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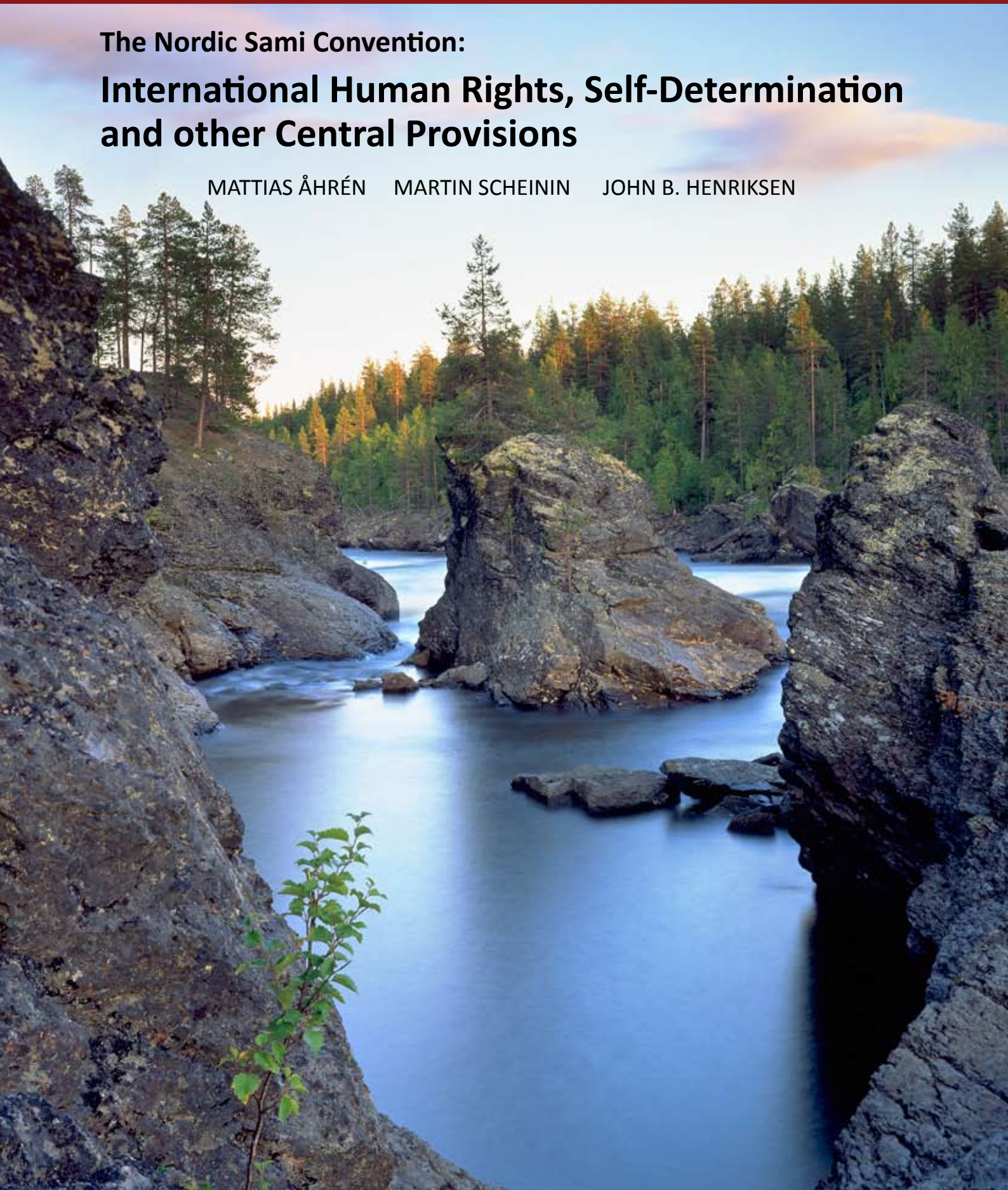
The Nordic Sami Convention:

International Human Rights, Self-Determination and other Central Provisions

MATTIAS ÅHRÉN MARTIN SCHEININ JOHN B. HENRIKSEN



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Preface

Gáldu Čála No. 3/2007 is in its entirety devoted to the draft Nordic Sami Convention, which the Nordic expert group presented in November 2005 following three years of work. The governments and Sami parliaments in the different countries intended to complete their consultation and impact assessment processes during the autumn of 2007. As this is being written, the joint ministerial meeting just closed, and we now know that this process was not completed in Finland. This means it will take longer than assumed before the draft Sami Convention can be adopted and finally enter into force.

The Nordic Sami Convention is a new international instrument / human rights convention with the object "to confirm and strengthen such rights for the Sami people as to allow the Sami people to safeguard and develop their language, culture, livelihoods and way of life with the least possible interference by national borders" (Article 1).

Our three authors in this issue are internationally recognised legal professionals with extensive experience with work on the rights of indigenous peoples. As members of the expert group for the Nordic Sami Convention, they have contributed their extensive expertise in establishing the wording of the convention.

In his article "Sami Convention", Mattias Åhrén provides an account of his own viewpoints and understanding of the expert group's work and the final version of the text. He also addresses some of the articles in the convention and how the individual provisions should be understood.

Martin Scheinin's article «Rights for individuals and peoples – towards a Nordic Sami Convention» addresses how the draft convention relates to the Finnish constitution and international human rights standards when it is to be implemented. He discusses the fundamental changes that will result from this process and how to resolve these issues in a Finnish context.

The right of self-determination, which constitutes the basis for the recognition of all other rights of indigenous peoples, was considered so important that a separate expert group was established to review the article that addresses this right in the draft Nordic Sami Convention. The objective of the expert group was further clarification of how international law relates to the right of self-determination. The members of the expert group that prepared this background material were John B. Henriksen, Martin Scheinin and Mattias Åhrén. This issue of Gáldu Čála includes the memo prepared by Henriksen, Scheinin og Åhrén for the convention.

On behalf of Gáldu, we wish our readers an inspiring and informative read.

Content

THE SAAMI CONVENTION

BY MATTIAS ÅHRÉN

1. INTRODUCTION

The last few years, much of the attention when it comes to international standard setting activities on the rights of indigenous peoples has been on the draft UN Declaration on the Rights of Indigenous Peoples (the UN Indigenous Declaration) process, and to some extent, on the efforts to elaborate a declaration on the rights of the indigenous peoples of the Americas, undertaken under the auspices of the Organization of American States (the OAS Declaration).[1] These processes have been going on for quite some time, and not long ago, it appeared unlikely that they would ever be successfully concluded. Recently, however, at least the UN Indigenous Declaration process has arrived at a happy end. On 13 September 2007, the UN General Assembly adopted the UN Indigenous Declaration.[2] The future of the OAS Declaration process appears somewhat more uncertain. Both indigenous and state representatives agree that considerable cleaning of the text is needed before the OAS Declaration text is ready for adoption.[3]

Somewhat in the shadow of the above mentioned standard setting activities, yet another international standard setting exercise on indigenous peoples' rights was conducted during the years 2003-2005; that on a draft Nordic convention on the rights of the Saami people.

1 In addition, the Working Group on Indigenous Populations (WGIP) has during the last few years, in yet another standard setting exercise directly addressing the situation of indigenous peoples, elaborated upon a set of draft Guidelines on the Protection of the Cultural Heritage of Indigenous Peoples. Responding to a request by the Office of the UN High Commissioner on Human Rights, the Guidelines have been crafted by the Saami Council, in cooperation with WGIP member Mr. Yokota. For the latest version of the Guidelines, see UN Document E/CN.4/Sub.2/AC.4/2006/5. It remains uncertain, however, what will be the fate of these Guidelines. At the moment, it appears unlikely that the Guidelines will be acted upon by the UN system, at least not within a foreseeable future.

2 See UN Resolution A/61/1.67. The Declaration was adopted by vote, with 144 in favour, 4 against and 11 abstentions.

3 Rather naturally though, the indigenous and state representatives do not necessarily agree on what parts of the OAS Declaration needs to be improved

2. BACKGROUND OF THE EXPERT GROUP, ITS COMPOSITION AND WORKING METHODS

The Saami people is the indigenous people of northern Finland, Norway and Sweden as well as of the Kola Peninsula in the Russian Federation. As other indigenous peoples around the globe, the Saami people has since colonization been struggling for the recognition of its rights. In addition, having had its traditional areas divided by national borders drawn by others, the Saami people has repeatedly called on the countries in which the Saami population now finds itself residing to mitigate or preferably remove the problems these borders create for the fellowship of the Saami people.

Consequently, the Saami Council[4] in 1986 proposed that the four countries with Saami population should, jointly with the Saami people, elaborate a "Saami Convention" with the purposes of (i) underlining the Saami people's rights as an indigenous people and (ii) tackle the problems the national borders cause to the Saami. In 1996, Finland, Norway and Sweden appointed a committee to investigate the need for a Saami Convention. In 1998, the committee answered this question in the affirmative and recommended that an Expert Group be appointed to craft a draft Convention.

In November 2001, the governments of Finland, Norway and Sweden - and the Saami parliaments in the three countries[5] - decided that such an Expert Group should be appointed with the task to draft a Nordic Saami Convention. The members of the Expert Group were appointed on 13 November 2002. The Expert Group commenced its work at its first meeting on 28-29 January, 2003.

From the outset, there was a clear understanding among all relevant parties that the Saami Convention should be elaborated in complete and equal partnership between the four peoples involved; the Finnish, Norwegian, Swedish - and the Saami people. Consequently, the parties decided that the Expert Group should consist of one member appointed by each of the governments and one member appointed by each of the Saami parliaments.[6] In addition, each member had a substitute member. Almost all substitute members participated actively in the elaboration of the Saami Convention.

The Expert Group spent a little bit less than three years crafting the Saami Convention. During these years, the Expert Group convened on 15 occasions. In addition, throughout the elaboration of the

4 The Saami Council is an umbrella organization with 15 members appointed by the major Saami organizations in Finland, Norway, Russia and Sweden. Established in 1953, the Saami Council is probably the oldest international indigenous organization in the world. Prior to the establishment of the Saami parliaments, the Saami Council was the highest representative body of the Saami people.

5 In each of Finland, Norway and Sweden, a Saami parliament has been established. The Saami population in each of the three countries elects the members of the Saami parliament in general elections. The Saami parliament is thus the representative body of the Saami population in each of the three countries.

6 The Expert Group came to include some highly distinguished members. As Chair of the Expert Group was appointed Professor Carsten Smith, former President of the Norwegian Supreme Court. Professor Smith will serve as a member of the Permanent Forum on Indigenous Issues from 1 January 2008.The Expert Group also included Mr. Hans Danelius, former Supreme Court Judge in Sweden, who has also served on the European Commission on Human Rights as well as Chief Lawyer for the Swedish Ministry of Foreign Affairs, and Professor Martin Scheinin, former member of the UN Human Rights Committee and presently the UN's Special Rapporteur on Human Rights and Counter-terrorism. Professor Kirsti Ström Bull served as secretary of the Expert Group.

Saami Convention, smaller groups of members met on various occasions to discuss key issues in the Convention such as self-determination, land and resource rights and the definition of who is to be regarded as a Saami person under the Convention. Further, members of the Expert Groups, in particular the Chair and the secretary, met with a large number of Saami organizations, communities and individuals to inform themselves on what issues the Saami Convention should address. In this process, particular attention was paid to Saami activities across the national borders.

Before the second meeting of the Expert Group in April, 2003, the Chair of the Expert Group had prepared a first rough Saami Convention draft, which was presented at the meeting. Even though the Expert Group in the beginning of its work also considered several general and cross-cutting issues, already from the second meeting, the Expert Group's discussions essentially focused on the Chair's Convention draft. Based on these discussions, the Chair would present a revised text to the next meeting. This process would be repeated throughout the entire elaboration process. Before each meeting, individual members could also submit text proposals of their own to the Chair, who would then include them as his own proposal or as alternative language in the revised text he submitted prior to the subsequent meeting. Towards the end of the process, the tabling in advance of alternative language was (almost) a prerequisite, should the Expert Group consider the proposal.[7]

«On 26 October 2005, the Expert Group had agreed on a unanimous proposal for a Saami Convention text, which it presented to three governments and the three Saami parliaments in November 2005.»

On 26 October 2005, the Expert Group had agreed on a unanimous proposal for a Saami Convention text, which it presented to three governments and the three Saami parliaments in November 2005.[8]

The negotiations in the Expert Group were carried out in a good spirit where all members genuinely wished to reach a fair and balanced text which it is possible for the Saami parliaments to accept, and for the three countries to implement. Further, all members worked hard and constructively to meet this end. Generally speaking, good arguments were decisive, international legal standards the guiding light, and the process not allowed to be politicized. The Saami members of the Expert Group were treated as equal partners, and their arguments carried as much weight as those of the government appointees'. Much of the honour for the great working environment within the Expert Group must go to its Chair.

7 As a result of this working method, most provisions in the Convention have been scrutinized, discussed and negotiated by the Expert Group members on more than ten occasions. It is probably fair to say that there is not a single comma or full stop in the Convention text that has not been subject to the consideration by the Group and its members more than once. As outlined under Chapter 8, below, several national institutions have been invited to comment on the Convention text, following the completion of the Expert Group's work. In doing so, a number of institutions opposed to further recognition of Saami rights have criticized the Expert Group's proposals. But also such critical institutions have generally acknowledged that the Convention text is uncommonly coherent, logical, structured and well-argued.

8 Even though the Saami Convention presented is a consensus proposal, a cover letter to the Convention clarifies that the Finnish government appointees only with difficulty could accept certain provisions in the Convention, namely Article 3 on self-determination, Chapter IV on land and resource rights and Article 42 on reindeer husbandry as an exclusive right of the Saami people. The reference to Article 42 is confusing, to say the least. As will be further outlined below, in my opinion, in the negotiations on Article 42, the Saami appointees had to make the biggest concessions. Indeed, Article 42 in its final form only marginally deviates from a proposal on Article 42 tabled earlier by the Finnish government members themselves. Given this background, it is difficult to understand why it was necessary for the same Expert members to list Article 42 as one of the provisions they could only with difficulties accept.

3. SOME GENERAL FEATURES OF THE SAAMI CONVENTION

3.1 The foundation for the Saami Convention - an equal partnership between four peoples

As mentioned above, throughout the entire Saami Convention process, there was a clear understanding among all involved parties that the Saami Convention must be elaborated in complete and equal partnership between the four peoples concerned. Consequently, it would have been natural that in addition to Finland, Norway and Sweden, also the Saami people had been a formal party to the Convention. This was also the initial aspiration of the Expert Group, which in the early stages of its work devoted considerable time to this particular matter and also commissioned a legal opinion addressing the question of what effect the Saami people being a formal party to the Convention would have on the Convention's status as a legally binding international treaty. The legal opinion concluded that rendering the Saami people a formal party to the Saami Convention would most likely deprive it of its status as a legally binding instrument under international law. Faced with this reality, the Expert Group opted for a solution according to which only the states are formal parties to the Saami Convention, but where the Convention proclaims that the entering into force of, and any amendment to, the Convention requires the approval not only of the three states, but also of the Saami parliaments.[9] It is thus fair to say that the Saami Convention is a modern treaty between the Finnish, Norwegian and Swedish state-forming peoples, on one hand, and the Saami people, indigenous to the three countries, on the other.[10] Despite that the Saami people could not be formal parties to the Saami Convention, the Convention undeniably marks a new partnership between the Saami and the colonizing peoples.[11]

3.2 A rights convention

Another general matter that the Expert Group had to consider was whether the Saami Convention should be a rights convention or a frame-work convention.[12] The Expert Group did not dwell much on this issue, though. Without any real deliberations, a general understanding emerged among the members that the Saami Convention should be a rights convention. The members agreed that the provisions in the Convention should to the largest extent possible be crafted in a concrete manner, rendering them directly implementable into domestic legislation in each country. Consequently, if one studies the final

9 That the Expert Group initially nourished a desire that the Saami people should be a formal party to the Saami Convention was also reflected in the fact that early drafts of the Convention text contained certain provisions that proclaimed not only rights of, but also obligations on, the Saami people (to be carried out through the Saami parliaments). Once it was decided that the Saami people would not formally be a party to the Saami Convention, however, the provisions containing obligations on the Saami people were one by one out-phased from the Convention text.

10 Further, in addition to the Finnish, Norwegian and Swedish versions of the Convention text, also the North Saami language version is an official one.

11 Note that the draft Saami Convention was presented prior to the UN General Assembly proclaiming the UN Indigenous Declaration. The adoption of the UN Indigenous Declaration is likely to impact on the legal status of treaties entered into between states and indigenous peoples under international law. Article 37 of the UN Indigenous Declaration stipulates that indigenous peoples have the right to the recognition of treaties concluded with states.

12 Put simply, a frame-work convention essentially spells out general principles and aspirations and contains few concrete obligations on the state and correspondingly equally few concrete rights for the beneficiaries of the instrument. A rights convention, on the other hand, focuses on expressing concrete rights that are directly implementable.

outcome, the Saami Convention is clearly a rights convention, with very few general or merely aspirational provisions.

3.3 The Saami Convention's relevance to the Saami population residing on the Russian side of *Sápmi*[13]

Perhaps the biggest shortcoming of the Saami Convention is that it does not apply to the parts of the Saami population residing in what today constitutes the Russian Federation. When the Saami Council proposed that a Saami Convention should be crafted, the intention was obviously that the Convention should encompass the entire *Sápmi* and the entire Saami population. This position and ambition of the Saami has not changed. However, in the process leading up to the appointment of the Expert Group, it became increasingly evident that at this stage, it would be too complicated to agree on a strong and effective Saami Convention if the negotiations should also include the Russian Federation. The political situation in the three Nordic countries compared to the Russian Federation is simply too different.

Nonetheless, the Saami members of the Expert Group pushed for the Expert Group, to the largest extent possible, considering also the situation of the Saami population residing on the Kola Peninsula. The state appointees were sympathetic to this position. During its work, the Expert Group met with Saami from the Russian side and also commissioned a study on the situation of the Saami population residing on the Kola Peninsula. Still, since the Russian Federation and the Saami on the Russian side are not party to the Convention, the Expert Group had to accept that the Saami Convention could not reasonably directly address the situation in the Russian Federation. It is worth noting though, that the individual rights contained in the Convention – such the rights to education, health and social services - do apply also to Saami persons that are citizens of the Russian Federation but reside in one of the contracting states. The Expert Group further expects the Nordic countries, as soon as the Saami Convention has entered into force, to initiate discussions with the Russian Federation on how the sprit and the provisions of the Saami Convention can become reality also for the part of the Saami population residing within Russia. Hopefully one day, the Russian Federation will become a party to the Saami Convention.[14]

13 Sápmi is the Saami people's traditional homeland. See further under 4.2.11, below.

14 In this context, it is encouraging to note that the Russian Federation, which after having played a constructive role during larger parts of the UN Indigenous Declaration process, but in the final stages expressed serious concerns with the Declaration as adopted by the UN Human Rights Council, chose to abstain at the time of the adoption of the Declaration by the UN General Assembly. In addition, the Russian Federation held an interpretative statement, where it explained that it found itself in agreement with major parts of the UN Indigenous Declaration.

4. SOME OF THE MOST CENTRAL MATERIAL PROVISIONS IN THE SAAMI CONVENTION

4.1 The preambular part

As is common in international human rights instruments, the Saami Convention consists of one preambular and one operative part. What probably renders the Saami Convention unique, however, is that the preambular part is in turn divided into two. In one section, the governments outline what they believe constitute the foundation for the Saami Convention. In a subsequent section of their own, the Saami parliaments do the same. The idea is that since the Saami Convention has been elaborated in partnership between four peoples, equal in dignity and rights, all four peoples should be allowed to express on what keystones the Convention, in their opinion, rest.

