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## Chapter 8: Indigenous Belonging: Membership and Identity in the Undrip: Articles 9, 33, 35, and 36

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## **Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous People**

Shin Imai and Kathryn Gunn \*

### **I. Introduction: The lack of definition and the interplay of legal regimes**

The recognition of Indigenous peoples' right to determine their own membership is crucial for their ability to meaningfully exercise their right to self-determination.<sup>1</sup> The Declaration addresses rights of membership directly in Articles 9 (right to belong); 33 (right to determine membership); 35 (right to determine responsibilities of members); and 36 (right to maintain relations across borders). Together, these provisions reinforce the right of Indigenous peoples to define themselves, both in terms of membership and geographic scope.

The lack of definition of *who* Indigenous people are, has already been mentioned in previous chapters. During the drafting of the Declaration, representatives of Indigenous peoples stressed the importance of self-identification. However, some States argued that the lack of a fixed definition would create a circularity whereby people who claimed to be Indigenous would define indigeneity based on the criterion that they themselves defined.

A similar problem arises when discussing *membership* in an Indigenous group or community. Article 9 recognizes that "Indigenous peoples and individuals have the right to belong to an Indigenous community or nation" suggesting that it if a group or individual *claims* indigeneity, they have a right to belong to the group. But Article 9 also stipulates that this right is to be exercised "in accordance with the traditions and customs of the community or nation concerned",

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<sup>1</sup> Sharon Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous People* (Theytus Books, Penticton 1998) pp 116-199.

which suggests that the community or nation determines who belongs and who does not. Like the question of indigeneity itself, the question of belonging becomes circular in that one segment of those who claim to be members of an Indigenous community would self-identify as members, perhaps denying recognition to others who also claim to be members of that community.

The only way out of the circularity of indigeneity and membership is to accept there are pre-existing groups that can act as reference points for acceptance. This pre-existing group will decide which “customs and traditions” will determine who are members and who are not. As a practical matter, it makes sense to begin with what is already there.

State laws come into play because indigeneity and membership in an Indigenous community may provide access to special protections and benefits from the State. Because this access is dependent on State recognition of indigeneity and Indigenous peoples, tensions can arise when Indigenous peoples feel that the State’s definitions are too narrow, thereby restricting access to benefits, or States are too generous in their definitions, thereby diluting the benefits available.

Finally, the international human rights norms can affect both decisions of States and decisions of Indigenous peoples. We discuss below decisions of the Inter-American Court on Human Rights and the African Commission on Human and Peoples’ Rights that have expanded State understandings of indigeneity. International standards relating to human rights may also apply to the actions of Indigenous governments themselves. We discuss the problems that arise with American tribes that are “disenrolling” long-time members for reasons that may have to do more with the distribution of cash from casinos than with cultural integrity. Are American Indian tribes subject to the gender equality and international human rights norms set out in Articles 44 and 46 of the Declaration? If so, should States legislate compliance with Articles 44 and 46?

This chapter will attempt to weave together the interaction of the laws of Indigenous peoples themselves with the laws of the State and international human rights norms. We use existing State practice to inform an interpretation of the provisions that is consistent with the spirit and intent of the Declaration, while recognizing the challenges faced in practical implementation. We feel that a somewhat detailed discussion of State practice is important because an abstract discussion will not help resolve the difficult rights and interests that are in play. By evaluating current State practice in relation to the standards set out in the Declaration, we hope to encourage the generation of the concrete ideas needed to make the aspirations of the Declaration a reality.<sup>2</sup>

## **II. Drafting History: Right to Belong, Right to Determine Membership, Right to Determine Responsibilities of Members and Right to Maintain Relations Across Borders**

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<sup>2</sup> After this chapter was written, the General Assembly of the Organization of American States approved the American Declaration on the Rights of Indigenous Peoples. We have not been able to fully analyze the OAS document, but we have added references to it in the footnotes when relevant. It contains many provisions similar to the United Nations Declaration: Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, AG/doc.5537/16 (June 8, 2016)

[http://indianlaw.org/sites/default/files/American%20Declaration%208\\_25.pdf](http://indianlaw.org/sites/default/files/American%20Declaration%208_25.pdf)

For a critique of some of the OAS provisions, see Nancy Yañez, “Regressive Elements in the American Declaration” (June 28, 2016) [http://www.iwgia.org/news/search-news?news\\_id=1377](http://www.iwgia.org/news/search-news?news_id=1377)

The lengthy discussions leading to the drafting of the Declaration focused largely on whether and how to define “Indigenous people” and what would characterize a group or people as “Indigenous.” By contrast, relatively little attention was paid to the wording of the articles that are the focus of this chapter. However, these articles play an important role in reinforcing the rights of Indigenous peoples to define themselves, particularly given that the final version of the Declaration contains no definition of the term “Indigenous.”

The extent to which the concerns of States and Indigenous observers were incorporated into or are absent from the final draft of the Declaration provides important insight into the often deeply divergent view of States and Indigenous groups on whether and how Indigenous peoples can define themselves, their membership, and their responsibilities.

#### *A. Article 9*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

During discussions in early Working Groups, a number of States raised concerns about Article 9’s proposed reference to the right to belong to Indigenous “nations” on the basis that possible confusion could arise between use of the term “nations” in the Draft and the more frequently-used concept of “nation-States.”<sup>3</sup>

At the December 10, 1996 Working Group, some States advised that they considered the term “nation” in the context of Article 9 to mean “communities.” The representative of Brazil suggested that the reference to “nation” in Article 9 be removed and that the text instead state that “[i]ndigenous people have the right to belong to an indigenous community.” Similarly, the representative of Australia stated that further discussion was needed on Article 9 and the meaning of the word “nation,” and that Australia could not support the term if the meaning went beyond the concept of “first nations.”

By contrast, however, Indigenous organizations took the position that the term “nation” was an accurate depiction of their political and legal status.<sup>4</sup> In particular, observers for the International Organization of Indigenous Resource Development, the Saami Council and the Aboriginal and Torres Strait Islander Commission all expressed strong support for Article 9.

Some participants also raised concerns with the use of the term “discrimination” and proposed that the term be clarified by substituting alternative words such as “disadvantage” or “adverse discrimination.” Although all States agreed that members of Indigenous collectivities should not be subject to discrimination as a result of such a membership, many States still believed it was necessary to strike a balance between their national human rights obligations and non-

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<sup>3</sup> Commission on Human Rights; Report of the Working Group Established in Accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 *Chairperson-Rapporteur: Mr Jose Urrutia* E/CN.4/1996/84 (4 January 1996) para. 68.

<sup>4</sup> *Ibid.*

interference.<sup>5</sup> Some States suggested including the expression “where those traditions and customs are consistent with international human rights standards,” but after deliberation agreed that inclusion of such an expression was unnecessary.

Many Indigenous representatives stressed that Article 9 in the Sub-Commission text was significant because their peoples did not have recognition as nations or communities and as such were deprived of human rights and fundamental freedoms enshrined in international instruments.<sup>6</sup>

### *B. Withdrawn Article 8*

An original draft of the Declaration included an Article 8 that provided as follows:

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.<sup>7</sup>

This Article would have clarified that, once an Indigenous people had identified itself as Indigenous, the State would have the obligation to recognize them as such. This Article was supported by Indigenous groups, but States raised a number of questions, including the relation between collective and individual rights, adherence to international human rights norms and the financial responsibility placed on States if the only criterion were self-identification.<sup>8</sup> The United States suggested a list of characteristics that could be considered for State recognition:

Indigenous peoples have the right to be recognized as such by the State through a transparent and reasonable process. When recognizing indigenous peoples states should include a variety of factors, including, but not limited to:

- Whether the group self-identifies as indigenous;
- Whether the group is comprised of descendants of persons who inhabited a geographic area prior to the sovereignty of the State;
- Whether the group historically had been sovereign;
- Whether the group maintains a distinct community and aspects of governmental structure;

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<sup>5</sup> Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 , *Chairperson-Rapporteur: Mr Luis-Enrique Chavez*, E/CN.4/2002/98 (6 March 2002) para 67.

<sup>6</sup> *Ibid* para 69.

<sup>7</sup> Commission on Human Rights, Report of the Working Group on Indigenous Populations in its Eleventh Session, *Chairperson-Rapporteur: Ms Erica-Irene A. Daes*, E/CN.4/Sub.2/1993/Annex I (23 August 1993) p 53.

<sup>8</sup> See, for example, Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 , *Chairperson-Rapporteur: Mr Luis-Enrique Chavez*, E/CN.4/2003/92 (6 January 2003) para.62-71.

- Whether the group has a cultural affinity with a particular area of land or territories;
- Whether the group has distinct objective characteristics such as language, religion, culture; and,
- Whether the group has been historically regarded and treated as Indigenous by the State.

The Article was deleted in the Chairman's proposal in 2006. There is nothing in the report indicating the reason for the deletion.<sup>9</sup>

### *C. Article 33*

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33, which addresses Indigenous peoples' right to determine their own membership or identity was subject to relatively little debate during the drafting of the Declaration. It is clearly related to Article 9 and the withdrawn Article 8, and most of the discussion was on those Articles. The discussions that did occur in relation to the rights in Article 33 focused on the concerns of some States that allowing a separate form of Indigenous citizenship would conflict with their own national legislation. For example, at an Inter-Sessional Working Group in 1995, Ukraine said that the provision pertaining to the collective right of Indigenous peoples to determine their own citizenship was at variance with the Constitution and Law on Citizenship of Ukraine.<sup>10</sup>

However, many Indigenous organizations said that the right to determine their citizenship in accordance with their own customs and traditions was an essential part of the exercise of the inherent right to self-determination,<sup>11</sup> and the text that was ultimately adopted in the Declaration reflects this position.

### *D. Article 35*

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<sup>9</sup> Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, *Chairperson-Rapporteur: Mr Luis-Enrique Chavez*, E/CN.4/2005/WG.14/CRP.1 (22 March 2006), Annex I

<sup>10</sup> Commission on Human Rights Open-ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples *Information Received from Governments* E/CN.4/1995/WG.15/2 (10 October 1995) p12, para 7.

<sup>11</sup> *Working Group (January 1996)* (n 3 ) para 91.

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

An early version of Article 35 appears in the First Revised Text of the Declaration in 1989, which stated that Indigenous peoples have “the right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms.”<sup>12</sup> In subsequent versions of this Article, the reference to the requirement that the right be exercised in a manner consistent with recognized human rights and fundamental freedoms is absent.<sup>13</sup>

A number of States pointed to the potential tension between this Article and the fulfillment of international human rights norms, and several States proposed revised versions of the Article which explicitly provided that this right would accord with international human rights standards, as in the initial draft.<sup>14</sup> Notwithstanding these concerns, however, the final version of this Article is silent on this requirement.

#### *E. Article 36*

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with Indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

An early draft of what became Article 36 can be found in the Declaration of Principles adopted by the Indigenous Peoples in 1987, which stated that “Indigenous nations and peoples have the right freely to travel, and to maintain economic, social, cultural and religious relations with each other across State borders.”<sup>15</sup> Parallels can also be seen between Article 36 and ILO Convention

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<sup>12</sup> Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, First Revised Text of the Draft Universal Declaration on Rights of Indigenous Peoples Prepared by the Chairman-Rapporteur of the Working Group on Indigenous Populations, Mrs Erica-Irene Daes, pursuant to Sub-Commission resolution 1988/18 E/CN.4/Sub.2/1989/33 (15 June 1989) para 25.

<sup>13</sup> *Working Group (August 1993)* (n 7).

<sup>14</sup> See for example Commission on Human Rights Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, *Draft Declaration on the Rights of Indigenous Peoples: Amended Text*, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland E/CN.4/2004/WG.15/CRP.1 (6 September 2004) p 12 and explanation in Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, Information Provided by States, *Draft Declaration on the Rights of Indigenous Peoples: Explanatory Comments to Amended Text*, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland, E/CN.4/2004/WG.15/CRP.2 (6 September 2004) p 8.

