECtHR has held that for a claim to succeed, it has to be established "that the situation of the alleged victim can be considered similar to that of persons who have been better treated."[68] Also, besides the prohibition of discrimination as a negative obligation, the phrase "shall be secured" implies that States are required to take positive action to remove obstacles to discrimination.[69]

However, like Articles 2(1) and 26 of the ICCPR, different treatment is not prohibited according to Article 14. Yet, objective and reasonable grounds must justify any different treatment of persons who are in similar situations. Again, such treatment must expose proportionality between the means employed and a legitimate aim which is sought realised.[70]

3.3.5. Summary

By referring to the international and regional instruments of human rights it becomes clear that Convention No. 169 does not constitute the only single instrument available addressing land rights and their importance for the cultural aspects and way of life of indigenous peoples. On the contrary, these instruments, that all have been adopted prior to Convention No. 169, protect indigenous land rights as matters of their human rights to respect of their property, culture and physical well-being, and the effective implementation of these rights is well supported by provisions of non-discrimination. In effect, a variety of the provisions in these instruments apply to the protection of land rights, yet under different labels. Thus, while the right to property protects directly indigenous peoples' special relationship to their land as a matter of the protection of ownership of and non-interference with their lands, this relationship is protected indirectly by the rights to culture and those pertaining to well-being of indigenous people such as private and family life. The human rights relevant for the protection of land rights dispose in this sense an interdependency and interrelatedness. The wording of Article 5 of the Vienna Declaration and Programme of Action

[65] *Idem*, para. 58.
[66] See for example *Johnston and others v. Ireland*, para 60.
[67] See for *example Scalabrino v. Italy*, para. 28.
[68] *Fredin v. Sweden*, para 19. An extension of the criterion of analogous situations can be seen in *Thlimmenos v. Greece*, para 44. Here the Court held that it also amounts to discrimination if a state fails "to treat differently persons whose situations are significantly different".
[69] As stated in *Belgian Liguistic case*.
[70] *Belgian Linguistic Case*, para 10.

seems most strikingly in this connection when stating that "All human rights are universal, indivisible and interdependent and interrelated."[71] It is the legacy of the interdependency of human rights pertaining to the protection of indigenous land rights that allows for the international and regional monitoring bodies to address this issue under a broad range of human rights provisions.

4. The Practice of the International and Regional Monitoring Bodies

4.1. Overview

The provisions of international and regional human rights instruments of a general nature are increasingly being applied in the jurisprudence of the universal as well as the regional monitoring bodies. Under different labels, the specific provisions for the protection of indigenous peoples' land rights as provided for in Convention No. 169 is in practice implemented by the HRC, the CERD-Committee, the ECtHR and by the Inter-American Court. In the following, selected cases representative of this jurisprudence will be referred to.

4.2. The Universal Level

4.2.1. Overview

The HRC has under its Optional Protocol on individual communications examined a number of cases relevant to indigenous peoples' land rights under Article 27 of the ICCPR. In this process, it has developed an understanding of the *notion of culture* in its widest sense, containing the foundation necessary for the enjoyment of indigenous peoples' particular culture, including access to lands, territories and resources. To this extent, the *Länsman* cases[72] represent important contributions as the HRC in these cases recognises the strength of the indigenous peoples-land nexus. Equally important is the *Hopu and Bessert* case[73] in which the protection of the interrelated areas of private and family life prohibited interference in indigenous peoples' burial grounds.

Also, at the universal level, the concern of the CERD Committee with indigenous issues has in the recent years become pervasive. The Committee has especially criticised States' continued

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[71] The Vienna Declaration and Programme of Action was adopted by the World Conference on Human Rights in Vienna on 25 June 1993.
[72] HRC, *Länsman et al. v. Finland, Communication No. 511/1992*, UN Doc. CCPR/C/52/D/511/1992 (1994) and HRC, *Jouni E. Länsman et al. v. Finland, Communication No. 671/1995*, UN Doc, CCPR/C/58/D/671/1995 (1996).
[73] HRC, *Communication No. 549/1993*, UN. Doc. CCPR/C/60/D/549/1993.

discriminatory patterns towards indigenous peoples in denying them to return to their ancestral lands and an existence as separate indigenous entity.

4.2.2. The Human Rights Committee

4.2.2.1 The Right to Culture

The theoretical application of Article 27 of the ICCPR in the protection of indigenous peoples' land rights has already been dealt with elsewhere in this work. In practice, the HRC has developed two elements used to measure whether interferences with indigenous territory amount to violations of Article 27 of the ICCPR. One of these prescribe that indigenous peoples should at all times be able to maintain the land base necessary to economically sustain their culture, while the other demands that they must be allowed to participate in decisions that have an impact on their way of living. Illustrative hereof are the two *Länsman* cases.

With regard to the first *Länsman case*[74], the authors of the communication complained that an agreement allowing for the extraction of stone by a private company in a certain area would disturb the traditional Saami-practice of reindeer herding and thereby "their right to enjoy their own culture."[75] In its assessment the HRC, despite the fact that the ownership of the area was disputed, stated that reindeer herding may come within the ambit of Article 27 as economic activities if this is an "essential element of the culture of an ethnic community."[76] In finding no violation of Article 27, the HRC compared measures which amounted to the denial of the right to enjoy culture with those which had only a limited impact on the Saami's way of life that did "not necessarily amount to a denial"[77] of their rights.

Although the HRC noted that the planned activities according to the agreement would have a minimal effect on the reindeer husbandry, it also emphasised that future activities had to be carried out in a way so that the applicants could continue to benefit from their traditional activities. In this connection, the HRC stated that if large scale activities were approved of in the area concerned "then this may constitute a violation of the author's rights under Article 27, in particular of their right to enjoy their own culture."[78]

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[74] HRC, *Länsman et al. v. Finland, Communication No. 511/1992*, UN Doc. CCPR/C/52/D/511/1992 (1994).
[75] *Idem*, para. 3.1.
[76] *Idem*, para 9.2.
[77] *Idem*, para 9.4.
[78] *Idem*, para 9.8

The same line of arguments is used by HRC in the second closely related *Länsman* case.[79] In this case, the author claimed a violation of Article 27 on the grounds of an agreement that allowed for logging and construction of roads in an area in which reindeer herding also was practiced. While reaching the same conclusion as in the first *Länsman* case, the HRC in this second case nonetheless added another element to the requirement of sustainability. Thus, the HRC pointed out that although different activities taken alone may only have a limited impact on the Saami life-style, these may cumulatively deprive the Saami's right to sustain their culture. More precisely the HRC stated that

> "the State party must bear in mind when taking steps affecting the rights under Article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together may erode the rights of Saami people to enjoy their own culture."[80]

As such, the HRC has thus taken a holistic approach of threats to the enjoyment of indigenous culture.[81] Generally, the purpose with the requirement of sustainability contained in Article 27 thus developed by the HRC has much similarity with the general purpose underlying Convention No. 169; they both require the protection of the foundation necessary for indigenous peoples to sustain their cultural survival, namely their access to land and resources.

As far as the requirement of participation is concerned, the *Länsman cases* do not reflect as extensive obligations as contained in Article 6 of Convention No. 169. The HRC seems to be satisfied that the authors of the respective claims "were consulted"[82] and went through a consultation process even though this was "capable of greater inaction."[83] Conversely, Article 6(2) of Convention No. 169 strongly prescribes that consultation should be undertaken in "good faith" and must pursue to achieve "agreement or consent" of the peoples concerned.[84] That being so, the requirement of participation in decisions that affects them must nonetheless in any case amount to effective participation.[85]

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[79] HRC, *Jouni E. Länsman et al. v. Finland, Communication No. 671/1995*, UN Doc, CCPR/C/58/D/671/1995 (1996).
[80] *Idem*, para. 10.7.
[81] This development has by Thornberry been described as a process moving toward "a doctrine of cumulative effects", See Thornberry, *Supra* n. 10 at p. 172.
[82] HRC, *Supra* n. 74 at para. 9.6.
[83] HRC, *Supra* n. 79 at para. 10.5.
[84] See section 2.5. above.
[85] See Section 3.2.2. above.

4.2.2.2. The Right to Privacy and Family Life

Apart from the protection of indigenous peoples' land rights as a protection of their particular culture under Article 27, the HRC has in the case of *Hopu and Bessert v. France*[86] interpreted the right to privacy and family life in Article 17 and 23 of the ICCPR respectively as providing for protection of an indigenous community's access to land on which its pre-European burial ground was situated. The authors of the communication had peacefully occupied the land concerned in order to prevent the construction of a hotel complex which the authorities of Tahiti, for which the French government was responsible, had allowed to be build. They claimed that a forceful removal from the occupied land and the destruction of the burial ground, where their family members were said to be buried in order to make way for the building of a hotel, would interfere with their privacy and family lives.[87] In this connection they contended that the land at issue was important for them in a historical sense as well as for their cultural life and life in general.[88] In finding that the construction of a hotel on the author's ancestral burial grounds would interfere with their right to privacy and family life, the HRC stated that 'cultural traditions should be taken into account when defining the term "family" in a specific situation'[89] and that the indigenous community concerned "consider their relationship to their ancestors to be an essential element in their identity and to play an important role in their family life."[90] As in the cases in which Article 27 is applicable, the HRC does not decide this dispute on the grounds of property rights. In fact, the HRC limited itself to noting that the disputed land had been disposed by a domestic court in 1961 – five years before the ICCPR entered into force – and that the previous owners had not appealed that decision.[91] Rather, it was the authorities' interference with the indigenous community's cultural and spiritual traditions attached to its lands that the HRC considered unlawful and amounting to a violation of the rights of the community.

4.2.3. The Committee on the Elimination of Racial Discrimination

As the HRC, the CERD Committee has equally concerned itself with the respect of indigenous peoples' land rights as an element in their cultural and spiritual traditions. In the case of Guatemala

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[86] HRC, *Communication No. 549/1993*, UN. Doc. CCPR/C/60/D/549/1993.
[87] *Idem*, para. 3.2.
[88] *Idem*, para 2.3.
[89] *Idem*, para 10.3.
[90] *Idem.*
[91] *Idem*, para. 10.2.

the Committee thus stressed "the importance that land holds for indigenous peoples and their cultural and spiritual identity."[92]

Generally, the Committee has addressed a wide range of specific threats to indigenous lands, including interferences of lands by evictions, displacements as well as the denial of a right to return to lands. Hence in the case of the Philippines, the Committee expressed concern at reports of "forced evictions and displacements of indigenous populations in development zones, as well as at reports that specific groups of indigenous peoples have been denied by force the right to return to some of their ancestral lands."[93] The failure to recognise and protect land rights have equally been addressed by the Committee. In reports concerning Finland and Norway and their respective Saami populations, the Committee recently (2003) called upon both these States "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."[94] The unwillingness of States to recognise and protect indigenous land rights has also been addressed close in connection with the denial by some States to accept the existence of indigenous groups as separate entities on their respective territories. In the case of Japan the Committee has thus recommended the State to promote the rights of the Ainu of Hokkaio "as indigenous peoples" and to recognise their land rights as well as the right to restitution and compensation for loss.[95] In particular strong wording, the Committee has criticised Denmark for its denial of the existence of the Inughuit as a separate indigenous peoples. The Committee has thus noted "with serious concern claims of denials by Denmark of the identity and continued existence of the Inughuit as a separate ethnic or tribal entity..."[96]

Comparable to the practice of the HRC, the practice of the CERD Committee reflects recognition of the importance for indigenous peoples' to hold lands, and for displaced peoples to return to their ancestral lands, in order for them to maintain their identity and culture as well as their existence as such. Like the HRC, the CERD Committee has hereby taken a holistic approach towards the protection of indigenous peoples, recognising the land base necessary for their continually cultural existence and future survival.

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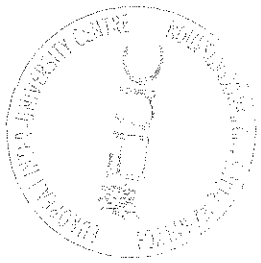
[92] As referred in Thornberry, *Supra* n. 10 at p. 214.
[93] CERD Commmittee, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Philippines.15/10/97.CERD/C/304/Add.34. (Concluding Observations/Comments)*, para. 17.
[94] CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Finland. 10/12/2003*, para. 12, and *CERD/C/63/CO/5*, para. 19 (norway).
[95] CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Japan. 27/04/2001, CERD/C/304/Add.114*, para. 17.
[96] CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination : Denmark. 21/05/2002. CERD/C/60/CO/5,* para. 18.



4.3. The Regional Level

4.3.1 Overview

The practice of the universal monitoring bodies is reflected and to some extent developed in the practice of the regional monitoring bodies. The ECtHR as well as the Inter-American Court have under their respective legal frameworks applied several provisions of relevance to the protection of indigenous land rights. At the regional European level, the ECtHR has in the case of *G. and E. v Norway*[97] acknowledged that interferences with indigenous peoples' traditional use of lands may constitute violations of the right to respect of their private and family life as well as their home. Also, while the ECtHR in general has adopted a wide interpretation of what constitutes "possessions" within the meaning of the property clause contained in the ECHR, the Commission has in the *Konkama case*[98] specifically recognised the protection of indigenous peoples' subsistence activities as a matter of the protection of their property rights. At the regional American level, the Inter-American Court has in line hereof recently delivered a landmark decision in *The case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001)[99], upholding the collective land and resource rights of an indigenous peoples which the State of Nicaragua had failed to do.