In its part, the three governments e.g. confirm that the Saami people constitutes one people, living across national borders entitled to the right to self-determination. They further acknowledge that continued access to lands and waters is a pre-requisite for the Saami people to be able to preserve its culture. Notably, the three governments admit that the fact that the Saami people has throughout history suffered injustices and has not been treated as an equal people shall be taken into consideration when determining the future status of the Saami people.

In their part, the Saami parliaments e.g. express their vision that the national borders shall not break the fellowship of the Saami population. The Saami parliaments further underline the importance of respecting the Saami people's right to self-determination as a people. They attach particular importance to the fact that the Saami people holds rights to the lands, waters and natural resources that make up *Sápmi*, the Saami people's homeland. The Saami parliaments further state that the Saami people aspires to live as one people within the borders of the contracting states.[15]

4.2 The operative articles

4.2.1 The objectives of the Saami Convention

Article 1 spells out the two main objectives of the Saami Convention. As indicated above, pursuant to Article 1, the Convention's first objective is to guarantee and safeguard the Saami people's human and other rights and fundamental freedoms. Secondly, the Saami Convention shall, to the largest extent possible, obliterate, or at least mitigate, the problems caused to the Saami population by the fact that its traditional territory is today divided by national borders.

4.2.2 The question of who is to be regarded as a Saami person, and hence as a right-holder, under the Saami Convention

Article 2 confirms that the Saami people is

15 This provision might come across as insignificant and the Saami parliaments' wish to include it in their preambular part as difficult to understand. The provision should be understood in the context of the principle of territorial integrity of states. In the final years of the UN Indigenous Declaration process, one of the most contentious issues was whether, and if so how, the principle of territorial integrity of states should be reflected in the Declaration. Indeed, it was the absence of a reference to territorial integrity in the UN Indigenous Declaration as adopted by the UN Human Rights Council that created the biggest problems when the Declaration was presented to the UN General Assembly. Only after a reference to territorial integrity had been inserted in Article 46 could the UN Indigenous Declaration be adopted. In the Saami Convention context, the Saami parliaments' declaring that the Saami population aspires to live as one people in the contracting states essentially took care of the territorial integrity issue. See further under 6.3, below.

the indigenous people of the three countries.[16]

Being a rights convention[17], the Saami Convention needs to define who – in addition to the Saami people as a collective[18] - enjoys rights under the Convention. Article 4 hence defines who is to be regarded as a Saami person under the Convention. Already from the outset, the government appointed members in the Expert Group declared that it must essentially be up to the Saami appointees to determine who should be regarded as a Saami person under the Saami Convention. Yet it turned out to be one of the most difficult issues in the entire Saami Convention to solve. The Saami members seriously struggled to come up with a definition. Article 4 found its final form only in the very end of the three year process, and even then, none of the Saami appointees where particularly happy with the final outcome. Perhaps, this could be taken as a token on how difficult the right to self-determination is to implement in practice…

In the end, Article 4 essentially came to build on the proficiency in the Saami language criteria used to determine who is eligible to vote in the Saami parliament elections, but adds a second criterion; also individuals that do not meet the language criteria, but are active in Saami reindeer husbandry[19] shall be regarded as Saami persons under the Saami Convention.[20]

4.2.3 The right to self-determination

As everyone that has been following the recent years' debate on indigenous rights is aware, indigenous peoples' representatives and others regard the right to self-determination as perhaps the most fundamental of all indigenous rights. Indigenous peoples have repeatedly underlined that recognition of the right to self-determination is a precondition for the effective exercise of all other human rights and fundamental freedoms.

Correspondingly, from the very first meeting of the Expert Group, the Saami appointees declared that any Saami Convention, to be acceptable, must recognize the Saami people's right to self-determination. The government members were sympathetic to this claim. During its first year of work, the Expert Group devoted considerable time to principal discussions on the issue of self-determination. Most individual members also studied the issue on their own, between the Expert Group meetings. Further, the Expert Group appointed a small group of its members[21] to craft a memorandum, outlining contemporary international law's position on the right to self-determination of indigenous peoples. It is fair to say that the self-determination issue dominated the early period of the Expert Group's work. It was clear to all members that the position the Expert Group took on the right to self-determination would fundamentally impact the entire Saami Convention. Yet the discussions on the issue of self-determination were never really heated. Without considerable debate, a consensus emerged within the Expert Group that it is evident that the Saami people indeed constitutes such a people that is entitled to the right to self-determination under international law, and that consequently any Saami Convention must rest on this fundamental building block.

Article 3 of the Saami Convention hence proclaims that the Saami people – as a people – enjoys the right to self-determination. The fact that Article 3 affirms that the Saami people enjoys the right to self-determination as a "people" reasonably renders it impossibly to claim that the right to self-determination enshrined in the Saami Convention is a *sui generis* right, and not the general right to self-determination held by all peoples under international law.

16 All the three contracting parties have in different manners officially recognized the Saami people's status as an indigenous people. Today, no one seriously challenges the Saami population's status as indigenous to Finland, Norway and Sweden. Even though it is not seriously contested that the Saami is the indigenous people to the contracting states, the Expert Group still found it appropriate that the Saami Convention affirms this fundamental prerequisite for Saami rights.

17 With regard to what is understood with a rights convention, see 3.2, above.

18 Regarding the issue of the relationship between collective and individual human rights, see further 6.2, below.

19 With regard to what is meant by Saami reindeer husbandry, compared to non-Saami reindeer husbandry, see under 4.2.12, below.

20 In addition, also children that do not themselves meet these criteria, but have a parent that does so, can claim rights under the Saami Convention.

21 These members were John B. Henriksen (deputy member to the Chair of the Expert Group, Carsten Smith), Martin Scheinin and the author of this Article, Mattias Åhrén

This could appear self-evident, but a few states have e.g. in the Indigenous Declaration process tabled ideas that the right to self-determination enjoyed by indigenous peoples is a *sui generis* right, not to be confused with the general right to self-determination.[22]

Article 3 (1) of the Saami Convention essentially merges paras. 1 and 2 of the common Article 1 of the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, respectively. Hence, in addition to proclaiming that the Saami people has the right to self-determination, equal to other peoples, Article 3 (1) further declares that this encompasses a right to determine over the Saami people's natural resources. At the same time, Article 3 mirrors international law's ambiguity as to what exactly is included in the right to self-determination. This is reflected in that the Saami Convention refers to international law for further guidance as to what, more in detail, this right encompasses when applied to a non-state forming indigenous people. Article 3 of the Saami Convention stipulates that as far as it follows from international law, the Saami people has the right to determine its economical, social and cultural development and self to dispose over its natural resources.[23]

As indicated above, indigenous and state representatives, as well as legal scholars, have until know essentially been focusing on to what extent the right to self-determination applies to indigenous peoples. Only recently has this question been answered in the affirmative, evidenced most notably by the recent adoption of the UN Indigenous Declaration.[24] Quite naturally therefore, there has been only limited discussions as to how a right to self-determination should be implemented in the context of non-state forming indigenous peoples. Having concluded that the Saami people does constitute such a people that is entitled to the right to self-determination, the Expert Group had to address this issue. Indeed, the Expert Group spent considerably more time discussing the implementation of the right to self-determination than the existence of the right as such, and the proposal on how the Saami people's right to self-determination is to be implemented came to occupy an entire chapter of the Saami Convention.

Chapter II (Articles 14-22) of the Saami Convention elaborates upon how the right to self-determination shall be implemented in a Saami context, given that a substantial part of the Saami people's traditional territory today have a mixed population.[25] The Saami population today shares its territory with the colonizing peoples, who of course also are entitled to the right to self-determination. The question is hence; how can a model for operationalizing the right to self-determination be constructed that allows two peoples that today to a substantial extent share the same land and water base, to exercise their right to self-determination, respectively?

The Saami Convention tackles the said question by introducing a sliding scale, which essentially awards the Saami people a varying degree of influence over the decision-making process depending on how important the question at hand is to the Saami people. In other words, the more significant an issue is to the Saami people, the more influence the Saami people have over the matter, ranging from a complete and exclusive decision right where no consideration has to be made to the non-Saami peoples to a right merely to be informed and briefed about a decision-making process by the non-Saami decision making bodies.[26]

22 Such claims are in my opinion from a legal perspective manifestly ill-founded, but can nonetheless politically be difficult to deal with. Together with the Saami Convention text, the Expert Group presented a background document in which the Expert Group among other things motivates each provision in the Convention. The background document thus assists in the interpretation of the Saami Convention text. In the motivation of Article 3, the Expert Group confirms that the right to self-determination contained in the Saami Convention is the same right enjoyed by other peoples, i.e. the right that is enshrined e.g. in the common Article 1 of the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, respectively.

23 Nonetheless, it is worth noting the Saami Convention's explicit reference to the resource dimension of the right to self-determination, something that is notably absent in the UN Indigenous Declaration, where the reference to the resource dimension is more implicit.

24 Article 3 of the UN Indigenous Declaration proclaims that indigenous peoples have the right to self-determination.

25 The population mix in Sápmi varies. The Saami population still utilizes parts of its traditional territory more or less exclusively, and other areas have an overwhelming Saami majority. In substantial parts of its traditional territories, however, the Saami population today finds itself in a minority position.

26 In other words, the Saami Convention recognizes that it is not possible for two people sharing the same territory to exercise a complete right to self-determination. Respect for the other people's equal right to self-determination often requires that each people shares decision making power on issues of concern to that people, but that is also relevant to the other people.

Article 14 (1) of the Saami Convention proclaims that in each of the contracting states there shall be a Saami parliament representing the Saami population in the country.[27] Pursuant to Article 14 (3), the Saami parliaments shall have such decision making and participatory rights that render it possible for them to effectively contribute to a realization of the Saami people's right to self-determination. Article 15 (1) declares that the Saami parliaments have the right to take independent decisions on all matters where international law or domestic legislation proclaims that the Saami people shall have an independent decision making right. Moreover, pursuant to Article 16 (2), the state parties must not engage in or allow any activities that could considerably damage the fundaments for the Saami culture, livelihoods or society, absent the consent of the Saami parliaments.[28] In other words, in Article 15 (1), the three countries undertake to transfer jurisdiction to the respective Saami parliament when international law so prescribes. In addition, the reference to national law suggests that the national parliaments shall transfer jurisdiction to the Saami people also on matters where it is not necessarily called for by international law, but when it nonetheless is appropriate.

On matters of importance to the Saami, but that also concerns the non-Saami populations, the Saami Convention proclaims that decisions shall be taken jointly by the two peoples through negotiation mechanisms. Article 16 (1) prescribes that in matters of considerable importance to the Saami, the states must enter into negotiations with the Saami parliaments before deciding on the matter. Together with the Saami Convention text, the Expert Group presented a background document in which the Expert Group motivates each provision in the Convention (the

«On matters of importance to the Saami, but that also concerns the non-Saami populations, the Saami Convention proclaims that decisions shall be taken jointly by the two peoples through negotiation mechanisms.»

Background Document). The Background Document can thus be used to assist in the interpretation of the Saami Convention text. The Background Document clarifies that such negotiations must have a mutual agreement as an aim.[29] Should no agreement be possible, the state institution has to consider how to move forward. It should not necessarily support the state position.[30] Moreover, recall that pursuant to Article 16 (2), if the proposed activity or legislation could potentially cause considerably damage to the fundaments for the Saami culture, the Saami parliament always has the decisive vote. The states further have an obligation to provide the Saami parliaments with resources sufficient for them to hire expertise etc. so that the negotiations can be carried out on a truly equal level.

Pursuant to Article 17 (2), before a decision is made on a matter that concerns the Saami people in a non-significant manner, the state must consult with the relevant Saami parliament. And Article 17 (1) proclaims that the Saami parliaments are entitled to be represented in governmental committees and similar bodies when such address matters that are of concern to the Saami people.[31]

Article 19 of the Saami Convention proclaims that the Saami parliaments shall represent the Saami people in international affairs. In other words, the Saami Convention underlines that the Saami people is entitled also to the external aspect of self-determination.[32] Presently, the Saami people formally exercises the external

27 Agreeably, whether the Saami people's right to self-determination should be exercised through a Saami parliament or through some other body is a matter that the Saami people should determine itself, without outside interference. The Saami Convention – and the contracting states - should hence ideally not have a position on this issue. However, at least one political party (Fremskridspartiet in Norway) in the three countries has suggested that the Saami parliament should be abolished. For this reason, the Expert Group concluded that a provision guaranteeing the position of the Saami parliaments merits its place in the Saami Convention.

28 Pursuant to Article 36 (3) and (4), such activities might also require the consent of the affected Saami community and/or individuals, see further under 4.2.11, below.

29 See p. 218 f.

30 See ibid., p. 220.

31 Pursuant to Article 18, the Saami parliaments shall further, whenever they so desire, be entitled to present issues of relevance to the Saami people to the national parliaments and shall also be allowed to address the national parliaments when these debate and decide on such matters.

32 The Saami Convention does not, however, support any claim to a right to secession for the Saami people. See further under 6.3, below.

aspect of self-determination through the Saami Parliamentarian Council (SPR).[33] Article 20 of the Saami Convention confirms that the Saami parliaments can form such joint organizations as the SPR. This is of course quite obvious. What is more interesting, however, is that Article 20 calls on the states to transfer jurisdiction also to such joint international Saami institutions, when necessary.

Like other peoples, also the Saami have a civil society. Article 21 underscores that the states shall respect and when necessary, in addition to with the Saami parliaments, consult also with Saami villages, reindeer herding cooperatives and other local Saami representatives.[34]

In conclusion, the Saami Convention takes a commendable modern stand on the right to self-determination, reflecting recent developments in international law. It underlines that the Saami people – as a people equal to other peoples – is entitled to the same right to self-determination as other peoples, which e.g. implies that the right to self-determination that the Saami people enjoys encompasses both the internal and the external aspect. The right to self-determination that the Saami Convention proclaims is a right based on ethnicity rather than on territory, which renders it more difficult to implement. The Saami Convention addresses this issue as well, by introducing a fairly concrete and detailed proposal on how the right to self-determination can be implemented in the context of a people that today share most of its traditional territory with other peoples that are equally entitled to self-determination. The real test will, however, come when the system for implementing the Saami people's right to self-determination that the Saami Convention tables is put into practice by the Finnish, Norwegian and Swedish governments and municipalities. Judging by past experiences, one should not expect all non-Saami institutions to be too accommodating to the idea of respecting and implementing the right to self-determination of the Saami people.[35]

4.2.4 Further on the right to self-determination; particularly on the Saami people's customary legal thinking and norms

The Saami Convention thus establishes that the Saami people has the right to determine over its own society. Any society, including the Saami people's, has to be governed by norms. These norms can of course be such that are enacted today by the Saami parliaments and other thereto mandated Saami institutions. But in addition, the Saami people's customary norms and legal thinking will be of importance for determining how the Saami society shall be governed. Consequently, intrinsically linked to the right to self-determination, Article 9 of the Saami Convention proclaims that the states shall duly recognize the Saami people's customary legal thinking and norms.[36]

All cultures, large and small, have legal regimes based on custom. Indigenous peoples are no exception in this regard. Customary law distinguishes itself from statutory law merely by being more intrinsically attached to a people's culture than statutory law. Unlike statutory law, customary law does not gain its authority from formal acts such as a vote by an assembly. Rather, it derives its existence and content from social acceptance.[37] This difference alone does not, however, justify a view that indigenous customary legal system should be less "worthy" of recognition than legal

33 SPR is an institution established by the three Saami parliaments in which they discuss and decide on issues of common concern to the Saami in the three countries, such as for instance foreign policy. The Saami from the Russian side of Sápmi have observatory status in the SPR. Of course, also the Saami Council has, and continuously does, extensively represented the Saami in international affairs. Indeed, the Saami Council is in reality considerably more active on the international arena compared to the SPR. The Saami Council is, however, a Non-Governmental Organization (NGO) and can as such not claim to formally represent the Saami people.

34 Indeed, the Saami parliaments are new, modern, inventions and are not anchored in the customary structure of the Saami society. Traditionally, decisions in the Saami society were made locally in Saami communities called siidas. Part of the siida structure remains still today, and constitute the fundamental building block in the Saami society.

35 As will be seen immediately below, not even the Saami Convention itself fully respect its own position on self-determination, when it fails to demand that non-Saami courts, administrative authorities and legislators shall respect Saami customary norms.

36 One could argue that the article in the Saami Convention addressing the Saami people's customary norms is misplaced, and rather should have been situated in the self-determination chapter

37 There are of course also examples of legal systems with a mix of customary and statutory law. Indeed, if following a ratification of the Saami Convention, the Saami people elaborates a legal system that blends contemporary norms enacted by the Saami parliaments with the Saami people's customary norms that have developed over generations, this will constitute an example of such a legal system with a mix of statutory norms and customary law.

systems predominantly based on statutes. There is no significant distinction between indigenous customary law and state statutory law. Consequently, it is not reasonably possible to argue that one of the legal systems should *per se* be subordinate to the other. Indeed, to take such a position is directly contrary to accepting that two peoples today sharing the same territory both have the right to self-determination.

As described above, the entire Saami Convention rests on the fundament that the Saami people does constitute such a people that is entitled to the right to self-determination. It can therefore not be described as anything else than disappointing that this position is not fully reflected in Article 9 of the Convention, addressing the Saami people's customary norms and legal beliefs. Unfortunately as this is, it should not come as too big a surprise. For the reasons briefly outlined above, it has been of considerable importance to indigenous peoples' representatives to gain recognition of and respect for their customary legal systems. It has proved surprisingly difficult, however, to get traditional non-indigenous lawyers (and political representatives) to accept that there can – and when two people share the same territory indeed shall - exist multiple legal systems within one geographical area. There appears to be a mental block against this idea among traditional lawyers, even though it is entirely feasible, and not a very dramatic thing, to introduce an order that respects two or more legal system, should there only be political will.

In line with the above stated, the Saami appointees argued fiercely for that the Saami Convention should call on non-Saami legislators, courts and administrative authorities to fully respect Saami customary and other norms, but failed to convince the state members. The outcome is, as often is the case, a compromise. Article 9 (1) stipulates that the contracting states shall demonstrate due respect for the Saami people's legal thinking, judicial traditions and customary norms. Article 9 (2) obligates the states to, before enacting legislation on issues to which Saami customary norms might pertain, to investigate to what extent such customary norms exist. Should such investigations reveal that Saami customary norms do pertain to the matter subject to legislation, the legislator must further evaluate whether the legislation shall recognize the customary norms. In addition, Article 9 (2) demands that non-Saami courts and administrative authorities shall duly respect Saami customary norms in their practices.

In conclusion, the Saami Convention does call for certain respect for the Saami people's customary legal system. Still, it essentially leaves it to the non-Saami institutions to determine to what extent they shall acknowledge the Saami people's customary norms. As explained above, respect for a people's legal system is intimately connected to the people's possibility to exercise its right to self-determination in any meaningful manner. Consequently, in my opinion, when presenting an Article 9 that does not demand respect for the Saami people's legal system, the Expert Group immediately contradicts its own position on Saami self-determination.[38]

4.2.5 Non-discrimination and states' obligations to take positive measures

As most, if not all, indigenous peoples, the Saami people has historically been subject to injustices, and have not always been viewed as people equal in dignity and rights compared with the other peoples inhabiting Fennoscandinavia and the Kola Peninsula. Even though theories of racial inferiority have today been out-phased, the Saami people is still suffering from remnants of past practices and continuous to be the subject of discrimination. This is e.g. evidenced by that all state parties to the Saami Convention have repeatedly been criticized by various UN bodies for their treatment of the Saami people. Indeed, the fact that the Saami are still suffering

38 The UN Indigenous Declaration addresses the issue of indigenous peoples' customary legal systems more adequately. Article 5, for instance, stipulates that indigenous peoples have the right to retain and strengthen their legal systems, and pursuant to Article 34, indigenous peoples have the right to develop and maintain their juridical systems and customs.

from discrimination is a main reason why a Saami Convention was deemed necessary.