<sup>15</sup> *Declaration of Principles adopted by the Indigenous Peoples Preparatory Meeting, held at Geneva 27-31 July 1987* in Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Reporting of the Working Group on Indigenous populations on its Fifth Session’ E/CN.4/Sub.2/1987/22 (24 August 1987) Annex V para 19.

169, which states that “Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.”<sup>16</sup> In support of this provision, one Indigenous observer noted that “where a boundary imposed by nation States divides or cuts through aboriginal lands, guarantees should be provided so as not to make immigrants out of Indigenous peoples who have occupied that territory since time immemorial.”<sup>17</sup>

By 1993, the Draft Declaration as agreed upon by the members of the Working Group at its Eleventh Session included wording for Article 36 very similar to the final text, including the requirement that States “take effective measures to ensure the exercise and implementation” of the right.<sup>18</sup> States expressed two major concerns.

First, the inclusion of this positive obligation on States raised concerns. For example, in 1996, the representative of Canada suggested that the States only be obligated to “facilitate” contacts<sup>19</sup> and in 2004, Denmark, Finland, Iceland, New Zealand, Norway, Sweden and Switzerland suggested that the word “promote” be substituted for “ensure”.<sup>20</sup>

Second, States were concerned about impacts on the right to control entry through State custom and immigration requirements.<sup>21</sup> Canada suggested that this should be subject to “reasonable and universal border control measures”.<sup>22</sup> In an effort to address these concerns, in 2004 the Chairman presented a summary of proposals with respect to what became Article 36 (then Article 35), which included reference to States taking effective measures to ensure the implementation of the right “in accordance with border control laws.”<sup>23</sup>

Notwithstanding this proposal, the final version of the text is silent on the issue of border control, but explicitly requires that States take effective measures to facilitate the exercise and ensure the implementation of cross-border rights. The final text of Article 36 is thus largely consistent with the views expressed by Indigenous participants in the course of the drafting process.

### III. Analysis of Article 9: The Right to Belong

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<sup>16</sup> Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, *Note by the Secretariat*, E/CN.4/Sub.2/1994/2 (5 April 1994).

<sup>17</sup> *Working Group (August 1987)* (n 15 ) para 59.

<sup>18</sup> *Working Group (August 1993)* (n 7 ) p 58. Note that Article 35 mentioned here became Article 36.

<sup>19</sup> Commission on Human Rights, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, *Chairperson-Rapporteur: Mr Jose Urrutia*, E/CN.4/1997/102 (10 December 1996) para 303.

<sup>20</sup> *Working Group (September 2004)* (n 14 ).

<sup>21</sup> *Working Group (January 1996)* (n 3 ) para 93.

<sup>22</sup> *Working Group (December 1996)* (n 19 ) para 303.

<sup>23</sup> Commission on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, Chairman’s Summary of Proposals (Mr. Luis-Enrique Chavez), E/CN.4/2004/WG.15/CRP.4 (14 October 2004) p 40.

This Article sets out obligations of the *State* to recognize the “right to belong to an indigenous community or nation.” In the next section of this chapter, we will discuss Article 33, which addresses the right of *Indigenous people* to decide on identity or membership in accordance with their customs and traditions.

A textual analysis of Article 9 raises the following questions:

- (A) What is the obligation of the State to recognize peoples as Indigenous?
- (B) What is the obligation of the State to recognize individuals as Indigenous?
- (C) What is the obligation of the State to recognize the “right to belong”?
- (D) What is the “discrimination” that the State is obligated to avoid?

*A. What is the obligation of the State to recognize peoples as Indigenous?*

The fact that the Declaration does not define “Indigenous peoples” poses practical challenges in implementing and enforcing State obligations which require recognition of peoples as Indigenous. Article 9 and Article 33 suggest that self-identification is the main criterion in determining Indigeneity,<sup>24</sup> but if this were the case, then any group could self-identify as Indigenous and compel the State to recognize them as such. For example, a group of white Afrikaners self-identify as “Indigenous” and are making a land claim in South Africa.<sup>25</sup>

As drafted, the Articles in the Declaration are ambiguous on what body is entitled to determine whether a people are “Indigenous.” As mentioned previously in this Chapter, an early version of the draft Declaration contained a version of Article 8 that would have provided Indigenous people with the right to “identify themselves as Indigenous and to be recognized as such.”<sup>26</sup> This clause would have obligated States to recognize peoples that self-declared as Indigenous, but its deletion leaves unresolved the question of which entity that has the authority to identify indigeneity.

In practice various domestic and international bodies are developing a list of characteristics that will help identify a group as “Indigenous”. For example, the United Nations Permanent Forum on Indigenous Issues (“Permanent Forum”) set out the following criteria for a “modern understanding” of indigeneity:

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<sup>24</sup> The Inter-American Commission on Human Rights mentions Article 9 in a report related to debt bondage and forced labour of the Guaraní people in Bolivia. The Commission cites the Article to support its statement that “under international law, self-identification is the main criterion for determining the status as Indigenous of the members of those peoples, both individually and collectively.” Inter-American Commission on Human Rights, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco* (2009), Inter-Am Comm HR, No 58/09, OEA/Ser.L/V/II para 34. The *American Declaration on the Rights Indigenous Peoples* provides that states are to respect the right to self-identity in Article I.2.

<sup>25</sup> Gloriakenidborona, “Who is and who isn’t indigenous in Africa?” (June 2016) online: <https://perma.cc/TT28-UF4J>; South Africa Today, “Massive Pretoria land claim by Boer Afrikaner” (May 4, 2015) online: <https://perma.cc/FQK6-TAQB>

<sup>26</sup> Text at (n 8). The *American Declaration on the Rights Indigenous Peoples* provides that states are to respect the right to self-identity in Article I.2.

- self-identification as Indigenous peoples at the individual level and accepted by the community as their member;
- historical continuity with pre-colonial and/or pre-settler societies;
- strong link to territories and surrounding natural resources;
- distinct social, economic or political systems;
- distinct language, culture and beliefs;
- form non-dominant groups of society; and
- resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.<sup>27</sup>

In the following paragraphs in this section, we describe how the issue of identify has been addressed in different regions of the world.

*(i) Indigenous peoples in the Americas, Australia and New Zealand*

The criteria for the “modern understanding” of indigeneity were originally derived from the experiences of Indigenous peoples in the Americas, New Zealand and Australia. For these groups, the concept of “historical continuity with pre-colonial and/or pre-settler societies” was an accurate reflection of historical reality. The author of an early attempt to identify criteria, José Martínez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated in 1986 that the term “Indigenous” should be restricted to situations where there was a European invasion, and should not be applied to the peoples of Africa and Asia.<sup>28</sup> However, as the concept of indigeneity began to be explored globally, the “pre-colonial” or “pre-settler” criteria became increasingly difficult to apply.<sup>29</sup> As will be discussed below, international courts, human rights bodies and governments are now modifying the “pre-colonial” requirement by recognizing Indigenous peoples in Africa and Asia, as well as peoples in the Americas who came into being during the period of colonization.

*(ii) Indigenous peoples in Africa and Asia*

In Africa and Asia, colonization imposed a European-dominated political and economic system on populations that were indigenous to the territory. In this sense, all of the non-European people in those colonies were “indigenous” and subsequently marginalized through the process of colonization. This dynamic made it difficult for some African nations in the post-colonial context to see how one segment of their population could be “Indigenous” while another segment was not. Some considered the term “Indigenous” itself to be derogatory.<sup>30</sup>

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<sup>27</sup> United Nations Permanent Forum on Indigenous Issues, ‘Who are Indigenous Peoples?’, (no date ) <[http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf)> accessed 14 July 2014.

<sup>28</sup> José Martínez Cobo, ‘Study on the Problem of Discrimination against Indigenous Populations’ (7 July 1986) E/CN.4/Sub.2/ (7 July 1986) para 379–382.

<sup>29</sup> See Rashwet Shrinkhal, “Problems in Defining 'Indigenous Peoples' under International Law” (2013-14) 7 Chotanagpur Law Journal pp 187-195.

<sup>30</sup> Rachel Murray, ‘The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organisations to Indigenous Peoples’ in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford 2011) p 496.

Nonetheless, newly independent African States were forced to confront the reality that within each country, some groups had become economically and politically dominant over others. In 2005, the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights produced a pioneering report which highlighted the relevance of the concept of indigeneity to Africa, including the issue of dominant groups within nation States post-colonization:

The Indigenous movement in Africa has grown as a response to the policies adopted by independent post-colonial African States. As argued by Mohamed Salih, post-colonial African States have in many respects continued the suppression, dispossession and discrimination that were initiated by the colonial regimes: 'post post-independent African States were no less cruel towards their Indigenous populations than the colonialists.'<sup>31</sup>

While an exhaustive list of peoples in Africa who identify as Indigenous does not yet exist, the Indigenous Peoples of Africa Co-ordinating Committee describes the peoples in Africa that would be recognized by the Declaration as including "those who have been living by hunting and gathering or by transhumant (migratory nomadic) pastoralism."<sup>32</sup> The concept of indigeneity in the African context was further articulated by the African Commission on Human and Peoples' Rights in 2009 in a decision dealing with a dispute between the government of Kenya and a group claiming Indigenous rights. The case was brought by the Centre for Minority Rights Development, a Kenyan NGO, on behalf of the Endorois, who are pastoralists that had, for hundreds of years, raised cattle on the fertile land around Lake Bogoria. The government of Kenya evicted the Endorois in order to create game preserves. Ultimately the Commission found that the Endorois were Indigenous within the meaning of the Declaration, and went on to describe four key characteristics of indigeneity:

[T]he occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.<sup>33</sup>

It is noteworthy that this formulation does not include the 'pre-colonial' or 'pre-settler' requirement as part of indigeneity in Africa.

In Asia, identifying certain groups as Indigenous is complicated by the difficulty of establishing chronological priority in many cases. Addressing this problem in the context of Nepal, James Anaya explains:

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<sup>31</sup> ACHPR and International Work Group for Indigenous Affairs, 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities: submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' (African Commission on Human and Peoples' Rights ; International Work Group for Indigenous Affairs ; Distribution in North America Transaction Publishers 2005) p 92.

<sup>32</sup> Indigenous Peoples of Africa Co-ordinating Committee, 'Who is indigenous in Africa?' <<http://www.ipacc.org.za/eng/default.asp>> accessed 14 July 2014.

<sup>33</sup> African Commission on Human and Peoples' Rights, 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya' (4 February 2010). The Commission relied on a case from the Inter-American Court on Human Rights, *Saramaka People v. Suriname*, (n 37) which had found that descendants of escaped slaves in Suriname could claim rights under the Declaration.

The country's population overall is the product of a long and complex history of original settlement and migration both into and within the territory of present-day Nepal, and of social and political processes that are strongly rooted in that territory and date back centuries.<sup>34</sup>

Nevertheless, while all citizens of Asian States are 'indigenous' vis-a-vis European colonialists, as in Africa, there are clearly certain groups within these countries that are politically and economically marginalized relative to others.

State practice in Asia varies. Nepal recognizes a number of groups as Indigenous (*Adivasi Janajati*) and Taiwan has extensive legislation in relation to Indigenous people.<sup>35</sup> India, on the other hand, does not recognize the existence of Indigenous peoples within its borders even though its Constitution provides for over 600 Scheduled Tribes who generally identify as Indigenous and would meet the established criteria of indigeneity.<sup>36</sup>

*(iii) Indigenous peoples because of, but not before, colonial invasion*

In the Americas, where there was a much clearer 'invasion' by the Europeans, defining the concept of indigeneity has become complex and cannot be accurately captured by a simplistic delineation based on the date of arrival of the settlers.