4.3.2. The European Court of Human Rights

4.3.2.1. The Right to Family and Private Life and Home

In similarity with the above-mentioned *Länsman cases*, the claimants in the case of *G. and E. v. Norway*, who were members of the Saami community, alleged that the effects of the construction of a dam and hydroelectric plant would obstruct with their traditional way of life, including the pursuance of their traditional economic activities such as reindeer herding, fishing and hunting. While the case was declared inadmissible, it nonetheless represents important aspects of the application of Article 8 of the ECHR. In applying Article 8, the Commission thus stressed that 'a minority group is, in principle, entitled to claim the right to respect for the particular life-style it may lead as being "private life", "family life" or "home"' and that the effects of the dam on traditional Saami economic activities may entitle them to compensation. However, the Commission abstained from more specifically assessing the impact of this interference on the applicant's life-style, and

[97] Nos. 9278/81 and 9415/81, *G. and E. v. Norway*, DR 35 (1983), 30-45.
[98] No. 27033/95, *Konkama and 28 other Saami Villages v Sweden*, DR 77/78.
[99] *The Mayagna (Sumo) Awas Tingi Community v. Nigaragua*, August 31, 2001.

used the arguments of economic well-being of the country and the sufficiency of a decision by national authorities to justify the interference.[100]

Regardless of the criticism that may be held against it, this decision nonetheless represents recognition of traditional land use of indigenous peoples as falling within the ambit of Article 8 of the ECHR. Following this case, a number of cases concerning the exercise of a traditional lifestyle have been declared admissible and assessed by the ECtHR under Article 8.[101]

4.3.2.2. The Right to Property

Besides establishing that interferences with indigenous peoples' herding, fishing and hunting may amount to a violation of rights as protected under Article 8, the Commission has interpreted the specific property clause in Article 1 of P1 of the ECHR as protecting similar activities. In the *Konkama case*[102], thirty-nine Saami villages claimed that regional and national regulations on small game hunting and fishing violated their exclusive Saami rights to hunt and fish in a specific area and thereby their rights to peaceful enjoyment their possessions as provided for in Article 1 of P1. The Commission held that whether the Saami's were holders of exclusive hunting and fishing rights was disputable, but recognised that reindeer herding, hunting and fishing "are fundamental elements of the Saami culture" and that "the exclusive hunting and fishing rights claimed by the applicant Saami Villages...can be regarded as possessions"[103] as the term is to be understood within the Protocol. Although the dispute was not settled since the case was declared inadmissible, the statements made by the Commission provide evidence that indigenous peoples' specific hunting and fishing rights qualify as "possessions" within the meaning of the Protocol and therefore must be protected as a matter of their property rights.

Moreover, if indigenous peoples should be the holders of such exclusive hunting and fishing rights, then these "possessions" may according to the Protocol only be taken "subjects to the conditions provided for by law."[104] Following the rule of law-principle, the ECtHR has in the later case of *Lithgow and Others* interpreted this phrase to require firstly the existence of such law and secondly, its compliance with adequately accessible and sufficiently accurate domestic legal

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[100] *G. and E v. Norway*, *Supra* n. 97 at para. 35.
[101] For a discussion on these cases concerning the Gypsy/Roma life-style, See Thornberry, *Supra* n. 10 at p. 301.
[102] No. 27033/95, *Konkama and 28 other Saami Villages v Sweden*, DR 77/78.
[103] *Idem.*
[104] For the full wording, see below Chapter Two section 3.3.2.

provisions.[105] If these requirements then, in turn, are met, compensation for the loss of rights must in all instances be provided for.[106]

While the Commission thus has taken a firm stand on the issue of indigenous peoples' right to pursue their traditional economic activities, the ECtHR has so far not handed down any decisions specifically concerned with indigenous land rights. Generally, the ECtHR has taken a broad view on what may be characterised as "possessions", including land and items representing economical value, such as benefits earned, established pension rights and business goodwill.[107]

Within its jurisprudence, however, it is a matter of well established principle that the ECtHR should consider the compliance of a given decision with relevant emerging international law reflecting some degree of international consensus, before handing down the decision in question. This so-called principle of "dynamic interpretation" or "present-day conditions" prevents the ECtHR from developing a narrow and closed system of European human rights protection, and accommodates instead a possibility for the ECtHR to contribute to the establishment of a common set of norms that are universally applicable. With reference to this principle, the ECtHR in the *sigurjónsson*[108] case considered a number of different international instruments, including the UDHR, to show that a "growing measure of common ground has emerged"[109] both nationally as well as internationally in the area in question and decided accordingly on the given issue.[110]

Article 1 of P1 should in this light be delimited and applied in accordance with the internationally growing consensus concerning protection of indigenous land rights. In this matter, it should reflect the protection afforded by international binding treaties as interpreted by international and regional human rights bodies, including the practice of the Inter-American Court and its application of provisions parallel to those found in the ECHR.

4.3.3. The Inter-American Court of Human Rights – the Right to Property

On its face, the *Awas Tingni case* probably constitutes the most significant case so far delivered by an international tribunal with respect to the protection of indigenous peoples' land rights. The Inter-American Court found in this case unambiguously that the protection of indigenous peoples' customary land and resource rights fall within the ambit of the Article 21 of the

[105] *Lithgow and Others v. United Kingdom*, para 110.
[106] *Holy monestaries v. Greece*, para. 75.
[107] Gomien, et. al. *Supra* note 61 at pp. 313-316.
[108] *Sigurjónsson v. Island.*
[109] *Idem*, para. 35.
[110] *Idem*, para. 35 and 48.

ACHR, containing the right to use and enjoy property. The Inter-American Court more precisely found that the State of Nicaragua violated the property rights of the Awas Tingni Community by allowing a foreign company to conduct timber exploitation within the Community's traditional lands and by failing to adequately recognise and protect the customary tenure of the Community. The decision is remarkable for its reference to the importance of indigenous peoples to hold land. On this matter the Inter-American Court held that

> "Indigenous groups, by the fact of their very existence, have the right to live freely in 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."[111]

It is noteworthy how this statement encompasses many of the concerns toward the protection of indigenous peoples land rights which have found expression in Convention No. 169 as well as in the practice of the international and regional human rights monitoring bodies. As the monitoring bodies at the universal level, the Inter-American Court recognises all the elements necessary for an adequate protection of indigenous lands. Another notable feature is that in line with the principle of dynamic interpretation developed by the ECtHR, the Inter-American Court resolves the dispute while recognising that human rights treaties "are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[112] In fact, this point had been argued by the Inter-American Commission in its written submissions, referring to the jurisprudence of the ECtHR concerning the application of Article 1 of Protocol No. 1 of the ECHR.[113] In its own wording, the Inter-American Court applied in the case a method of "evolutionary interpretation of international instruments for the protection of human rights."[114] While doing so, it reached a wide interpretation of the concept of property, including collectively owned property. More precisely, the Inter-American Court stated that

> "it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the

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[111] *The Mayagna (Sumo) Awas Tingi Community v. Nigaragua, Supra* note 99 at para. 149.
[112] *Idem*, para. 146.
[113] Anaya, J., Grossman, C., *The Case of Awas Tingi v. Nigaragua: A New Step in the International Law of Indigeous Peoples*, in <The Arizona Journal of International and Comparative Law Online>, vol. 19 No. 1, 2002.
[114] *The Mayagna (Sumo) Awas Tingi Community v. Nigaragua, Supra* note 99 at para. 148.

> indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua."[115]

Similar to the positive State obligation contained in Convention No. 169, the Inter-American Court conclusively demanded the Nicaraguan authorities to effectively delimit, demarcate and title the property of the Community in accordance with their "customary law, values, customs and mores..." in order to facilitate the Community's enjoyment and exercise the their property rights.[116]

As such, the judgement recognises and must be taken as a large step towards the full recognition of traditional occupancy of land as constituting indigenous peoples' legitimate property rights. The emphasis placed upon the evolutionary aspects of international law in the decision, illustrates the willingness of the Inter-American Court to establish a protection of indigenous peoples' land rights in compliance with the larger framework of international human rights law. If human rights are to provide for a consistent and equal protection universally, then this is the right path to follow for the Inter-American Court as well as other international tribunals in their future jurisprudence. However, while the Inter-American Court acknowledges the "autonomous meaning"[117] of international human rights treaties, it nonetheless finds support for its decision in Nicaraguan national law. In the case of *Awas Tingni,* this reference to domestic law could not lead to any other finding by the Inter-American Court, since the Community already enjoyed protection under such law. Yet in cases where domestic law does not provide for a similar high degree of protection, international human rights treaties must *per se* provide protection of indigenous peoples' land rights and *in effect* be given such "autonomous meaning" *independently* of domestic legislation. Any practice to the contrary would negate the universality of human rights and provide for inconsistency in the implementation of universal norms.

4.3.4. Summary

The case of *Awas Tingni* remains the most elaborated and progressive decision in the protection of indigenous lands right so far delivered by an international tribunal. However, the decision is only an element in the broader development which has taken place and is ongoing within other international and regional monitoring bodies. Thus, the HRC and the CERD Committee have applied

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[115] *Idem.*
[116] *Idem*, para. 173.3. For a status of the implementation of the decision by January 2003 see "The Awas Tingni Case - Fifteen Months Later: *The Challenge to the Implementation of the Decision of the Inter-American Court of Human Rights*"at http://www.indianlaw.org/awas_tingni_info_english.htm.
[117] *Idem*, para. 146.

general human rights provisions to protect the special situation and culture of indigenous peoples. Both bodies have recognised the factual existing relationship between indigenous peoples and their lands, resources and territories, and taken a holistic approach towards the preservation of their existence and survival. While doing so, they have strongly criticised States for their continuing encroachments upon indigenous land rights while demanding positive action for the removal of interferences with the traditional indigenous way of life. Their respective case-law and reports form an extensive legal framework against which it is possible to measure State action. Less comprehensive guidelines can be deduced from the delivered case-law of the European Commission on Human rights and the ECtHR although they have clearly recognised indigenous subsistence activities to fall within the ambit of the provisions of the ECHR. But the principle of dynamic interpretation developed in the ECtHR's jurisprudence allows the ECtHR in future decisions to take due account of emerging international law and thereby to apply its legal framework in compliance with the universal standards articulated by the HRC, the CERD Committee and the Inter-American Court. Yet, the decisions delivered by these international and regional bodies have already, taken together, displayed the universal feature of the system of human rights in embracing property interests other than those that exists within Western liberal societies which traditionally are based upon individual ownership and formal titling. What is displayed is an application of abstract universal norms sensitive in reading indigenous peoples' traditions of collective ownership of property and way of life.

5. Conclusion

The protection of indigenous peoples' land rights has become extensive in contemporary international law. The special features of collective ownership, traditional occupancy and the overall special relationship between indigenous peoples and their lands, territories and resources have been enshrined with legal protection in the binding Convention No. 169 and are strongly articulated in emerging international law as envisaged in the UN draft Declaration. It is recognised that the indigenous peoples shall be able to exercise these special features for the purpose of their own existence and future survival, but also to preserve cultural diversity and ecology of human kind. This requires both respect paid and positive action taken by States to maintain and facilitate the conditions under which such exercise is possible.

The protection of indigenous land rights is further endorsed by the international and regional human rights monitoring bodies which have applied general human rights provisions in compliance

and complementation of the comprehensive framework contained in Convention No. 169, and thus provided a set of binding universal standards taking into consideration their special culture and pattern of living. Strong criticism has been delivered in the jurisprudence of the monitoring bodies of States ignoring the binding obligations in international law to implement the rights of indigenous peoples to respect of their property, culture and way of life on an equal footing compared with the implementation of rights of other individuals within the jurisdiction the given State.

In conclusion, in international treaties and the jurisprudence of international and regional monitoring bodies, the focus necessary for an adequate protection of indigenous peoples' land rights are increasingly reflected. Even at the present stage of this development, international standards of protection comprise a comprehensive framework against which historical as well as present interferences with indigenous land rights can be measured. The historical element is important since contemporary international law addresses past arbitrary or unlawful interferences with indigenous way of life and culture and requires restitution and compensation of such actions.

III. Greenland

1. Introduction

This section examines to what extend the international system of protection of indigenous peoples' land rights apply to Greenland and whether this system is reflected, supported or impeded by domestic law applicable to Greenlandic territory. For this purpose, this section will refer to the legal history of Greenland insofar as this is important for the understanding of which State entity is responsible for the protection of land rights in Greenland and under which legal system these rights must be protected. Prior hereto, a short reference to the geography and population of Greenland will contribute to this background information necessary for the case-study undertaken later in the present chapter.