Even though the Expert Group essentially agreed on the background laid out above, there were different opinions on how this should be reflected in the Saami Convention text. The Saami appointees initially insisted on that a reference to past injustices should be included in the operative part of the Saami Convention, but fairly early settled for that a reference to historic inequities in the preambular section would be sufficient.[39]

From the outset, the Expert Group agreed that the Saami Convention should include an article underlining that the Saami have the right not to be subject to discrimination, and that the state parties have certain obligations to take positive action to implement this right. There were, however, rather substantive discussions on how this general agreement should be expressed in the Saami Convention. The final outcome of these discussions is found in Article 7, which proclaims that the Saami people and Saami individuals must not be subject to discriminations, and obligates the state parties to, if necessary, take special measures to realise the rights contained in the Convention.

I am not completely satisfied with Article 7 as it appears in the final version of the Saami Convention. Today, international law clearly establishes that the fundamental right not to be subject to discrimination implies not only that similar cases be treated similarly, but also that different cases be treated differently. If this is true, most state actions that are normally labelled positive or special measures, affirmative action etc., are not really special measures. Rather, they are simply a correct interpretation of the right to non-discrimination. I believe that this could have been better reflected in the Saami Convention text. Still, the practical implications of choosing one wording before the other are perhaps not that significant, and the Background Document also clarifies that Article 7 should be understood in the light of that under international law, the right not to be subject to discrimination encompasses also a right to have different situations treated differently.[40]

It shall be noted that Article 7 explicitly proclaims that not only Saami individuals - but also the Saami people as such - have the right not to be subject to discrimination. This is noteworthy since some claim that the right not to be subject to discrimination is merely an individual, and not a collective, right.

4.2.6 Obliteration of the problems caused to the Saami population by the fact that its traditional territory is today divided by national borders

The Saami people had established its own nation in northern Fennoscandinavia and on the Kola peninsula long before the non-Saami population moved in and gradually colonized these areas and subsequently drew the state borders of today.[41] As indicated above, this areas is *Sápmi*, the Saami people's homeland.[42] *Sápmi* is a nation without state or state borders, but with a common history, culture and language and with common traditional livelihoods.[43] For the Saami people, it is paramount to highlight this background; that the Saami constitute one people, united in their own culture, language and history, living in areas which since time immemorial they have alone inhabited and utilized, and that national borders should not prevent the unity of the Saami people.[44]

The political will and aspirations of the Saami people is one thing, realpolitik created by others something different. In reality, the fact that national borders today

39 See under 4.1, above.

40 See pp. 204 f.

41 It is still not established exactly when the Saami people came to these areas, but it appears clear that they inhabited major parts of Sápmi by the year 0 BC. The first registered contact between the non-Saami population and the Saami is from the year 890, but it would take some several hundred years before the contacts became more frequent. The border between what today constitutes Norway, on one hand, and what today makes up Finland and Sweden, on the other, was drawn in 1751. Finland and Sweden determined their common border in 1810 and Norway and Russia did the same in 1826. In 1833, the last border to cross Sápmi was established, the one between Finland and Russia.

42 In addition, Sápmi is also the Saami name for the Saami people.

43 That said, Sápmi is also home to considerable cultural variations as well as to variations in the traditional livelihoods.

44 See e.g. the Political Declaration from the 13th Saami Conference, taking place in Åre, on the Swedish side of Sápmi, in 1986.

cross through *Sápmi* does cause considerable problems to the Saami people. That is particularly so for the part of the Saami population residing on the Russian side of *Sápmi*. During the Soviet Union era, the Russian part of *Sápmi* was essentially isolated from the rest. But also today, for instance visa demands and restrictions on the transporting of goods across the Russian border render interaction between Saami inside and outside the Russian Federation considerably more cumbersome than interaction between the Nordic countries. Since the Russian Federation is not yet a party to the Saami Convention, this article will not, however, address this issue any further.

But the national borders create considerable problems also for interaction between Saami residing within different states in Fennoscandinavia.[45] Consequently, as stated under 4.2.1, above, in addition to underscore the Saami people's rights as an indigenous people, the Saami Convention has an additional major objective; to obliterate, or at least mitigate, the problems caused to the Saami by the fact that their traditional territory is today divided by national borders. Predominantly Articles 10-12, 25 (2) 2 mom and 43 operationalize the Saami Convention's second objective.

Pursuant to Article 10, the contracting states shall, in cooperation with the Saami parliaments, harmonize legislation and other forms of regulations of importance to the Saami people's activities across national borders.

Article 11 calls on the states to take measures to facilitate the pursuit of the Saami livelihoods across national borders by removing impediments based on the Saami's citizenship or domicile or that otherwise are a result of that *Sápmi* today is divided by state borders. The states shall further endeavour to make cultural activities available for the Saami in the country in which they reside, regardless of citizenship. Article 12 stipulates that the states shall take measures to provide Saami individuals residing within the three countries with access to education and health and social services in the country where it is most practical.[46]

Pursuant to Article 25 (2) 2 mom, the contracting states shall, in cooperation with the Saami parliaments, promote the cooperation across national borders among media institutions that offers media services on the Saami language.

Article 43 addresses a highly contentious issue in the Saami areas; the pursuit of reindeer husbandry across national borders. In addition to causing debate between the Saami and the non-Saami societies, the issue of to what extent reindeer herders should be allowed to use grazing areas in countries other than in which they reside causes conflicts also within the Saami society. The present situation is a result of a long historical process which this article can not possible describe in any detail. However, a brief overview is necessary to grasp the problem that Article 43 addresses.

As described above, the borders that today divide *Sápmi* where essentially drawn in a 100-year period from the middle of the 18th to the midst of the 19th century. Initially, these borders had little impact on the reindeer herders, who were allowed to continuously cross the borders with their reindeer. For instance, when Denmark[47] and Sweden in 1751 established the border between Norway and Sweden, they in an addendum to the border-treaty known as *Lappkodicillen* proclaimed that the Saami should continuously be allowed to use such grazing areas on each side of the borders that they had customary utilized.[48]

45 A few examples can be mentioned to illustrate the problem. The right to cross national borders with reindeer is severely restricted, which causes nuisances to the reindeer husbandry. (Regarding this issue, see further below.) As stated above, the Saami are culturally distinct from the engulfing population and e.g. speak a different language, but the Saami population is also relatively few in numbers. There might thus not be a big enough Saami population residing in an area on one side of the border to motivate a separate Saami school class or a separate Saami ward at a nursing home. Yet if one added the Saami populations on each side of the border, there could be a sufficient population basis to motivate such services. There are customs and other restrictions to transport reindeer meat, fish and other Saami goods across state borders. For natural reasons, cross-state borders marriages are common among the Saami population, yet it might not be economically feasible and administratively impractical e.g. for a Saami woman to give birth in a country other than in which she is a citizen. Financial support for cultural activities are normally administrated on a domestic basis, whereas the Saami language and culture stretches across national borders and often ill fits the schemes for financial support available. The examples go on and on.

46 In this context, recall, as stated under 3.3, above, the rights enshrined in Articles 11 and 12 apply also to Saami individuals carrying a Russian passport, if they have their domicile within any of the three contracting states.

47 At this time, Norway was a part of Denmark.

48 In addition, Lappkodicillen proclaimed several other rights of the Saami people, declared that the states should respect the Saami people's customary laws, and referred to the Saami as a Saami nation. Lappkodicillen is thus a very important document to the Saami. It is sometimes referred to as the Magna Carta of the Saami.

In the middle of the 19th century, however, the non-Saami attitude towards reindeer husbandry became more hostile, and the national borders where one by one closed to the reindeer. Finland and Norway closed their border to reindeer husbandry in 1852 and Finland and Sweden in 1888. With regard to the Norwegian-Swedish border, as just mentioned, the *Lappkodicillen* continuously guaranteed the reindeer herders access to their traditional grazing lands on each side of the border. But in particular Norway wanted to reduce "Swedish" reindeer herders' access to grazing land on the Norwegian side of *Sápmi*, and in 1919 succeeded in getting Sweden to agree on a treaty severely restricting the Saami's rights to cross the Norwegian-Swedish border with their reindeer.[49] This treaty was later superseded by another treaty of 1972 which in turn expired in 2005. Norway and Sweden have for several years been involved in negotiations on a new treaty to replace the one from 1972, but the discussions have been highly infected and so far fruitless.[50]

As a consequence of the border closings, there are today no reindeer herding activities across the Finnish-Norwegian border. Indeed, the states have erected a fence to prevent reindeer from crossing the border.[51] Reindeer husbandry in the Finnish-Swedish border areas are regulated in a treaty from 1925. And, as outlined above, cross-border reindeer herding activities between Norway and Sweden are severely restricted in practice, as the legal situation remains unclear.

The situation is obviously not satisfying. The division of grazing land does not follow natural borders. For instance, if using the Norway-Sweden situation as one example, the Norwegian side of *Sápmi* is comparatively rich in summer grazing lands whereas the Swedish side hosts a lot of forest areas suitable for winter-grazing. The traditional Saami reindeer herding cycle obviously depends on access to both. The closing of the state borders thus renders the Saami reindeer husbandry less efficient than it could be. Moreover, the artificial division of *Sápmi* forces the reindeer herders to pursue reindeer husbandry in a manner that is not always fully respectful to the Saami people's traditions, customs and customary laws pertaining to reindeer husbandry, which causes harm to the *siida* system and consequently threatens the fundamental building block of the Saami society.

«The closing of the state borders thus renders the Saami reindeer husbandry less efficient than it could be. »

At the same time, one must be mindful of that in the areas that traditionally belonged to one Saami community prior to the closing of the borders and the forced reallocation of the Saami population, other Saami communities have now been active for many years. It is obviously not possible to simply drive these reindeer herders away without consideration of how they should be able to continuously pursue their traditional livelihood. Nonetheless, in my opinion the Saami shall actively work towards a return to a reindeer husbandry where grazing rights are based on custom, and are not a result of arbitrary state regulation. And this is also the position that the Saami Convention takes.

Article 43 (1) proclaims that custom is the base for Saami reindeer herding grazing rights, also across national borders.[52] In other words, as far as reindeer husbandry is concerned, the Saami Convention erases

49 The border-closings compelled many reindeer herders to "immigrate" to another country to be allowed to continuously access their traditional grazing lands. This resulted in a too high pressure on certain grazing areas, which in turn caused the states to forcefully reallocate Saami to other parts of Sápmi. These parts, however, of course already had a Saami population, which obviously led to conflicts between the "old" Saami population and the newcomers. In parts of Sápmi, these conflicts are still ongoing. The closing of the borders and the subsequent forced reallocations resulting in chaos in the Saami society is one of the worst crimes of the colonizers against the Saami people.

50 Meanwhile, Norway has unilaterally declared the 1972 treaty valid law in Norway. Sweden, on the other hand, has proclaimed the Norwegian unilateral act void, and has stated that absent a new treaty, Lappkodicillen of 1751 re-enters into force. There have even been talks about Sweden taking Norway to the International Court of Justice to settle the matter.

51 The Chairperson of the Expert Group Carsten Smith has ironically stated that following the fall of the Berlin wall, the border-fences in the Saami areas are the only remaining walls between nations in Europe.

52 In addition, Article 43 (3) clarifies that such rights based on custom take precedent over any state treaty on cross-border grazing rights.

national borders and essentially reintroduces Saami customary law pertaining to grazing rights, as confirmed by the *Lappkodicill*. Article 43 (2) then explains that the Saami communities can swap grazing lands[53] between themselves, if appropriate.[54]

4.2.7 Language and education rights

Article 23 of the Saami Convention maps out the Saami people's basic language rights and Article 24 translates those rights into state obligations. Hence, Article 23 (1) proclaims that the Saami have the right to use, develop and revitalise their language and traditions. Pursuant to Article 23 (2), the Saami also have the right to determine and preserve, as well as to receive public acknowledgment for, their personal and geographic names. Article 24 then correspondingly stipulates that the states have a duty to actively promote the rights spelled out in Article 23. More specifically, the states shall guarantee that the Saami language can be used before courts and administrative authorities in the Saami areas[55] and shall promote the publishing of literature on the Saami language. Pursuant to Article 25, the states shall create an environment that caters for an independent Saami media policy.[56] Further, the states are obliged to guarantee that programs in the Saami language can be broadcasted on radio and television and shall also promote the publishing of newspapers in the Saami language. Article 24 (4) underlines that the obligations contained in Article 24 apply also to the lesser used Saami dialects and pursuant to Article 25 (3), also Saami media should be made available in these dialects, to the extent this is reasonable.[57]

Article 26 proclaims that Saami education shall be accustomed to the Saami's cultural background. At the same time, a general feature of the provisions in the Saami Convention addressing rights to language and education is the distinction between the Saami population living within the traditional Saami areas and the part of the Saami population today residing outside those.[58] Hence, pursuant to Article 26 (1), Saami residing within the traditional Saami territory shall be provided education in and on the Saami language. Also otherwise shall the education be accustomed to their cultural background and shall be organized in such a manner that it provides the foundation for continued studies at all levels. At the same time, however, shall the education be organized in such a fashion that it allows Saami that are active within the traditional Saami livelihoods to continuously pursue the Saami traditional lifestyle, parallel to attending school. Article 26 (2) then stipulates that also Saami children and youth residing outside the Saami areas shall be provided the possibility to have education in Saami, and also on Saami to the extent it can be deemed reasonable.[59] Pursuant to Article 26 (3), the states shall prepare the national curricula in cooperation with the Saami parliaments, in order to guarantee

53 This is no novelty. The Saami people's customary norms pertaining to reindeer husbandry includes elaborate regulation on mutually agreed exchange of grazing lands between different Saami communities.

54 The Expert Group agreed on Article 43 almost without debate. Article 43, as it now appears in the Saami Convention text, was drafted immediately following a meeting that the Expert Group had in November 2004 with the Norway/Sweden negotiation group on a potential new treaty on cross-border reindeer husbandry to replace the expired 1972 treaty. (This negotiation group, which includes both state and Saami representatives, has got a new composition since then.) The meeting sent the Saami Convention Expert Group almost into a stage of shock. Having heard the arguments made by some of the members of the border treaty negotiation group, the Saami Convention Expert Group unanimously decided on the necessity to include in the Saami Convention an article that underscores the fundamental fact that Saami reindeer herding rights always have as their foundation customary use by Saami, also when reindeer husbandry is pursued across national borders. The fact that Saami representatives can argue against this fundamental fact, and hence conclude that the border should remain essentially closed is in my opinion highly disappointing. If the Saami starts to stray away from the position that the right to our traditional lands, waters and natural recourses is based on traditional use of the same, they are embarking on a dangerous road. That the Saami have not managed to reach an agreement on the issue of cross-boarder reindeer husbandry cannot be described as anything else than a failure of the Saami people. As described above, it is true that the present situation is a result of past crimes by the colonizing population against the Saami. But it is also true that if the Saami ourselves could today agree on the cross-border reindeer husbandry issue, Norway and Sweden would most likely not object to settling the matter in the manner the Saami suggest. In other words, it is the Saami that are not capable of settling our own internal affairs. This is thus yet another example of that exercising the much desired right to self-determination is not always a walk in the park. And I do repeat that the transition back to the traditional distribution of grazing land also across national borders must be done step by step with due consideration to the rights and interest of the reindeer herders that moved into a certain grazing area following the closing of a border, or that have even been forcefully reallocated to the area.

55 This right also applies to appeal courts and authorities outside the Saami area, if the case started in an institution situated within the Saami people's traditional territory.

56 Hence, again one could argue that this particular provision should have been placed in the self-determination chapter.

57 The Saami language group contains several distinct dialects. The dominating Saami dialect is Northern Saami, with a large number of speakers. Some of the lesser used Saami dialects are spoken by such a small number of persons that they are under threat of being extinct.

58 The distinction between the parts of the Saami population residing inside and outside the Saami people's traditional areas respectively is also expressed in a more general manner in Article 6 (3), which stipulates that the state parties' responsibility to take measure under the Saami Convention shall also to a reasonable extent apply to the part of the Saami population that today resides outside the Saami traditional territory. Regarding what constitutes the traditional Saami areas, see under 4.2.11, below.

59 For instance, it will probably not be considered reasonable for a Saami child to demand education on Saami in a small municipality where she or he is the only Saami child attending school (even though technical advancements within the field of e.g. distance education might soon change this assessment), whereas the state parties will presumably be obliged to organize education also on Saami for interested Saami children in e.g. the state capitals, where today many Saami reside.

that the curricula are accustomed to the Saami's cultural background and particular needs.[60]

4.2.8 Health and social services

Similarly to the provisions on language and education, the articles in the Saami Convention addressing the Saami population's right to health and social services accustomed to their culture also distinguishes between the parts of the Saami population residing inside and outside the traditional Saami areas, respectively. Hence, Article 29 (1) obliges the states to, in cooperation with the Saami parliaments, guarantee health and social service institutions within the Saami people's traditional area organized in such a manner that safeguards the Saami population residing within these areas health and social services accustomed to their linguistic and cultural background. And Article 29 (2) stipulates that also outside the Saami people's traditional area, health and social service institutions shall recognize Saami individuals' linguistic and cultural background.

4.2.9 Saami children, youth, women and elders

As outlined under 4.2.7, above, the articles in the Saami Convention addressing education contain certain provisions that specifically address the situation of Saami children and youth. Otherwise, the Saami Convention is almost clean from language that particularly considers these segments of the Saami society. Article 30, the only article in the Saami Convention completely devoted to Saami children and youth, modestly proclaims that Saami children and youth have the right to exercise their culture and preserve and develop their Saami identity.

The Saami Convention is even more parsimonious towards Saami women, who it only refers to in the preambular part of the Convention, where the Saami parliaments express that more weight should be placed on Saami women as important custodians of the Saami culture as well as an aspiration that Saami women should be better represented in public bodies. And when it comes to Saami elders, the Saami Convention is completely silent.

The Expert Group can perhaps be criticized for not giving more attention to Saami children, youth and women. That is especially so, since these segments of the Saami society undoubtedly wrestle with problems particular to them. It is often comparatively tough to grow up as a young Saami today. It involves a constant battle to preserve, develop and defend one's cultural identity. And even though things have arguably improved the last few years, the Saami people still have considerable work to do with regard to equality between men and women.

So why then, does the Saami Convention not give more attention to these issues? It was not because the Expert Group forgot about children, youth and women. The Group spent considerable time discussing these particular segments of the Saami society, and a number of different draft articles addressing Saami children, youth and women were also tabled by the Chairperson as well as by individual members of the Expert Group at various stages during the three years the Expert Group convened. But more or less all of these proposals failed to gain the support of the Expert Group. Indeed, stronger language on the rights of Saami children, youth and women than the boiler-plate kind of provisions that appear in the Convention text were not even close to make into the Saami Convention. The reason, I believe, should be sought in the emphasis the Saami Convention places on the right to self-determination. Even though all members of the Expert Group certainly wished to include language that guaranteed the rights of Saami children, youth and women, it proved impossible to do so, without the result being that the states – in a Saami Convention that intends to protect the rights of the Saami people – impose standards on the Saami people that it essentially should be for the Saami people itself to decide on.