In areas of Latin America, there exist communities of escaped slaves, sometimes referred to as Maroons or *afrodescendientes*, who have lived in their own communities within the jungles and in the countryside for hundreds of years. Of course, these groups did not *precede* the arrival of the Europeans, but they are clearly the *result* of colonization. They are socially, economically and geographically marginalized and identify as Indigenous vis a vis the dominant groups in their country. The Inter-American Court of Human Rights recognized the indigeneity of *afrodescendientes* in their 2007 ruling on a complaint against the Suriname government regarding resource extraction within the territory of the Saramaka, an *afrodescendiente* group. The Court found that the Saramaka were a 'tribal people' within the meaning of the ILO 169,<sup>37</sup> and drew heavily from the United Nations Declaration to articulate the rights of the Saramaka.<sup>38</sup> As a remedy, the Court ordered the Suriname government to demarcate Saramaka territory and to stop resource extraction until the free, prior, informed consent of the Saramaka was obtained.<sup>39</sup> In

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<sup>34</sup> Human Rights Council, 'Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: addendum : report on the situation of indigenous peoples in Nepal', (20 July 2009) A/HRC/12/34/Add.3 para 11.

<sup>35</sup> For Nepal, see Anaya (n 34 ) para 12-14 and for Taiwan see text at (n 60 ).

<sup>36</sup> Pooja Parmar, 'Undoing Historical Wrongs: Law and Indigeneity in India' (2012) 49 Osgoode Hall L.J. 491, pp 496-497. Indonesia recognizes in its constitution that there are groups, referred to as *masyarakat adat* or *masyarakat hukum adat*, but apparently believes that all Indonesians are indigenous and so no special laws are needed. See IWGIA, "Indigenous Peoples in Indonesia" <http://www.iwgia.org/regions/asia/Indonesia>.

<sup>37</sup> ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, (adopted 27 June 1989), 1650 UNTS 28383 (ILO) art 1.

<sup>38</sup> Luis Rodriguez Pinero, 'The Inter-American System and the UNDRIP: Mutual Reinforcement' in Steve Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford 2011).

<sup>39</sup> *Saramaka People v. Suriname*, Inter-American Court of Human Rights Series C No 172 (28 November 2007).

Bolivia, the situation of the *afrodescendientes* is explicitly recognized in the Constitution, which provides that the *afrodescendientes* enjoy the same rights as Indigenous people.<sup>40</sup>

There are other groups in Latin America, often referred to as *campesinos*, who hold land communally. In Peru, the *campesino* communities originated in indigenous populations but over time became agricultural workers on large *haciendas*. With land reform in the 1960's and 1970's the workers were given land which they largely worked collectively. These communities have their own legal mechanisms and see themselves as distinct from both the mainstream Peruvian population and from the Indigenous population. The current constitution distinguishes between *comunidades campesinas* and *comunidades nativas*,<sup>41</sup> although in the 1930s they were both referred to as *indígenas*.<sup>42</sup> For the purposes of international law, however, Peru recognizes both *comunidades campesinas* and *comunidades nativas* as Indigenous, and as such both qualify as groups that must be consulted in relation to resource development in their territories.<sup>43</sup>

In Canada, the Métis people came into being as the result of the union of French or English fur traders with Indigenous women, creating a distinct group that was neither European nor Indian. In one area of Canada, the Métis developed their own language and participated in two revolts in 1870 and 1885 in order to secure their own homeland within Canada.<sup>44</sup> The Canadian government has since acknowledged that the Métis are a distinct Aboriginal people and in 1982 explicitly recognized them in the Constitution.<sup>45</sup>

#### *(iv) Conclusion on State obligations to Indigenous peoples*

One of the challenges inherent in attempting to achieve a “modern” understanding of indigeneity is the fact that the generally accepted criterion for determining who is Indigenous is a combination of chronological factors (“pre-colonial”), relational factors (“non-dominant”), subjective factors (“resolve to maintain ancestral environments”) and normative factors (“strong link to territories”).<sup>46</sup> The discussion above shows that the term “Indigenous” is not to be understood by a single factor but rather a combination of factors which may or may not all be present. As the UN Special Rapporteur on Indigenous Issues, James Anaya suggests, the term

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<sup>40</sup> *Constitución Política del Estado Plurinacional de Bolivia 2009* (Bolivia) s 32:

The African-Bolivian people enjoy, in all ways applicable, the economic, social, political and cultural rights recognized in the Constitution for the indigenous campesino nations and peoples. [Author's translation]

online: [https://www.constituteproject.org/constitution/Bolivia\\_2009.pdf](https://www.constituteproject.org/constitution/Bolivia_2009.pdf)

<sup>41</sup> *Constitución Política de Perú* (1993) s 89.

<sup>42</sup> Charis Kamphuis, 'Foreign Mining, Law and the Privatization of Property: A case study from Peru' (2012) 3 JHRE 217.

<sup>43</sup> *Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo* (2011) s 7.

<sup>44</sup> Royal Commission on Aboriginal Peoples, 'The Forging of Métis Identity', (1996) volume 1.6, 138-145, <<http://caid.ca/RRCAP1.6.pdf>> accessed August 5, 2014.

<sup>45</sup> Section 35(2), *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982 c 1.

'In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada'

<sup>46</sup> *Shrinkhal* (n 29 ) p 190.

“Indigenous” is better understood as a rubric that is defined by “context rather than abstraction.”<sup>47</sup>

### *B. What is the obligation of the State to recognize individuals as Indigenous?*

The discussion above has provided an outline of the types of *peoples* that have been recognized as Indigenous either by state practice or views of international bodies. In this section we will discuss the obligations imposed by Article 9 on States to recognize the right of Indigenous *individuals* to belong to an Indigenous community or nation. This obligation is particularly important to three types of individuals who may self-identify as Indigenous and have genealogical ties to an Indigenous people, but do not belong to a specific Indigenous community or nation.

The first group consists of those who have lost their connection to their community through the process of colonization. For example, many Māori in Aotearoa/New Zealand are not registered with an *iwi* (tribe) as a result of migration to urban centres and government policies hostile to tribal organizations.<sup>48</sup>

The second group consists of those who have been excluded by state legislation. In Canada, the federal government’s *Indian Act* determines membership in ‘Indian’ bands and for nearly one hundred years provided that Indian women who married non-Indian men lost their status as Indians. For Indian women who married non-Indian men, this led to the severing of legal ties to the Indian community and loss of rights to reside on reserve, both for the women and their children. The descendants of these women and children were often referred to as “non-status” Indians.<sup>49</sup>

The third group consists of those who were once members of an Indigenous group but were subsequently excluded by the rules of the Indigenous community itself. This group includes former members of American Indian tribes who have been “disenrolled,” as discussed below in relation to Article 33.<sup>50</sup>

We discuss each of these three groups in more detail below.

#### *(i) Indigenous individuals who are not members of an Indigenous group*

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<sup>47</sup> S. James Anaya, *International human rights and indigenous peoples* (Aspen Publishers, New York 2009) 30. For a summary of the debate over the definition of “Indigenous” see International Law Association, *Rights of Indigenous Peoples Committee, Interim Report for the Hague Conference* (2010) <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> pp 6-9.

<sup>48</sup> See Mason Durie, *Te mana te kāwanatanga - The politics of Māori self-determination* (OUP, Oxford 1998).

<sup>49</sup> For Canada, see Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Purich Publishing, Saskatoon 2011).

<sup>50</sup> For the United States see Matthew Fletcher, ‘Tribal Membership and Indian Nationhood’ (presented at the Sovereignty and Identity Symposium American Indian Law Review 1 March 2012) <<http://ssrn.com/abstract=212981>> accessed 15 April 2013.

Article 9 States that only *Indigenous* individuals have a right to belong. The first question then, is what criteria are used to identify an individual who does not belong to an Indigenous community or nation as *Indigenous*?

This issue was discussed before the enactment of the Declaration by the Human Rights Committee in two cases related to Article 27 of the International Covenant on Civil and Political Rights. That Article provides:

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

In the first case, from 1977, *Lovelace v. Canada*,<sup>51</sup> a Maliseet woman from Canada had been removed from membership in her band after she married a non-Indian as a result of the operation of the *Indian Act*. After her marriage ended, she was not permitted to regain membership to the band and consequently lost many of the benefits associated with membership, such as the right to vote or the right to live on the reserve. When she applied for housing on reserve, the Band Council stated that priority for housing on reserve was to be given to those who were registered as Indians under the *Indian Act*. The Human Rights Committee found that Canadian legislation harmed Lovelace by preventing her from registering as an Indian.

The second case, from 1989, *Kitok v. Sweden*,<sup>52</sup> revisited the same issue, this time in the case of Saami man who had lost his rights to herd reindeer under Sweden's *Reindeer Husbandry Act* when he left the practice for a number of years. The *Act* permitted the Saami village to decide whether to permit an individual who was ethnically Saami to return to farm reindeer. In this case, the village refused to reinstate full reindeer farming rights to Kitok, citing concerns with the number of people that could be supported in the practice. Kitok appealed to a Swedish tribunal, but the tribunal upheld the decision of the Saami village.

The *Lovelace* and *Kitok* cases are significant to our discussion here because in both cases the Committee had to first determine whether the individual was entitled to belong to the Indigenous group. In the case of Sandra Lovelace, the Committee observed:

Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as "belonging" to this minority....<sup>53</sup>

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<sup>51</sup> Human Rights Committee, 1981. *Sandra Lovelace v. Canada*, *Communication No. 24/1977 (1) & (2)* (Dec. 29, 1977) U.N. Doc. CCPR/C/13/D/24/1977. The Committee found that the Canadian legislation violated Article 27.

<sup>52</sup> Human Rights Committee, 1988. *Kitok v. Sweden*, *Communication No. 197/1985 (Dec. 2, 1985)* CCPR/C/33/D/197/1985. The Committee found that the restrictions on Kitok were reasonable because it provided a way to protect reindeer herding for the Saami as a whole.

<sup>53</sup> Lovelace (n 51) para.14.

In the case of Ivan Kitok, the Committee noted:

Mr. Kitok has always retained some links with the Saami community, always living on Saami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.<sup>54</sup>

These two examples suggest that indigeneity of individuals needs to be established in relation to a recognized Indigenous people through a combination of genealogy and continued ties to an existing Indigenous community or nation.

We can see a similar approach in Canada in cases involving the Métis. As we mentioned earlier, the Métis are descendants of French and English fur traders and Indigenous women. They are one of the three groups recognized as Aboriginal in the Constitution of Canada. In 2003, the Supreme Court of Canada held that individuals who identified as Métis and were accepted by a contemporary existing Métis community could exercise Aboriginal hunting rights.<sup>55</sup> After that decision, individuals in various regions of Canada self-identified as Métis and claimed to be exempt from provincial hunting regulations. Courts rejected cases where the claimants were unable to demonstrate their connection to a historical Métis community. For example, in one case, the judge found that the individual claiming to be Métis was ten to twelve generations removed from a Chief who had signed a Treaty in 1693. The individual discovered his Aboriginal lineage when he was 32 years old. The Court continued:

... he demonstrates no connection to any contemporary rights-bearing community, or for that matter, to any Indian band or other aboriginal community, rights-bearing or not. ... Membership in self-styled organizations does not make one aboriginal for purposes of constitutional exemptions.<sup>56</sup>

The UN Committee for the Elimination of Racism also found that cultural factors were important for determining whether an individual was indigenous. The issue was raised at the Committee after the Finland Supreme Administrative Court decided to allow voting for the Saami Parliament by any person with any ancestor registered as “Lapp” dating back to as far as 1763.<sup>57</sup> The Saami Parliament had more stringent requirements for voting, including that at least one parent or grandparent, spoke Saami as a first language.<sup>58</sup> The UN Committee recommended that the state give recognition to the narrower Saami Parliament requirements that included cultural ties to the Saami.

*(ii) Conclusion on obligation to Indigenous individuals*

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<sup>54</sup> Kitok (n 52 ) para.9.7.

<sup>55</sup> *R. v Powley* (2003) SCJ 43 (Supreme Court of Canada). See also *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 which held that Métis were under federal legislative authority, similar to Indians and Inuit.

<sup>56</sup> *R. v Hopper* (2008) NBCA 42 (New Brunswick Court of Appeal) para 18.

<sup>57</sup> James Anaya, Letter to the Government of Finland (May 24, 2012) <[https://spdb.ohchr.org/hrdb/21st/Public\\_-\\_AL\\_Finland\\_24.05.12\\_%281.2012%29.pdf](https://spdb.ohchr.org/hrdb/21st/Public_-_AL_Finland_24.05.12_%281.2012%29.pdf)> accessed 14 July 2014.