2. Geography and Population

Greenland is the largest island in the world. It is located 3-4,000 km away from metropolitan Denmark, northeast of Canada between the Arctic Ocean and the North Atlantic Ocean. The island covers a total area of 2,166,086 sq. km which is more than 50 times the size of the Danish mainland.[118] Permanent human habitation is possible only on some 15 percent of its surface where the island is ice-free. The remaining part is covered by the immense inland ice which rises to over 3,000 metres. The climate in Greenland is arctic to sub arctic with cool summers and cold winters. The sea waters of the island are relatively rich on sea mammals, such as seals, whales, walrus and narwhals.[119]

As of 1 January 2004, the population of Greenland numbered 56,854 persons, including approximately 7,000 Danes.[120] In comparison, metropolitan Denmark has some 5 million inhabitants. The indigenous peoples of Greenland are believed to have migrated from the Canadian High Arctic to the northeast of Greenland in 2,000 B.C. They have ties to the larger group of Inuit who live in the Arctic regions of Canada, Alaska, parts of Russia, and the rest of Greenland.[121] While the main part of the population lives in townships on the west and southwest coast, there are

[118] For an extensive geographical overview, see http://www.gh.gl/dk/fakta/geografi.htm.
[119] Minority Rights Group, *Polar Peoples*, London, Minority Rights Publications, 1994, p. 3.
[120] See http://www.statgreen.gl. Out of the total population, 48,029 persons were born in Greenland. The official statistic does not differentiate between the native population of Greenland and other inhabitants, but refers to those subject to Danish law. Yet, it is generally accepted that some 7,000 Danes live in Greenland.
[121] Gad, Finn., *Grønland*, Århus, Politikens Forlag A/S, 1984, p. 11.

also small settlements in the Thule District on the northwestern coast and a few places along the central east coast.[122]

3. History

3.1 The Colonisation of Greenland

In 982 A.D., a group of Icelandic and Norwegian seafarers called the Norsemen settled in small colonies in Greenland. In 1261, their colonies came under the Norwegian King but in the early 15th Century the Norsemen perished. Theories point to different factors leading to the demise of the Norse settlement including a lack of contact with Europe, climatic deterioration, disease, starvation and conflicts with the native population.[123] Regardless of the Norsemen's extinction, Greenland remained, at least on paper, a Norwegian colony until 1814. That year Norway ceded Greenland to Denmark in the Treaty of Kiel.[124]

During the 17th and 18th Century, a number of Danish trade and whaling companies were formed and by the Danish State given the privilege to ply between Denmark and Greenland.[125] In 1721, Hans Egede, a Norwegian-Danish Lutheran priest, established a trading company on Greenland's west coast. The Danish King granted Egede's company a concession placing the entire Greenland at its disposal. In 1774, the Danish authorities formed the Royal Greenland Trade Company and themselves established a trade monopoly with regard to Greenland's southwest coast. In 1849, the first Danish colony was established there. In the following period, an increasingly number of colonies was established on Greenland, accompanied by administrative decrees and ordinances, thus raising the level of Danish authority over the island. In 1921, the Danish minister of interior officially expanded the trade monopoly to encompass the entire territory of Greenland.[126]

Prior to this expansion, Denmark and a number of other nations had led negotiations concerning the sovereignty over Greenland. Norway, which had been separated from Denmark in 1814, now claimed sovereignty over a part of eastern Greenland. The dispute went to the Permanent Court for International Justice in 1933.[127] In effect, the Court found in favour of Denmark and

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[122] See *Supra* n. 118.
[123] There are several theories on the extinction of the Norsemen, See Minority Rights Group, supra n. 119 at p. 4.
[124] For a legal overview, see, *U.2004.382*, H. Østre Landsrets dom 20 August 1999 (3. afd.),(The Thule Relocation Case) available at www.thomson.dk.
[125] Viemose, Jørgen., *Dansk kolonipolitik i Grønland*, Viborg, DEMOS, 1977, p. 19.
[126] *Idem*, p. 58.
[127] *Eastern Greenland* (Denmark v. Norway), 1933 P.C.I.J. (ser. A/B) No. 53.

confirmed that Denmark, both before and after 1921, was the rightful claimant for the full sovereignty over Greenland as a Danish colony. The Court based its judgment on the presence of Danish activities in Greenland and Denmark's intention and will to act as a sovereign power over the island. Considerations towards the native population were not taken into account. The Court did not find that they had a saying in disputes between organised States.[128] After the Court's ruling, no further dispute over the island occurred. In 1946, Denmark placed Greenland on the list of non-self-governing territories under Chapter IX of the UN Charter.

3.3. The Integration of Greenland and the Greenlandic Home Rule Act

On June 5, 1953, a Danish constitutional amendment put an end to the status of Greenland as a Danish colony. The new Danish Constitution, which is still in force today, was by referendum in Denmark extended to all parts of the Danish Kingdom, including Greenland which thus became an integral part of Denmark.[129] The Constitution provided Greenland with two seats in the Danish Parliament out of a total of 179.

On September 3 that same year, the Danish minister for foreign affairs asked the United Nations General Assembly to remove Greenland from the list of non-self-governing territories. Until such removal had taken place, Denmark would continue to be considered as an administering power and required to undertake its obligations under Chapter IX of the UN-Charter. By resolution 849 (IX) of November 22, 1954, the General Assembly responded positively to the Danish proposal. It noted that according to the provided information, the people of Greenland through chosen representatives had exercised their right to self-determination and freely chosen to become an integral part of Denmark.[130]

In 1979, the Danish Parliament adopted the Greenland Home Rule Act which introduced a form of autonomy for the Greenlanders. While the Act provides for delegation of certain powers from the Danish legislators to the Greenlandic Home Rule Government (Landsstyre), it maintains the territorial and legal unity of the Kingdom of Denmark. It was adopted by two acts of the Danish

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[128] See Alfredsson, G., *Greenland and the Law of Political Decolonization*, in <German Yearbook of International Law>, vol. 25, 1982, p. 201.

[129] In Section 1 it is thus stated "This Constitutional Act shall Apply to All Parts of the Kingdom of Denmark".

[130] There were a number of flaws in the process of integration which points to the fact that Denmark did not allow for the Greenlandic population to exercise their right to self-determination. Due to lack of space this will not be further discussed. On this point see Alfredsson, *Supra* n. 128 at pp. 301-306 and Myntti, K., *Minoriteters och urfolks politiska rättigheder*, Rovaniemi, Lapplands Universitets tryckeri, 1998, p. 281.

Parliament. One act before an advisory referendum was held in Greenland and the other one after.[131] According to Danish constitutional law, these acts can be repealed at any time by another act of the same parliament, without consultation of the Greenlanders. Against this theory, scholars have argued that the home rule arrangement has acquired special constitutional status which can be changed only by agreement, or at least through negotiations with the Home Rule Authorities. As of today, the constitutional status of the home rule arrangement remains unsolved.[132]

4. Legal Framework

As mentioned above, the adoption of the Home Rule Act did not affect the legal status of Greenland in international law: Greenland is still an integral part of Denmark and within Danish jurisdiction. While the Home Rule Act allows the Home Rule Authorities to participate in international agreements of particular relevance to Greenland, foreign affairs remain according to the Danish Constitution a prerogative of the Danish government.[133] The government may accordingly enter into international agreements applicable to Greenlandic territory and population. This competence may be used to enter into agreements which place obligations on the Greenlandic population as well as to ratify international instruments which endow it with rights.

4.1. International Instruments ratified by Denmark – applicable to Greenland

As a member of the United Nations, Denmark has been obliged to respect the human rights enshrined in the UDHR within its entire territory, including Greenland, since its adoption in 1948. This obligation is, however, more political and moral than legal in nature.[134] On the other hand, both the UN-Charter and the Statute of the European Council which refer to the human rights enshrined in the UDHR have been legally binding upon Denmark since 1945 and 1949 respectively. Also legally binding, both the ICCPR and the ICERD have entered into force in Denmark. These

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[131] The limited participation in the process leading to the establishment of the Home Rule Act cannot be characterised as an exercise of the right to self-determination. Due to lack of space this will not be discussed in this thesis. See Alfredsson, *Supra* n. 128 at p. 306.

[132] Zahle, H., *Dansk forfatningsret 2. regering, forvaltning og dom*, København, Christian Ejlers' Forlag, 1996, p. 96 compared with Harhoff, F., *Rigsfælleskabet*, Århus, Klim, 1993, pp. 131-140.

[133] See Section 10 of the Home Rule Act 'the home rule authorities shall be subject to such obligations arising out of treaties and other international rules as at any time are binding on the Realm'. See also Section 19 of the 1953-Constitution.

[134] Due to lack of space, the customary nature of the rights enshrined in the UDHR will not be discussed in this thesis. For an overview of international instruments ratified by Denmark see Betænkning nr. 1407, *Inkorporering af menneskerettigheder i dansk ret*, København, Statens Information, 2001 and *U.2004.382, Supra* n. 124.

two treaties have applied to Greenlanders as well as Danes since 1976 and 1972 respectively.[135] Concerning the ECHR, including its additional Protocol No. 1, Denmark declared its provisions to be applicable to Greenland on 7 April, 1953. The ECHR became legally binding upon Denmark in September 1953 as it entered into force. In 1992, it was incorporated directly into Danish law.

As far as Convention No. 169 is concerned, the Danish minister for foreign affairs, in the process of ratification, declared that "in Denmark there exists only one indigenous peoples in the sense of Convention No. 169. The concerned is the indigenous population in Greenland or Inuit."[136] With regard to the right to property, the declaration further read that "The point of departure is, that it is the public – the State – that has the right to land in Greenland as such."[137]

However, this declaration may be politically relevant but legally it has no validity. The ILO simply does not allow for States to make unilateral reservations when ratifying ILO-conventions. If so allowed, its unique tripartite system would be jeopardised.[138] Convention No. 169 entered into force in Denmark on 22 February 1997.

4.2. National Provisions

The main national provisions for the protection of property rights applicable to Greenlandic territory are found in the Danish Constitution and the Home Rule Act. As mentioned above, this latter instrument was especially adopted with the purpose of providing for larger autonomy to the Greenlandic population within the Danish constitutional framework. Before referring to these two instruments below, it is relevant to point out to what extent, if any, international law can be regarded as a legal normative source independent of or accessory to the application of Danish law. The purpose hereof is to illustrate what level of protection international law affords to indigenous peoples within the hierarchy of norms in the Danish legal system.

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[135] Denmark has also recognised the complaint mechanisms under both the Optional Protocol of the ICCPR and Article 14 (3) of the ICERD.

[136] *U.2004.382, Supra* n. 124 at p. 557. [unofficial translation]

[137] *Idem.*

[138] See also ILO Governing Body, *Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Convention No. 169, made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (SIK)*, p. 6.

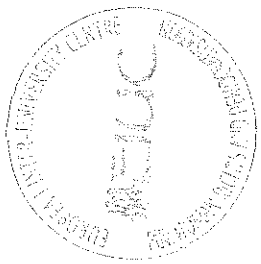
4.2.1. The Status of International Human Rights Treaties in Danish Law

The effect on domestic law of the considerable number of international instruments relevant for the protection indigenous land rights which have been ratified by Denmark, is from a *prima facie* point of view rather limited. The Danish Constitution does not regulate the relationship between international law on domestic law. Unless international treaties are incorporated into Danish law, as in the case of the ECHR, international treaties traditionally have not been considered as applicable in Danish law without explicit legal authority. This dualistic approach, in which international law and Danish law are perceived as two separate and different legal systems has, however, to a large degree been modified today.[139]

Thus, Professor Henrik Zahle argues that unwritten rules of interpretation applied in practice have enhanced the influence of international law on domestic law.[140] Zahle argues that the appropriately description of the Danish situation today is one in which international human rights treaties in general must be considered as "*legal sources normative for the interpretation of Danish law* and as an *individual source of law*" [141], independently from domestic law. He argues that the traditional dualistic constitutional theory today has been replaced by the *theory of practical monism.*[142] The fact that this point of view also represents the official Danish position is expressed in various reports provided for the United Nations. In the view of the Danish government, all federal and local authorities are legally obliged to ensure that general laws and concrete decisions comply with ratified international human right treaties.[143] It is in the light of this theory that the provisions relevant for the protection of indigenous peoples' land rights enshrined in Danish law must be interpreted.

4.2.2. The protection of property

The property clause in the Danish Constitution became directly applicable to Greenland without limitations after its integration into Denmark. In Section 73, it provides that



[139] See Zahle, H., *Dansk forfatningsret 3. Menneskerettigheder*, København, Christian Ejlers' Forlag, 1996, pp. 45, 268 and 275.
[140] *Idem.*
[141] *Idem.* p. 45.
[142] *Idem.*
[143] UN document: *CCPR/C/1/Add. 51 (29 November 1979)*, sections 31-32, see for example also UN document: HRI CORE/Add. 58 (1995), para. 53 and para. 103.

> The right of property shall be inviolable. No person shall be ordered to surrender his property except where required in the public interest. It shall be done only as provided by statute and against full compensation.

The mentioning of "No person" seems to indicate that this provision applies to individually property interests only. Yet, among both former and contemporary Danish leading scholars, there is obvious consensus to the contrary concerning the over all scope of this provision. The most used interpretation of this provision has been provided by Alf Ross according to whom it "presumably applies to all rights which by their very nature create the foundation for people's economic existence and activity."[144]

Section 73 thus applies to a wide range of property interests including those without economic commercial value as long as they fulfil the precondition of creating the "foundation for people's economic existence and activity". The application of the provision is not dependent on the traditional Western definition of private ownership but is rather connected to the actual loss of value that a right may represent. This includes both the complete right and the more limited right, such as commercial rights or the right of use.[145] That the "surrender" or expropriation must only take place "as provided by statute" is in contemporary constitutional law interpreted as an enhancement of the general rule of law-principle. It prescribes that for an act of expropriation to be valid it must have legal authority under law or administrative decree.[146]

The constitutional property clause seems, against this background, well conceived to protect the property rights of indigenous peoples living within Danish jurisdiction, independent of, but also when interpreted in the light of the theory of practical monism. Thus, traditionally occupied lands and the use of natural resources by indigenous communities fall within Section 73 as property rights in that they constitute the foundation for these communities' "economic existence and activities." The provision seems to protect the actual value that property rights represent to people in general regardless of their system of property tenure, this being collectively or individually. It establishes the inviolability to enjoy these rights without interferences not legitimated in law.

To further delimit the scope of this provision, the theory of practical monism prescribes the involvement of relevant international law. In practice, it is especially the rights enshrined in the ECHR that have been used as a source of interpretation of the human rights enshrined in the Danish

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[144] As cited in Brøsted, J. et.al., *Native Power*, Bergen, Reklametrykk Grafisk A.s, 1985, pp. 213-239.
[145] Zahle, H., *Supra* n. 139 at p. 164.
[146] *Idem*, p. 186.