60 Again, this is obviously a self-determination provision.

The Saami Convention takes the position, and rightly so in my opinion, that in a first analysis it is up to the Saami themselves to build a society that caters also for the rights and interests of Saami children, youth and women.[61]

The situation is different with regard to Saami elders, however. As far as I can recall, the Expert Group simply missed to consider this particular segment of the Saami society.[62]

4.2.10 Traditional knowledge, traditional cultural expressions and cultural relics

For many years, indigenous peoples' knowledge about plants etc. have been patented by multinationals and utilized with little or no remuneration. Indigenous peoples' art is copied onto carpets, clothes and greeting cards and is also otherwise utilized by the tourist industry, often without any recognition of who's culture is being exploited. Their handicrafts are copied and sold as authentic. Indigenous songs are being fused with techno-house dance rhythms to produce million selling "world-music" albums, without anyone ever being made aware of who is the real "composer" of the tune. Indigenous words and signs are being trade-marketed for commercial purposes. The examples go on and on.

The reason is that conventional intellectual property rights (IPRs) only to a limited extent protect indigenous peoples' traditional knowledge (TK) and traditional cultural expressions (TCEs). That, in turn is so, put simply, because; (i) indigenous TK and TCEs are normally not considered original or new from an IPR perspective, in that they generally build on - and as a consequence are "too" similar to - already existing elements of the culture; (ii) IPRs require that a known creator can be identified. TK and TCEs, on the contrary, are often distinguished by the anonymity of the originator or by the fact that the creation is to attribute to the community; (iii) the concept of ownership in TK and TCEs is alien to most indigenous customary legal norms and thinking. Whereas IPRs confer exclusive, private property rights in individuals, indigenous peoples are more akin to usage and management rights, which are communal in nature, and; (iv) the limited term of protection in IPRs imply that TK and TCEs that once were, or could have been, the subject of IPR-protection might no longer be.

Human rights standards have, at least in theory, for quite some time provided certain protection for indigenous TK and TCEs. For various reasons, however, these rights have never been really implemented. The situation has been deemed non-satisfying, evidenced e.g. by the fact that some ten plus UN system organizations are currently involved in activities to strengthen the protection of TK and TCEs. For instance, the World Intellectual Property Organization (WIPO) has developed two sets of guidelines for protection of TK and TCEs respectively. When adopted, these guidelines will substantially increase the protection of TK and TCEs.[63] Moreover, and more importantly, the UN Indigenous Declaration contains some provisions that provide a strong protection for elements of indigenous peoples' cultural heritage. For instance, Article 31 proclaims that indig-

61 Certainly though, not all would completely agree with this assessment. The discussion on what stand, if any, the Saami Convention should take on the situation of Saami children, youth and women reflects a much debated issue within the human rights discourse; does a recognition of collective human rights risk resulting in violations of individual human rights within the group? It has been argued that a group's collective interest to preserve its distinct identity might often be partly achieved by placing a disproportionate burden on certain vulnerable segments of the group, and the segments often put forward as examples in this context are indeed women and the girl-child. And it is undeniably true that collective and individual human rights do sometimes conflict. At the same time, one must remember that sometimes also individual human rights run contrary to each other. The human rights system is not perfect in that sense that all human rights form a perfect patch-work. Sometimes rights do overlap and/or conflict. And when they do, one has to balance the rights against each other, on a case to case basis. In this regard, I fail to see why one should treat differently the situation when a collective right conflict with an individual right compared to when two individual rights conflict with each other. (That said, this is to somewhat oversimplify the human rights system. One should note that certain human rights are of such character that they always take precedent over, and cannot be balanced against, other human rights.) In any event, democracy (and the Saami society today is a democracy) always entails a risk that certain persons in minority positions are not content with the decision of the majority. The exact same concerns that are raised whit regard to certain individuals' status if respecting the rights of peoples, could indeed be raised with regard to the powers exercised by a state. And the risk that individual human rights might be violated has never, to my knowledge, been used as an argument for that a population should not be allowed to form a state. Rather, one balances the interest of the state and the interests of the individual citizen, exactly through the guarantee of individual human rights in the Constitution and the international human rights system. It is difficult to see why the same balancing of rights and interests should not be done with regard to a non-state forming people exercising its right to self-determination, on one hand, and the individual members of the people, on the other.

62 Had it done so though, the deliberations probably would have been similar as those concerning other particular segments of the Saami society, outlined above.

63 See WIPO Documents WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/9/5. The Guidelines have so far not been adopted for reasons that have little to do with a lack of interest in protecting indigenous cultures. Rather, the Guidelines have been politicized, and are stuck in a trench-war between the industrialized countries in the north and the countries in the south, rich in genetic resources and associated TK.

enous peoples have the right to control, protect, and develop their cultural heritage, including their TK and TCEs.[64]

The Saami Convention follows this international trend. Article 31 (1) provides a protection similar to the on the UN Indigenous Declaration proclaims, however slightly weaker. Pursuant to Article 31 (1), the Saami people has the right to manage their TK and TCEs, and the states have the obligation to promote the Saami people's possibility to protect and develop their TK and TCEs as well as to purvey such cultural elements to future generations. Pursuant to Article 31 (2), the contracting states shall more particularly endeavour to guarantee that the Saami people can exercise influence over activities that utilize the Saami culture for commercial purposes as well as receive a fair share of profits arising from such activities. Read in isolation, the provision is quite weak. Article 31 (2) 2 mom, however, declares that the Saami culture shall be protected from utilization of cultural elements that in a deceptive fashion pretends to be of Saami origin. If one reads the two sentences together, it appears that commercial utilization of the Saami culture would demand the consent of the Saami.[65]

Article 32 extends some protection to Saami cultural relics.[66] Article 32 (1) stipulates that Saami cultural relics shall be managed by the Saami parliament, or in cultural institutions in cooperation with the Saami parliament. Even though the Background Document correctly asserts that the provision is a step forward in increasing the Saami people's right to self-determination[67], it is unsatisfactory that the Article leaves the states with the option to retain Saami cultural relics in non-Saami institutions, potentially against the will of the Saami people. Pursuant to Article 32 (2), the states shall further promote the return of Saami cultural relics of particular importance to the Saami people to appropriate museums and cultural institutions in accordance with agreements with the Saami parliament in the country.

Notably, Article 32 does not address the issue of repatriation of human remains.[68] That is not because this is a non-issue in the Saami areas. Also in *Sápmi*, the late 1800s and the early 1900s was an epoch marked by social Darwinist and cultural hierarchist theories. These theories affected also the natural sciences. During this period the Saami population and Saami human remains were subject to "studies" and "research" by "doctors" and "scientists" that wanted to establish the physical differences between the superior Scandinavian peoples and the inferior Saami people. A considerable amount of Saami human remains used in these "scientific" projects is still held by non-Saami museums and other similar institutions. The Saami have made repeated requests to have these human remains returned, sometimes successfully, but Saami human remains are still held by non-Saami institutions. Neither is the human remains issue absent in the Saami Convention because the Expert Group oversaw the matter. The Expert Group did discuss human remains, but failed to find a wording that addresses the issue in an appropriate and cultural sensitive manner. For this reason, Article 32 makes no reference to human remains.

4.2.11 Land and resource rights

As everyone that follows the indigenous

64 Furthermore, Article 11 of the UN Indigenous Declaration stipulates that indigenous peoples have the right to practice and revitalize their cultural traditions and customs, and pursuant to Article 12 (1), indigenous peoples have the right to manifest and practice their spiritual and religious traditions, customs and ceremonies. In addition, as mentioned above, the WGIP has lately been carrying out standard setting activities aiming at protecting the cultural heritage of indigenous peoples. At its session in August 2006, the WGIP decided to recommend that a UN Expert Meeting be arranged with the purpose of approving a set of Guidelines for the Protection of the Cultural Heritage of Indigenous Peoples, crafted under the auspices of the WGIP. The future of these Guidelines, who, as has also been mentioned above, have been crafted by the Saami Council in cooperation with WGIP member Mr. Yokota, remain very uncertain, however.

65 In addition, Article 36 (1) on Saami rights to natural resources proclaims that the protection of such resources shall particularly consider that continuous access to natural resources can be a prerequisite for the possibility to preserve Saami TK and TCEs. Absent in the Saami Convention is the reference to IPRs contained in Article 31 of the UN Indigenous Declaration, and rightly so. IPRs are, per definition, made up of the forms of expressions of human creativity that the state legislator at any given moment decides should be protected as an IPR. The term thus has no meaning in itself, at least not in a human rights context. In other words, a reference to IPRs is nothing else than a reference to domestic legislation. Indigenous peoples generally object to references to domestic legislation in international standards addressing indigenous peoples' rights. Moreover, if a form of indigenous creativity is defined to constitute an IPR under domestic legislation, it is obviously already protected as such. Including a reference to IPRs in the UN Indigenous Declaration adds nothing. It is therefore difficult to understand why certain indigenous representatives insisted that a reference to IPRs should be included in the Indigenous Declaration. On the other hand, the reference to IPRs is probably of no harm either.

66 Cultural relics that fall under Article 32 include both cultural sites, artefacts etc.

67 That is true at least for Finland and Sweden. In Norway, the Saami parliament already manages the Saami peoples' cultural relics.

68 In comparison, Article 12 (1) of the UN Indigenous Declaration proclaims that indigenous peoples have the right to repatriation of their human remains.

human rights discourse are fully aware of, together with the right to self-determination, indigenous land and resource rights are the most contagious issues in the debate on indigenous rights. As outlined under 4.2.3, above, the Expert Group managed to reach an agreement on the right to self-determination fairly early in the Saami Convention process, without too extensive deliberations. The same was not the case with regard to Saami land and resource rights.

On the Saami land and resource rights issue, the Expert Group got into a deadlock almost immediately. In his first rough draft of a Saami Convention, presented at the second meeting, the Chairperson included a land and resource rights chapter that essentially was a clone of the corresponding articles contained in the ILO Convention No. 169[69], however to some extent accustomed to the particular situation of the Saami people.[70] The Saami members declared that they accepted the proposal as a starting point for negotiations, but at the same time stated that the level of protection for land and resource rights in the ILO Convention No. 169 constituted their bottom line.[71] Government appointees from one country, however, stated that since their country has not yet ratified ILO Convention No. 169, they could not accept language copied from the ILO Convention in the Saami Convention. These two contradicting positions obviously placed the Expert Group in a difficult situation. It was decided that the government appointees from the country objecting to ILO language should come back with an alterative set of concrete draft articles on Saami land and resource rights, to serve as a starting point for the Expert Group's deliberations.

While waiting for the promised draft proposal, the Expert Group did not discuss the Saami land and resource rights issue at all, and the government appointees presented the alterative language on land and resource rights only nine months later. And when the proposal did appear, it fell way below ILO Convention No. 169, and was consequently a no-starter for the Saami appointees, and also for the other government members. This was without competition the most heated moment during the three year the Expert Group spent crafting the Saami Convention.

After a period of turmoil, the Expert Group, however, started to address the situation constructively. In the summer of 2004, the Expert Group had reached a common understanding from where to start the negotiations[72], and from the autumn 2004, the Expert Group at each meeting had constructive discussions that took the draft articles addressing the Saami land and resource rights increasingly towards consensus.[73] The problem was, however, that the Expert Group at that stage had less than one year left to conclude its work. This is obviously a very short period to reach an agreement on such a difficult issue as Saami land and resource rights. The land rights chapter in the Saami Convention should be read against this background.

Generally speaking, the land and resource rights chapter (Chapter IV, Articles 34-40) draws from the corresponding articles in the ILO Convention No. 169,[74] but accustoms the provisions to the particular situation of the Saami. Hence, Article 34 (1) proclaims that the Saami shall have ownership rights, individually or collectively[75], to such land and water areas they have traditionally used, insofar as ownership rights follows from international law.

69 See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 May, 1989

70 For instance, when Article 14 of the ILO Convention No. 169 speaks of nomadic people, the Chairperson's proposal referred to reindeer husbandry, as a nomadic livelihood of the Saami people.

71 Since Norway has already ratified the ILO Convention No. 169, and Finland and Sweden are involved in a process to do so, it would make little sense for the Saami to accept any language in the Saami Convention that falls below the standards set by the ILO Convention No. 169.

72 A between session informal meeting where members Carsten Smith, Hans Danelius and Mattias Åhrén and deputy member John B Henriksen participated assisted greatly in this process.

73 The entire Expert Group deserves great credit for managing to find a way out of the crisis it was in with regard to the land and resource rights. All members demonstrated commendable flexibility and constructiveness.

74 Still, the final version of the land rights chapter deviates further away from the corresponding provisions in the ILO Convention No. 169, compared to the initial draft presented by the Chairperson at the Expert Group's second meeting.

75 In other words, the Saami Convention does not take a stand on how indigenous peoples' collective rights to land relates to individual members' individual right to the same. This in turn implies that the Saami Convention is silent on how lands and natural resources shall be distributed within the Saami society. Claims that the Saami Convention particularly benefits certain segments of the Saami society in this regard are hence not justifiable.

Article 34 (2) then goes on to stipulate, in much the same manner as ILO Convention No. 169 Article 14 (1) 2 mom, that the Saami, when they are not entitled to ownership rights pursuant to Article 34 (1), have the right to continuously use, to the same extent that they have traditionally done, land and water areas that they today find themselves sharing with the non-Saami population. Pursuant to the Article, such shared usage should be carried out with due respect for, and with due consideration of, the different nature of the rights pursuant to which the Saami and non-Saami use the land.[76] The Article clarifies, however, that the right to use the land and water areas to the same extent as before should not be construed to imply that the Saami loose rights because of adopting the land usage to the economic and technical development.[77]

Article 34 (3) underlines that the evaluation of whether the Saami have traditionally utilized an area shall take into consideration that the Saami peoples' traditional livelihoods normally leave little permanent traces in the nature. The provision is of significant practical importance. It has proved extremely difficult for the Saami population to succeed in domestic court proceedings against competing non-Saami claims to land. This is partly due to the fact that the cases are tried under non-Saami rather than Saami law. But another important factor is that the rules of evidence in the countries within which the Saami population resides are modelled after non-nomadic, non-Saami use of lands. Article 34 (3) obliges non-Saami courts to accustom the burden of proof on Saami parties to the Saami traditional land use, in cases concerning whether the Saami have traditionally used a particular land area.

Article 35 (2) obligates the state parties to introduce into domestic legislation efficient mechanisms through which the Saami can establish their rights to lands and waters. The Saami shall in particular be provided with financial resources sufficient to have their rights to lands and waters tried before a court of law. If implemented, this provision will probably prove to be one of the most important provisions in the entire Saami Convention. Most certainly, the Saami have much stronger rights to their traditional territories than the states want to acknowledge, also under domestic legislation. The Saami have not had the possibility to materialize these rights, however, due to a lack of sufficient financial resources to take their claims to courts, or to defend themselves, when sued by others.

Also drawing from the ILO Convention No. 169, Article 36 (1) of the Saami Convention proclaims that the states shall particularly protect the Saami's right to natural resources in areas to which the Saami hold rights pursuant to Article 34. Article 36 (2)–(4) builds on Article 27 of the CCPR, as interpreted by the UN Human Rights Committee, but blends it with provisions on the Saami people's right to self-determination.[78] Pursuant to Article 36 (2), relevant actors must negotiate with effected Saami before extracting natural resources, including sub-surface resources, in the Saami areas. If the matter is of particular importance to the Saami people pursuant to Article 16, negotiations must in addition also be carried out with the Saami parliament.[79] Article 36 (3) proclaims an absolute prohibition on natural resource extraction in the Saami areas that would render it impossible or considerably more difficult for the Saami to pursue their traditional livelihoods. Article 36 (4) then clarifies that the same prohibition applies also to other activities in the Saami people's traditional

76 This e.g. implies that any balancing of rights must recognize that the Saami rights might be human rights while the competing rights of the non-Saami population with few exceptions are not. The Article further clarifies that in this regard, particular consideration should be given to the reindeer herding Saami's interests.

77 For instance, the fact that reindeer herders today often use both snowmobiles and motorcycles does hence not mean that such land usage does not give rice to rights.

78 Similarly to how the UN Human Rights Committee, when addressing indigenous peoples' rights, has interpreted CCPR Article 27 in the light of CCPR Article 1, the latter proclaiming all peoples right to self-determination.

79 Further on the right to self-determination, Article 39 stipulates that the Saami parliament shall have the right to co-management of all Saami traditional areas, pursuant to Article 16. And pursuant to Article 40, environmental preservation activities in the Saami areas should be carried out in cooperation between the states and the Saami parliaments.

territories.[80] Article 37 (1) stipulates that if such an activity is permitted, the affected Saami are entitled to compensation for any damage caused to them by the activity.

Article 38 addresses fjords and coastal seas that the Saami people has traditionally occupied and used. The intention behind Article 38 is not so much to proclaim rights additional to those that are already enshrined in Articles 34-37. Rather, Article 38 serves to highlight that the rights contained in Articles 34-37 apply also to the coastal areas traditionally used by the Sea Saami population. For an outsider that might appear obvious, but the coastal areas in northern Norway were subject to a particular harsh assimilation process, and many Norwegians are still ignorant to the fact that these areas indeed constitute a part of the traditional Saami territory. The Expert Group therefore agreed, without debate, that Article 38 well merits its place in the Saami Convention. Coastal see fishing is of particular importance to the Sea Saami culture. Article 38 (2) therefore declares that when deciding on fishing quotas in these areas, particular consideration should be given to traditional Saami usage of the coastal seas and fjords as well as to the importance of coastal sea fishing to the Sea Saami culture.

In the indigenous land and resource rights discourse the last few years, the questions of what rights indigenous peoples have to restitution of lands lost and what rights they have to sub-surface resources in their traditional areas[81], have been highly contentious. These two issues are also receiving increasingly greater attention in a Saami context. Unfortunately, they were also the two major casualties of the limited time the Expert Group had to discuss the land and resource rights, as explained above. Only in the very end of its three year mandate did the Expert Group reach an agreement on what rights the Saami have to continuously use and own the land and water areas they traditionally, and still, occupy. As a consequence, there was more or less no time left to consider what rights the Saami have to territories lost and/or to non-traditional resources[82] in the Saami areas. Moreover, the state appointees where not overly enthusiastic towards the idea of the Saami Convention addressing these matters. Nonetheless, the Saami appointees pressed the issue, and on the very last night of the Expert Groups work, the Group reached a compromise. In both instances, the Saami Convention tackles these contentious issues by confirming that the right to restitution and the right to non-traditional natural resources are indeed relevant in a Saami context, and that these matters have to be solved. The Saami Convention itself does not offer any solutions, however. Rather, it leaves it to future discussions between the Saami and non-Saami peoples to reach an agreement on these very important matters.

Hence, pursuant to Article 34 (4), Article 34 (1) – (3) should not be construed to limit any right the Saami, under international and national law, might have to restitution of traditional lands and waters taken without consent.[83]

Drawing from the ILO Convention No. 169, Article 37 (1) of the Saami Conven-

80 Article 36 (4) lists military training activities as one example of activities that are prohibited if they render it impossible or considerably more difficult for the Saami to pursue their traditional livelihoods. The issue is of significant practical importance. Military training activities cause considerably problems to the Saami traditional livelihoods and military training fields occupy substantial areas within the Saami traditional territory. The Saami members in the Expert Group therefore ideally wanted that an article should be included in the Saami Convention specifically addressing military activities. This proposal met considerable resistance from the state appointees, and the Saami members settled for having military activities mentioned in the list contained in Article 36 (4). One example of Saami interests conflicting with military training activities is the case of the so called Mauken-Blåtind military training field in Northern Norway, which the Norwegian military wished to expand on the expense of reindeer husbandry grazing areas. Having resisted the military's pressure for a decade, the reindeer herders in 2006 finally felt obliged to enter into an agreement according to which they gave up certain parts of their grazing areas for monetary compensation. This example further highlights the need to define how Saami collective rights to land relate to Saami individuals' rights to the same. One should not blame the reindeer herders in Mauken-Blåtind, who fought the military for several years until eventually being more or less compelled to make a deal. Nonetheless, one can question with what right these individuals "sold" a part of the Saami traditional areas, with effects for not only the present but also future Saami generations. The "sale" becomes even more controversial when considering that the grazing area in question is one of those that reindeer herders from the Swedish side of Sápmi traditionally used prior to the closing of the Norwegian-Swedish border, and hence claim rights to. (See further under 4.2.6, above.) Surprisingly, the selling of the land in Mauken-Blåtind did not cause much debate or principal discussions within the Saami society.