<sup>58</sup> Committee on the Elimination of Racial Discrimination, Finland, CERD/C/FIN/CO/20-22 ( August 31, 2013) para 12.

While the Declaration does not contain any definition for an *Indigenous* individual, precedents from international bodies and some domestic courts indicate that a genealogical connection on its own, especially when it dates back many generations, will not be enough to require recognition by the State. The individual will have to show some ties and on-going participation in the activities of an existing Indigenous community or nation in order to be considered Indigenous for the purpose of exercising the rights set out in the Declaration.

C. *What is the State obligation to recognize the “right to belong”?*

This part of our discussion of Article 9 will focus on state legislation that provides definitions for membership and the extension of State benefits and rights to Indigenous peoples and individuals who are recognized in State legislation.

(i) *Defining membership*

Some States have very detailed legislation on who is considered “Indigenous.”<sup>59</sup> In Taiwan, for example, legislation sets out a list of groups that are recognized as “Indigenous”<sup>60</sup> and sets out extensive rules on who is a member of an Indigenous community and who is not. Membership is based on permanent residency in specified regions as well as on whether an individual or their immediate kin are registered in the census as being of Indigenous descent. The *Status Act* addresses what happens on marriage to a non-Indigenous person, what happens to children who are born out of wedlock and the effect of adoption on status.<sup>61</sup> In Canada, the *Indian Act* also has complex rules on defining “Indians.”<sup>62</sup> State legislation that defines membership can be problematic if they are too exclusionary, as in the case of the 1971 *Alaska Native Claims Settlement Act*, which imposed the requirement that beneficiaries be of at least “one quarter Native blood.”, leading to fears of a decrease in membership as young people have children with non-Indigenous partners.<sup>63</sup> Conversely, problems arise where legislation is over-inclusive, as in Australia where the statute-imposed definition of “Aboriginal” has caused some controversy among Aboriginal communities who criticize the definition for including individuals who discovered their Aboriginal heritage later in life and otherwise had no connections to actual communities.<sup>64</sup>

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<sup>59</sup> For a general discussion on state membership codes, see Ravi de Costa, ‘Self-Determination and State Definitions of Indigenous Peoples’ in *In Restoring Indigenous Self-Determination: Theoretical and Practical Approaches* (2014) (E-International Relations, Bristol, UK, 2014) pp.18-24 online: <http://www.e-ir.info/2014/05/14/self-determination-and-state-definitions-of-indigenous-peoples/>

<sup>60</sup> *Indigenous Peoples Basic Law* (2005)

<<http://law.moj.gov.tw/eng/LawClass/LawContent.aspx?pcode=D0130003>> accessed 14 July 14, 2014.

<sup>61</sup> See Articles 2-12, *Status Act for Indigenous People*

(2008).<<http://law.moj.gov.tw/ENG/LawClass/LawContent.aspx?pcode=D0130001>> accessed 14 July 2014.

<sup>62</sup> *Indian Act*, R.S.C. 1985.

<sup>63</sup> Dalee Sambo Dorough, ‘Reflections on the UN Declaration on the Rights of Indigenous Peoples: An Arctic Perspective’ in Allen and Xanthaki (n 36) 518.

<sup>64</sup> Jennifer Clarke, ‘Australia: The White House with Lovely Dot Paintings whose Inhabitants have “Moved on” from History?’ in Benjamin Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Hart Publishing, Oxford 2009) p 86.

(ii) *State obligation to facilitate belonging*

The identification of specific Indigenous communities is becoming increasingly important both for agreements which address past wrongs perpetrated by States, and for new agreements relating to the use of traditional territories for resource extraction. These agreements play a key part in fulfilling many of the State's obligations under the Declaration in relation to land and self-determination.<sup>65</sup> However, these rights cannot be enjoyed unless Indigenous individuals belong to an Indigenous nation or community. When the State is or has been complicit in the creation of circumstances which create a group of Indigenous people without a recognized Indigenous nation or community, such as disenfranchisement through legislation, the State should be obliged to do more than passively recognize the right to belong. The State should facilitate the creation of a group to which the individual might belong in order to benefit from the rights in the Declaration. This obligation does not appear to have been addressed by any international bodies, but there have been law reform recommendations in New Zealand and Canada that have addressed this problem.

In the case of the urban Māori, the New Zealand Law Commission, in its report *Waka Umanga: A Proposed Law for Māori Governance*, recommended creating a special corporate vehicle called the *waka umanga* to provide a legal structure to Māori communities. The *waka umanga* would have some of the characteristics of a corporation but most of the internal governance arrangements would be developed by the Māori collectivity. The Law Commission regarded the *hapu* (sub-tribe) as the basic community unit, and suggested that there should be at least fifty members for the group to be viable:

A viable *hapu* being one that can respectably manage customary requirements in welcoming, feeding and bedding other tribal groups. That probably requires an active and local membership of at least 50, as nowadays all are not available for every event.<sup>66</sup>

The Law Commission recommended that fifteen people could propose or oppose the creation of a *waka umanga* and that disputes could be taken to the Māori Land Court, which has expertise on Māori issues. Initially, it would be those individuals that get together to make or oppose the *waka umanga* that would determine the membership of the group. Outside of the requirement for the minimum size of a *hapu*, there would be no imposed criteria. The Law Commission stated that “it is the right of a tribe to determine its own membership and membership rules.”<sup>67</sup>

In Canada, the Royal Commission on Aboriginal Peoples also considered a process for creating Indigenous nations with their own land bases and self-governing jurisdiction. According to the Commission, Canada's six hundred or so “Indian bands” created under the *Indian Act* would need to be reconstituted as larger nations based on 60-80 traditional affiliations.<sup>68</sup> These larger nations would hold the inherent right to self-government. The Commission suggested that a

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<sup>65</sup> See Shin Imai, ‘Self-determination and the State’, in Benjamin Richardson et al (n 64 ).

<sup>66</sup> New Zealand Law Commission, *Waka Umanga: A Proposed Law for Maori Governance Entities*, Report 92 (NZLC, May 2006) para 7.65.

<sup>67</sup> *Ibid* para 4.50.

<sup>68</sup> Royal Commission on Aboriginal Peoples, ‘Self-determination and self-government: overview’ (1996) volume 2.2 p 158 <<http://caid.ca/RRCAP2.3.pdf>> accessed August 8, 2014.

charter group, such as a group of bands currently recognized under the *Indian Act*, could hold a referendum to determine whether to proceed toward self-government. This group would then develop a constitution and membership criteria that would be inclusive of those historically excluded by the membership criteria of the *Indian Act*. Membership would not depend on blood quantum. Rather, the Commission contemplated that there would be wide consultation with all potential members, and that prior to being recognized by the government, the constitution and membership criteria would be presented to a Recognition Panel composed of a majority of Aboriginal people.<sup>69</sup>

While neither of these initiatives has been implemented, they stand as examples of the type of policies that would fulfill the State's obligations under Article 9.

*(iii) Conclusion on the right to belong*

Article 9 states that the right to belong is to be realized according to the "traditions and customs" of Indigenous peoples. It follows that State legislation defining who is and who is not a member is valid only to the extent that the legislation is congruent with the customs and traditions of the Indigenous community or nation. This is not to say that legislation is not necessary. Since governments can only act through legislative mandates, there must be legislation. However, like Sweden's *Reindeer Husbandry Act*, which recognizes membership decisions made by the Saami village, State legislation need not set out complex rules on membership. As Kirsty Gover, one of the chapter authors of this book states,

... the goal is not to design and impose regulatory criteria defining indigeneity, but to operationalize in public law the cultural concept as it emerges from indigenous practices of recognition. In this way, the concept of public indigeneity can be created by the positive choices of Indigenous individuals and groups.<sup>70</sup>

In addition, where the State has been complicit in the creation of groups of Indigenous individuals who do not belong to an Indigenous community or nation, the State has a positive obligation to create mechanisms in consultation with the Indigenous individuals in question to facilitate the creation of new groupings of Indigenous communities and nations to implement the right to belong.

*D. What is the "discrimination" that the State is obligated to avoid?*

Being recognized as Indigenous can bring benefits and rights to communities and individuals. In Taiwan, for example, Indigenous people are entitled to preferential access to natural resources;<sup>71</sup>

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<sup>69</sup> Royal Commission on Aboriginal Peoples. 'Rebuilding and recognizing Aboriginal nations' overview' (1996) volume 2.2 pp 299-304 <<http://caid.ca/RRCAP2.3.pdf>> accessed August 8, 2014.

<sup>70</sup> Kirsty Gover, *Tribal constitutionalism: States, tribes, and the governance of membership*, (Oxford University Press:New York 2010) p 11.

<sup>71</sup> *Regulations on Development and Management of Lands Reserved for Indigenous Peoples*, <<http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous>> accessed August 4, 2014.

preferred placement and subsidies for schools;<sup>72</sup> preferential hiring for jobs;<sup>73</sup> and assistance in obtaining intellectual property rights over Indigenous intellectual creations.<sup>74</sup> Because of these rights and benefits, the government has an economic interest in being able to identify clearly who is eligible, and an interest in limiting the numbers of those eligible. As mentioned above, Taiwan addresses this issue by legislating detailed rules on membership. Inevitably, the existence of State legislation will result in situations where an individual claims to be Indigenous, and may even be accepted by an Indigenous community, but where the government refuses to extend rights and benefits because that individual does not qualify under the legislation.

In Canada, this discrepancy is even spelled out in the *Indian Act*. The *Act* sets out detailed criteria for determining who is registered as an “Indian” for the purposes of the *Act*. For example, a child must generally have at least two grandparents who are registered as an Indian in order to be eligible for registration. However, the *Act* allows communities of Indians (called Bands) to decide who will be members of the communities. Under this system, some Bands will allow children to be members even if they have only one grandparent who is registered under the *Indian Act*. However, the *Act* states that the Canadian government will extend benefits, such as exemption from income tax, only to those individuals who qualify to be registered under the *Indian Act* so that Band members who do not qualify to be registered do not receive benefits.<sup>75</sup>

In this context, what does the non-discrimination clause in Article 9 mean? Does it mean that the State cannot discriminate in its law and programs between those citizens who are not Indigenous and those citizens who are members of Indigenous groups? Or does it mean that the State cannot discriminate among members *within* an Indigenous community or nation?

Given that Indigenous individuals are already protected against discrimination vis a vis non-Indigenous citizens by many other Articles in the Declaration (eg. Articles 2, 15, 16, 21, 22, 24, 29), we do not think that the first possibility- that the clause refers to the State’s obligation not to discriminate between Indigenous and non-Indigenous citizens of the State- is correct.

A better explanation is that Article 9 was intended to ensure that, once an individual is recognized as Indigenous according the customs and traditions of an Indigenous community or nation, the State must treat that individual the same as all other members of that community or nation. For example, it may be that this clause will prohibit the discrimination in the Canadian legislation mentioned above, where some Band members are recognized under the *Indian Act* for benefits, whereas other Band members do not receive benefits.

#### **IV. Analysis of Article 33: Right to Determine Own Identity or Membership**

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<sup>72</sup> *Education for Indigenous Peoples*, <<http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous>> accessed August 4, 2014.

<sup>73</sup> *Indigenous Peoples Employment Rights Protection Act*, <<http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous>> accessed August 4, 2014.

<sup>74</sup> *Protection Act for the traditional intellectual creations of indigenous peoples*, <<http://law.moj.gov.tw/eng/Law/LawSearchResult.aspx?p=Z&t=A1A2B1B2&k1=indigenous>> accessed August 4, 2014.

<sup>75</sup> See Olthuis, Kleer, Townshend and Shin Imai, *Aboriginal Law Handbook*, (3<sup>rd</sup>) (Carswell, Toronto 2008) ch.11.

This Article overlaps with Article 9, but has a slightly different focus. Article 9 provides Indigenous peoples and groups with the right to belong, a right that groups or individuals could claim against the State. Article 33 focuses on the right of Indigenous peoples to decide on membership and the obligations of Indigenous peoples to their own members.