Constitution, and usually with the result that the protection afforded under the ECHR is elevated to the constitutional level in the hierarchy of norms in the Danish legal system.[147] Other relevant property clauses in international law, such as Article 17 of the UDHR, should equally be considered according to this theory when applying Section 73. As explained earlier, both the ECHR and the UDHR afford protection of indigenous peoples' property rights.[148]

4.2.3. Non-discrimination

Although indigenous peoples' property rights seem protected under Section 73, the Danish Constitution contains no State obligation to ensure that all individuals on an equal basis enjoy and exercise such rights. It contains no general right to equality before the law, equal protection of the law or non-discrimination.[149] Yet, in Danish constitutional theory it has been argued that a general principle of equality exists as an unwritten principle of constitutional law. On the constitutional level there is, however, neither a principle of equality nor non-discrimination that can be said to exist with certainty.[150]

Nonetheless, Article 14 of the ECHR is a part of Danish law and must be observed in relation to any situations that fall within the scope of the rights under the Convention, such as the right to property. This provision prescribes that the right to property must be conferred equally to all individuals within Danish jurisdiction. Moreover, the right to equality before the law and equal protection of law as provided in both the ICCPR and the ICERD and in other international treaties, constitutes, according to the theory of practical monism, independent sources of law, and should in general be used as legal sources normative for the interpretation and application of Danish law.

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[147] For an overview of case-law see *Idem*, p. 51.
[148] See Chapter Two section 3.3.2. and 3.2.1.
[149] Several provisions are, however, relevant to the protection against discrimination. Thus, a particular prohibition of religious discrimination is enshrined in section 67 which protects the freedom of religion. Section 68 provides that no one should contribute to any kind of worship against his own beliefs. According to section 70, no one may be deprived of civil or political rights on the grounds of faith or descent. Section 71 (1) states that no Danish citizen can be deprived of personal liberty on grounds of political opinion, faith or descent. Apart from these provisions, the constitution does not provide for any provisions that prohibit discrimination.
[150] For an overview of theories see Simonsen, K. and Jensen, L. Solskov: '*Diskrimination – en analyse af Danmarks menneskeretlige forpligtigelser of forholdet til folkekirkeordningen*'. Rettid 2002. Studenterafhandling.

4.2.4. The Protection of Natural Resources

From a *prima facie* point of view, the Home Rule Act provides even stronger protection of the Greenlandic indigenous peoples' property rights than the Danish Constitution does. Thus, in Section 8(1) of the Act, it is stated that "the resident population of Greenland has *fundamental rights* to the natural resources of Greenland."[151] The wording of this provision suggests that the Greenlandic population have the rights to the natural resources as a matter of fundamental law, i.e. a right that cannot be changed, restricted or altered by statutory regulation or even constitutional amendments.

However, in the same provision (para. 2) it is stated that "prospecting and exploitation of these resources are to be regulated by agreement between the Government and the Home Rule Government (Landsstyre)." So, no use of the natural resources can be pursued by the Greenlandic authorities without prior permission with the Danish government. The constellation is rather paradoxical: On the one hand, the rights of the Greenlandic population are of fundamental character, while these rights, on the other hand, are dependent on agreement with the Danish government. It is clear that these so-called "fundamental rights" must be seen within certain limitations.[152] On its face, Section 8(1) seems appropriately to be characterised more as reflecting a political principle than an actual legal provision with normative content.

In addition, these rights to the natural resources, including the right to participate in their use as enshrined in Section 8(2), apply not only to the indigenous peoples but to the "resident population" of Greenland. This must be read as including Danes as well as persons of other nationalities who may now be or will in the future become permanent residents of Greenland.[153]

The provision seems difficult to reconcile with Article 14 of Convention No. 169 which, applied to Greenland, prescribes the Danish State to recognise the *ownership* and *possession* of lands of the *indigenous peoples* in Greenland.[154] As with the other provisions of the same Convention, Article 15 is equally only concerned with peoples' rights to their natural resources. Other than the indigenous peoples belonging to the "resident population" can with reference to Convention No. 169 hardly be entitled to the Greenlandic natural resources.[155]

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[151] Italics added.
[152] For a similar viewpoint see Rehof, L. A., *Human Rights and Self-government for Indigenous Peoples*, in Blume P. et.al, <Suum cuique: legal studies from the University of Copenhagen Law Faculty>, Cph, DJØF, 1993, p. 28.
[153] For a similar viewpoint see *Idem*, at note 36, p. 37.
[154] See also Alfredsson G., *The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries*, in <Zeitschrift für öffentliches Recht und Völkerrecht>, vol II, 1999, p. 532.
[155] For a different viewpoint see Myntti, *Supra* n. 130 at p. 294.

4.3. Summary

The international instruments relevant for the protection of indigenous peoples' land rights have all entered into force in Denmark and apply to Greenlandic territory. While it is only the ECHR that has been incorporated directly into Danish law, other international instruments constitute sources of law and may be applied independently of or as normative sources for the interpretation of Danish law according to contemporary constitutional theory. However, within domestic law, the reading of Section 73 of the Danish Constitution in connection with Section 8(2) of the Home Rule Act leaves some ambiguity regarding which entity is endowed with the territorial rights in Greenland. On the one hand, the indigenous traditional system of land tenure and use of natural resources seem to fall under the protection of property afforded in Section 73 of the Danish Constitution as a matter of indigenous peoples' rights to own property without interferences from outside powers. Article 14 of the ECHR together with other relevant provisions in international law seems to protect the equal enjoyment and exercise of these rights. To hold these rights depends not on any kind of prior obtained permission but instead on the actual value they represent to the holders of the concerned rights.

On the other hand, Section 8(2) of the Home Rule Act states that the Greenlandic natural resources may only be used by the Greenlandic population in agreement with the Danish government. This provision seems to impede the full ownership of property rights to the Greenlandic population as provided for by Section 73 of the Danish Constitution. The existence of the two provisions within the same legal system appears difficult to reconcile. Their co-existence may well result in narrow interpretations of the scope of Section 73 for the purpose of preserving the integrity of the Danish legal system including the Home Rule Act. In effect, the case-study undertaken below will reveal that the protection afforded under Section 73 is not extended to Greenlandic territory.

5. The Relocation Case

5.1. Introduction

The constitutional prerogative for the Danish government to enter into international agreements applicable to Greenlandic territory has had and continues to have severely negative consequences for the inughuit living in northern Greenland. Through a bilateral agreement with the United States, the Danish State allows the continuous presence and activities of the American Thule Air Base on a

central part of Inughuit hunting grounds. This chapter will refer to the facts surrounding the establishment of this base and its historical and present day consequences for the Inughuit. Prior hereto, it will refer to the geographical delimitation of Inughuit territory and their dependency of this territory including their customary patterns of use in order to provide an understanding of the importance that land rights represent to the Inughuit, and how such rights have developed in history based upon land use. It will then refer to the legal history of northwestern Greenland because this history has a somewhat different character from the colonial perspective than for the rest of the island. By way of completion, it will finally refer to recent Danish court proceedings in which the Inughuit have sought remedy for the interferences with their territory.

5.2. Thule District and the Inughuit

The Thule District covers a territory of 491,000 sq. km along the northwestern coast of Greenland between 75° and 79°30' north latitude and 58° and 74° west latitude. It stretches from the Humboldt Gletscher in the north to the Steenstrup Glecther in the south and is situated approximately 1,300 km from the North Pole.[156] The Inughuit living in the Thule District constitute the northernmost human society in the world and are one of several sub-groupings or tribes of the Inuit. They have been identified as a separate and distinct tribe both before and after the Danish colonisation as well as today. The Inughuit have a distinctive language and special cultural identity based on their utilisation of the natural resources of the high artic climate.[157] In number, the Inughuit population is among the smallest in the indigenous world. As of March 31, 1952 the Inughuit population numbered 372 persons;[158] today, the population in the Thule District is in total approximately 1000 persons.[159] Prior to colonisation, the lands in the Thule District was exclusively used and possessed by the Inughuit. The invisible boundary between the Inughuit's small and

[156] See Brøsted, J. Fægteborg, M., *THULE – fangerfolk og militæranlæg*,Viborg, Special-Trykkeriet Viborg A/S. 1987, p. 17.
[157] See CERD Committee, Background information for the CERD Committee. Relative to the 15th periodical report of DK (CERD/C408/ADD.1) and expert testimony by Robert Petersen before the Danish Supreme Court in, *U.2004.382*, H, Supra n. 136 at p. 603, and Damas, David., Handbook of North American Indians, vol. 5, Artic, Smithsonian Institution, Washington, 1984, p 593, and S.i.k report to the ILO Committee, ILO, 31, October, 2002. *A Call for the reconsideration of the Report of the Committee of the Governing Body of the ILO in GB.280/18/5.*
[158] Brøsted, *Supra* n. 156 at p. 17.
[159] This includes the Inughuit as well as non-Inughuit. The population in Central Qaanaaq Communia counted 859 inhabitants in 2003: Source: www.statgreen.gl/dk. See also Harlang, C. et.al, *Retten til Thulelandet*, København, DIKE, 1999.

scattered settlements and the West-Greenlanders in the South could simply at that time not be transgressed by human beings without their lives being endangered.[160]

5.3. Dependency of Lands and Customary Practice

As their central settlement, the Inughuit had chosen a place they called Uummannaq (later Dundas) in the central Thule District from where hunting opportunities were particularly favourable, especially on seal, walrus and birds.[161] The fjords off the coast by the settlement have been referred to as the Inughuit's most important "larder".[162] The hunting opportunities on land were equally favourable. In reports from Danish natural scientists and polar-researchers, it is described how the Inughuit traded the skin of polar bears and foxes in exchange for useful material for their hunting and catching, such as knives and wood for building kayaks and sledges.[163] In 1919, Knud Rasmussen, a Danish polar-researcher, wrote that the southern Thule District contained such large amounts of foxes that people easily could provide themselves with more furred animals than necessary and the local population always had plenty of foxes ready for sales purposes.[164]

The annual cycle of the Inughuit were determined by the resource distribution in the area. To avoid overexploitation of the different resources, change of settlements was frequently made. Accordingly, hardly any of the Inughuit families returned to the same winter settlement after finishing their summer hunting expeditions. This variation in the resource utilisation shows the interrelated dependence on all available resources which provided the population with food, shelter, clothing, heat, light, and transportation.[165]

The customs regulating the Inughuit's use of resources in the Thule District were similar to those existing in other parts of Greenland. These customs were for the Inughuit, as well as other Arctic Eskimos, matters of fundamental law. It was for example a fundamental law that no one could establish himself in a settlement without prior agreement with those already settled there.[166] More generally, individuals or families could, according to customary practice, obtain special privileges to use a certain part of the territory e.g. for hunting purposes. The condition for acquiring

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[160] Brøsted, *Supra* n. 156 at p. 215.
[161] See Vibe, C., *Fangerfolk og fugle fjælde*, Hagerup, 1938, p. 146.
[162] See Lundsteen, P.H.'s letter of 25 May 1951 to Eske Brun in Harlang, *Supra* n. 159 at p. 17.
[163] See Mylius-Erichsen L. Harald Moltke., *Grønland.*, Copenhagen, Gyldendal, 1906, p. 213.
[164] Rasmussen, K., *Grønland langs Polhavet*, Cph, Gyldenal, 1919, p. 48.
[165] Brøsted, *Supra* n. 156 at p. 19.
[166] Reitzel, C.A., *Meddelelser om Grønland. Commissionen for Ledelse af de goelogiske of geografiske Undersøgelser I Grønland. Fire og Tredve hefte.* København. Binnco Linus Bogtrykkkeri.1910, p. 367.

a special right was its *use*. If the use was discontinued, the right reverted back to the community. Also, attached to such privileges were corresponding obligations to contribute economically to the sustainability of the community. The same principles applied in building rights and other land use. As of today, special privileges can be adopted into municipal ordinances but no formal registration or recognition is needed for them to exist.[167]

5.5. The Colonisation of the Thule District and the Thule Act

At the end of the 19th Century and the beginning of the 20th Century, the Thule District was occasionally visited by whalers and explored by a number of polar expeditions. Although the Danish colonisation of the central and southern parts of Greenland was initiated in the 18th Century, it was not until 1902 that a Danish expedition for the first time visited the Thule District and not until 1909 did an actual colonisation of the Thule District take place. In fact, as the Danish state did not show any interest in the area, Knud Rasmussen, the Danish Polar-researcher, privately initiated and raised the necessary means for the colonisation of the Thule District himself and established in 1910 a commercial trading station by the name "Cape York Station Thule".[168]

During the period of Rasmussen's colonisation, much effort was made not to interfere with the traditional life and culture of the local inhabitants. As a mean to maintain their freedom and independence, Rasmussen established the Hunter's Council in 1928. On June 7, 1929, this Council adopted the "Laws of the Cape York Station Thule" (Thule Act). The Preamble of Section A of this Act stated that the Thule Tribe should take part in the decision-making which were of common interest to the society.[169] It is further stated that "All members of the tribe are called with one word for the society, and the society speaks through the Hunter's Council."[170] According to article 1 of the Act, the Hunter's Council of the Cape York District was composed of six members, namely the trading station manager, the priest and the doctor in Thule along with three chosen members from the north, central and southern district. Article 5 prescribed the responsibility of the Hunter's Council to adopt rules and propose initiatives relevant for the peoples' way of life and economic pursuits. The responsibility of the Hunter's Council was both to lay down rules and ensure their

[167] For an overview see Harhoff, F., *Supra* n. 132 at p. 135 and Brøsted, J., *Territorial Rights in Greenland. Legal basis – view points and considerations*, in Arctic Anthropology, Cph, 1985, p. 44.
[168] For a more extensive historical overview see Malaurie, J., Thule: *det yderste land*, Cph, Gyldendahl, 2002.
[169] The Thule Act is reproduced in *U.2004.382, Supra* n. 124 at p. 387.
[170] *Idem*, para 4. [unofficial translation]

effective implementation. As such, the Thule Act reflected the already existing customary law in the Thule District.[171] The Thule Act was ratified by Denmark on September 8, 1931, in a document addressed to Rasmussen.[172]

After Rasmussen's death, the trading station was transferred to the Danish State. The legal position of the Thule District, however, remained the same. In a note to the chairman of the Hunter's Council, the Danish prime minister thus stated that "this new constellation does not affect the present legal position in the [Thule] District."[173] What had been transferred were thus the rights attributed to running the trading station, leaving the jurisdiction of the Hunter's Council and the legal validity of the Thule Act intact.