81 The Saami areas are extremely rich in sub-surface and other natural resources. For instance, a substantial part of Europe's oil, gas, minerals and forests are situated within the Saami people's traditional areas. The Saami people has with increasing strength demanded a share of the profits from the utilization of such resources. Serious negotiations on such profit sharing schemes are yet to commence, however.

82 Minerals are here referred to as non-traditional natural resources. That said, one should note that there are examples of Saami communities traditionally pursuing mining

83 That under international law, the Saami people indeed has a right to return of lands, waters and territories traditionally used but that have been taken without their consent, has now been affirmed by the UN Indigenous Declaration. Article 28 of the UN Indigenous Declaration proclaims that indigenous peoples' have the right to restitution of lands and waters that they have traditionally occupied and used, but have today lost due to the colonization process or through other means. If restitution is not possible, indigenous peoples have the right to compensation, preferably in the form of alternative land or water areas, equal in quality and size with the territories lost.

tion stipulates that if domestic legislation obligates an extractor of natural resources to pay a share of the profits to the owner of the land area, the same shall apply with regard to Saami that have traditionally occupied and continuous to use a land area. Even though this constitutes an improvement compared to the present situation, the Saami appointees in the Expert Group where not satisfied. They believed the time to be ripe for a more general provision on the Saami people's right to a share in profits from natural resource extraction in the Saami areas. The compromise reached resembles the one on restitution. Article 37 (2) declares that the provision should not be construed to limit any right the Saami might have to share in profits from extraction of natural resources.[84]

As has been explained above, the concept "the Saami people's traditional territories" is used throughout the Saami Convention. Many of the rights the Convention proclaims are intrinsically connected to this particular area. A correct understanding of the term is hence obviously key to determine the scope of many of the rights the Saami Convention proclaims. Yet the Saami Convention does not explicitly define what constitutes the Saami people's traditional territory. Nonetheless, in my opinion, the Convention must be understood to indirectly define the Saami traditional territory in Article 34, (1), (2) and (4). The Saami people's traditional territory – *Sápmi* - is simply the sum of the lands and waters the Saami population has traditionally occupied and/or used, and continue to use, alone or together with the non-Saami population.[85] In addition, pursuant to Article 34 (4), *Sápmi* further encompasses such lands and waters that the Saami population have traditionally used and/or occupied, but have lost through the colonization process or through other means, to the extent a right to restitution follows from international and/or international law.

Still, it remains to define these areas in practical terms, something that, as stated above, Article 35 (1) of the Saami Convention also calls for. A Swedish governmental committee has recently concluded such a survey with regard to the Swedish side of *Sápmi*.[86] Also Norway is in a process of defining what constitutes the traditional Saami areas. Article 29 of the so called *Finnmark Act*[87] establishes a commission with the task of identifying the traditional Saami areas within *Finnmark Fylke*, the northernmost county in Norway. Other similar initiatives can be expected for the remaining part of the Norwegian side of *Sápmi*. Finland has chosen to administratively define the Saami homeland areas as encompassing the three northernmost municipalities in the country[88] as well as the *Lapin paliskunta* reindeer herding district in *Sodankylä* municipality.[89]

«Article 41 (1) is a general provision and proclaims that the Saami livelihoods and use of natural resources shall enjoy particular protection, to the extent such livelihoods and resource use constitute an important fundament for the Saami culture. »

4.2.12 The Saami livelihoods

Intrinsically connected to the Saami's lands, waters and natural resources are of course the Saami traditional livelihoods. Chapter V (Articles 41-43) addresses this issue.

Article 41 (1) is a general provision and proclaims that the Saami livelihoods and use of natural resources shall enjoy

84 Rather surprisingly, the UN Indigenous Declaration does not contain any specific provision addressing benefit sharing. However, the right to benefit sharing is implicit in the Declaration's provisions on free, prior and informed consent (FPIC).

85 As explained above, Article 38 erases any potential doubts as to whether the traditional Saami territory encompasses also fjords and coastal seas.

86 See "Samernas Sedvanmarker", Betänkande av Gränsdragningskommissionen för renskötselområdet", SOU 2006:14. The survey has been heavily criticized by Saami representatives who point out that the findings with regard to the southern Saami areas, as well as to certain parts of the forest Saami areas, are clearly inadequate. Certainly, Sweden still has some work to do to properly define the Saami traditional territories.

87 See Lov 17. juni nr. 85 om rettsforhold og forvaltning av grunn og naturresurser i Finnmarks fylke.

88 These are Enontekis, Utsjoki and Enare municipalities.

89 The Finnish Saami parliament and other Saami representatives in Finland appear to have accepted this definition, even though it seems to be in tension with the ILO Convention No. 169's Article 14 (2) (as well as with Article 35 (1) of the Saami Convention).

particular protection, to the extent such livelihoods and resource use constitute an important fundament for the Saami culture. Article 41 (2) clarifies that under the Saami Convention, Saami livelihoods and resource utilization are such activities that are important for the Saami to be able to maintain and develop their local communities.

Article 42 (1) acknowledges reindeer husbandry as a traditional livelihood and a fundamental cultural denominator of the Saami people. The Article underscores that the Saami's right to reindeer husbandry is based on customary use and proclaims that reindeer husbandry shall be specifically protected by law. Article 42 should not be understood to mean that reindeer husbandry is the only Saami traditional livelihood. Nor is reindeer husbandry more important for the identity of a reindeer herder than for instance coastal see fishing for the identity of a Sea Saami. But reindeer husbandry stands out among the Saami traditional livelihoods in that for many non-Saami persons, it is reindeer husbandry that distinguishes the Saami population from the non-Saami population. It is very much reindeer husbandry that explains to the non-Saami that the Saami people constitutes a distinct ethnic and cultural population, separate from the other peoples today inhabiting Fennoscandinavia. That is why the Saami Convention particularly protects reindeer husbandry as a cultural denominator.[90]

Article 42 (2) and (3) shall be understood against this background. Under Norwegian and Swedish legislation, reindeer husbandry is an exclusive right of the Saami people. Non-Saami persons are not allowed to pursue reindeer husbandry.[91] In Article 42 (2), Norway and Sweden undertake to preserve this order. In Finland, reindeer husbandry is not a sole right of the Saami people. Non-Saami persons farm reindeer in Finland, although not in a traditional Saami manner. Nonetheless, the fact that the Finnish population farm reindeer in Finland has resulted in a dilution of the borderline between the Saami and Finnish cultures, which in turn has resulted in less respect for the Saami culture. A majority of the Expert Group viewed this as a great concern, and argued that the Saami Convention should call on Finland to gradually out-phase non-Saami reindeer husbandry. The Finnish government appointees asserted, however, that it would not be politically feasible to make such a call on Finland, even if allowing Finland a considerable time-period to gradually implement an exclusive Saami right to reindeer husbandry.

The Expert Group spent considerable time on this issue, and did not reach an agreement until the very end of the three year period. Pursuant to Article 42 (3), Finland undertakes to improve the situation of Saami reindeer husbandry, e.g. by considering Protocol No. 3 to Finland's and Sweden's ascending treaty to the European Union (EU). To a person unfamiliar with Nordic and Saami politics, this must come across as the most cryptic provision in the entire Saami Convention. But Protocol No. 3 grants Finland and Sweden an exception from the EU competition rules for the purposes of protecting Saami reindeer husbandry. Hence, under Protocol No. 3, Finland and Sweden are allowed to keep/make reindeer husbandry an exclusive right of the Saami people, something the EU competition laws would otherwise not admit. For Sweden, Protocol No. 3 was hence necessary to preserve reindeer husbandry as a sole right of the Saami. For Finland, Protocol No. 3 was not a necessity. The fact that Finland still became a party to Protocol No. 3 could therefore be viewed as a sign of Finland's intention to render reindeer husbandry a sole right of the Saami also in the future. The reference to Protocol No. 3 in Article 42 (3) of the Saami Convention should thus be understood as an encouragement to Finland to act in accordance with the exception to the competition rules it got from the EU. Still, given this relatively indistinct call on Finland to render reindeer husbandry an exclusive right of the Saami, and given the apparent sensitivity of

90 In addition, the Saami language is of course also an important cultural denominator for the Saami people.
91 There are a few, but non-significant, exceptions to this general rule.

the issue in Finland, it is probably unlikely that Article 42 (3) will be implemented, at least not within a foreseeable future. Given the importance of this issue as discussed above, Article 42 (3) can only be described as one of the most dissatisfying provisions in the Saami Convention.

Regarding the pursuit of reindeer husbandry across national borders, see under 4.2.6, above.

5. PROVISIONS ADDRESSING THE IMPLEMENTATION OF THE SAAMI CONVENTION

Chapter VI of the Saami Convention addresses the implementation of the Convention.

Article 45 establishes a committee tasked with overseeing the implementation of the Saami Convention. The committee shall have six members serving in their individual capacity, one appointed by each of the three states and one appointed by each of the three Saami parliaments. The committee is not a treaty body proper, in the meaning of the institutions tasked to monitor state compliance with the major UN human rights treaties. Still, individuals can report alleged violations of the Saami Convention to the committee, and expect a response. The committee shall also regularly report to the three governments and the three Saami parliaments on how the committee views that the implementation of the rights contained in the Convention is proceeding. The committee can further offer advice on measures that further the objectives of the Saami Convention. The committee is in addition expected to have an important role in overseeing the harmonization of state policies and practices, as e.g. Articles 10-12 call for.[92]

Pursuant to Article 46, the state parties are obliged to render the provisions in the Convention directly applicable in domestic legislation. As described above, Article 35 (2) obligates the state parties to guarantee the Saami financial resources sufficient to have their rights to lands and waters tried before a court of law. Article 47 (2) similarly obliges the state parties to provide financial assistance so that the Saami can have also other cases of principal importance to them tried before courts. Pursuant to Article 47 (1) the state parties shall also otherwise provide financial resources sufficient to implement the rights proclaimed by the Saami Convention.

92 Evidently, the Saami Convention's instructions as to the committee's mandate and working methods are not very precise. To a large extent, it will be up to the committee itself, once established, to define its own role in the implementation of the Saami Convention. How this is done will surely have a substantial impact on how important a document the Saami Convention will become. A strong, truly objective and principled committee that gives concrete advice on how the provisions in the Saami Convention can be implemented and that in a fair manner criticizes the states when they violate the Convention will definitely greatly assist in furthering the aims of the Saami Convention.

6. SOME PROVISIONS THAT ARE NOTABLY ABSENT FROM THE SAAMI CONVENTION

6.1 No general provisions on cross-cutting issues

During the final deliberations on the UN Indigenous Declaration, the so called general provisions or cross cutting issues got a lot of focus. Many participating states were concerned that some of the provisions in the UN Indigenous Declaration were too far reaching and sweeping. They hence sought to include in the Declaration, provisions that accommodated for, in their opinion, legitimate interests of third parties, as well as for the general welfare of the state. Indigenous peoples' representatives were very sceptical to such provisions, fearing that including such language would dilute the rights contained in the Declaration. Nonetheless, the UN Indigenous Declaration, in its final reading, came to include an Article 46 stipulating that in the exercise of the rights contained in the Declaration, the human rights of all should be respected. Further, states are allowed to limit the exercise of the rights contained in the Declaration for the most compelling requirements of a democratic society, although only in a non-discriminatory manner. Reasonably, the applicability of Article 46 of the UN Indigenous Declaration is limited to extreme circumstances. Nonetheless, Article 46 does create a small amount of uncertainty as to what influence third party rights and the interest of "society as a whole" might have on the applicability of the rights enshrined in the Declaration. In contrast, the Saami Convention does not include any such general provisions. In my opinion, the path chosen by the Expert Group is preferable; to agree on the exact scope of each material provision, and not include any general provisions that leaves all the material provisions in the instrument open to interpretation.

6.2 No provisions specifically addressing collective rights

From the beginning of the UN Indigenous Declaration process and to its very end, participants debated whether the Declaration should recognize the existence of indigenous peoples' collective human rights. A united indigenous front tirelessly maintained that the UN Indigenous Declaration must reflect the collective nature of indigenous cultures. But it did not stop there. In addition, indigenous representatives asserted that the collective rights of indigenous peoples that the Declaration proclaims are human rights, and that any declaration on the rights of indigenous peoples must award such collective human rights a more prominent place than the rights of indigenous individuals. On the other hand, some states (who as the UN Indigenous Declaration process progressed became increasingly fewer), stubbornly continued to challenge that international law acknowledges the existence of collective human rights. The matter was settled in the final hours, through inclusion of language in the Declaration that can best be described as a "constructively ambiguous". Articles 1 and 2 of the UN Indigenous Declaration appear to affirm that the collective human rights encompassed in the UN Indigenous Declaration are indeed also human rights. Still, the provisions are perhaps ambiguous enough to cater also for a

different interpretation, by a non-objective and wicked enough lawyer.

The Expert Group – in comparison - spend no time whatsoever on a theoretical discussion on whether international law recognizes collective human rights. As evident from the above, a vast number of the provisions contained in the Saami Convention have the Saami people – rather than Saami individuals – as subject. The Saami Convention hence undoubtedly recognizes collective rights. It should be noted, however, that all collective rights contained in the Saami Convention are not necessarily human rights, even though some undoubtedly appear to be.[93]

6.3 No reference to territorial integrity of states

As stated under 4.1., above, the Saami Convention contains no reference to the principle of territorial integrity of states. In fact, the Expert Group hardly discussed this issue at all. This might be surprising for those that followed the last few years of the UN Indigenous Declaration process, where the issue of whether, and if so how, the principle of territorial integrity of states should be reflected in the UN Indigenous Declaration. States put forward various quotes and quasi-quotes from a number of international instruments addressing the principle of territorial integrity, while indigenous representatives objected to them all. In the end, Article 46 of the UN Indigenous Declaration came to include a brief reference to territorial integrity, simply stating that the rights contained in the Declaration must not be exercised in violation of the principle of territorial integrity of states.[94]

The Expert Group quickly concluded that the Saami people's right to self-determination does not encompass a right to secede from existing states. Neither does such a right follow from any other provisions in international law. This recognition by the Expert Group, in conjunction with that i) Article 3 in the Saami Convention affirms that the right to self-determination is to be exercised in accordance with international law, and ii) that the Saami parliaments in the preambular part declare the Saami people's aspiration to live as one people within the contracting states, took care of the territorial integrity issue in the Saami Convention.

93 If one compares the Saami Convention with the UN Indigenous Declaration, the Saami Convention contains considerably more provisions addressing individual rights relative to collective rights. I would submit that the Saami Convention has been more careful when considering what rights are collective and what rights are individual, and has found a more appropriate balance between the two categories of rights, compared with the UN Indigenous Declaration. The UN Indigenous Declaration clearly contains a few provisions referring to the subject of the right as "indigenous peoples", when it is difficult to understand the right addressed in the provision as being anything but individual in nature. Indeed, the UN Indigenous Declaration on a few occasions even proclaims that "indigenous peoples have the individual right to…" Such provisions do nothing but create confusion around what is the exact nature of the rights the UN Indigenous Declaration proclaims, and could thus potentially be harmful since they render it less clear to what extent the UN Indigenous Declaration acknowledges collective human rights proper.

94 The Working Group negotiating the UN Indigenous Declaration could not reach an agreement on whether the Declaration should include an explicit reference to territorial integrity or not. The Chairperson-Rapporteur of the Working Group then decided not to include a reference to territorial integrity in the Declaration he presented to the UN Human Rights Council for adoption, and which the Council subsequently also adopted. However, during the elaborations on the Declaration in the UN General Assembly, it became evident that it would be extremely difficult, if not impossible, to convince the Declaration to pass a Declaration without an explicit reference to territorial integrity. Hence, Article 46 was modified as described, and the General Assembly subsequently adopted the UN Indigenous Declaration.

7. THE SAAMI CONVENTION AS AN EXAMPLE OF GOOD PRACTICE INTERNATIONALLY

The Saami people is struggling to preserve and develop its culture, livelihoods, society and collective identity, on its own terms. Yet the Saami people is obviously in a fortunate position compared with most other indigenous peoples. The Saami do not have to battle with problems such as hunger, extreme poverty, summary executions or other direct threats to their physical health.

Conversely, the Nordic countries with Saami population are in a better position to respect their indigenous population's rights, compared to most other countries within whose borders indigenous peoples today find themselves residing. Finland, Norway and Sweden are all among the richest countries in the world, and the Saami population relatively small. Hence, these countries should be able to cater for the Saami people's rights without major harm to their economies or otherwise to their societies.

The fortunate situation the Fennoscandinavian peoples find themselves in places an enormous responsibility on the shoulders of the political leaders of the Finnish, Norwegian, Swedish – and Saami – peoples. These are faced with a draft Saami Convention that none of them will find perfect. Still, if accepting the Saami Convention, this will not only constitute a new political base for a relationship between the Saami people on one side, and the Finnish, Norwegian and Swedish peoples on the other. And in addition, the draft Saami Convention constitutes a once in a life-time opportunity for the leaders of these peoples to set an example of good practice internationally. If the Fennoscandinavian peoples can agree on such a constructive arrangement in modern time, the example will surely be followed by indigenous and non-indigenous peoples sharing the same territory in other parts of the world. Conversely, if the Saami people and the non-indigenous peoples in a Nordic context fails to accept the Saami Convention, that would set a very poor precedent. If these peoples, for whom it should be politically and economically feasible to conclude a constructive arrangement for their continued co-existence fail to do so, how should it be possible in other parts of the world, where the economic, geographical and political conditions are much less promising? If the Nordic countries cannot accept a document as the Saami Convention, which does nothing more than proclaims that international human rights shall apply also to their indigenous population and that the Saami people should be allowed to preserve and develop its society across national borders, how can they expect other governments to accept the rights of their indigenous peoples and minorities?

8. RECENT DEVELOPMENTS AND THE PROCESS FORWARD

In conclusion, the Saami Convention stands out as a unique international instrument and project. Even though the Convention is not perfect, if the colonized Saami people and the colonizing peoples can – in the 21st Century – agree on a new basis for their future relationship, that would not only serve the Saami people and the other peoples in Fennoscandinavia, it could serve as an inspiration for other countries in which indigenous peoples reside. So the question is then, what does the future hold in its hands for the Saami Convention?

Following the presentation of the finalized draft Saami Convention by the Expert Group in November 2005, it was decided that the Convention text should be remitted to relevant national, regional, local and Saami institutions for consideration. The remittance period has now ended, and the considerations submitted have been compiled.

The Saami parliaments have all announced that they accept the draft Saami Convention.[95] Also the Saami Council – the organization that 20 years ago took the initiative to the Saami Convention – has given its thumbs up. At the same time, these institutions have also stated that they accept the draft only reluctantly, since they had hoped for a Saami Convention that went further in recognizing the Saami people's right.

As to the non-Saami institutions, there were, as could be expected, mixed responses. Many comments, e.g. by universities and major NGOs such as the Red Cross are positive towards the Saami Convention. Positive reactions to the Saami Convention have also generally been made by non-Saami nation-wide public authorities that do not specifically deal with Saami, but rather with cross-cutting, issues. These institutions refer to the Saami Convention text as balanced and well crafted, and call for a speedy adoption of the Convention by the states and the Saami parliaments. Other non-Saami institutions, however, particularly municipalities and county administrative boards in the Saami areas and public authorities representing extractive industries such as forestry and mining that compete with the Saami traditional livelihoods, have with few exceptions been negative towards the Saami Convention, and have urged the state parties not to adopt the Saami Convention.[96] This shall come as no surprise. Municipalities and the county administrative boards in the Saami areas, in particular in Finland and Sweden, generally believe that that interest of the non-Saami population is more important than the human rights of the Saami people.[97]

The contracting states' ministers responsible for Saami affairs - and the Saami parliament presidents - met in October,

95 The Saami parliaments in Finland and Norway unanimously accepted the Saami Convention. In Sweden, the biggest political party, however still in a majority position, Jakt- och fiskesamerna, dissented.