The concept of self-identification found in Article 33 has been endorsed by the Inter-American Commission on Human Rights. In its 2009 report, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources*, the Commission refers to Article 33.1 in the context of a discussion supporting Indigenous self-identification.<sup>76</sup> Two cases at the Inter-American Court on Human Rights have also endorsed this Article. In the case of the *Kichwa Indigenous People of Sarayaku v Ecuador* (2010),<sup>77</sup> the applicants brought a complaint against Ecuador for granting an oil concession and allowing an Argentinean company to undertake seismic exploration in Sarayaku territory without prior consultation or consent of the Sarayaku. The Court refers to the right to cultural identity and mentions a number of Articles from the Declaration, including Article 33.<sup>78</sup> In the case of the *Rio Negro Massacres v. Guatemala*<sup>79</sup> the Court mentions Article 33 together with other Articles from the Declaration in the context of discussing state-Indigenous relations and the connection of Río Negro inhabitants to their land.<sup>80</sup>

Article 33 raises the following issues:

- (A) Are “Indigenous people” the same as an “Indigenous community or nation”?
- (B) What does it mean to determine identity or membership?
- (C) What limitations are there on “customs and traditions”?
- (D) What does it mean to have citizenship in the States in which they live?
- (E) What are the rights with respect to structures and institutions of membership?

*A. Are “Indigenous people” the same as an “Indigenous community or nation”?*

Article 33 recognizes that “Indigenous peoples” have the right to their own identity or membership, whereas Article 9 refers to membership in an Indigenous “community or nation.” There is no explanation of this difference in the drafting record.

An interpretation that would make sense would see Article 9 address rights to belong to Indigenous communities or nations that have governance structures that could apply the “customs and traditions” to membership decisions. These communities or nations may not be as large as an entire “Indigenous people.” For example, as we explain in our discussion of Article 36 below, an “Indigenous people” may be divided by State borders and there may not be a single governance structure on both sides of the border, even if they are a single “Indigenous people.” Therefore, Article 33 may refer to the abstract right of an Indigenous people as a whole to

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<sup>76</sup> Inter-American Commission on Human Rights, , *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources*, (2009) OEA/Ser.L/V/II.Doc.56/09 para 30.

<sup>77</sup> *Kichwa Indigenous People of Sarayaku v Ecuador* (2012), Inter-Am Ct HR (ser C), No 245 para 217.

<sup>78</sup> *Ibid* para 217.

<sup>79</sup> *Caso masacres de Río Negro v Guatemala* (2012), Inter-Am Ct HR (ser C), No 250.

<sup>80</sup> *Ibid* para 52.

control membership, whereas Article 9 may refer to the rights of individual Indigenous people to belong to an Indigenous group.

Having said this, we are not able to see any practical implications that arise from this difference in wording.

*B. What does it mean to determine identity or membership?*

The right described in Article 33 encompasses two different concepts: identity and membership.

The right to determine identity makes it clear that Indigenous people decide what to call themselves and how they identify the constituent groupings that make up the people as a whole. The Inter-American Court reinforced this concept, in interpreting the American Convention on Human Rights. In this case, the Court upheld the land rights of an Indigenous community that was “multi-ethnic”<sup>81</sup> in the sense that the community was composed of peoples who had been historically distinct. The Court stated,

... it is not for the Court or the State to determine the Community’s name or ethnic identity. As the State itself recognizes, it “cannot [...] unilaterally assign or deny names of [the] Indigenous communities, because this action corresponds to the Community concerned.” The identification of the Community, from its name to its membership, is a social and historical fact that is part of its autonomy.<sup>82</sup>

The concept of identity would also be applicable in the case of people like the Inuit, the Saami, the Mohawk or the Pygmies/Batwa who are separated by State boundaries. Those people have the right to identify themselves as one people notwithstanding their residence in different States. As we will see below, under Article 36, States have an obligation to take “effective measures” to facilitate contact across international borders.

Membership refers to the right of the indigenous people to decide which individuals belong to the community or nation. The UN Committee on the Elimination of Racial Discrimination considered Article 33 in 2013, in a comment on the decision of the Finland Supreme Administrative Court to permit any individual who self-identified as a Saami to vote for the Saami Parliament. As noted above in section III.B of this chapter, the Finnish court overruled the decision of the Saami Parliament to restrict voters to those who self-identified and met a language requirement. The CERD noted that the court decision gives “insufficient weight” to the right of Saami to determine their membership under Article 33.<sup>83</sup>

This Article was also considered by the Permanent Forum on Indigenous Issues in 2010 in response to a complaint from Mohawks about problems crossing the US-Canada border. The Mohawk territory straddles the border, and to get from one part of the Canadian reserve to another part of the Canadian reserve, it is necessary to cross through the part of the reservation located in the United States. The Permanent Forum urged Canada and the United States “to

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<sup>81</sup> *Xákmok Kásek Indigenous Community v Paraguay* (2010), Inter-Am Ct HR (ser C), No 214.

<sup>82</sup> *Ibid* para 37.

<sup>83</sup> Committee on the Elimination of Racial Discrimination, Finland, CERD/C/FIN/CO/20-22 ( August 31, 2013) para 12.

respect the right of Indigenous nations to determine their own membership, in accordance with article 33 of the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>84</sup>

*C. What limitations are there on “customs and traditions”?*

The “customs and traditions” of Indigenous people are to be determined by Indigenous people themselves. But what happens if these “customs and traditions” result in gender discrimination or are inconsistent with other international human rights standards? We discuss this issue in the context of an ongoing debate over tribal membership in the United States.

*(i) Is there a limitation on the right to determine tribal membership in the United States?*

In the United States, federally-recognized tribes have their own inherent jurisdiction to determine membership through their tribal constitutions. This jurisdiction has been upheld by the US Supreme Court in the case of *Santa Clara Pueblo v Martinez*,<sup>85</sup> in which the court considered a Pueblo tribal law which provided that the children of a woman who married out of the tribe lost their tribal membership, but the children of a male tribal member who married out of the tribe did not lose their membership. Julia Martinez, a Pueblo woman married a Navajo man and had a daughter. The family continued to live on the Santa Clara Pueblo reserve. The mother and a child challenged the tribal law as discriminatory. The US Supreme Court held that federal courts lacked jurisdiction to deal with claims because enforcement of tribal law was a tribal matter. The response to this decision was varied, with some hailing it as an affirmation of tribal sovereignty<sup>86</sup> and others viewing it as an example of toleration of sexism within tribal communities.<sup>87</sup>

In recent years, other examples of apparent discrimination have arisen in the United States tribal system, particularly in relation to decisions by some tribes to ‘disenroll’ certain members. Perhaps the best known case is that of the Cherokee Freedmen, who were descendants of African Americans who had lived with the Cherokee for generations as members of the tribe. In 2007, the Cherokee Nation amended its constitution to remove 2,800 Freedmen from membership, effectively stripping the Freedmen of all political and economic rights associated with being a member of the tribe. The tribe’s decision was upheld by the Cherokee Nation Supreme Court in 2011.<sup>88</sup> The Nooksack tribe was also involved in a disenrollment initiative, in this case of tribe members who were descended from families who had married Filipinos.<sup>89</sup> Racial issues play into these decisions, but commentators also point to the distribution of casino profits as a reason for

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<sup>84</sup> Permanent Forum on Indigenous Issues, ‘Report on the Ninth Session’, ESC Apr 2010, UNESCOR, 2010, Supp No 23, E/C.19/2010/15 para 97. Unfortunately, the report does not provide more context for this statement, although the instigating complaint referred to problems related to border crossing.

<sup>85</sup> *Santa Clara Pueblo v Martinez* (1978) 98 S Ct 1670 (United States Supreme Court).

<sup>86</sup> John R. Wunder, *Retained by the people: a history of American Indians and the Bill of Rights* (Oxford University Press, Oxford 1994).

<sup>87</sup> David H. Getches, *Cases and materials on federal Indian law* (5th edn Thomson/West 2005) pp 399–405.

<sup>88</sup> Darryl Omar Freeman, ‘Neo-Colonial Adaptation or Neo-Sovereignty: Oklahoma Cherokee/African Ancestry Freedmen Conflict’ (2011) <<http://ssrn.com/abstract=1941471>> accessed April 13, 2013.

<sup>89</sup> Gail Courey Toensing, ‘Nooksack Indian Tribe in Disenrollment Fight’ *Indian Country Today* (New York 11 April 2013).

decreasing enrolled members. By reducing the number of members, the remaining members will receive greater share of the casino profits.<sup>90</sup>

Native American commentators have further noted that there is a lack of recourse for Indigenous individuals in cases of apparent discrimination on the part of Indigenous groups. As academic and tribal court judge Wenona Singel observes:

This gap in the human rights system exists because tribes do not have direct obligations under public international law, they are largely immune from external accountability under the domestic law of the United States, and they are frequently immune from judicial review within their own systems of tribal law.<sup>91</sup>

On the one hand, an argument can be made that tribes are acting within their rights under Article 33 in deciding membership “in accordance with their customs and traditions.” However, it can also be argued that these rights are limited by provisions in the Declaration that limit the authority of Indigenous institutions. Article 44, for example, states that the rights in the Declaration will be “equally guaranteed to male and female indigenous individuals,” and Article 46 states that the exercise of the rights in the Declaration are to be interpreted “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.”<sup>92</sup> The application of these standards to the membership provisions of the Declaration was contemplated during the drafting stage. Some States proposed to add the words “where those traditions and customs are consistent with international human rights standards” to the Articles dealing with membership, but decided to withdraw the amendment, believing that Article 46 would apply.<sup>93</sup>

Given the intent of Articles 44 and 46 and discussion in the drafting history, it is clear that the Declaration does not contemplate an absolute right to determine membership. In the case of the Cherokee Freedmen or the Santa Clara Pueblo, it follows that the tribes’ actions should be evaluated in the light of the gender equality and human rights provisions that are outlined in the Declaration itself.<sup>94</sup>

Having said this, Articles 44 and 46 should be applied sensitively so that they do not result in taking away the autonomy of the Indigenous people involved. The International Law Association, in its commentary on Articles 44 and 46 suggests that collective and individual

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<sup>90</sup> Wenona Singel ‘Indian Tribes and Human Rights Accountability’ (2012) 49 San Diego L.Rev. 567, pp 610-11.

<sup>91</sup> Ibid p 568.

<sup>92</sup> Similar provisions exist in the 3 *American Declaration on the Rights of Indigenous Peoples* in Article XXII (international norms) and Article XXXII (equality of men and women). A report of the International Law Association says that conforming to international human rights standards are an implicit requirement for all rights set out in the Declaration. See International Law Association, Rights of Indigenous Peoples Committee (n 47 ) p 18. For a view that the Declaration emphasizes individual human rights at the expense of collective rights, see Karen Engle, “On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights”, (2011) 22 (1) *European Journal of International Law* 141

<sup>93</sup> *Working Group* (2002) (n 6 ) para 67.

<sup>94</sup> In Canada, for example, the aboriginal and treaty rights protected under the Canadian Constitution are guaranteed equally to male and female persons: *Constitution Act* (n 43) s 35(4). In Ecuador, the Constitution provides that the exercise of rights by Indigenous peoples cannot breach the rights of “women, children and adolescents”: *Constitución del Ecuador* art 57(10), online: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>

rights “must be properly balanced in order to ascertain how and to what extent both rights can be accommodated.”<sup>95</sup> What this means in the case of the Cherokee Freedmen and the Santa Clara Pueblo, is that the tribes’ actions must be scrutinized, but the result of the scrutiny is not a foregone conclusion.