In 1950, the Danish Parliament adopted a new law concerning a division of Greenland into three administrative parts, namely western-, eastern-, and northern Greenland. The 1950-law prescribed the less populated eastern and northern Greenland to be administered according to the relevant minister's "further decisions". Although this law replaced a law adopted in 1925 in which the administrative minister concerned was to observe "valid laws and decrees and treaty obligations", these obligations remained in force after the adoption of the 1950-law.[174] With regard to the Thule District, this ministerial discretion was used to reaffirm the validity of the Thule Act.[175] In fact, the Thule act remained in force in its entirety until January, 1963, when the exclusive powers of the Hunter's Council were taken over by a municipal council and a local court.[176]

5.6. The Official Position of the Danish Administration before the United Nations

According to the 1950-law, cf. the 1925-law, the administration of northern Greenland was not only to be carried out under due observance of the Thule Act as ratified by the Danish government, but also under due observance of "treaty obligations". When Greenland, in 1946, was listed as a non-self-governing territory, Denmark undertook the "treaty obligation" to guarantee the development of Greenland towards obtaining a full measure of self-governance including the obligation to promote to the utmost the well-being of its inhabitants under Article 73 of the UN-

[171] This is acknowledged in *U.2004.382, Supra* n. 124 at p. 488.
[172] Brøsted, *Supra* n. 156 at p. 20.
[173] *U.2004.382, Supra* n. 124 at p. 388. [Unofficial translation].
[174] This is acknowledged in *U.2004.382, Supra* n. 124 at p. 538. Italics added.
[175] Harlang, C. *Supra* n. 159 at p. 30.
[176] Brøsted, *Supra* n. 156 at p. 21.

Charter.[177] As a part of this obligation, Denmark was required to provide the United Nations with annual reports concerning the Greenlandic situation.[178] For the purpose of fulfilling this obligation, Denmark, in its initial report from 1947, assured the United Nations that

> "Greenlanders enjoy the same civil rights as Danes regarding freedom of speech, assembly, Press, religion as well as freedom of choice of residence and occupation."[179]

As far as the protection of Greenlandic property rights is concerned, the report from 1952 notes that the Danish administration had always followed the principles in the Danish Constitution in situations these were practically applicable to Greenland. Similar statements were made in the report of 1953 according to which

> "The Greenland Administration has pursued a policy based on the principles of the Danish Constitution. There has been no expropriation of private property except for reasons of public policy, and then full compensation is allowed."[180]

The aim with this reporting procedure was for the United Nations to monitor Denmark's compliance with its obligations towards the development in Greenland. If certain conditions hampered this process, Denmark was obliged to include such conditions in the reports. In one instance only, namely in the report from 1953, the Thule District is briefly mentioned with regard to the deterioration of its hunting fields:

> "...walrus hunting in the Thule District is steadily declining, the animals – due to local conditions especially in the vicinity of Thule proper – disappearing from the hunting fields."[181]

What this report referred to as "local conditions" was more precisely the Thule Air Base's establishment in the early 1950's and subsequent activities which had a significant negative impact

[177] For an interpretation of Article 73 see above section 3.2.4.
[178] See UN-Charter Article 73(e).
[179] As reproduced in Harlang, C. *Supra* n. 159 at p. 114.
[180] *Idem.*
[181] Harlang, C. *Supra* n. 159 at p. 117.

on the ecological resources and the opportunities for the Inughuit to pursue their hunting activities in the Thule District.

5.7. The Relocation Case

5.7.1. The Construction of the Thule Air Base

The Thule District and other parts of Greenland became of strategic military interest during the Second World War.[182] On April 9, 1941, an American Danish agreement concerning the defence of Greenland was adopted. It provided for the USA in the period from 1941 to 1944 to establish 17 bases for military purposes in Greenland including the establishment of a so-called *Danish American Weather Station* in the Thule District in 1943.[183]

At the end of the war, the grounds on which the 1941-agreement was based upon no longer existed. The USA made, however, no sign of evacuation of their installations. Instead, they planned to maintain and expand these installations as a part of a nuclear strategy in the light of the development of the Cold War.[184] Without knowledge of these plans, the Danish authorities in 1946 allowed the construction of an airstrip in connection to the weather station. When negotiations were initiated on a new defence agreement between the USA and Denmark on Marts 27, 1951, a preliminary team of six hundred American construction workers had already been flown into the Thule District to prepare for the construction of a military air base in the Thule District.[185] It was not until the final stage of these negotiations the Danish authorities became aware of the larger scale of the American activities in the Thule District.[186] What actually was allowed for when the Danish Parliament authorised the 1951-agreement on April 27, 1951, was, however, not clear. The Parliament was neither provided with any information regarding the practical consequences of the agreement nor exactly which new areas would be released to the Americans. The agreement was general in its wording and adopted under a simplified procedure for Parliamentary decisions instead of through the legislative procedure for the enactment of laws. Also, the demarcation of the new defence area was held in a top secret schedule.[187]

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[182] For an overview, see Dansk Udenrigspolitisk Institut (DUPI), *Grønland under den kolde krig. Dansk og amerikansk sikkerhedspolitik 1945-68*, København, Gullanders Bogtrykkeri, 1997.
[183] *Idem*, p. 64.
[184] *Idem*, p. 28.
[185] Brøsted, *Supra* n. 156 at p. 39.
[186] *Idem*, p. 23.
[187] See Brøsted, *Supra* n. 156 at p.23

Nonetheless, the Danish minister for foreign affairs assured the Parliament that new defence areas would not be placed at locations close to the Greenlandic population. In this connection, he argued that the welfare of the local population was secured through article VI of the 1951-agreement:

> "Due respect will be given by the Government of the United States of America and by United States nationals in Greenland to all the laws, regulations and customs pertaining to the local population and the internal administration of Greenland...."[188]

While discussions were taking place in the Danish Parliament, an air lift of approximately 3.000 round trip flights together with a convoy of 120 ships loaded with cranes, bull-dozers and 12.000 construction workers were working its way into the Thule District. By October 1952, the Thule Air Base covered some 320 km^2 of Inughuit territory, including a base for a permanent stab of 5.000-10.000 men situated close to the central settlement of the Inughuit in Uummannaq. The Inughuit had neither received any information nor been consulted with regards to the invasion on their hunting territory.[189]

5.7.2. The Relocation

During the final stage of the construction in 1952, the USA started investigating the air defence of the Thule Air Base.[190] On April 28, 1953, the Danish authorities received a request from the American authorities concerning the erection of an anti-aircraft battery at the location of the Inughuit settlements.[191] At this point of time, it became clear to the Americans that the relocation of the Inughuit was a necessity. Thus, an assistant of the American defence wrote in a note dated April 30, 1953, that

> "US position requires movement of Eskimo village to insure the security of the gun position. Security control without relocation of the Eskimo village would be extremely difficult."[192]

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[188] *Idem*, p. 219.
[189] Idem, pp. 24-25.
[190] DUPI, *Supra* n. 182 at p. 182.
[191] *Idem*, p. 191.
[192] *Idem*, the importance of this document concerning the decisions of the removal is unclear.

This request for expansion of the Thule Air Base was welcomed by the Danish authorities.[193] The Danish authorities called the colony inspector and the local priest in the Thule District to Copenhagen to plan the removal of the Inughuit. The two officials were ex officio members of the Hunter's Council but they had no mandate of any kind to negotiate on the Council's behalf. No records account for any kind of decisions during the visit in Copenhagen. On May 11, 1953, the Danish authorities officially announced that the Hunter's Council had agreed on a relocation of the Inughuit settlements.[194] The Danish authorities tried to justify the removal by explaining to the press and the public that the population were "nomads" and "it is natural for them to move": "...According to the Greenlanders own perception, their occupation and personal conditions will not be damaged by the removal. The animals are already leaving and then they have to follow."[195]

In a meeting on the May 25, called for by the Danish authorities, twenty-seven families, consisting of 116 persons of the Inughuit population were told to move from their settlement in Uummannaq in the central Thule District. Accordingly, these families resettled 150 km north of Uummannaq mainly in the uninhabited area of Qaanaaq.[196] Several hunters have later explained that the Danish colonial inspector in the Thule District did not allow for any debate during this meeting. Others have explained that those who refused to move were not provided with new houses in their resettlement areas, and that their existing houses would be demolished by bull-dozers. Some hunters have further explained that they were told to move within four days. Five days after the meeting, on May 31, the inspector in Thule reported to the Danish authorities in Copenhagen that the relocation had taken place.[197]

5.7.3. The Consequences for the Inughuit

While the family houses of the Inughuit were demolished in 1956 and 1957 respectively,[198] the Danish authorities for historical reasons decided to maintain the Inughuit's ancestral burial grounds in Uummannaq. For the relocated population, it nevertheless became difficult to maintain and practice their spiritual bonds with their buried ancestors given that they now had to travel 150 km

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[193] *Idem,* p. 192.
[194] *Idem.*
[195] The content of this announcement was strategically chosen in order to avoid critique of the actual reasons for the relocation from Danish as well as American authorities, See Brøsted, J., *Racediscrimination i Thulesagen,* [unofficial translation] U.1996B.502, in <UfR Online>, www.thomson.dk.
[196] Brøsted, *Supra* n. 156 at p. 82.
[197] Walsøe, per., *Thule Farvel, Tvangsflytningen I 1953,* Viborg, Tiderne Skifter, 2003, pp. 140-141.
[198] See Harlang, C. *Supra* n. 159 at pp. 125-134.

by sledge in the harsh Artic climatic conditions to visit their old cemetery.[199] Several of the hunters have, however, occasionally returned, by their own means of transportation or a provided helicopter, to worship their buried ancestors.[200]

The establishment of the base and the relocation resulted in a deterioration of hunting opportunities. At the Hunter Council's meeting in April, 1954, the hunters thus asked to be compensated for the loss of their fox-hunting territory. They further complained that the rules concerning their prohibition of access to the area close to the Thule Air Base were not clear.[201] Similar issues were discussed during the Hunter's Council meetings in May 1956. Here, it was further stated that the location of the base hindered the access of the Inughuit to their traditional territories which, together with the fact that the foxes were attracted by the food-dumps on the air base, caused a significant reduction in the hunting and income opportunities.[202] At a Council meeting in 1960, the hunters complained about the noise and disturbance from the American air-plane traffic which they considered as having a deteriorating effect on the hunting resources.[203] At a Council meeting in 1961 the closing down of Inughuit sledge routes through the defence area was regarded as a necessity since the Inughuit on these routes risked to be contaminated by the radiation from the installations on the base. During this meeting, it was also pointed out that the Inughuit were prohibited access to the base and its surrounding installations, including a shooting facility were mortar-grenades were fired.[204]

In January 1968, an American B-52 Bomber exploded close to the Thule Air Base. It left four nuclear bombs shattered and their contents contaminated a significant area of the fjords.[205] Hunters have subsequently observed various malformations in the seals.[206] The expenditure of the restoration of the damages caused by the activities of the base on the ecological resources in the Thule District is estimated to DKR 200 – 250 millions.[207]

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[199] *Idem*, p. 570.
[200] *Idem*, p. 470. See also documentary, '*Kolonimagt. De fordrevne*' at www.dr.dk.
[201] Brøsted, *Supra* n. 156 at pp.88-89.
[202] *Idem*, pp. 89-91.
[203] Brøsted, *Supra* n. 156 at p. 94.
[204] *Idem*, p.98.
[205] For an account of the specific facts surround the crash and the following diplomatic crisis see DUPI, Supra n. 182 at pp. 451-482.
[206] Martínez, M. A., *Discrimination Against Indigenous Peoples. Study on treaties, agreements, and other constructive arrangements between States and indigenous Populations*, UN Doc. E/CN.4/Sub.2/1996/23, para. 206.
[207] Shøler-Kjær, H., *Afsluttende bemærkninger i Thulesagen*, 13 Nov. 2003 (radio-documentary) at www.dr.dk.