96 Apparently, the provisions that have caused most concern are Article 16 (2), affirming that the states are not allowed to undertake any action that could considerably damage the fundaments for the Saami culture and the similar Article 36 (3) and (4), pursuant to which the states shall not allow any encroachment in the Saami areas that would render it impossible or considerably more difficult for the Saami to continuously use the area in question for activities fundamental to preservation of the Saami culture. The objections to these provisions are difficult to understand, to say the least. The right to preserve and develop one's culture is one of the most well-established and fundamental human rights. It will consequently be interesting to hear these institutions motivate why Articles 16 (2) and 36 (3) and (4) are not acceptable.

97 That is so despite that these local municipality boards and regional county administrative boards, being public bodies, are obliged to respect human rights. Moreover, even though being non-Saami institutions, these bodies are under law supposed to look after also the interests of the Saami population residing within their area. Somehow, however, these institutions rarely ever take the Saami side on any issue, against a competing non-Saami interest.

2006. It was generally believed that they would then appoint a political (rather than an expert) group, made up of representatives of the three governments and the three Saami parliaments, with the purpose of reaching and agreement on a final version of a Saami Convention text. The outcome of the October 2006 meeting was however highly disappointing. Rather than trying to reach a conclusion on the Saami Convention, it was decided that the three countries independently should study the consequences of ratifying the Saami Convention for another year. The decision was most unfortunate. It cannot be described as anything but absurd that Finland, Norway and Sweden, that internationally like to portray themselves as champions of human rights, conduct analysis to evaluate the consequences of respecting one particular segment of society's human rights. Further, the conducting of consequence studies only serves to delay the adoption of the Saami Convention. The contracting states' ministers responsible for Saami affairs and the Saami parliament presidents will meet again in November 2007 to discuss the future of the Saami Convention. Hopefully, they will take a more pro-active decision this time.

As in most countries with indigenous populations, the Saami issues have a tendency to be politicized. As indicated by some of the responses to the remittance, certainly large segments of the non-Saami population in the Saami areas will try to convince the states not to adopt the Saami Convention. Similar attempts will be made by public bodies, even though one should be able to trust that these respect human rights and also that they are neutral in conflicts between the Saami and non-Saami population.[98] Yet, as pointed out above, the Saami Convention has been drafted by the finest experts on international law that Finland, Norway and Sweden can present. And even if some institutions have called on the states not to ratify the Convention, none of these have denied that the text is well crafted and argued. Nor have they managed to explain where the text is not in line with established international law on indigenous peoples' rights. Moreover, the three countries have invested a lot of political capital in the Saami Convention process. Responding to calls from the Saami to take action on various matters of importance to the Saami society, state representatives' have the last few years often stated that the issue will be settled by the Saami Convention. And internationally, state and indigenous representatives, as well as UN treaty and other bodies, are closely watching if Finland, Norway and Sweden - by ratifying the Saami Convention - is taking a considerable step towards addressing the only major human rights issue left outstanding in these three countries; that of the right of the indigenous Saami people. Also legal scholars are following the fate of the Saami Convention with great interest.

In conclusion, the Saami Convention - louder than any person, institution or text before it - poses the question to Finland, Norway and Sweden; will they allow the Saami issues to be continuously politicized, or will they finally adopt a Saami policy based on the principle of non-discrimination, respect for human rights and the rule of law? I would like to answer the question in the affirmative. Once the consequence analyses have been completed, true champions of human rights, who also constitute three of the richest countries in the world, cannot possibly reach any other conclusion than that the price it would take to end centuries of discrimination of the Saami people cannot be too high. If not, these countries human rights rhetoric internationally is merely a fraud. That is particularly so since the Nordic countries not only supported, but actually were some of the strongest proponents of, the newly adopted UN Indigenous Declaration. The UN Indigenous Declaration goes much further in the proclamation and protection of indigenous peoples', including the Saami peoples', rights, than does the Saami Convention. Hence, since actively supporting the UN Indigenous Declaration, the Nordic states

98 Such pressure has so far for instance prevented Finland and Sweden from ratifying the ILO Convention No. 169.

must reasonably be ready to immediately adopt also the Saami Convention. I hence trust that within a foreseeable future, the Finnish, Norwegian, Swedish and Saami peoples sit down and put their ink under a Saami Convention text that has neither been diluted nor diminished compared to the version presented by the Expert Group.

THE RIGHTS OF AN INDIVIDUAL AND A PEOPLE: TOWARDS A NORDIC SÁMI CONVENTION[1]

BY MARTIN SCHEININ

1 This article is an english translation of the authors article ”Ihmisen ja kansan oikeudet – kohti Pohjoismaista saamelaissopimusta” first time published in the Journal Lakimies Vol. 104 issue 2006/1. English translation by Kaija Anttonen.

INTRODUCTION

On 16 November 2005, an expert group appointed by the governments of Norway, Sweden and Finland and the Sámi parliaments of these countries finished its three-year task and published a draft Nordic Sámi Convention. The purpose of the Convention is to strengthen and consolidate the rights of the Sámi people so that they can, state borders notwithstanding, maintain and develop their language, culture, sources of livelihood and social life. The Convention will recognize the status of the Sámi people as the only indigenous people of these three Nordic countries. It will be binding under international law and regulate the rights of the Sámi people and the members of this people in a way that complies with the developments in indigenous rights that have taken – and are taking – place in international law.[2]

The Sámi Convention also reflects the development of the past decades in Finland, whereby our legal system has increasingly become based on the rights of the individual. The idea that the state and all its bodies and authorities are to respect the fundamental rights of the individual has not been self-evident even during the time that Finland has been independent. Until the 1970s, the right to property was the only basic right of those enshrined in the Finnish Constitution that was taken seriously;[3] even after that, the idea that the legislator should show respect for fundamental rights has only gradually been adopted. It was only the 1995 reform of basic rights that ended, partly as a result of international human rights treaties,[4] the custom of enacting frequently what we know as exceptive laws – requiring a qualified majority of Parliament – to abrogate or derogate from the protection provided by fundamental rights.[5]

Viewed in light of this development, the Sámi Convention has one special feature: it deals with the individual and collective rights of a certain group. However, this is not new in Finland, as the traditional solution of having two national languages (Finnish and Swedish) was implemented in the Constitution partly in the form of collective rights as early as 1919.[6] In addition, a provision stating that the Sámi are an "indigenous people" was added to the Constitution in 1995. The term can now be found in section 17, subsection 3, of the Constitution, according to which the Sámi have, as an indigenous people, the right to maintain and develop their language and culture.[7] Indigenous rights are an important theme in the international discourse on human rights, and, given the changes in Finnish human rights policy in the early 1990s, it is now natural that Finland should take a progressive stand on the recognition and codification of indigenous peoples' rights in the United Nations and other international forums. Together with the

2 See ILO Convention (No. 169) concerning Indigenous and Tribal Peoples (72 ILO Official Bulletin 59), UN Declaration on the Rights of Indigenous Peoples as adopted by the General Assembly on 13 September 2007 (UN document A/61/L.67), as well as Articles 1 and 27 of the International Covenant on Civil and Political Rights (ICCPR) and the way the UN Human Rights Committee (HRC) interprets them.

3 The Constitutional Law Committee's opinion *PeVL 2/1971 vp* on airport security checks is considered a basis for a wider understanding of fundamental rights in Finland.

4 See the Constitutional Law Committee's opinion *PeVL 12/1982 vp,* which emphasized that the provision of the Constitution of Finland empowering Parliament to enact – through the procedure for constitutional legislation – laws that contain exceptions to the Constitution does not empower Parliament to depart from Finland's international human rights obligations.

5 Formally, the institution of the exceptive law was maintained in the 1995 basic rights reform and in the constitutional reform that entered into force in 2000. The scope and frequency of application of such exceptive laws have, however, been radically restricted.

6 See section 14 of the 1919 Constitution Act of Finland.

7 In addition, section 121 of the Constitution contains a provision on the cultural self-government of the Sámi.

other Nordic countries, Finland worked in favor of adopting the UN Declaration on the Rights of Indigenous Peoples rapidly and including a provision on the right to self-determination for indigenous peoples in the Declaration.[8]

The rights of indigenous peoples are not a simple matter conceptually or legally. On the one hand, indigenous peoples' rights are part of the discourse on human rights, which means that they must be understood and formulated so that they are in harmony with universal human rights, which are usually guaranteed in the form of individual rights. In the context of human rights, indigenous peoples' rights are not special rights but a call for special measures to help implement universal human rights in the case of indigenous peoples and their members. On the other hand, the rights of indigenous peoples are based on the idea of preferential treatment, or special measures. From the point of view of human rights treaties the acceptability of such treatment stems from countering discrimination: as indigenous peoples are de facto suppressed or discriminated against, states have a right and an obligation to take special measures in order to eliminate material inequality.[9] Moreover, in addition to dealing with individual rights, indigenous rights encompass collective rights.[10] For some lawyers who are used to the vertical tradition of human rights, the idea of collective human rights may seem strange, or even dangerous. If human rights are the wall that protects individuals against violations by the state – thus functioning as a guarantee for individual liberty – is there not a risk that the situation is turned upside down if some human rights are defined as the collective rights of a group or a people? Can we end up in a situation where collective rights are in fact used for suppressing an individual, forcing him or her to conform to the dominant community? In addition, the recognition of indigenous peoples as peoples among other peoples questions the idea of the nation-state as the cornerstone of modern constitutions. If "the nation" no longer consists of the entire population of a state, how should we understand democracy and the sovereignty of the people?

In the autumn of 2002, the governments of Norway, Sweden and Finland and the Sámi parliaments of these countries appointed an expert group to draft a Nordic Sámi Convention.[11] Each member was also designated a personal alternate. The writer of this article had the honor of being appointed to the group upon a proposal by the Finnish Sámi Parliament. The government of Finland appointed the Director of Legislation from the Ministry of Justice, Mr. Matti *Niemivuo*, whereas the other Nordic countries chose retired judges of their supreme courts, with Norway appointing Carsten *Smith* and Sweden Hans *Danelius*.

«For some lawyers who are used to the vertical tradition of human rights, the idea of collective human rights may seem strange, or even dangerous.»

This article is not a chronicle of the work of the Expert Group, nor is it a commentary on the Sámi Convention drafted by the group. My primary aim is to examine the basic approach of the Draft Sámi Convention in a way that will enable the reader to understand it in the context of constitutional law and international human rights

8 The joint proposals of the five Nordic countries for the adoption of the UN Declaration on the Rights of Indigenous Peoples and the changes that the Declaration in their view required are published as an appendix to the report prepared by the Expert Group on the Nordic Sámi Convention.

9 The International Convention on the Elimination of All Forms of Racial Discrimination and the International Convention on the Elimination of All Forms of Discrimination against Women articulate a view according to which preferential treatment aimed at accelerating de facto equality may not be considered discrimination. In General Comment No. 18 (1989) of the UN Human Rights Committee – which interprets the Covenant on Civil and Political Rights – special measures are, pursuant to Article 26 of the Covenant on equality and the prohibition of discrimination, found to be an obligation of states (para. 10). The same interpretation has later been established in the judgment of the European Court of Human Rights in *Thlimmenos* v. *Greece* (Apr. 6, 2000, § 44).

10 ILO Convention (No. 169) concerning Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples, mentioned in note 1, [*supra* n. 1] focus on the regulation of collective rights, although they, too, contain provisions on the rights of individual members of indigenous peoples. Article 27 of the Covenant on Civil and Political Rights on the rights of persons belonging to ethnic, religious and linguistic minorities talks about the rights of individuals, taking at the same time into account the collective dimension of these rights ("in community with the other members of their group"). Article 1 of the ICCPR on peoples' right to self-determination, in turn, states that the right is a purely collective one, which, according to the interpretation of the Human Rights Committee, cannot as such be an object of an individual's complaint, although it can affect the interpretation of decisions made by the Committee on the complaints of individuals based on the rights safeguarded by the Covenant. See *Apirana Mahuika et al.* v. *New Zealand* (Communication No. 547/1993).

11 Nordisk samekonvention – Direktiv för en expertgrupp (Nov. 7, 2001, revised on Nov. 13, 2002). Directive establishing the Expert Group on the Nordic Sámi Convention.

norms. I will also examine the challenges I have referred to above.

The Draft Nordic Sámi Convention is a result of three years of intensive work. Its solutions and individual provisions are not haphazard: they were arrived at through careful and considered preparation and, in many cases, by reconciling competing points of view through compromises. The Expert Group adopted the present draft unanimously, although the covering letter to the document states that the member appointed by the government of Finland and his deputy had particular difficulties in accepting some of the provisions. However, the wording of the letter shows that these difficulties were overcome and did not prevent the group from arriving at a jointly agreed text.

The concept of "an indigenous people"

The United Nations has been working on its Declaration on the Rights of Indigenous Peoples for a long time.[12] Nevertheless, the term "an indigenous people" was not defined in the Declaration. Instead, ILO Convention (No. 169) concerning Indigenous and Tribal Peoples contains a definition – or at least a characterization – of which groups the Convention applies to. Article 1, paragraph 1(b) defines an indigenous people in the following way:

Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[13]

However, in the ILO Convention the term "an indigenous people" is more complex than would appear from the above-mentioned provision. The text reveals directly or indirectly four central characteristics of an indigenous people:

(1) Being *indigenous* in the ordinary sense of the word, or having been present in a certain geographical region before other populations and especially before the present dominant population.[14] We must note that neither this provision nor the other provisions of the ILO Convention mean that the term "an indigenous people" would entail that the members of the people are direct biological descendants of the first known owners of individual pieces of real estate. We are talking about cultural presence in a certain geographical area before other cultures and about the passing down of this indigenous culture to the present generations.

(2) Subordination by the present dominant population, whose power is typically based on colonization or the drawing up of state boundaries using criteria other than the presence of distinct cultures. The concept of "an indigenous people" always entails *a relation* between a historically indigenous group and a population that is in power at present. This starting-point for the definition is very clear if we look at the ILO Convention as a whole: it regulates in detail the rights of indigenous peoples in relation to a state that is all the time assumed to be in the hands of another (dominant) people. If an "indigenous" population (and culture) of a country is the only or the dominant population of that country, it is not an indigenous people in the legal sense of the term.

(3) Distinctiveness in relation to other populations. This "distinct nature" has its historical background in the conditions that prevailed before the arrival of the present dominant population and the drawing up of state boundaries, and it is

12 The discussions have centred around the draft proposed by the Subcommission of the Commission on Human Rights Committee, available as document E/CN.4/Sub.2/1994/2/Add.1 (1994). In 2006, the declaration, with some amendments, was adopted by the Human Rights Council (A/HRC/1/L.10) and in September 2007 it was finally approval by the United Nations General Assembly.

13 72 ILO Official Bulletin 59. Internationally, the Convention entered into force in 1991 with Norway as a party, but neither Finland nor Sweden has thus far become a party to it.

14 This condition of having occupied a certain geographical area before others differentiates the term "indigenous people" from the term "tribal people", which is used in paragraph 1 (a) of Article 1 of the ILO Convention. In the context of the wider discussion on the rights of indigenous peoples, the concept of tribal peoples used in the ILO Convention means that indigenous rights are applied to populations which are in a position analogous to that of indigenous peoples without being "aboriginal". The wide scope of the ILO Convention is one explanation why paragraph 3 of Article 1 contains a provision according to which treating a group as an indigenous or tribal people under the Convention does not, as such, mean that the group in question is "a people" in the general meaning of public international law.

manifested in special social, economic, cultural and political features. The term "an indigenous people" does not deal solely with protecting "acquired rights" or making up for past wrongdoings to the original owners or inhabitants of certain areas. It relates at least as strongly to seeing and protecting the cultural diversity of humankind as an important value, and this entails guaranteeing that distinct cultures continue to exist and are passed down to future generations.

(4) Unbroken continuity from the historical state of "aboriginality" to the present and future. The legitimacy of indigenous rights largely lies in the fact that the indigenous group has managed to maintain its distinct culture until today and also wants to transmit it to future generations. Indigenous cultures that have been eradicated are interesting both historically and anthropologically, but they provide no basis for the present rights of indigenous peoples unless some of their social, economic, cultural or political institutions have persisted.

In addition to these characteristics – which derive from Article 1 of the ILO Convention – it is possible to deduce two other essential features of "an indigenous people" from the Convention in general:

(5) According to Article 1, paragraph 2, collective *self-identification* as indigenous is a fundamental criterion for determining the scope of the Convention: if a group does not consider itself an indigenous or tribal people, it should not be classified as such. On the other hand, if the group defines itself as an indigenous or tribal people, such self-identification should have legal significance. I would like to emphasize that paragraph 2 of Article 1 of the Convention deals only with collective self-identification and thus does not say anything about the grounds on which a certain individual belongs to an indigenous people.

(6) A special relationship to the land and resources of a particular geographical region.[15] The above-mentioned features of being first, distinctiveness and continuity are all connected with the fact that the distinct culture of an indigenous people has not arisen in a particular geographical area by coincidence: it has evolved in the course of hundreds or thousands of years in interaction with the conditions and resources of the region. Fishing, hunting, gathering, nomadism and distinct forms of agriculture are, globally, typical means of subsistence for indigenous peoples and, at the same time, a natural substratum for their social organization, material and spiritual culture and political institutions. The communal life of indigenous peoples may be determined by natural resources and the historical ways of using these resources. Such historical traditions also shape the language, practical artifacts and artistic expression of the peoples. Through the special relationship indigenous peoples have to resources, we can also understand their vulnerable (or subordinated) position. Relocation or new, modern sources of livelihood may improve the material standard of living for the members of an indigenous people, but they may also violate indigenous peoples' rights in that they sever the connection, including the historical continuity, that the peoples have with their natural environment and resources; these changes may also destroy the distinct nature of their culture.

Although Finland, Norway and Sweden have, in different contexts, recognized that the Sámi are an indigenous people in their territory, and although Finland has inserted this recognition to its Constitution, the three states have not always based their recognition on a legally distinguishable concept of an indigenous people; nor have they always been aware of the exacting legal consequences that the use of the term "an indigenous people" has. When dealing with the Draft Nordic Sámi Convention, the states will finally have to take a more outspoken position on the issue: acknowledging that the Sámi are the *only*

15 In the ILO Convention, this characteristic appears, for example, in the introduction, which refers to the contributions of indigenous peoples to the ecological harmony of humankind, and in Article 13, which deals with land rights; the article emphasizes that the traditional lands of indigenous peoples and the associated natural resources have special importance for the cultures and spiritual values of the peoples concerned.

indigenous people of Finland, Norway and Sweden and recognizing them as such *must* have legal consequences.