*(ii) The necessity of genealogical connection for membership*

The nuances needed for an appropriate balance is especially important in evaluating the appropriate genealogical connection needed to become a member – often referred to as the “blood quantum” rule. Kirsty Gover argues that a genealogical connection can play a legitimate role in the customs and traditions of an Indigenous people.<sup>96</sup> Canada’s Royal Commission on Aboriginal Peoples came to a different position in its 1996 Report. The Commissioners, the majority of whom were Indigenous, clearly saw Indigenous nations as political units, not ethnic enclaves:

The Commission concludes that under section 35 of the *Constitution Act, 1982*, an Aboriginal nation has the right to determine which individuals belong to the nation as members and citizens. . . . . [However] it cannot specify a minimum blood quantum as a general prerequisite for citizenship. Modern Aboriginal nations, like other nations in the world today, represent a mixture of genetic heritages. Their identity lies in their collective life, their history, ancestry, culture, values, traditions and ties to the land, rather than in their race as such.<sup>97</sup>

Similarly, for Michael Oeser, the question of who is a tribal citizenship should “speak to a person’s political identity, as opposed to ancestral or cultural identity.”<sup>98</sup> Oeser argues that American tribes should abandon exclusive reliance on minimum blood quantum or lineal descent in determining citizenship, and instead adopt two-part citizenship requirements based on lineal descent and non-genealogical criteria such as birth within the nation, birth to citizen parents, residency, cultural integration, historical knowledge, governmental knowledge, civil service.<sup>99</sup> Articles 44 and 46 does not provide an *a priori* answer to the debate on genealogical connection, and will have to be applied in the context of situations as they arise.

*(iii) Application of the Declaration on tribal governments*

If there is an irreconcilable conflict between international standards and the “customs and traditions” of Indigenous people the next challenge is to decide how those international standards should be implemented. The United Nations standards apply only to States, not tribes, and accordingly American tribes, to the extent that they are exercising inherent tribal jurisdiction, do not come under the purview of these standards. This has led lawyer Greg Rubio to suggest that

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<sup>95</sup> International Law Association (n 47 ) p 18.

<sup>96</sup> For a discussion supporting the “blood quantum” rules, see Kirsty Gover, ‘Indigenous Membership and Human Rights: When Tribalism meets Liberalism,’ Handbook of Indigenous Peoples’ Rights, eds Corinne Lennox and Damien Short, Abingdon, Routledge, 2016.

<sup>97</sup> Royal Commission on Aboriginal Peoples (n 68 ) p 227.

<sup>98</sup> Michael D. Oeser,, “Avoiding Extinction, Preserving Culture: Sustainable, Sovereignty-Centered Tribal Citizenship Requirements” ( 2015). North Dakota Law Review 1, p.4 online: <http://ssrn.com/abstract=2647111>

<sup>99</sup> Ibid, p.29.

the United States government should be responsible for ensuring that international standards relating to discrimination apply to tribal governments.<sup>100</sup> In the case of the Cherokee Freedman, tremendous federal government pressure, including threats to withhold funding, ultimately led to the Cherokees' reversal of their decision to disenroll the Freedmen. While the actions of the United States government clearly interfered with the sovereignty of the tribe, under Rubio's approach, the American government could be seen as fulfilling its obligations under international law.

The idea that only States have the power to ensure that Indigenous people comply with the standards set out in the Declaration seems counterintuitive, given that the thrust of the Declaration is to recognize greater autonomy for Indigenous peoples. It also seems odd that the Indigenous peoples that are recognized as having self-determination powers under the Declaration would not also be bound to comply with the Declaration itself. This is especially true for Tribal governments that have endorsed the UN Declaration.<sup>101</sup> In general, those tribes which have endorsed the Declaration as a means to enforce the individual and collective rights of their citizens against the State, including by asserting greater control over proposed resource development activities which threaten traditional lands and sacred sites.<sup>102</sup> However, it would seem very odd that a tribe would endorse the Declaration but argue that the provisions of the Declaration did not apply to the operations of the Tribal government.<sup>103</sup> We could not find international precedent that addresses this situation, but there is a possibility of an approach that will provide for the application of international human rights standards directly on Indigenous peoples.

We suggest that the Declaration contemplates the creation of Indigenous entities that are not fully nation states, but that are sufficiently autonomous to be able to implement United Nations standards. By recognizing the right to determine community membership, as well as requiring that Indigenous peoples' institutions comply with international human rights standards, the

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<sup>100</sup> Greg Rubio 'Reclaiming Indian Civil Rights: The Application Of International Human Rights Law To Tribal Disenrollment Actions' (2009) 11 Oregon Review of International Law 1.

<sup>101</sup>For example, on April 12, 2010, the Pit River Tribe of Northern California became the most recent tribe after the Gila River Tribe of Arizona and the Seminole Nation of Oklahoma to officially affirm the Declaration. See <http://indiancountrytodaymedianetwork.com/2012/04/10/pit-river-tribe-endorses-undrip-107398>. Similarly, on February 18, 2011, the Cherokee Nation Tribal Council unanimously passed a resolution applauding the government of the United States for endorsing Declaration. See: <http://indiancountrytodaymedianetwork.com/2011/02/18/ Cherokee-nation-tribal-council-meeting-ends-approvals-18427>; *A Resolution Applauding the United States Government for Endorsing the United Nations Declaration of the Rights of Indigenous Peoples*, COUNCIL OF THE CHEROKEE NATION, No. R-06-11 (Dec. 3, 2011), available at <https://cherokee.legistar.com/Legislation.aspx> (change the search year to "2011"; search for "R-06-11")

<sup>102</sup> See for example the efforts of the Pit River Tribe to protect sacred sites at Medicine Lake from proposed geothermal development: <http://indiancountrytodaymedianetwork.com/2012/04/10/pit-river-tribe-endorses-undrip-107398>

<sup>103</sup> We are not aware of any tribes that have expressly adopted (rather than endorsed) the Declaration to date. However, we note that the Navajo Nation Human Rights Commission, which relies primarily on Navajo law, has chosen to also draw on aspects of the Declaration in advocating for human rights members on behalf of Navajo Nation members. This has included calling for legislative reform within the Navajo Nation to bring the Navajo articulation of self-determination in its own legislative code in line with the more forceful language in the Declaration. See Kristen A. Carpenter and Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 Cal. L. Rev. 173 (2014) p 223. Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol102/iss1/8>.

Declaration implicitly necessitates the creation of Indigenous political entities with governance structures capable of ensuring that the customs, policies and laws of the Indigenous people conform to international standards. In this model, Indigenous authorities would have the jurisdiction and obligation to impose international standards directly without requiring recourse to the nation state. This would at least recognize that Indigenous peoples were bound by the provisions of the Declaration and that indigenous decision-making bodies could be the subject of comment by international bodies, in the same way that States can be the subject of such comment. Whether States also have a concomitant obligation to ensure that Indigenous peoples are complying with the terms of the Declaration is not answered by this approach. It may be that State obligations under the Declaration remains, but to the extent that Indigenous peoples themselves address the limitations imposed by Articles 44 and 46, States may show deference to the Indigenous approach. Or it may be that the State has no obligation to monitor compliance with the provisions of the Declaration once the Indigenous people act within their jurisdiction to determine membership. While a more complete exploration of this issue is not possible within the framework of this Chapter, it is a question that will have increasing relevance as membership issues become prominent.<sup>104</sup>

*D. What does it mean to have citizenship in the States in which they live?*

The right to obtain citizenship is the right of Indigenous individuals and reinforces Article 6, which states that “Every Indigenous individual has a right to a nationality.”

This provision in Article 33 prevents the State from denying citizenship to a member of an Indigenous community. Ecuador implements this right in its Constitution as follows:

Ecuadorian nationality is a political and legal bond between individuals and the State, without detriment to their belonging to any of the other Indigenous nations that coexist in plurinational Ecuador.<sup>105</sup>

The Constitution of Bolivia similarly provides for a clear expression of the coexistence of Indigenous membership and state citizenship by permitting individuals to register their cultural identity on documents issued by the State, such as passports and citizenship documents.<sup>106</sup>

But this Article does more than provide for a passive obligation to permit members of Indigenous communities to obtain citizenship in the State. Combined with the right to a nationality in Article 6, and the ameliorative purpose of the Declaration, this Article should be interpreted as requiring States to take positive steps to facilitate registration as citizens. While we have found no comments on this part of Article 33 in international or domestic law, a case under the American Convention on Human Rights addresses the issue of registration. The Inter-American Court of Human Rights held in *Sawhoyamaxa Indigenous Community v. Paraguay*, that Paraguay had the obligation to "implement mechanisms enabling all persons to register their

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<sup>104</sup> *Singel* (n 90) 611 ff. Singel proposes the creation of an intertribal human rights system to provide external accountability for tribal decisions.

<sup>105</sup> *Constitución del Ecuador* (n 94 ) s 6.

<sup>106</sup> *Constitución Política del Estado Plurinacional de Bolivia* (n 40) art 30 (II)(3).

births and get any other identification documents,"<sup>107</sup> especially in the case of vulnerable groups.<sup>108</sup> In *Sawhoyamaxa*, the court held that Paraguay had violated several individuals' right to a legal personality,<sup>109</sup> as it failed to register 18 out of the 19 Sawhoyamaxa people (mostly children) who died due to preventable diseases while living along the roadside near a pending land claim area.<sup>110</sup>

*E. What are the rights with respect to structures and institutions (Article 33.2)?*

The right in Article 33.2 to "determine the structures and to select the membership of their institutions in accordance with their own procedures" is very similar to Article 34, which recognizes Indigenous peoples' right to "promote, develop and maintain their institutional structures."<sup>111</sup> There are three differences between the Articles. First, Article 33.2 refers to structures and institutions related to membership, while Article 33 refers to a right to develop institutional structures in general. Second, Article 33.2 specifically includes the right to select the membership of the institutions, whereas Article 34 is silent on this point. Third, Article 34 states that the institutions must conform to "international human rights standards," whereas Article 33.2 is silent on this point.

There was no discussion of this difference during the drafting stages, and it is not necessary to make fine distinctions between these two Articles. The overall intent of these Articles, taken together, is clear: Indigenous peoples have the right to establish their own institutional structures, which necessarily includes the right to decide the composition of its members. International human rights standards apply to both Articles, either because it is directly mentioned (Article 34) or because of the application of Article 44 (gender equality) and Article 46 (human rights and good governance).

## **V. Analysis of Article 35: Right to Determine Responsibility of Members**

This Article provides that "[i]ndigenous peoples have the right to determine the responsibilities of individuals to their communities." The wording is curious, especially in light of Article 4 which provides for the "right to autonomy or self-government".

Article 35 raises the following issues:

- (A) What is the difference between determining responsibilities under Article 35 and having a right to autonomy or self-government in Article 4?
- (B) Are there limits on the types of responsibilities that can be assigned to individuals?

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<sup>107</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Series C No. 146. (March 29, 2006) para193.

<sup>108</sup> *Ibid* para. 189.

<sup>109</sup> *Ibid* para. 194.

<sup>110</sup> *Ibid* para. 190 and para. 178.

<sup>111</sup> The *American Declaration* has a similar provision in Article XXI.

A. *What is the difference between determining responsibilities in Article 35 and having a right to autonomy or self-government in Article 4?*

In a liberal democratic state, one would usually cast the relationship between individuals and communities as one where citizens have the presumed right to live autonomously, subject to limitations established by the State in order to ensure the welfare of the citizenry as a whole. The corollary is that if there is no rule prohibiting or prescribing a specific action, there is no requirement to conform to any particular form of behaviour.

By contrast, Article 35 contemplates the possibility of a different type of relationship within Indigenous communities. It is not a relationship based on coercive laws imposed on individuals through the organs of the State, but rather a relationship based on individual members assuming responsibilities to the collective. The responsibilities can be articulated as a set of expected behaviours rather than a list of prescriptive rules enforced through rigid hierarchies found in the legislatures, police and judiciaries of the nation State. In an Indigenous society, power may be more diffuse and norms may be established through mechanisms such as feasts, ceremonies and informal dispute resolution.<sup>112</sup> In this sense, then, Article 35 is complementary to Article 4. Whereas Article 4 can be seen as creating space for Indigenous agency through the recognition of self-determination, Article 35 articulates the relationship between individuals and the collective within that space.