5.7.4. Thule Today

In comparison with the local communities elsewhere in the Arctic, Qaanaaq can today be characterised as an economically unsustainable and underdeveloped community.[208] For a long period of time, social scientists have pointed to the fact that the community has large scale social and economic problems.[209] It is struggling with widespread unemployment, a low educational rate, poverty problems, and a high reliance on governmental subsidies and dependency on social welfare.[210] In addition, a widespread abuse of alcohol is increasing, causing problems of child neglect and wife battering.[211]

According to the Mads Fægteborg, a Danish Eskimologist, the primary reason for these social and economical conditions are historically based on the circumstances surrounding the establishment of the Thule Air Base in 1951 which caused the deterioration of an important part of the local populations' catching and hunting territory. The fact that the removed population in addition were resettled in areas with sparse ecological resources, only further deteriorated their hunting and catching opportunities and sustained their problems of poverty.[212]

Regardless of the unfavourable conditions under which they have to be practiced, a large number of people are still occupied with traditional activities such as hunting, fishing and trapping.[213] Modern as well as traditional equipment is used for these activities.[214] Even though the economic significance of hunting is declining, since the available ecological resources are being used in their entirety without this having any considerable pay-off,[215] the Inughuit still attach much importance to the hunting ideology and remain proud of their hunting culture. More than the rest of the Greenlandic population they identify themselves as catchers and hunters.[216] Yet, the use of Inughuit territory continues to be decided by outside powers. Recent agreements concerning Inughuit territory have thus been made which do not improve the hunting opportunities in the Thule District.

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[208] Remie, C., *Facing the future. Inughuit Youth of Qaanaaq*. Nijmegen, Nijmegen Univesity Press, 1998, p. 23.
[209] Tolstrup, J., *Thuleboerne i modvind*, in <Polarfronten>, vol. 4/3, Cph, DPC, 2004.
[210] Remie, *Supra* n. 208 at p. 25.
[211] *Idem*.
[212] Tolstrup, *Supra* n. 209.
[213] Remie, *Supra* n. 208 at p. 23.
[214] *Idem*, p. 24 and Tolstrup, *Supra* n. 209.
[215] Tolstrup, *Supra* n. 209.
[216] Remie, *Supra* n. 208 at p. 25.

Firstly, on February 20, 2003, the government of the USA and the Danish government including the Greenlandic authorities signed a memorandum[217] which provides for the return to Denmark of the Dundas (former Uummannaq) area from where the Inughuit were relocated. While the Danish and Greenlandic authorities saw this agreement as a step towards a normalisation of the relationship between the Thule Air Base and the Greenlandic population and as a victory for Greenland respectively,[218] the agreement allows the Inughuit neither to resettle nor to hunt in the area.[219] Secondly, on May 14, 2004, the Danish government and the Greenlandic Home Rule authorities reached an agreement regarding a planned renegotiation with the USA concerning the 1951-agreement that will allow for an upgrading of the radar-installations at the Thule Air Base. The base is planned to become part of its national missile defence system and to become operative in this present or the next coming year. The American government has expressed its will in the future expand this system as to also encompass friends and allies of the USA, either through bilateral agreements or within the NATO-cooperation.[220]

The Inughuit oppose the content and validity of both agreements. They maintain their collective claim of compensation for the loss of hunting territory. This claim was originally raised in the Hunter's Council in 1959, but has subsequently been ignored and wrongfully declared disappeared by the Danish authorities.[221] Today, other three claims have been issued by the Inughuit before the Danish Courts, namely (1) the right to live and use the native settlement in Uummannaq/Dundas in the Thule District (2) the right to move and hunt in the entire Thule District (3) the right for the Inughuit to receive compensations individually.

5.7.5. The Relocation Case before the Danish Courts

On November 28, 2003, the Danish Supreme Court awarded the Thule Tribe (consisting of 420 Inughuit) a collective compensation of DKK 500.000, while the applicants individually were awarded on average a compensation of DKK 17.000 (the claim was 235 millions DKK and 250.000 DKK respectively). In doing so, the Supreme Court upheld the earlier Eastern High Court's ruling of August 20, 1999. Before both Courts the Thule Tribe referred to, among a number of

[217] Lovtidende C, No. 23. 3 September 2003. *Bekendtgørelse af aftalememorendum af 20. februar 2003 med Amerikas forenede Stater vedrørende udskillelsen af Dundas fra forsvarsområdet ved Thule.* Udenrigsministeriet.
[218] See official statements at http://dk.nanoq.gl.
[219] Article 4 (3) of this agreement prescribes that no persons may settle and no buildings may be erected in the Dundas-area in three years from the agreement. It is further prescribed that for an additional three year period, any initiative to change the existing buildings in the area has to be approved of by the American authorities.
[220] See '*Missilforsvar of Thule-radaren*', Marts 2003, Danish Government at http://dk.nanoq.gl, p. 29.
[221] See Brøsted, J., *Den forsvundne erstatningssag*, U2000B.621, <UfR Online> at www.thomson.dk.

international instruments relevant to the protection of indigenous peoples land rights,[222] its rights under Convention No. 169 as a separate indigenous entity. The government agreed that the Inughuit did exist fifty years or less ago as such an entity, but contended that they today only exist as an integrated part of the Inuit majority population in Greenland. The government further held that no taking of land rights have taken place, but only a non-compensable regulation of the Inughuit rights of use in the Thule District.[223] Yet, in its assessment the High Court held the Inughuit to be a separate indigenous entity. More precisely, the High Court held that

> "the population in the District, when the Thule Air Base was constructed and the removal took place, must be regarded as having been a peoples in the sense this term now is defined in the ILO-convention, cf. article 1 (1) (a) of the convention."[224]

Nevertheless the High Court denied the Inughuit to exercise their claimed rights since this would be incompatible with the existence of the Thule Air Base. The High Court stated that the State could not be seen as obliged to remove the base as it was established in accordance with the 1951-agreement which had "constitutional validity".[225] Having made these statements, the Court abstained from considering any further possible application of Convention No. 169.[226]

The Supreme Court, in turn, did not oppose to the High Court's finding of the Inughuit as an indigenous peoples. However, the Supreme Court agreed with the government that the Thule Tribe today no longer can be held to exist as a separate indigenous peoples. The Supreme Court stated in this connection that

> "The evaluation of the Thule Tribe as a distinct indigenous peoples in the sense of the ILO-convention has to be made on the grounds of the actual conditions...On the grounds of the provided information the Supreme Court finds that the population in the Thule-District basically shares the same conditions as the Greenlandic peoples and does not in any other relevant way differ from this."[227]

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[222] For an overview see Thulestammen, *Påstandsdokument (15. oktober 2003)*, at http://www.harlang-adv.dk.
[223] See Kammeradvokaten, *Indstævntes Påstandsdokumnet af 22 Oktober. 2003*, pp. 11-12. at http://www.harlang-adv.dk.
[224] *U.2004.382, Supra* n. 124 at p. 490. [unofficial translation].
[225] *Idem.*
[226] *Idem.*
[227] *Idem*, p. 604. [unofficial translation]

This viewpoint was supported by reference to two sources. One of these was the declaration made by the Danish government when ratifying Convention No. 169 which stated that there is only one indigenous peoples in Denmark consisting of the (entire) indigenous population of Greenland.[228] The other was a decision by the Governing Body of the ILO which equally denied the separate existence of the Inughuit today.[229] The Supreme Court did, however, not refer to the later delivered opinion by the CERD Committee according to which the Inughuit is a separate ethnic or tribal entity.[230]

Moreover, like the High Court, the Supreme Court further held the establishment of the Thule Air Base to be constitutionally valid according to the 1951-agreement.[231] Yet, the Supreme Court ruled that it were infringements of expropriation when the base was established in 1951 and when the removal took place in 1953. In this connection, it reproduced a statement made by the former Danish prime minister on December 2, 1999, which stated that the removal was decided and carried out in a manner that amounted to "*a serious infringement and an unlawful act towards the people in Uummannaq*".[232] However, the Supreme Court held that both of these infringements of expropriation '*could happen without legislative authority*'[233] and further stated, without any documentation or information concerning *who* decided the removal, *what* more precisely was decided or *where* the removal was decided that

> "the interference in 1951 with the access to hunting and catching as well as the interference in 1953 in the removal of the settlement was legal and valid. It is not in this connection necessary to consider whether the population in the Thule-District at that time was an tribal peoples or a distinct indigenous peoples in the sense that this term now is defined in article 1 (1) of the ILO-convention."[234]

Concerning the issue of compensation, the Supreme Court found that Denmark at the time of the interferences had been obliged in accordance with the 1925-law to observe Denmark's obligations arising from Article 73 of the UN-Charter.[235] The amount to be paid aimed to

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[228] See above Chapter Three section 4.1.
[229] *U.2004.382, Supra* n. 124 at p. 605.
[230] See below Chapter Two section 4.2.3.
[231] *U.2004.382, Supra* n. 124 at p. 605.
[232] *Idem,* p. 607. Italics added.
[233] *Idem*, p. 605. Italics added.
[234] *Idem.* [unofficial translation].
[235] *Idem*, p. 606, cf. p. 492.

compensate the Thule Tribe's rights to use the land and resources in the entire Thule District based on Greenlandic customary law, as enshrined in the Thule Act, and was to cover the period from the interferences took place until today. Apart from this reference to the UN-Charter and the mentioning of Convention No. 169, the judgement does not reflect any consideration of applicable international legal standards relevant to the protection of the land rights of indigenous peoples.

IV. Evaluation

1. Introduction

As earlier explained, a comprehensive legal framework of international law protecting indigenous peoples land rights has entered into force in Denmark and applies to Greenlandic territory. The Thule Tribe has referred to relevant parts of this framework before the proceedings in the Danish Courts[236] which, however, have only taken a very small part of this into consideration in their respective rulings. This section will attempt to measure the historical and the ongoing interferences with Inughuit territory against a larger part of the international standards applicable to Greenlandic territory. In this connection, domestic law as outlined in section Four of Chapter Three above, and the domestic law referred to in the historical overview of the Thule District will be referred to whenever relevant. The ruling of the Supreme Court will also be commented upon.

The attempt involves the measuring of State action that took place more than fifty years ago and thus raises the question of applying law retroactively. From a *prima facie* point of view, the historical interferences can only be measured against the legal instruments which were in force at that time. However, since the effects of these historical events continue to affect the present day conditions of the Inughuit, international instruments ratified and domestic law adopted later in time will equally be considered in the assessment undertaken below.

2. The Situation before June 5, 1953

At the time of the establishment of the Thule Air Base in 1951 and the relocation of the population in 1953, the rule of law-principle applied between the Inughuit and the Danish State. Thus, the 1950-law, cf. the 1925-law, read that the relevant administrative minister in his "*further decisions*" regarding the Thule District had to observe "*valid laws* and decrees and *treaty provisions*", including the Thule Act which had been ratified by the Danish State in 1931.[237] The traditional system of land tenure and utilisation of resources in the Thule District had in addition formed customary "valid laws" among the Inughuit which, to some degree, were codified in the Thule Act. These customary laws included, among others, the fundamental rule that no one could settle himself without prior consent from the other inhabitants in the settlement concerned. By the same laws, the Inughuit had also acquired special rights to use the entire territory in the Thule

[236] See Thulestammen, *Supra* n. 222.
[237] See above Chapter Three section 5.5.

District.[238] Therefore, a decision to interfere with Inughuit territory had at that time to respect both customary law and the Thule Act which enshrined the jurisdiction of the Hunter's Council's in the entire Thule District. However, the establishment of the base and the relocation was allowed by the Danish State without consultation with or approval by the local inhabitants or the Hunter's Council. The Thule Act and Inughuit customary law as well as the rule of law-principle were not observed by the State in these matters.

By not observing these laws and the rule of law-principle, the Danish State also infringed upon its *sacred trust* to pay due respect to the Inughuit's special relationship to their lands and customary laws as part of their culture, and ensure their just treatment and protection against abuses according to Article 73 of the UN-Charter.[239] This "treaty provision" has to be read in conjunction with Articles 1(3) and 55 of the same Charter which have, since 1945, prescribed States to promote the respect and observance of all human rights of all persons on a equal basis, including the collective right to own property in Article 17 of the UDHR from 1948 and subsequently. In the sense of Article 17 of the UDHR, the interferences amounted to arbitrary taking of property because no compensation for the taking of Inughuit territory was paid.[240] The adoption of the 1951-agreement can lead to no other conclusion since Article 103 of the UN-Charter prescribes these obligations to prevail over any other obligation based on international agreements.[241] Article 3 of the Statute of the Council of Europe was also valid at that time and was equally infringed upon by the non-observance of the principles of the rule of law and of the enjoyment by all persons of human rights.[242]

When the Danish Parliament adopted the 1951-agreement, and thereby allowed the establishment of the Thule Air Base, it did not intend, however, to interfere with Inughuit way of life. The Parliament was simply misguided, through a simplified procedure for the adoption of Parliamentary decisions different from that of enactment of laws, and provided with wrongful information about the new defence areas, while its actual demarcation was kept top secret.[243] Regardless of its constitutional validity, the 1951-agreement could not then and cannot today in itself form the legal basis for an expropriation of land rights. No records have been provided which indicates that such expropriation was intended by Parliament and this is also the reason why the

[238] See above Chapter Three section 5.3.
[239] See above Chapter Two section 3.2.4. in conjunction with Chapter Three section 3.3.
[240] See above Chapter Two section 3.2.1. and 3.2.4.
[241] See above Chapter Two section 3.2.4.
[242] See above Chapter Two section 3.3.1.
[243] See above Chapter Three section 5.7.1.

Danish government before the Supreme Court argued that no expropriation had taken place, but only a non-compensable regulation of general public rights of use. As of today, no information exists concerning *who* decided to expropriate Inughuit territory when the base was established and the Inughuit were relocated, *how* these decisions were made, or *where* these decisions were made.[244] No legal or formal "further decision" has been produced. Rather than acts of expropriation legitimated in law, these interferences should therefore more appropriately be characterised as arbitrarily taking, unlawful taking or confiscation of Inughuit property.