Articulating indigenous rights: the right to a past, to the present and to a future

In another context, I have examined comparatively how the rights of indigenous peoples can indeed be articulated in very different ways under various frameworks of human rights treaties, even though the legal claims put forward may, in the end, have the same objective: to grant indigenous peoples protected possession and use of the land and natural resources within a particular territory as a basis of their distinct culture.[16] Where ILO Convention No. 169 concerning Indigenous and Tribal Peoples talks primarily about *land*,[17] the International Covenant on Civil and Political Rights focuses on *culture*.[18] Where the American Convention on Human Rights seems to stretch *the right to property*[19] to protect indigenous rights, the European Convention on Human Rights focuses on *the protection of private and family life*.[20] The difference in the articulation of the claims can most often be explained by the fact that the convention texts themselves are different; it seems that each one opens different kinds of "windows" through which indigenous rights can try to enter the system of human rights. At the same time, this situation shows how interlinked all human rights are; indigenous legal claims that are very similar in content can be articulated in many ways.[21]

The Draft Nordic Sámi Convention offers several alternatives for presenting claims that concern the safeguarding of Sámi culture, which is distinct and based on the use of Arctic natural resources. These various ways of articulation – or legal strategies – can be analyzed by means of such concepts as the right to a past, to the present and to a future, as Ánde Somby, a Sámi himself, has done.[22] In this article, I refer to these concepts only as aids that help me make a point; I do not claim that they are real analytical categories of legal significance.

Right to a past. It is possible to assess, demand and settle indigenous rights, including the rights that the Sámi people have as an indigenous people, on the grounds of arguments and material based on the past. This approach is legitimized by the feature of aboriginality that the term "indigenous people" entails. Where an indigenous people inhabited a certain area before the present dominant population arrived or assumed power in the area, the people often has claims of reparation that are based on its historical title to or use of the land. The fact that ILO Convention 169 emphasizes land rights – stating, in Article 14, that historical continuity, or traditional use, substantiates indigenous peoples' right of ownership and possession to land – supports the choice of such a point of view and provides arguments for legal claims based on it. In Finland and the other Nordic countries, arguments that are based on historical ownership and use of land have, thus far, been emphasized in the discussion on how to safeguard the indigenous rights of the Sámi. This is partly due to the existence of high-quality research in

16 See: Scheinin Martin, "The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land", pp. 159-222 in Orlin – Rosas – Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*. Turku 2000.

17 ILO Convention No. 169, Part II (Arts 13-19).

18 See Article 27 of the Covenant and, as an important source of interpretation of the Covenant, General Comment No. 23 (1994) of the UN Human Rights Committee. See also the Committee's decisions on the individual cases *Ivan Kitok* v. *Sweden* (Communication No. 197/1985), *Bernard Ominayak (Lubicon Lake Band)* v. *Canada* (Communication No. 167/1984), *Ilmari Länsman et al.* v. *Finland* (Communication No. 511/1992) and *Apirana Mahuika et al.* v. *New Zealand* (Communication No. 547/1993).

19 See the American Convention on Human Rights (1144 U.N.T.S. 123), Article 21, and the judgment of the Inter-American Court of Human Rights in *Awas Tingni v. Nicaragua* (Aug. 31, 2001). The radical dimension of the decision lies in the court's interpretation that the Convention's concept of the right to property has an autonomous meaning and includes – in addition to the right to property safeguarded by the domestic laws of the states parties to the Convention – the indigenous legal systems that are based on customary law.

20 See the decision of the European Commission of Human Rights in *G. and E.* v. *Norway*, European Commission of Human Rights, Decisions and Reports, Vol. 35 (1984), pp. 30-45.

21 The situation can be illustrated clearly by the decision of the Human Rights Committee in *Hopu and Bessert* v. *France* (Communication 549/1993). As a reservation by France made it impossible to base the case on Article 27 of the International Covenant on Civil and Political Rights, the Committee based its decision on Articles 17 and 23, which deal with the right to privacy and family life, deducing from them legal effects that were very similar to the ones that had been deduced from Article 27 in earlier case law.

22 Somby Ánde, *Juss som retorikk* ("Law as Rhetoric"), Tromsø 1999.

the field of legal history[23] and partly to the attention which ILO Convention No. 169 has attracted in public discussions and in the drafting of laws.[24]

However, I would like to emphasize that the position of the Sámi as an indigenous people will not be settled, nor the protection of their human rights guaranteed, by reports on the ownership of land in history, as valuable as such reports can be as a factual basis for the decisions made in legislatures or courts. We should in particular question the usefulness of the study on land rights ordered by the Finnish Ministry of Justice, as it deals with a completely different period than the centuries when the state (Sweden) and its dominant population colonized the lands historically inhabited by the Sámi.[25] The study deals primarily with whose private ownership the state first acknowledged according to documents, not with who owned the land before the state arrived in the areas that the Sámi traditionally occupied.

The Draft Nordic Sámi Convention does not define the lands that are owned by the Sámi, the state or some other party in Finland, Norway and Sweden. In line with the provisions of ILO Convention No. 169, the states parties would, however, bind themselves to settle, in good faith, in which areas the long-lasting traditional use of lands and waters by the Sámi constitutes grounds for individual or collective ownership by the Sámi in accordance with national or international norms on use from time immemorial or similar institutions. In the areas where the Sámi have traditionally used certain lands or waters along with other people for reindeer herding, hunting, fishing, or other purpose, they must have the right to control and use the areas continuously. For example, the traditional Sámi way of using the land without leaving lasting traces in nature should be recognized in the assessment process. The Nordic Sámi Convention would not hinder the Sámi from making individual or collective land claims that are more extensive than those the Convention directly provides for, and, therefore, the draft states that the provisions of the Convention do not restrict the right of the Sámi to claim property that they are entitled to under national or international law.[26]

By signing the Sámi Convention, the states would bind themselves to taking measures in order to safeguard Sámi land rights effectively. The national court systems are to have appropriate methods for dealing with claims concerning Sámi land and water rights. In particular, the Sámi are to be provided with the necessary economic support so that they can take their cases to court.[27]

Right to the present. In international discussion, indigenous rights are as strongly based on the present conditions as they are on the facts and arguments concerning the historical ownership and unjust dispossession of land. The right to the present means that, today, indigenous peoples represent distinct cultures, the maintenance and transmission to future generations of which is an end in itself – no matter who legally owns the natural resources that are the material basis of these cultures. The legal claims that arise from protecting the viability of indigenous cultures are founded on the distinct nature of those cultures and their historical continuity from the past to the present. However, these claims are also based on the special relationship that has evolved in the course of hundreds or

23 See Korpijaakko, Kaisa: *Saamelaisten oikeusasemasta Ruotsi-Suomessa. Oikeushistoriallinen tutkimus Länsi-Pohjan Lapin maankäyttöoloista ja –oikeuksista ennen 1700-luvun puoliväliä* ("Legal Rights of the Sámi in Finland and Sweden During the Period of Swedish Rule"). Helsinki 1989; Korpijaakko-Labba, Kaisa: *Saamelaisten oikeusasemasta Suomessa – kehityksen pääpiirteet Ruotsin vallan lopulta itsenäisyyden ajan alkuun* ("Legal Rights of the Sámi in Finland: The Main Trends from the End of Swedish Rule to the Beginning of Independence"). Diedut 1999/1. Rovaniemi 2000; Report by the Working Group of the Sámi Parliament on the land ownership issue of the Sámi Area. Partial Report I. *Valtion metsämaa, suojelualueet ja yleiset vesialueet* ("State Forests, Conservation Areas and Public Waters"). Enontekiö 2002; Korpijaakko-Labba, Kaisa: *Valtionmaat Suomen kiinteistöjärjestelmässä – erityisesti silmällä pitäen saamelaisten maaoikeusasiaa* ("State Forest within the Finnish Legal System – With Particular Emphasis on Sámi Land Rights"). *Oikeustiede – Jurisprudentia* 2003, pp. 299-350.

24 See Vihervuori, Pekka: *Maahan, veteen ja luonnonvaroihin sekä perinteisiin elinkeinoihin kohdistuvat oikeudet saamelaisten kotiseutualueella. ILO:n alkuperäis- ja heimokansoja koskevan yleissopimuksen edellyttämät saamelaisten maahan ja vesiin kohdistuvia oikeuksia koskevat muutosehdotukset* ("Rights Concerning Land, Water and Natural Resources as well as Traditional Means of Livelihood in the Sámi Area. Amendment Proposals Concerning the Land and Water Rights of the Sámi Required by the ILO Convention concerning Indigenous and Tribal Peoples"). Ministry of Justice in Finland. Publications of the General Department 3/1999; Wirilander, Juhani: *Lausunto maanomistuoloista ja niiden kehittymisestä saamelaisten kotiseutualueella* ("Statement on Land Ownership Conditions and Their Development in the Sámi Area"). Ministry of Justice 2001.

25 See the press release of the Ministry of Justice of 20 December 2002: *Lapin maaoikeustutkimus käynnistyy* ("A Study on the Land Rights of Lapland is Launched").

26 The Draft Nordic Sámi Convention, Article 34.

27 Article 35.

thousands of years between each individual culture and the resources that it relies on in a particular geographical area. In the discussion on human rights, "the right to the present" is above all an articulation of the right of a group and its members to enjoy their own culture. Indeed, the concept of culture is central in section 17, subsection 3, of the Finnish Constitution, which deals with the Sámi as an indigenous people, and in Article 27 of the UN Covenant on Civil and Political Rights, as well as in the subsequent interpretive practice of the latter instrument. The Covenant has repeatedly been interpreted such that, especially in the case of indigenous peoples, "culture" covers traditional or otherwise typical means of subsistence that are based on land and its resources. This interpretation was also the starting-point of the 1995 fundamental rights reform in Finland.[28] Thus, as concerns Article 27 of the Covenant, the Human Rights Committee has established that if competing uses of land and resources result in indigenous means of livelihood losing their economic or cultural sustainability, those land uses constitute a denial of a minority's right to enjoy its own culture. On these grounds, the Committee has also found that if mining and logging activities in the Finnish Sámi Area continue and expand, they may constitute a violation of Article 27 of the Covenant.[29]

The provision of Article 8 of the European Convention on Human Rights on the right to the protection of private and family life also provides a legal basis for claims that arise from the present conditions of indigenous peoples and concern the safeguarding of a distinct way of life and its material basis.

In the Draft Nordic Sámi Convention, "culture" is understood in the same comprehensive way as in Article 27 of the ICCPR and in section 17, subsection 3, of the Constitution of Finland. The Convention would explicitly state that, as far as Sámi culture is concerned, the obligations of the states parties also cover the material basis of culture, meaning that the Sámi are to be provided with the necessary social and economic means of retaining and developing their culture.[30] In line with the interpretative practice of the Human Rights Committee,[31] the Sámi Convention would require the states parties to ensure the effective participation of the Sámi in decisions which affect their living conditions. Each country's public authorities would be obliged to always negotiate with the Sámi Parliament of the country before making a decision on an issue that is of essential importance to the Sámi. Such negotiations would have to be conducted early enough to permit the Sámi Parliament to contribute to the decision-making process and the outcome of the issue. The Convention would provide in particular that, without the consent of the Sámi Parliament of the respective country, the state may not take or approve measures that could considerably harm the fundamental conditions of Sámi culture, sources of livelihood and social life.[32]

Right to a future. In the international discourse on human rights, indigenous peoples' "right to a future" follows in part from their right to a present: guaranteeing the sustainability of a distinct culture is largely a question of transmitting it to new generations. However, "the right to a future" can also be connected with the last part of the term "an indigenous people", that is, with the idea that indigenous peoples are *peoples* among other peoples and therefore have a right to self-determination. The UN Human Rights Committee has emphasized in many contexts – also when dealing with the periodic reports of Norway, Sweden and Finland – that the provision of Article 1 in the Covenant on Civil and Political Rights concerning the right of peoples to self-determination also applies to the Sámi living in the three Nordic countries[33] and

28 See the General Comment (especially paragraph 7) and the individual cases mentioned supra n. 17.
29 See *Ilmari Länsman et al.* v. *Finland* (Communication 511/1992), para. 9.8 and *Jouni E. Länsman et al.* v. *Finland* (Communication 671/1995), para. 10.5.
30 Draft Nordic Sámi Convention, Art. 33.
31 See *Ilmari Länsman et al.* v. *Finland* (Communication 511/1992), para. 9.6 and *Jouni E. Länsman et al.* v. *Finland* (Communication 671/1995), para. 10.7.
32 Draft Nordic Sámi Convention, Article 16.
33 See the latest Concluding Observations of the UN Human Rights Committee on the periodic reports of different countries: Norway (CCPR/C/79/Add. 112; 1999), Sweden (CCPR/CO/74/SWE; 2002) and Finland (CCPR/CO/82/FIN; 2004).

at least several indigenous peoples living in other countries.[34]

As a norm of international law, the right of a people to self-determination does not mean that every people has the right to form its own state and secede unilaterally from a multiethnic state. The view that a subordinated people may – by virtue of international law – exercise its right to self-determination in its ultimate form (to form a state of its own) only under very special circumstances (e.g., military occupation, colonization or other type of oppression) can be considered an established position.[35] In its decisions – especially on indigenous peoples' right to self-determination – the Human Rights Committee has repeatedly emphasized the meaning of paragraph 2 of Article 1 in the Covenant on Civil and Political Rights: that a people which has the right to self-determination – these peoples including at least certain indigenous peoples – has a right to freely dispose of its natural resources.

«As a norm of international law, the right of a people to self-determination does not mean that every people has the right to form its own state and secede unilaterally from a multiethnic state.»

In international discussion, the Nordic countries have actively defended wordings according to which indigenous peoples, too, are subjects in relation to the right to self-determination of peoples. At the same time, however, the countries have emphasized that this right does not, as such, entitle a people to form a state of its own through a unilateral act.[36]

As far as indigenous peoples' right to self-determination is concerned, the Draft Nordic Sámi Convention is in line with the international discussion. According to the draft, the Sámi have "as a people the right to self-determination in accordance with the rules of international law and the provisions of this convention".

As regards the legal effects of the right to self-determination, the Convention would stipulate that, in accordance with and within the framework of the norms to which the quotation refers, the Sámi have the right to decide themselves on their economic, social and cultural development and to dispose of their natural resources for their own ends.[37]

Challenges: the future of Sámi reindeer herding

In terms of Finnish law, the section of the Draft Convention dealing with the position of reindeer herding as a Sámi source of livelihood and as the basis of Sámi culture is one of the most difficult ones in the instrument. As reindeer herding is, with minor exceptions, an exclusive right of the Sámi in Norway and Sweden, and as Protocol No. 3 of the Act of Accession – through which Finland joined the European Union – explicitly allows Finland, too, to have a provision to that effect, the Convention must deal with the question of how the position of reindeer herding as a Sámi source of livelihood and the basis of Sámi identity and culture will be strengthened in Finland. One obvious complication is that more than half of the reindeer in Finland are, de facto, owned by non-Sámi, outside the Sámi homeland.

The Expert Group discussed at length the wording of the provisions through which Finland would commit itself, in the course of a transition period, to making reindeer herding an exclusive right of the Sámi. In these discussions, it was consistently emphasized that the property rights of the present non-Sámi reindeer herders must be respected. Therefore, it is necessary, when replacing the present reindeer-herding system with one based on an exclusive right of the Sámi, to stress

34 Corresponding statements that recognize at least some indigenous peoples as subjects in terms of the right of peoples to self-determination have been presented by the Committee when dealing with the reports of, for example, Canada (CCPR/C/79/Add. 105; 1999, Mexico (CCPR/C/79/Add. 109; 1999), Australia (CCPR/CO/69/AUS; 2000) and Denmark (CCPR/CO/70/DNK; 2000).

35 The Supreme Court of Canada has dealt with the issue very comprehensively in its decision *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

36 The joint proposals of the five Nordic countries are included, as an appendix, in the report of the Expert Group on the Nordic Sámi Convention.

37 Draft Nordic Sámi Convention, Article 3.

voluntary measures and the right to full compensation for losses that have a monetary value.

As the members of the Expert Group who were closely affiliated with the government of Finland had difficulties in accepting even such solutions, the Group finally settled on a formulation which does not, in terms of international law, obligate Finland to make reindeer herding an exclusive right of the Sámi. Instead, Finland would commit itself to strengthening the position of reindeer herding as a Sámi means of livelihood, taking into account Protocol No. 3 of the Act of Accession, which concerns the Sámi as an indigenous people.[38]

Sámi culture and the Sámi way of life are not based exclusively on reindeer herding. In Finland, there are also Sámi groups – for example, on the River Teno – whose communal life and Sámi identity are based on fishing, a livelihood that they have pursued from time immemorial. Nevertheless, the viability of Sámi culture in Finland requires measures that will strengthen the position of Sámi reindeer herding. The social interaction of the still existing Sámi communities, the Sámi language, the relationship of the Sámi with nature, Sámi artistic expression and the transmission of Sámi culture to future generations are all linked with the fate of Sámi reindeer herding in Finland. Continuous logging in the winter pastures of Sámi reindeer herders' cooperatives – which graze their animals in different areas according to the seasons – and Finnish agricultural policy whereby the reindeer is treated as a domestic animal kept only for meat production are eroding Sámi reindeer herding in Finland. At the same time, the Sámi language, Sámi culture and even the existence of the Sámi people are threatened.

Article 8 of the UN Declaration on the Rights of Indigenous Peoples mentions the concept of destruction of culture (earlier referred also as cultural genocide), listing five different courses of action that fall under the notion. The present legislation of Finland and certain activities of the state concerning Sámi reindeer herding fulfill three of these five criteria: we are dealing with actions which have the aim or effect of depriving the Sámi of their integrity as a distinct people,[39] dispossessing them of the essential natural resources that their culture is based on,[40] and assimilating them as an indigenous people into the dominant population through measures taken by the state.[41] It is high time to acknowledge that the survival of Sámi culture requires that Finland take measures to strengthen the position of Sámi reindeer herding.

…and the idea of two peoples within the territory of a State

The idea of "one country, two peoples" is quite incompatible with the principle of nation-state that the constitutions of Finland and the other Nordic countries are based on. Nevertheless, it is necessary for us to adopt this idea if our aim is a social contract between the Sámi people and the governments representing the majority populations of the nation states. Similarly, only by recognizing the Sámi people as a people can we act in line with the development of international law; this development has meant recognizing some indigenous peoples – who have, at least partly, retained their distinct and traditional institutions – as entitled to the right of peoples to self-determination. The UN Human Rights Committee, which supervises the implementation of the Covenant on Civil and Political Rights, has clearly established that the Sámi of the Nordic countries belong to the indigenous peoples that are *indigenous* in relation to the present dominant population but are also *peoples* in the meaning of Article 1 of the Covenant on Civil and Political Rights. In connection with the drafting and adoption of the UN Declaration on the Rights of Indigenous Peoples, Finland and the other Nordic countries actively advocated recognizing indigenous peoples

38 Draft Nordic Sámi Convention, Article 42.
39 Article 8, paragraph 2 (a) of the Declaration on the Rights of Indigenous Peoples, see footnote No. 1, *supra*
40 Paragraph 2 (b).
41 Paragraph 2 (d).

as peoples and as subjects of the right that such peoples have to self-determination.

The idea that the Sámi are a distinct indigenous people has been recorded in the Constitution of Finland.[42] The Draft Nordic Sámi Convention is in line with this principle that was adopted more than ten years ago. However, there is a tension between this idea and other sections of the Constitution – sections that are older and even more essential for how the Finnish state understands itself.

Pursuant to subsection 1 of section 2 of the Constitution, the powers of the state in Finland are vested in "the people", who are represented by Parliament. In spite of this, section 17, subsection 3, of the Constitution refers to the Sámi as an "indigenous people"; the Constitution also contains several provisions on self-government solutions that complement the authority of Parliament.[43] The provision on the Sámi as an indigenous people is contained in the same section as the provisions on the national languages of Finland. These different elements can be reconciled by the fact that the term "people" in subsection 1 of section 2 means "the entire population", including our indigenous people, the Sámi. The reference in subsection 2 of section 17 to the Finnish- and Swedish-speaking "populations" does not make these language groups separate peoples; we are dealing with different linguistic identities among one people that speaks two languages.