In making this observation, we do not intend to essentialize Indigenous social structures, and we note that Article 35 could also take in a wide range of modalities that include the fairly structured governance structures found in American tribes. The Indian Law Resource Centre in the United States, for example, sees Article 35 as a basis for tribes “to make their own laws about what conduct is unlawful, and to require that all persons—Indian or non-Indian—abide by such tribal laws.”<sup>113</sup>

B. *Are there limits on the types of responsibilities that can be assigned to individuals?*

We have noted above an early version of this Article contained a clause requiring the exercise of this right to conform to international human rights standards. The clause was removed, but in our view, Article 44 (gender equality) and Article 46 (human rights and good governance), apply to Article 35 for the same reasons that these standards apply to Article 33.<sup>114</sup>

A more challenging limit will be the presence of State legislation which conflicts with the responsibilities assigned by Indigenous peoples.<sup>115</sup> Those issues are addressed in this book on discussions on self-determination in Chapters 4 and 5.

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<sup>112</sup> Val Napoleon, ‘Living Together: Gitksan Legal Reasoning as a Foundation for Consent’ in Jeremy Webber and Colin M. Macleod (eds) *Between Consenting Peoples: Political Community and the Meaning of Consent* (UBC Press, 2010) pp 45–76 and John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press, Toronto 2010) pp 23-106.

<sup>113</sup> Indian Law Resource Centre, “Using the Declaration to End Violence Against Native Women” (nd) <<http://www.indianlaw.org/content/using-declaration-end-violence-against-native-women>> accessed April 14 2014.

<sup>114</sup> See International Law Association (n 47 ) p 18: “the duties that an indigenous community would require of its members must comply with international human rights standards.”

<sup>115</sup> See Shin Imai ‘Self-determination and the State’, in Benjamin Richardson et al (n64 ).

## V. Analysis of Article 36: The Right to Maintain Relations across Borders

The territories of Indigenous peoples long predate the borders of the modern nation-state, and in most cases, national borders do not conform with the pre-existing territories of Indigenous peoples. As a result, Indigenous peoples' ability to maintain their culture and traditional practices may be significantly compromised where their territories and traditional lands are intersected by international borders. Article 36 of the Declaration attempts to address this issue by recognizing the right of Indigenous peoples to maintain and develop contacts, relations and activities for spiritual, cultural, economic and political activities across borders, and by placing a positive obligation on States to take "effective measures" to ensure the implementation of the right.

The text of Article 36 raises the following issues:

- (A) What are the types of "contacts, relations and cooperation" that would constitute "effective measures"?
- (B) What "effective measures" can be taken with respect to crossing international borders?

*A. What are the types of "contacts, relations and cooperation" that would constitute "effective measures"?*

One avenue by which Indigenous peoples have effectively exercised their rights under Article 36 is through international organizations which promote relations and political connections across national borders.

### *(i) The Draft Nordic Saami Convention*

The most ambitious initiative to address cross-border issues is the draft Nordic Saami Convention. If ratified, the Convention could meet or in some aspects exceed the standards for the facilitation of cross-border Indigenous rights established under Article 36.

The Saami are a nomadic people who follow the seasonal migration of reindeer herds across the international boundaries of Norway, Sweden, Finland, and the Kola Peninsula of the Russian Federation.<sup>116</sup> In 2005, Norway, Sweden, Finland, and the Saami people released a draft convention that would set out the framework by which the States would recognize the rights of the Saami across state borders.<sup>117</sup> The aim was to have the Convention finalized by 2015, but as of the date of writing, the process is on-going.<sup>118</sup>

According to Timo Koivurova, the draft Convention would exceed the scope of rights under Article 36 by going beyond facilitating cooperation between groups, to exercising collective self-

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<sup>116</sup> Nigel Banks and Timo Koivurova, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing, Oxford 2013).

<sup>117</sup> *Ibid* p 1.

<sup>118</sup> *Ibid* p 1.

determination across international borders.<sup>119</sup> The Convention would create a “gradual process whereby the Saami and the three Nordic nations may develop their relationship in such a manner that we might perceive four nations, coexisting in the same physical space, composed of the territories of three States.”<sup>120</sup> The draft Convention provides, among other things, for the right of the Saami to compensation and profit-sharing in relation to natural resource use, as well as for the right of the Saami to be engaged in the co-determination and environmental management of lands and resources in areas traditionally used by the Saami.<sup>121</sup>

However, the reluctance of some States to finalize the draft in its current form emphasizes the contentious nature of state recognition of cross-border Indigenous rights.<sup>122</sup> For example, the draft Convention falls short of fully harmonizing States’ practices and legislation with respect to how the Saami rights-holder is defined. As currently worded, the draft emphasizes the homogeneity of the Saami, but also provides different ways for the participating States to define who is Saami.<sup>123</sup>

Nevertheless, if adopted, the Convention will stand as an example of how the cross-border rights of an Indigenous people can be recognized and facilitated by nation state, and of how this recognition may both co-exist with and pose a challenge to pre-conceived notions of state sovereignty.

#### *(ii) The Inuit Circumpolar Conference*

The Inuit Circumpolar Council (ICC), an NGO created in 1977 to represent 55,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia), is one group which is actively exercising the right to maintain and develop cultural, spiritual, social, and economic relations across international boundaries.<sup>124</sup> The ICC aims to “strengthen unity among Inuit of the circumpolar region; promote Inuit rights and interests on an international level; develop and encourage long-term policies that safeguard the Arctic environment; and seek full and active partnerships in political, economic and social development in the circumpolar region.”<sup>125</sup> The ICC’s objectives of strengthening both cultural and political relations across national borders falls squarely within the rights described in Article 36.

The ICC is active on an international level in relation to a variety of issues including: the promotion of the Inuit language, trade, the environment, resource use, and human rights. To this end, the ICC maintains involvement in a number of international bodies such as the Arctic Council, the United Nations, the World Summit on Sustainable Development, the Convention on the Trade of Endangered Species, the World Intellectual Property Organization, the Organization

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<sup>119</sup> Timo Koivurova, ‘Can Saami Exercise Their Self-Determination?’ in Banks and Koivurova (n 116 ) p 123.

<sup>120</sup> Ibid p 124.

<sup>121</sup> *Banks and Koivurova* (n 116) pp 4-5.

<sup>122</sup> Ibid p 5.

<sup>123</sup> T Joona, ‘The Subjects of the Draft Nordic Saami Convention’ in Banks and Koivurova (n 116 ) p 257.

<sup>124</sup> Inuit Circumpolar Council Home Page < <http://www.inuitcircumpolar.com/index.php?Lang=En&ID=1>> accessed April 15 2013.

<sup>125</sup> *Inuit Circumpolar Council*, <<http://www.inuitcircumpolar.com/icc.html>> accessed July 28 2014.

of American States, and the International Whaling Commission.<sup>126</sup> Between 2002 and 2006, the ICC focused particularly on the Arctic Council, an eight-nation intergovernmental body where governments and Indigenous peoples' organizations work together on issues related to the environment and sustainable development in the Arctic.<sup>127</sup> In addition, the ICC holds consultative status II at the United Nations and was active within the UN and its subsidiary bodies, including the UN Human Rights Commission and its Working Group on Indigenous Populations. The ICC participated in the drafting of the Declaration, and cites the elimination of any specific reference to "the principle of territorial integrity of States" as one of its key successes.<sup>128</sup>

The ICC's work in uniting and promoting Inuit interests exemplifies how Indigenous groups who are divided by state borders have successfully worked together to build connections across international boundaries for both cultural exchanges and political coordination. In this sense, the ICC's work is a positive example of Indigenous peoples exercising the right to maintain and develop cultural, social, political and economic relations across national borders.

However, for many Indigenous groups the promotion of cross-border connections will have little practical utility unless States also fulfil their obligation under Article 36 to facilitate the movement of Indigenous peoples across national borders. As the subsequent section will suggest, significant challenges arise in respect of the implementation of Article 36 where perceived issues of border security and national autonomy are engaged.

#### *B. What "effective measures" can be taken with respect to crossing international borders?*

Globally, the extent to which States acknowledge and facilitate the cross-border rights of Indigenous peoples ranges from Ecuador's explicit constitutional guarantee of the right of Indigenous peoples to develop contacts with peoples divided by international borders,<sup>129</sup> to the United States' construction of a militarized fence on the United States-Mexico border. The following examples provide an overview of the considerable disparity amongst States' approaches to ensuring that Indigenous peoples divided by international borders can exercise their rights under Article 36.

##### *(i) Africa's Recognition of the Rights of Nomadic Peoples*

In Africa, there is wide-spread state discrimination towards Indigenous groups who carry on a nomadic way of life across international borders. For example, the African Commission on Human and Peoples' Rights describes the marginalization of nomadic groups such as the Pygmies/Batwa, who practice a forest-based culture and experience varying degrees of exclusion and discrimination in a number of different nations including Rwanda, Burundi, Uganda, the Democratic Republic of the Congo, Cameroon and Congo-Brazzaville.<sup>130</sup> Rather than facilitating the right of the Pygmies to maintain their nomadic way of life, which spans a number of

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<sup>126</sup> *Inuit Circumpolar Council* <<http://www.inuitcircumpolar.com/activities--initiatives.html>> accessed July 28 2014.

<sup>127</sup> *Inuit Circumpolar Council* <<http://www.inuitcircumpolar.com/icc.html>> accessed July 28 2014.

<sup>128</sup> *Inuit Circumpolar Council* <<http://www.inuitcircumpolar.com/un-declaration-on-the-rights-of-indigenous-peoples.html>> accessed July 28 2014.

<sup>129</sup> *Constitución del Ecuador* (n 94 ) art 57(18).

<sup>130</sup> *African Commission on Human and Peoples' Rights* (n 31 ).

international borders, steps taken by States to protect the Pygmies are made with the goal “to assimilate the Pygmies into the dominant culture and not to promote multiculturalism.”<sup>131</sup> In some States, officials consider that the “permanent settlement of the Pygmies is inevitable and irreversible, if they are to become true partners in the national economy.”<sup>132</sup>

Similarly, other African States use the notion of the sanctity of borders to deny the nomadic inhabitants the right to associate with their kin or to access resources in different countries. For example, nomadic inhabitants of the Kidal region of Mali have experienced harassment as they attempt to cross into Algeria. A report of the African Commission on Human and Peoples’ Rights states that these nomadic peoples have been beaten, searched, or imprisoned when they try to cross borders to obtain basic necessities.<sup>133</sup>

As these examples suggest, where States refuse to take positive steps to facilitate border crossing, it is difficult for many nomadic peoples in Africa to realize the practical benefits of their rights under Article 36.

(ii) *United States – Canada border*

The United States and Canada recognize, to a limited extent, the rights of Indigenous peoples to maintain and develop their culture across the United States -Canada border. However, although the United States and Canada differ in their approach to cross-border Indigenous issues, neither country has demonstrated complete adherence to the principles set out in Article 36.

Perhaps the most significant acknowledgement of the rights of Indigenous peoples whose territory crosses the United States -Canada border is the United States’ recognition of a right for Indigenous people who possess the requisite blood quantum requirement to pass freely from Canada to the United States. This right is recognized by the United States through the Jay Treaty, and has been subsequently acknowledged by American courts and codified in its immigration laws.<sup>134</sup> As a result, Aboriginal people born in Canada who meet the blood quantum requirement prescribed by the state are entitled to enter the United States for purposes of employment, study, retirement, investing and/ or immigration.<sup>135</sup>

In granting the right to free passage for Canadian-born Aboriginal people, the United States explicitly acknowledges the rights of Indigenous peoples to maintain their culture across international borders. However, this recognition is limited by the fact that applicants must provide documentation demonstrating that they possess 50% ‘American Indian blood.’<sup>136</sup> The fact that Canadian law does not define who is Aboriginal by blood status creates further

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<sup>131</sup> Ibid p 36.

<sup>132</sup> Ibid p 36.

<sup>133</sup> Ibid p 39.

<sup>134</sup> Sapphire Diamant-Rink, ‘The Dividing Line: Borders as an International Indigenous Human Rights Issue’ (2009) 30 *Im. & Nat.L.Rev.* 911, p 913. See also *McCandless v United States ex rel. Diabo*, 25 F.2d 71 (3<sup>rd</sup> Circuit Court of Appeal); Immigration and Nationality Act 1965 (US) s 289.