On this background, the Supreme Court wrongfully ruled that the interferences amounted to *expropriations* that could take place *without legal authority* for two reasons. Firstly, no expropriation (other than *de facto* expropriation) has taken place but only arbitrarily taking of Inughuit territory as opposite to a lawful expropriation with the consent of the Hunter's Council, which had jurisdiction in the entire Thule District according to the Thule Act. Secondly, the 1950-law, cf. the 1925-law, laid down the rule of law-principle which demanded observance of domestic laws including the Thule Act as well as treaty provisions which laid down the same principle.

The ruling of the Supreme Court is rather inconsistent. On the one hand, the Court acknowledges the validity of the 1925-law, Greenlandic customary law, the Thule Act and treaty provisions as the legal background against which compensation is held to be paid while it, on the other hand, rules that expropriation could take place without legal authority against these laws and treaty provisions. That the Supreme Court may have intended to view the case in a historical legal perspective, and therefore adhered to the earlier valid dualistic theory in Danish constitutional law,[245] does not explain its decision as the interferences amounted to infringements of both domestic and international law.

3. The Situation after June 5, 1953

3.1. The Right to Property

Considering the fact that the interferences in 1951 and 1953 did not amount to acts of expropriation and no such acts have taken place subsequently, the Inughuit's original customary rights to traditionally occupy and possess the Thule District have not been extinguished but continue to exist into the present.

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[244] See above Chapter Three section 5.7.2, 5.7.3 and 5.7.5.
[245] See above Chapter Three section 4.2.1.

At the time of the interferences, the Greenlandic population was not protected under the Danish Constitution. As far as the relocation is concerned, it was carried out as a matter of urgency only one week before the Constitution was extended to Greenlanders and three month before the ECHR would be legally enforceable to Greenlandic territory.[246] Both of these instruments apply, however, to the present situation of the Inughuit.

Section 73 of the Constitution protects Inughuit's property rights as a matter of foundation of their economic activities, independent of, but also if it is construed in the light international law according to constitutional theory.[247] Within the scope of Article 1 of P1 of the ECHR, indigenous peoples' hunting and fishing rights are regarded as "possessions" and collectively afforded protection as "fundamental elements" of culture as recognised by the Commission in the *Konkama* case.[248] Article 1 of P1 should, as argued above, under all circumstances be interpreted in the light of emerging international law according to the principle of dynamic interpretation developed in the Court's jurisprudence. In this sense, it should at least encompass the equal level of protection as provided for in its parallel provision in Article 21 of the ADHR, as illustrated in the precedent case of *Awas Tingni*.[249]

Taken together, this means that the dispossession of a central part of Inughuit's traditional lands (the Thule Air Base today covers some 2.743 sq. km)[250] constitutes a continuous denial of their inviolable rights to own and peacefully enjoy property. It violates Section 73 of the Danish Constitution and Article 1 of P1 of the ECHR respectively, whereas both provisions demand interferences in property rights to be legitimated in law – a condition which has not been observed with regard to Inughuit territory.

3.2. The Right to Culture

The exclusion from their lands and territories is currently obstructing the Inughuit from exercising, maintaining and developing their traditional pattern of living and their culture associated with the use of land resources. The hunter ideology still exists and strong among the Inughuit[251] but slowly declining due to their lack of possibility to use an important part of their traditional hunting

[246] See above Chapter Three section 4.1. in conjunction with section 5.7.2.
[247] See above Chapter Three section 4.2.2.
[248] See above Chapter Two section 4.3.2.2.
[249] See above Chapter Two section 4.3.2.2., 4.3.3 and 3.3.2..
[250] *U.2004.382, Supra* n. 124 at p. 598.
[251] See above Chapter Three section 5.7.4.

grounds which constitutes the material base necessary to economically sustain their cultural identity as hunters. The Thule Air Base is placed on their central hunting grounds and its more than fifty years large scale military related activities have had significant detrimental effects on the environment and the Inughuit's possibilities to pursue their traditional economic activities based on the utilisation of all available natural resources.[252] The location of the base and its activities cannot be described as having only a minimal effect on the possibility for the Inughuit to pursue their traditional subsistence activities but rather to independently or cumulatively threaten their way of life and culture so long as they continue. In effect, the continuous presence of the base on Inughuit territory is a contributing factor to the further deterioration of the already existent unsustainable economy and development as well as the poverty problems of the Qaanaaq community.[253] Therefore, whereas the presence of the base causes severe deterioration of the economy of the Qaanaaq community, and whereas the Inughuit have not been given any opportunity to participate in the decision-making concerning the use of a central part of their territory, the situation, in the light of the *Länsman* cases, amounts to a denial of the Inughuit to enjoy their own culture as enshrined in Article 27 of the ICCPR.[254]

Furthermore, the prohibition of resettlement in the native village of Uummannaq/Dundas, as enshrined in the Dundas-agreement, is hampering the Inughuit from practicing their cultural and spiritual attachment to their ancestral burial grounds. The recent visits paid by members of the Inughuit evidence that their attachment to the burial grounds is maintained into the present despite the unfavourable conditions under which it is bound to be practised.[255] In the light of the *Hopu and Bessert v. France* case, the problems faced by the Inughuit in practicing their relationship with their ancestors as an essential element of their identity and spiritual traditions, creates a condition in which they are prevented from exercising their rights of privacy and family life according to Article 17 and 23 of the ICCPR respectively, and their parallel provision in Article 8 of the ECHR.[256] With regard to the scope of Article 8, the *G and E v. Norway* case illustrates that this provision protects the elements in the particular life-style lead by indigenous peoples as matters of private life and family life.[257]

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[252] See above Chapter Three section 5.7.3.
[253] See above Chapter Three section 5.7.4.
[254] See above Chapter Two section 4.2.2.1. in conjunction with section 3.2.2.
[255] See above Chapter Three section 5.7.3.
[256] See above Chapter Two section 4.2.2.2.
[257] See above Chapter Two section 4.3.2.1.

Generally, the current situation of the Inughuit leaves the Danish government with a positive obligation to take all necessary measures to *effectively* ensure the rights of the Inughuit to enjoy and exercise their own culture as well as their private and family life according to Articles 27, 17 and 23 of the ICCPR and Article 8 of the ECHR.[258]

3.3. The Right to Return

The continuous cultural attachment to their lost lands and the relatively recent dispossession of lands mean that the Inughuit, in the sense of Article 14 of Convention No. 169, still "traditionally occupy" these lands.[259] Article 14 endows the Inughuit with the right to claim back the territory from which they have been expelled. Accordingly, the Danish government is currently under the positive obligation to recognise and identify the lands traditionally owned and possessed by the Inughuit. The obligation to safeguard the natural resources according to Article 15[260] pertaining to Inughuit territory equally rests with the government, but is not observed since it continuously permits the presence and the activities of the Thule Air Base in the territory damaging for the ecological resources in the Thule District. Generally, the government is in continuous violation of its overall obligation to make way for the Inughuit to practice their special relationship to their lands as enshrined in Article 13 of the same Convention.[261]

Moreover, the reasons behind the establishment of the Thule Air Base and the relocation no longer exist today. The military interests in the present and future operation of the base cannot be characterised as compelling or having any connection with the conflict which at that time was alleged to demand the relocation. According to Articles 16(3) and 16(4) of Convention No. 169, the Danish State is therefore under the obligation to either provide for the return of the Inughuit to their native village in Uummannaq and provide for their use of the land in the entire Thule District or at least provide them with lands that can sustain their economic, social and cultural undertakings and future development.[262]

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[258] See above Chapter Two section 3.2.2., 4.2.2.2. and 4.3.2.1. The positive State obligations in the ICCPR can be deduced from Article 2 according to which States undertake to "ensure" the rights of all individuals. The word "respect" in Article 8 of the ECHR has by the ECtHR been interpreted as prescribing positive State obligations see Lorenzen, P., et. al., *Supra* note 58 at p. 381. Due to lack of space, the margin of appreciation afforded to States in will not be subject to analysis in this thesis.
[259] See above Chapter Two section 2.3.
[260] See above Chapter Two section 2.2.
[261] *Idem.*
[262] See above Chapter Two section 2.3.

3.4. Non-discrimination and Participatory Rights

By allowing the continuous deprivation of their land, the Danish government is currently upholding a situation in which the Inughuit suffer from less favourable protection of their individual and collective rights compared with the protection of individual rights afforded to other persons under Danish jurisdiction as well as the protection of collective rights some of which the majority Inuit population in Greenland enjoys. Three reasons support this argument.

Firstly, the original occupation and traditional land use by the indigenous peoples in Greenland are not afforded the property protection as enshrined in Section 73 of the Danish Constitution and in Article 1 of P1 of the ECHR compared with the types of tenure that otherwise give rise to such protection in other parts of the Danish Kingdom. Secondly, the Inughuit are not provided equal protection of their rights under Convention No. 169 compared with the majority Inuit population in Greenland. In fact, the Home Rule Authorities are wrongfully vested with a mandate to decide in affairs concerning the non-identified Inughuit territory as a right for the Inuit to exercise their participatory rights in accordance with Section 8 of the Home Rule Act.[263] This is illustrated by the fact that both the Dundas-agreement and the agreement concerning different use and possible extension of the Thule Air Base are adopted in agreement with the Home Rule Authorities but without previous consultation or consent of the Inughuit[264] and therefore without respect for the Inughuit's rights to self-control over their lands and meaningful participation in decisions-making processes according to Articles 6 and 7 respectively of the same Convention.[265] Thirdly, the denial of land rights is for the Inughuit tantamount to the denial of their cultural rights and the rights pertaining to their particular way of life such as the right to respect of private and family life as well as of their home; rights which other persons or groups exercise and enjoy within Danish jurisdiction.

Thus, while the legal framework necessary for the protection of indigenous land rights exists within the Danish legal system and applies to Greenlandic territory, the Inughuit are *de facto* denied the equal exercise of these rights compared with other persons or groups within Danish jurisdiction. The ethnic or racial stereotype of the Inughuit as "nomads" who do not need the same level of protection as ethnic Danes, which was used to justify the relocation in 1953,[266] has so far not been disproved by the Danish government and no objective or reasonable reasons can be or have so far

[263] See above Chapter Three section 4.2.4..
[264] See above Chapter Three section 5.7.4.
[265] See above Chapter Two section 2.5.
[266] See above Chapter Three section 5.7.2.

been produced to legitimise this differential treatment that exist today. If considerations towards the preservation of the integrity of the Home Rule Act may be held to explain this differential treatment as indicated above,[267] then these considerations pursue a legitimate aim, but to uphold a situation in which the Inughuit is unlawfully deprived of their property rights can under no circumstances be deemed proportional to this aim.[268] A proportional solution would rather be to amend the Home Rule Act which in any case is difficult to reconcile with indigenous peoples' right to own traditional occupied land enshrined in Convention No. 169.[269]

Compared to the Inuit (similar in race to the Inughuit) and ethnic Danes, the lack of protection of Inughuit property rights and the interrelated cultural rights and the rights pertaining to their well-being, therefore amounts to *de facto* discrimination and *de facto* racial discrimination respectively.[270] According to both general provisions and provisions of accessory nature of non-discrimination earlier mentioned in the present work, this situation demands positive action of the Danish government to remove these discriminatory patterns that prevent the Inughuit to own, develop, control and use their traditional lands, territories and resources and to exercise and enjoy their human rights to own property and other interrelated rights on an equal footing compared with the rest of the population within the jurisdiction of the Danish State.[271]

3.5. Note on Application

Despite the positive obligations enshrined in international law as outlined above, the Danish government has not yet demonstrated any willingness to comply with these. On the contrary, it contends that the Inughuit does not exist today as a separate indigenous peoples in the sense of Article 1 of Convention No. 169 while it simultaneously acknowledges that the Inughuit existed as such a peoples at the time of the interferences some fifty years ago - a viewpoint which has now been endorsed by the Supreme Court. Yet, it may on a number of grounds be questioned whether this application of Article 1 is in accordance with the general rule of interpretation of treaties under

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[267] See above Chapter Three section 4.2.2.
[268] The requirement for the government to pursue a legitimate aim under Article 14 of the ECHR is generally taken to be fulfilled by the Court, See for example *Podkolzina v. Latvia* in which the preservation of the States' institutional system was held to be legitimate, para. 34.
[269] See above Chapter Two section 4.6. In the assessment of whether means employed are proportionate to a legitimate aim, alternative solutions are taken into account in the application of Article 14 of the ECHR, See Harris, D.J., O'Boyle, M. and Warbrick C: '*Law of the European Convention on Human Rights*'. Butterworth, 1995, p. 483.
[270] For a similar viewpoint with regard to racial discrimination see Brøsted, J., *Supra* note 195.
[271] See above Chapter Two section 2.4., 3.2.3., 3.3.4., 4.2.3. and Chapter Three section 4.2.3.

the Vienna Convention of the Law of Treaties which prescribe treaties to be "*interpreted in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and *in the light of their object and purpose*."[272]

Firstly, as stated in the Preamble, the Convention is concerned with cases in which indigenous peoples' "laws, values, customs and perspectives" have been eroded. In the case of the Inughuit, such erosion has in fact taken place and this has been recognised by the Danish government and the Danish Supreme Court in their common agreement that Inughuit culture existed until fifty years or less ago but not today. These authorities have also to some degree accepted that the interferences in 1951 and 1953 have contributed to this erosion in accepting the former Danish prime minister's characterisation of the relocation as a "serious infringement and an unlawful act" towards the Inughuit. It has further been recognised that the erosion has taken place due to more than fifty years of State interference given that the Inughuit has been compensated for these interferences, although inadequately, from their commencement until today.[273]

Secondly, Article 1 has to be interpreted in the light of Article 1(2) which prescribes self-identification as a "fundamental criterion" for the application of the provisions of the Convention. The "very serious consideration", which this criterion should be given when considering any application of the Convention as expressed in the *Guide*,[274] must especially apply to the present case in which objective recognisable elements of Inughuit culture, such as their harvesting of all available natural resources, have been eroded by activities allowed by the State. To claim otherwise would effectively negate the possibility to address already eroded cultural aspects and be in contradiction to the objects and purposes of the Convention. The degree demanded of objective verifiable elements of a social, economic and cultural nature according to Article 1 must under any circumstances be construed in the light of both the right of the Inughuit to develop and change their culture,[275] and the lack of possibilities for the Inughuit to sustain and develop these elements due to State interferences.