<sup>135</sup> Embassy of the United States, Entering the United States: First Nations and Native Americans <<http://canada.usembassy.gov/visas/information-for-canadians/first-nations-and-native-americans.html>> accessed April 14, 2013.

<sup>136</sup> Ibid.

complications in an applicant's ability to establish his or her Indigenous identity when crossing the border. Additionally, the fact that both Canada and the United States maintain the right to define who is an Indigenous person for cross-border purposes places an inherent limit on the extent to which these countries actively facilitate the rights under Article 36.

Unlike the United States, Canada does not recognize that Aboriginal people have an inherent right to cross the Canada- United States border. Instead, Canadian courts have approached the right to free passage by considering the applicant's Aboriginal relationship to Canada in a historic and contemporary context.<sup>137</sup> Canada does not recognize the right to free passage unless an Aboriginal person can establish, that he or she is an Indian registered under the *Indian Act*.<sup>138</sup> While decisions of the Supreme Court of Canada have recognized the possibility of an Aboriginal right protected under Canada's *Constitution Act, 1982* to pass freely across the Canada-United States border, the Court has thus far failed to expressly confirm the existence of such a right for specific Indigenous groups.<sup>139</sup>

For Indigenous groups whose territories are bisected by the international border, such as the Mohawks of Akwesasne, the problems associated with the United States and Canada's failure to fully recognize cross-border rights are a daily reality. As discussed earlier in this Chapter, the United States -Canada border runs directly through the Akwesasne community. In Akwesasne in Canada, the Canadian government maintains that, because the Mohawks moved into the area after the Jay Treaty was signed, the Treaty does not apply (notwithstanding the fact that the lands are a traditional territory of the Mohawk).<sup>140</sup> On the United States side, Akwesasne members can exercise their rights to free passage if they meet the United States blood quantum requirements, but post 9/11 have to contend with significantly increased border security.<sup>141</sup>

Akwesasne has had some success in having its rights implicitly recognized by the Canadian government. This Indigenous nation has successfully negotiated a remission order with Canada, which provides that Canada will not to collect taxes on goods acquired in the United States by a resident of Akwesasne for personal or household use.<sup>142</sup> Akwesasne has also negotiated a political protocol with the Canadian government addressing issues over which Akwesasne can exercise its inherent jurisdiction, including initiatives that support the social and economic development of Akwesasne, divestiture of federal lands, border crossing, and tax exemption.<sup>143</sup> The international community has further implicitly acknowledged that the Haudenosaunee (of which the Mohawks of Akwesasne are a part) maintain one national identity, notwithstanding

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<sup>137</sup> Nicole Terese Capton Marques, 'Divided We Stand: the Haudenosaunee, Their Passport and Legal Implications of Their Recognition in Canada and the United States' (2011-2012) 13 San Diego L.Rev. 385, pp 394-395.

<sup>138</sup> *Ibid.* p 395.

<sup>139</sup> Boos, Greg and McLawsen, Greg and Fathali, Heather, "Canadian Indians, Inuit, Metis and Metis: An Exploration of the Unparalleled Rights Enjoyed by American Indians Born in Canada to Freely Access the United States" (2014). 4 Seattle J. Envtl. L. 343, , pp. 355-359.

<sup>140</sup> *Diamant-Rink* (n 134 ) p 919.

<sup>141</sup> *Ibid* p 920.

<sup>142</sup> *Akwesasne Residents Remission Order* R.5.c.41 (3<sup>rd</sup> Supp.) 3/7/91 *Canada Gazette* Part II. Vol. 125 No.4.

<sup>143</sup> 'Political Protocol Between Her Majesty the Queen and the Mohawks of Akwesasne' (May 30, 2012)

<<http://www.akwesasne.ca/PDF/PoliticalProtocol.pdf>> accessed April 14 2013.

divisions imposed by the international border, through the recognition of the Haudenosaunee passport by a number of governments.<sup>144</sup>

In 2010, the Mohawks raised their border problems with the Permanent Forum on Indigenous Issues, which urged Canada and the United States to implement Article 36:

The Permanent Forum recommends that the Governments of Canada and the United States address the border issues, such as those related to the Mohawk Nation and the Haudenosaunee Confederacy, by taking effective measures to implement article 36 of the United Nations Declaration on the Rights of Indigenous Peoples, which States that Indigenous peoples divided by international borders have the right to maintain and develop contacts, relations and cooperation with their own members as well as other peoples across borders.<sup>145</sup>

*(iii) United States – Mexico border*

Unlike their northern counterparts, Indigenous peoples on the United States -Mexico border do not have the benefit of explicit recognition of the right to free passage in international treaties.<sup>146</sup> In recent decades, the rights of Indigenous peoples whose territories lie on the United States-Mexico border have been further marginalized by the increased militarization of the United States border. As Angelique EagleWoman notes, United States policies implemented under the premise of ensuring national security run directly counter to Article 36 of the Declaration, and could have the effect of criminalizing the cultural, social and economic ties of Indigenous groups whose territories cross the border.<sup>147</sup>

The most visible example of the increased militarization is the ongoing construction of a 700-mile double-layered fence which will separate the United States from Mexico, and in so doing, disrupt the lives and culture of Indigenous groups whose territories cross the international border.<sup>148</sup> According to EagleWoman, “[s]acred sites are being desecrated by the Border Patrol, and access to such sites will be cut off if the double-layered fence is put into place.”<sup>149</sup>

For the Tohono O’odham, whose reservation is contiguous with the United States -Mexico border, the United States’ increasingly militarized approach is a significant impediment to maintaining social, cultural, spiritual and economic ties with members on the opposite side of the border. Members who were once able to travel freely across the border are now forced to drive to

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<sup>144</sup> *Captan Marques* (n 137 ) pp 388-389. Sixteen countries have recognized the Haudenosaunee passport since 1923, although the recognition is often considered to be symbolic or a matter of diplomatic courtesy.

<sup>145</sup> *Permanent Forum on Indigenous Issues*, (n 84 ) para 98.

<sup>146</sup> *Diamant-Rink* (n 134 ) p 916. Diamant-Rink notes, however, that some argue that the Treaty of Guadalupe Hidalgo, which originated from the resolution of the Mexican War in 1848 "recognized the right of indigenous peoples living along the border to maintain their land, culture, and religion regardless of the land transfer and new political border."

<sup>147</sup> Angelique Townshend EagleWoman, 'Fencing off the Eagle and the Condor, Border Politics, and Indigenous Peoples' (September 11, 2008) ABA Section of Environment, Energy and Resources: National Resources & Environment, Vol.23, Fall 2008, 33-36 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1266866](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266866)> accessed April 15 2013.

<sup>148</sup> *Ibid* p 34.

<sup>149</sup> *Ibid* p 35.

checkpoints which may be hours from their homes; furthermore, there have been reports of harassment and of members being turned away at the border by border officials.<sup>150</sup> The increased militarization also presents difficult economic and cultural choices for the Tohono O’odham, such as whether to bear the cost of developing government ID cards to cross the border on their own lands, and whether to take on the expense of policing the border themselves or to allow the United States or Mexican government law enforcement officers onto their lands.<sup>151</sup>

On the other hand, the Kickapoo in Texas have successfully advocated for the passage of legislation which allows tribe members to pass over the United States-Mexico border for specific purposes, including to attend religious sites and to work as migrants in the United States.<sup>152</sup> According to Sapphire Diamant-Rink, the legislation “recognizes the unique cultural needs of the Kickapoo, granting them passage and the services provided to other Indigenous groups living solely in the United States.”<sup>153</sup>

### *C. Conclusion on cross-border rights*

Ultimately, the meaningful exercise of Indigenous cross-border rights is in large part dependent on the willingness of States to move past perceived concerns about state autonomy or long-standing discrimination against nomadic peoples towards the active facilitation of Article 36. As the examples above illustrate, States have been inconsistent in ensuring the implementation of Article 36, and in some cases, appear to be taking measures directly contrary to the positive obligation imposed by the Article. Unless States are willing to actively fulfil their obligations pursuant to the Declaration, it will be impossible for Indigenous peoples to fully realize their rights to maintain and develop cultural, social, economic and political connections across the international boundaries that have been imposed over their traditional lands.

## **VI. Conclusion**

In this chapter we have examined Indigenous peoples’ rights related to membership and identity as set out in the Declaration from the interaction of three perspectives – the customs and traditions of Indigenous communities; the laws of the State; and international law. These perspectives take different approaches to the subject matter of this chapter, but we can suggest broad convergence on each of the Articles.

Articles 9 and 33 raise issues related to indigeneity. What has emerged from the study in this chapter is that the “pre-invasion” paradigm developed primarily for the Americas, Australia and New Zealand, is a useful tool in conceptualizing who are indigenous and who not. However, even within that paradigm, there are situations, such as the Métis in Canada or the Maroons in South America, who do not fit neatly into the “pre-invasion” model. When we move to Africa and Asia, this paradigm becomes quite awkward to apply because of a number of factors, including a history of internal migrations and the dynamics of post-colonial development. This leaves us, we feel, with three contextual factors to consider in the recognition of Indigenous

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<sup>150</sup> *Diamant-Rink* (n 134) p 917.

<sup>151</sup> *Ibid* p 917.

<sup>152</sup> *Ibid* p 917; *Texas Band of Kickapoo Act*, 25 United States. §§ 1300b-13 (d) (1983).

<sup>153</sup> *Diamant-Rink* (n 134 ) p 917.

peoples under the Declaration. To be considered “indigenous” in the context of the Declaration, the group in question would:

1. self- identify as culturally and linguistically distinct from other groups in the population;
2. form a “non-dominant” sector of society; and
3. have a historical connection to a collective territory.<sup>154</sup>

Articles 9 and 33 also raise issues related to obligations of the State and the Indigenous nation or community to conform to international human rights standards. In our discussion on Article 33, we describe decisions made by American tribes on membership which may be contrary to established human rights norms. We argue that the control of membership is subject to the gender equality and international human rights norms set out in Article 44 and 46 of the Declaration. Furthermore, we raise the possibility that Indigenous governments, not State governments, are responsible for ensuring conformity with these norms. States also have responsibilities to recognize membership decisions made by Indigenous peoples and to avoid discriminating among members of an Indigenous people. We also argue that the ameliorative nature of the Declaration places positive obligations on States to ensure that Indigenous peoples are able to access State citizenship and to reconstitute Indigenous groups where such groups have been fragmented or dispersed due to the effects of colonialism.

Article 35 addresses Indigenous peoples’ responsibilities to their communities, and in some ways addresses the same issue as Article 4 (autonomy and self-government). In our view the wording of Article 35 evokes different societal structures and creates a space for intra-community relationships that do not necessarily mimic the hierarchical structures of the nation-state. The responsibilities assigned to members, however, are bound by the human rights standards outlined in Articles 44 (gender equality) and 46 (human rights and good government).

The discussion of contacts across borders set out in Article 36 suggests that Indigenous peoples have a right to identify themselves irrespective of the existence of State boundaries. However, States’ willingness to implement and facilitate the cross-border rights of Indigenous peoples is situation-specific and is often recognized in a limited manner, secondary to national security concerns. Arrangements which facilitate border-crossings and government funding for Indigenous organizations such as the Inuit Circumpolar Council and the proposed Nordic-Saami Convention represent positive steps towards realizing the rights of Indigenous peoples across international borders. The construction of the US-Mexico fence and Canada’s refusal to acknowledge the Akwesasnes’ right to bring goods across the border, however, reflect instances of ongoing reluctance on the part of some States to fully recognize the cross-border rights of Indigenous groups.

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<sup>154</sup> The 2005 guidelines from the World Bank do not mention a chronological “pre-invasion” criterion in their description of indigenous peoples. World Bank, ‘Operational Manual, OP 4.10 Indigenous Peoples’, 2005, sections 3-5, <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564187~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html>> accessed 13 April 2013.

The views expressed in this chapter are necessarily preliminary. We have attempted to illustrate examples of current state practices that may, or may not, be consistent with the provisions of the Declaration. The complex issues described above cannot be resolved in the abstract- rather, they must be addressed through the ongoing implementation of the Declaration. We look forward to observing developments in the years to come.