Thirdly, Article 35 states that "[t]he application of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national law, awards, custom or agreements." This provision prescribes that Convention No. 169 contains a minimum protection compared with the other legal

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[272] See Article 31 of the Vienna Convention. Italics added.
[273] See above Chapter Three section 5.7.5.
[274] *Guide*, *Supra* n. 12 at p. 10.
[275] *Idem*, p. 2.

sources which happen to contain better protection than the protection afforded by the Convention.[276] In other words, the application of Article 1 cannot in any way be used to negate the protection of indigenous peoples' rights afforded by these sources. Nevertheless, this is in fact the way in which this provision is used by the Danish government in upholding the current interferences with Inughuit territory on the ground that the Inughuit do not exist in the sense of Article 1. It thereby, as illustrated above, deprives them their property rights and other interrelated rights, including the rights to protection against discrimination, in violations of Recommendations, international treaties, national law and Greenlandic customary law.

Finally, the application of Article 1 has to be applied in the light of the Convention's purpose to preserve the cultural diversity and social and ecological harmony of human kind. To simply declare the Inughuit to have become extinct as a separate indigenous entity during a fifty year period or less can hardly be taken to fulfil this purpose considering their strong will to sustain their indigenous integrity and thus contributing to the maintenance of cultural diversity of human kind. On the contrary, the application of Article 1 by the Danish government is used to continuously deprive them of their land, territory and resources which are important elements in sustaining their culture and integrity as a distinct peoples. Such action has a negative impact on the cultural diversity of human kind and with reference to Article 7 of the Un Draft Declaration and the San José Declaration, this may well be appropriately characterised as an act amounting to cultural genocide.[277]

All this means that regardless of the degree of existent objective verifiable elements of Inughuit culture, the context of Article 1 and the object and purpose of the Convention indicate the Convention's applicability to the situation of the Inughuit especially in the light of the fundamental criterion of self-identification and their difficulties in preserving their culture due to interferences by outside powers. On this ground, the Supreme Court's decision does not reflect an interpretation of Article 1 in accordance with the Vienna Convention since it contains none of the above-mentioned considerations. Yet, although not mentioned in the decision, the Court may have supported its judgement on Article 34 of Convention No. 169 which states that "[t]he nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country." This provision may have

[276] According to the *Guide*: 'This prevents governments from diminishing the protection that these peoples may have, on the pretext of having ratified the Convention, if those protections happen to be better than those provided for in the Convention', see *Guide*, *Supra* n. 12 at p. 11.
[277] See above Chapter Two section 2.6.

been interpreted as to serve the interests of the Danish State in upholding the integrity of the Danish legal system.[278] Thus, besides finding that the Convention did not provide the Thule Tribe with any rights, the Supreme Court also indicated that the Convention was not relevant for the settlement of the dispute since Danish law - according to which the expropriations were held to be legally and valid – did not allow for the conflicting Convention No. 169 "already because" Danish law was clear on this issue.[279] Article 34 may thus in this perspective have sustained a possible uneasiness and self-restraint among the Danish judges, in a case concerning unfamiliar legal issues and factual circumstances, necessary to rule in favour of strong State interests with the effect of reducing the level of protection of the rights of the Inughuit. However, regardless of the amount of State discretion Article 34 may be held to enshrine, this provision can under no circumstances justify an application of Article 1 that conflicts with the context and object and purpose of Convention No. 169.

[278] Van Boven comments upon Article 34 that it '…may be interpreted as serving the interests of the State with the possible effect of reducing the level of protection', see Boven, T. v., *General course on human rights*, in <Collected Courses of the Academy of European Law>, vol. 4 (2), The Hague, Kluwer Law International, 1995, pp. 1-106, at pp. 20-1 in Thornberry, *Supra* n. 10 at p. 366.
[279] For a similar viewpoint see Spiermann, O., *Moderne folkeret. - 2. omarbejdede udgave*, Cph, DJØF, 2004, p. 474.

VI. Conclusion

The analysis undertaken in this thesis has proven that a comprehensive framework of the protection of indigenous peoples' land rights has emerged in international law and is rapidly developing. The international community has begun to respond to the multilayered relationship between indigenous peoples and their lands in an increasingly adequate way taking into account the special fragility of the indigenous culture. Representative hereof, Convention No. 169 affords legally binding international standards construed in the light of the important indigenous peoples-land nexus. It recognises in legal features traditional occupancy, collective ownership, indigenous customs and participatory rights, and emphasises the need for facilitating these elements necessary for the existence and future survival of indigenous peoples in order to ensure the cultural diversity and ecological harmony of human kind. It places corresponding positive obligations on States including the facilitation of indigenous peoples to return to their homelands when relocated or expelled, and establishes that persons belonging to indigenous peoples shall not be prevented from equally enjoying the same rights as other persons within the jurisdiction of a given State.

The extensive and elaborated protection afforded by Convention No. 169 is further endorsed and enshrined in universally legal standards in the jurisprudence of the international and regional monitoring bodies. Here, a range of provisions of general human rights treaties are being applied under a broad range of different labels to protect indigenous land rights. What these bodies have illustrated in doing so, is the capability of universal norms to apply not only to property interests as found in western liberal societies where such interests normally enjoys formal recognition but also to culturally different property concepts found among indigenous peoples based upon unwritten customary law. Strong criticism has been issued by the HRC and CERD Committee towards States neglecting their positive obligations to recognise the existence of their indigenous peoples and their rights to respect of property and culture on an equal footing compared with the rest of the their populations. The Inter-American Court has supported and further enhanced this development by its landmark ruling in the case of *Awas Tingni* in which indigenous peoples' collective ownership of property without formal titling was held to fall under the property clause of the ACHR. The ECtHR has yet to follow. All elements necessary are set for the ECtHR to proceed in the same direction as its regional counterpart. The ECHR, precedent rulings, the case-law by the Commission and the ECtHR's interpretive principles allows it to contribute to the universal standard setting recognising *sui generis* indigenous peoples land and resource rights. Conclusively, the international legal level of protection of indigenous land rights seems well elaborated and adopted to the cultural

characteristics of indigenous culture and way of life. To further sustain and extend this protection, the next step would naturally be the adoption of the UN Draft Declaration.

However, the comprehensive framework of international legal standards is not sufficient to protect indigenous land rights at the domestic level. A good example of this is the situation within the Kingdom of Denmark where these standards have not been effectively implemented and enforced with regard to the indigenous peoples of Greenland.

On the one hand, the lands of indigenous peoples enjoy adequate protection within the Danish legal system. Here, a broad range of international legal standards protecting indigenous land rights constitute, according to contemporary constitutional theory, a part of domestic law and should be applied as normative sources for the interpretation of Danish law. Among these legal standards, Articles 14 and 15 of Convention No. 169, applied to Greenland, prescribes that the rights of *ownership* and *possession* of the *indigenous peoples* of Greenland to their lands and pertaining natural resources shall be recognised. Independently hereof, but also if interpreted in accordance with contemporary Danish constitutional theory, the indigenous systems of tenure and land use of natural resources seem moreover to be protected under the property clause in the Danish Constitution, as matters of indigenous peoples' rights to *own* and *possess* property. In addition, these possessive rights are complemented by the protection afforded by the ECHR which has been incorporated directly into Danish law, and provides for the equal enjoyment of property rights for all persons including persons belonging to indigenous peoples.

On the other hand, the Home Rule Act, adopted by the Danish Parliament, only provides the Greenlandic population to use Greenland's natural resources in agreement with the Danish government. While the Greenlandic population thus has the right to participate in the decision-making concerning their use, it has not, according to the Act, the right to ownership over the natural resources in Greenland. Also, the indigenous peoples living in Greenland must share this right to participate with the "resident population", comprising Danes and other persons who permanently reside in Greenland. In principle, if fifty thousand Danes decided to move permanently to Greenland, they would be entitled to exercise this right on an equal footing with the indigenous peoples of Greenland.

Obviously, a normative conflict exists concerning which legal entity is endowed with the territorial rights to Greenland between the Home Rule Act on the one hand, and on the other hand the Danish Constitution, Danish law and international law. From a legal point of view, the most plausible solution to this conflict would be to recognise the *full ownership* of the *indigenous peoples*

of Greenland to Greenlandic territory through an amendment of the Act. Another approach would be to adopt a narrow reading of the property clauses in domestic law which leaves out the protection of the land tenure systems found in Greenland - against the interpretive rules found in contemporary constitutional theory - while ignoring, or equally narrowly construing, the protection afforded to the Greenlandic population under international legal standards. In effect, an analysis of the situation of the indigenous peoples called the Inughuit in Thule District in northern Greenland shows that the Danish government and the Danish Supreme Court in practice have chosen to pursue the latter approach.

With regard to the government, it has declared the Danish State as the owner of the entire territory of Greenland including Inughuit territory. The viewpoint seems to be that the Danish government, either during or after the Danish colonisation of northern Greenland, in some way has invalidated or acquired the traditional rights of the Inughuit to their lands and resources. The government has, however, made no such pretensions. On the contrary, during Danish colonial rule in 1931 with subsequent approval in 1950, the government ratified a special regulation, the Thule Act, which aimed at preserving and maintaining the original land rights of the Inughuit. This regulation remained in force when the government allowed the establishment of the American Thule Air Base on Inughuit territory in 1951 and forcibly relocated the Inughuit from their native village in 1953. The decisions to interfere with Inughuit territory in these matters neither altered the Thule Act nor were they formed as legal acts necessary for the expropriation of land. In fact, it is yet to be identified *who* made these decisions, *what* these decisions more precisely were about, and *where* these decisions were taken.

As of today, no lawful expropriation of Inughuit territory has taken place. The ownership of the Inughuit to their homelands has for that reason not been extinguished but continues into the present. Against this background, the viewpoint that Greenlandic territory is owned by the Danish State cannot be legitimated in law. At the most, it finds support in the doctrine of *terra nullius* which is characterised as illegitimate and racist by the international community.

The Danish Supreme Court has faced the challenge to enforce the rights of the Inughuit against a number of strong economic and political interests. Some of these embrace the interest to preserve the integrity of the national legal system including the home rule arrangement, to avoid the high expenditure of restoring the ecological environment damaged by the activities of the Thule Air Base in the Thule District, to contribute to NATO defence plans, and to maintain and preserve the close friendship with the USA by allowing the presence of and future expansion of the base. Regardless

of whether or not these interests may have influenced the judges in assessing the legality of the American presence in Thule District, the Court preserved them all when it ruled against the Inughuit. However, in doing so, the Court committed several legal flaws. Thus, the Court selectively applied Greenlandic customary law and elements of domestic law. It completely ignored constitutional theory and infringed upon the fundamental rule of law-principle. The Court found support of its judgement in two statements by political organs, namely one by the Danish government and another by the ILO Governing Body, instead of considering the later delivered legal opinion by the CERD Committee. In addition, the Court chose to interpret Convention No. 169 in conflict with the Vienna Convention on the Law on Treaties and totally, except from its selective application of the UN-Charter, abstained from applying any other international standards relevant for the protection of the land rights of the Inughuit.

As for the situation of the Inughuit, it remains alarming. The Inughuit are currently deprived of a central part of their homelands necessary to sustain their distinct culture, their spiritual life, their integrity and their economic survival. Under these circumstances they are *de facto* denied their corresponding human rights to enjoy their culture, their property, their family and private life as well as their right to freedom from discrimination. By allowing and further sustaining this situation, the Danish government is doing nothing but continuing the discriminatory patterns from the colonial period. The Inughuit have exhausted all domestic legal remedies which have proven to be unable to adequately resolve the land claims by the Inughuit.

The case of the Inughuit shows that the realisation of indigenous peoples' land rights requires more than international standard setting and legally binding State obligations. Despite the good will shown by the Danish State to ensure an adequate protection of its indigenous peoples, by adhering to the comprehensive legal framework protecting indigenous land rights, the factors opposing to its effective implementation are simply too immense. In this perspective, the protection of indigenous land rights under the international human rights system might have proven to be *universally applicable* but it is yet to be *universally implemented*. The international community must therefore not only continue its standard-setting taking due account of the special relationship between indigenous peoples and their lands, territories and resources, but also make sure that these standards and pre-existing standards are universally implemented. In this connection, the jurisprudence of the international and regional monitoring bodies plays a vital role given its significant impact on domestic human rights problems. This is especially true with regard to the ECtHR because the governments concerned to a considerable high degree have been willing to implement its decisions.

The ECtHR is therefore in a special position and has a corresponding duty to contribute to the universal implementation of indigenous land and resource rights. The ECtHR should bear this in mind when responding to the claim of the Inughuit to peacefully enjoy their traditionally occupied and possessed lands as the fundamental basis for their culture, integrity and economic life as well as their private and family life. The claim was filed against the Kingdom of Denmark on May 28, 2004.[280]

[280] Hingitao-53, *Application*, (Thule Tribe v. Denmark) available at http://www.harlang-adv.dk.

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