It will probably take some time to get used to the idea that the Sámi of Finland are not just "an indigenous people" but also "a people". The terminology of the Nordic Sámi Convention chosen by the Expert Group will probably be most significant at the symbolic level: calling the Sámi a people shows that we are not only dealing with a convention through which the three Nordic countries aim to safeguard the rights of a minority, but that we are creating a social contract between the Sámi people and the states (and the dominant population exercising power in them).

Further drafting of the Sámi Convention

The appointing and the work of the Expert Group that drafted the Nordic Sámi Convention represent a profound change in the attitude of the governments of the Nordic countries towards the Sámi, the indigenous people of these countries. When the Group was appointed, the governments and the national Sámi parliaments were considered equal parties in the process. This was in line with the nature of the Sámi Convention, which is meant to become a social contract between the Sámi people and the three nation-states. During the work of the Expert Group, the principle of equality between the members appointed by different bodies was respected, with everyone having an equal say in the formulation of the joint result.

In November 2005, the Expert Group submitted, without dissenting opinions, its draft convention to the ministers of the three Nordic countries responsible for Sámi matters and the presidents of the three national Sámi parliaments. Thus, the parties are jointly responsible for the further drafting of the Convention, and the matter cannot be returned to the level of governmental negotiations without violating the fundamental nature of the instrument. If the Sámi parliaments were relegated to being just one body among many that submit comments on the draft, the fundamental nature of the Convention would be violated. It is absolutely necessary to hear other interest holders in drafting the Convention, but this hearing is to be seen as a common project between the governments and the Sámi parliaments that aims to assess and improve the proposal of the Expert Group.

If and when the governments and Sámi parliaments agree on the final content of the Sámi Convention, it will be signed

42 Subsection 3 of section 17 in the Constitution of Finland.

43 See section 120 (on the self-government of the Åland Islands) and section 121 (on municipal and other regional self-government, including the cultural self-government of the Sámi) of the Constitution. Pursuant to section 123 of the Constitution, universities, too, are self-governing. Sections 75 and 76 of the Constitution restrict the sovereignty of Parliament in using its legislative power on the Åland Islands (s. 75) and in relation to the Evangelic Lutheran Church (s. 76).

by the governments of the three Nordic countries[44] and submitted both to the Sámi parliaments of the three Nordic countries for acceptance[45] and to parliamentary proceedings in these countries in accordance with their constitutions.[46] One of the special features of the draft convention is that although the Convention will be a binding treaty between states under public international law, the entry into force and amendment of the instrument will require not only appropriate parliamentary proceedings in each country but also approval by their respective Sámi parliaments.[47]

The condition that the Convention cannot enter into force or be amended without the consent of the Sámi parliaments also reflects the nature of the Nordic Sámi Convention as a social contract between the Sámi people and the governments of the three Nordic countries.

44 Draft Nordic Sámi Convention, Article 48.
45 Article 48.
46 Article 49.
47 Article 51.

THE SAAMI PEOPLE'S RIGHT TO SELF-DETERMINATION[1]

Background Material for the Nordic Saami Convention

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1 English translation by Translatørservice AS, Norway.

1. INTRODUCTION

The idea of self-determination was developed during the Age of Enlightenment at the end of the 18th Century, and respect for people's self-determination came to be regarded as a fundamental ideological and political principle, which has since played an important role in almost all political development. After the establishment of the United Nations (UN) in 1945, the principle of self-determination was developed from a principle to constitute a right for all peoples. The right to self-determination has been established in the Charter of the United Nations, the UN's International Covenant on Civil and Political Rights, the UN's International Covenant on Economic, Social and Cultural Rights, etc. It has also been established in several other central instruments of international law and been recognised by the UN's International Court of Justice on several occasions.

The right to self-determination was initially mainly associated with the liberation of colonies and establishment of new nation states that was the result of the decolonisation process. During this period, the right to self-determination was almost synonymous with the right of the inhabitants within a specific territory, regardless of their ethnicity, to establish a separate state. In the last 20 years, however, it has become increasingly more obvious that the right to self-determination, as a right for all peoples, cannot easily be limited to apply only in a colonial situation. Even though the dominant opinion during the time when the colonies were liberated probably was that «the peoples» with a right to self-determination according to international law was to be understood as the total of all inhabitants in a colony or state, international law has developed since then. During recent decades, UN bodies, states and experts on international law have emphasised more and more strongly that even peoples that do not constitute the entirety of all inhabitants within a colony or state also have the right to self-determination. A distinctive group of people within a state may also constitute a «people» under international law, and a people may even be residing in several states. The development towards the understanding that the right to self-determination must also apply for peoples outside the traditional colonial situation, and that the right to self-determination therefore may be expressed in ways other than through establishment of states, has to a great extent come about as a result of the UN, states and other bodies having to take a stand on the rights of indigenous peoples.

As «peoples» no longer is understood as only the total of all inhabitants of a state, the UN system has started work on various working definitions of the term «peoples». After the UN system started discussing the rights of indigenous peoples, it has also ended up using certain working definitions of the term «indigenous peoples». A comparison of these working definitions shows that the definitions of «peoples» and «indigenous peoples» are more or less identical. As it is clear that the territory of one state may include more than one people, and as it is difficult to make a rational distinction between indigenous peoples and other peoples that should indicate why these should have different rights, several competent UN bodies, such as the UN's Human Rights Council, the UN's Committee on the Elimination of Racial Dis-

crimination and the UN's Human Rights Commission, have therefore in recent years confirmed that groups of indigenous peoples may constitute peoples with a right to self-determination. Even regional organisations, such as the European Union (EU), have confirmed that indigenous peoples are entitled to self-determination. It should be noted, however, that not all groups of indigenous peoples that refer to themselves as an indigenous people are regarded as such according to international law. For this to be the case, the people in question must comply with the international law criteria regarding what characterise a people.

There is also widespread agreement at the state level that indigenous peoples constitute groups of people that may be entitled to self-determination. Some of the states that participated in the work on establishing the UN's Declaration on the Rights of Indigenous Peoples have expressed a somewhat different opinion than indigenous peoples having a right to self-determination. During the work on the Declaration on the Rights of Indigenous Peoples, the Nordic countries had a joint position, which included indigenous peoples having the right to self-determination. However, when they have stated that indigenous peoples have the right to self-determination, the Nordic countries, as well as most other countries, have at the same time emphasised the viewpoint that the principle of the state's territorial integrity sets certain limits for the exercise of the right to self-determination. In other words, these states are of the opinion that the circumstance that indigenous peoples may constitute a group of people that may be entitled to the right to self-determination, does not entail that the indigenous peoples are entitled to secede and establish their own states. This viewpoint is most certainly in agreement with international law. It is clear today that current international law does distinguish between the right to self-determination and the exercise of this right in the form of secession. The fact that a people have the right to self-determination is really of no relevance for whether said people are entitled to establish a separate state under international law. Today, opinion even differs as to whether international law does in any way include a positive right to secession, but should there be such a right, it only applies if the people in question are subjected to severe human rights infringements in the state in which they now reside, and not as an element included in their possible right to self-determination.

A study of the working definitions of indigenous peoples being tested by the UN system shows that the Saami are to be regarded as an indigenous people, and several UN bodies have also confirmed that the Saami are an indigenous people under international law. That the Saami constitute an indigenous people has even been confirmed by all countries with a Saami population, and is not seriously being questioned today. There has been more discussion in recent years as to whether the Saami also constitute a «people» under international law. However, it must be regarded as having been established that the Saami even qualify among the indigenous peoples that on objective basis comply with the international law requirements for constituting a «people» - with a right to self-determination. This is evident from the above-mentioned working definitions of «peoples», and competent UN bodies have also on several occasions explicitly stated/confirmed that the Saami are to be regarded as a people under international law. The Nordic countries no longer question whether the Saami constitute an indigenous people with a right to self-determination.

«During the work on the Declaration on the Rights of Indigenous Peoples, the Nordic countries had a joint position, which included indigenous peoples having the right to self-determination.»

To sum up, it now appears clear that a group of people that does not form a nation within an existing state, or whose area covers several states - may constitute

a «people», and thus be regarded as a legal entity and have the right to self-determination according to international law. This applies even to non-state indigenous peoples, and the Saami constitute such a people with a right to self-determination.

As regards the material content of the right to self-determination, this is often divided into an internal and an external aspect. As indicated by the term, the internal aspect of the right to self-determination is the right to make decisions in all issues affecting how the society of a people is to be governed internally. In principle, this covers all issues of significance for preserving and developing the cultural, social and financial aspects of a people's society, including issues and areas such as education, health and social services and media. However, the most central element of the internal aspects of the right to self-determination, not least for indigenous peoples, is the resource dimension; i.e. the right for a people to control their natural assets on their own terms and not lose their livelihoods. The culture and society of indigenous peoples are closely linked to their traditional land and water areas as well as natural resources. The UN bodies that have emphasised that indigenous peoples have the right to self-determination, have especially pointed out the importance of indigenous peoples being able to control their land, livelihoods and natural resources. As regards the Saami, the UN bodies that have confirmed that the Saami people constitute a group of people that according to international law has the right to self-determination, have also placed special emphasis on the Saami's right to dispose of their natural assets and not be deprived of their ways of making a living. It must be noted that these statements are not limited to traditional Saami natural resources, but that the resource dimension of the right to self-determination, at least to some extent, even covers non-traditional Saami economic activities such as oil recovery and mining. Even the EU has expressed this viewpoint. During the work on the Declaration on the Rights of Indigenous Peoples, the Nordic countries have confirmed that their understanding of indigenous peoples' right to self-determination includes a resource dimension.

The external aspects of the right to self-determination include a right for all people to decide their relationship with the outside world. As regards the external aspects of the right to self-determination, it has already been confirmed that it currently does not grant the Saami people the right to secede and form their own nation. However, less extreme external aspects of the right to self-determination are of relevance for the Saami, including the right of the Saami to represent themselves internationally and to decide their political status, including their place in and their relationship to the international community.

As regards the implementation of the right to self-determination, the Saami right to self-determination is mainly realised through the Saami's own decision-making bodies, now primarily through the Saami parliaments. In addition to maintaining and developing their own social institutions, the Saami are also entitled to participate in the social life of the majority society. Implementation of the Saami right to self-determination may even be facilitated by Saami representatives being included in non-Saami decision-making bodies.

2. ON THE RIGHT TO SELF-DETERMINATION IN ACCORDANCE WITH INTERNATIONAL LAW

2.1 Peoples' right to self-determination - historical perspective

The principle of the peoples' right to self-determination has developed in line with the political development over the course of several centuries.[2] The perspective of self-determination has lines extending all the way back to the philosophy of the Age of Enlightenment and its ideas regarding sovereignty of the people. In both the French and American revolutions towards the end of the 18th Century, the demand for self-determination constituted the foundation for formation of the nation. It was the principle of the sovereignty of the people that legitimised execution of power in the constitutional systems that were established. It was the people's support of the rules of law, for example based on theories regarding a social contract, that constituted the basis for the binding force of the rules of law. Through the years, self-determination has represented everything from a political idea, ideology and principle to finally become a right to self-determination.

The League of Nations[3] - the predecessor to the current UN - applied the principle of the peoples' self-determination as a fundamental ideological and political principle, even though the League of Nation's Covenant did not explicitly include any provisions on self-determination.[4] The principle of the peoples' self-determination was central in the peaceful ending of the First World War, and the losers in the war had to accept that «the peoples» were granted self-determination, while the victors were unaffected. The American president Wilson worded Fourteen Points for Peace for a peaceful ending of the First World War, including the principle of self-determination. As we know, the USA did not become a member of the League of Nations, and this was the reason that self-determination was not explicitly incorporated into the Covenant itself. However, there were several detailed rules that must be regarded as being a specific application of the principle of self-determination, for example the extensive protection of minorities that was established under the auspices of the League of Nations. In the wake of the First World War, a central issue was how to implement protection of minorities. The League of Nations' system for handling the rights of minorities was a comprehensive set of rules and an enforcement apparatus, and was a product of the principle of the peoples' right to self-determination. The legal and political basis for the protection of minorities was the principle of the peoples' right to self-determination and the recognition that it was important for the sake of peace to also safeguard the rights of those ethnic groups not granted the opportunity to form a separate state. The League of Nations attempted to introduce an international innovation by applying the

2 Benedict Anderson, Imagined Communities (1983); Alfred Cobban, The Nation State and National Self-Determination (rev. ed. 1969); Ernest Gellner, Nations and Nationalism (1983) Oscar I. Janowsky, Nationalities and National Minorities (1945) C.A. Macartney, National States and National Minorities (1934) Hugh Seton-Watson, Nations and States (1977); Hurst Hannum, Rethinking Self-Determination (1993),

3 The League of Nations was established in 1919. The United Nations (UN) was established in 1945.

4 Quincy Wright, Mandates and the League of Nations (1930); R.N. Chowdhuri, International Mandates and Trusteeship Systems; A Comparative Study (1955); Hurst Hannum, Rethinking Self-Determination (1993).

principle of the peoples' self-determination in various manners, depending on the actual situation. In Europe, old empires were converted to nation states to the extent possible, with protection of minorities as part of the arrangement, while a mandate system under the victors was introduced in other parts of the world. This was an arrangement under which these areas would be granted independence when they were ready, and with protection of indigenous populations as an alternative arrangement to safeguard such ethnic groups. In addition to the League of Nations' system for handling the rights of minorities being based on the principle of the peoples' right to self-determination, the system was also part of an attempt to establish peace and international order through international law monitored by the new world organisation. Several bilateral treaties on the protection of minorities were also established outside the system of the League of Nations, although many of these were based on the League of Nations' system.[5]

Following the establishment of the UN in 1945, peoples' right to self-determination has been worded as a right. The idea of self-determination was developed from a principle to become an actual right. This is expressed most clearly in the UN's 1966 covenants on civil and political rights (ICCPR) and economic, social and cultural rights (ICESCR), respectively. The right to self-determination was to a large extent related to decolonisation and the establishment of new independent nation states, which entailed a limitation compared with the broad understanding of the principle of self-determination during the interwar period.

There is currently increasing recognition that the right to self-determination cannot easily be limited to traditional decolonisation cases. This recognition has been applied to indigenous peoples in particular. The proposal for a UN Declaration of Indigenous Peoples Rights of 1994, prepared by a sub-commission of the Human Rights Committee, contains several articles on indigenous peoples' right to self-determination. Moreover, several competent UN bodies have gone relatively far towards recognising indigenous peoples' right to self-determination over the last decade.[6] There is currently wide agreement at the state level that indigenous peoples complying with the criteria for «peoples» have the right to self-determination. In the work on the UN Declaration on Indigenous Peoples Rights, the Nordic states have adopted a joint position proposing that indigenous peoples' right to self-determination is incorporated into the declaration, with some specific limitations, in particular regarding the territorial integrity of the states.[7]

A corresponding development has taken place within regional organisations, including the European Union (EU) and the Organization of American States (OAS). The EU's action plan for the northern dimension for the period 2004-2006, for example, states that it is necessary to protect the northern indigenous peoples' right to self-determination («inherited right of self-determination….. of indigenous peoples of the region.»).[8] The OAS is currently working on a separate declaration on indigenous peoples' rights for the American Continent, which includes a provision on indigenous peoples' right to self-determination.

2.2 The basis in international law for the right to self-determination

Peoples' right to self-determination is now a basic international law standard. The right to self-determination is included in the UN Charter; in Articles 1(2) and 55, as well as in Chapters XI and XII. The right to self-determination has also been addressed in several declarations from the UN's General Assembly, including Declaration No.

5 NOU 1984:18 On the legal status of the Saami, page 228 et seq.
6 The UN Working Group on Indigenous Populations, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the UN Human Rights Committee, the Commission on Human Rights´ Working Group on the draft UN Declaration on Indigenous Peoples Rights.
7 Finland, Denmark, Iceland, Norway and Sweden presented a joint Nordic proposal on indigenous peoples' right to self-determination to the 9th session of the Commission on Human Rights' Working Group on the UN Declaration on Indigenous Peoples Rights, held in Geneva during the period 15-26 September 2003.
8 EC / The General Affairs Council (Heads of States): The Second Northern Dimension Action Plan, 2004-06, adopted 29 September 2003.
9 Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 Dec. 1960.
10 Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the UN Charter.

1514 (XV)[9], Declaration No. 1541 (XV)[10], as well as Declaration No. 2625 (XXV).[11]

The right to self-determination is also incorporated into many other international and regional instruments, including the Helsinki Final Act, the African Charter on Human and Peoples' Rights and the CSCE Charter of Paris for a New Europe.[12] Peoples' right to self-determination has also been recognised by the UN's International Court of Justice in several cases.[13]

«The right to self-determination is also expressly recognised as a human right in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (1993), where it is stated that the right to self-determination is a natural part of the international protection of human rights and that it is universal in nature.»

2.2.1 The right to self-determination as a human right

The right to self-determination is now also recognised as a collective human right. Peoples' right to self-determination has been incorporated into the two most central human rights covenants adopted by the UN; the ICCPR and the ICESCR.[14] The right to self-determination is here stated as a collective human right for «all peoples». This is expressed in an identical provision (Article 1) in the two above-mentioned covenants:

«1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.»

The UN's General Assembly has stated that this right is universal and shall apply at all times: *«The right [contained in article 1 of the Covenants] would be proclaimed in the Covenants as a universal right and for all time.»*[15]

The right to self-determination is also expressly recognised as a human right in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights (1993), where it is stated that the right to self-determination is a natural part of the international protection of human rights and that it is universal in nature.[16] The World Conference expressed the objective of developing a world order fully based on the principles of the UN Charter, including respect for equal rights and self-determination for all peoples. Implementation of the right to self-determination is recognised as a precondition for fulfilling other human rights and fundamental freedoms, regardless of whether these are civil, political, economic, social or cultural rights.

2.2.2 ILO Convention No. 169 concerning Indigenous and Tribal Peoples - delimitation

ILO Convention No. 169 concerning

11 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 24 Oct. 1970.
12 The Helsinki Final Act (Conference on Security and Co-operation in Europe - 1975), the African Charter on Human and Peoples' Rights, 1981, and CSCE Charter of Paris for a New Europe – 1990.
13 The Namibia case, 1971, ICJ 16; the Western Sahara case, 1975, ICJ 12; the East Timor case, 1995, ICJ, 102
14 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted in 1966.
15 Third Committees report to the General Assembly, UN Doc: A/C.3/SR.397 (1952).
16 The Vienna Declaration and Programme of Action (1993), cf. especially operative Section 2.

Indigenous and Tribal Peoples in Independent Countries (ILO 169) is sometimes identified as an international law basis for the Saami right to self-determination. ILO 169 can hardly be invoked as a basis for self-determination, because the convention has a special provision, Article 1 (3), that establishes a limitation in relation to the «peoples» right to self-determination: «*The use of the term «peoples» in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.*»

This entails that the Convention does not address the peoples' right to self-determination. In spite of ILO 169 having some provisions that contain elements of relevance in relation to Saami self-determination, it will not be correct to assume that the Convention can be invoked as a basis for Saami self-determination under international law. ILO has expressed that the qualification in Article 1 (3) is due to ILO's mandate being limited to social and economic rights and that an interpretation of the concept of self-determination is outside the competence of ILO. However, ILO does emphasise that ILO 169 does not establish any general limitations regarding indigenous peoples' right to self-determination, and that it therefore is compatible with any international instrument that does establish or define such a right for indigenous peoples: «*[T]he Convention does not impose any limitation on self-determination nor take any position for or against self-determination. In other words, there is nothing in Convention No. 169 which would be incompatible with any international legal instruments which may establish or define the right of indigenous and tribal peoples to self-determination.*»[17]

2.2.3 The 1966 Covenants

As said before, the identical Article 1 of ICCPR and ICESCR quoted above emphasises that the right to self-determination is a right of «all peoples».

The right to self-determination assumes certain special characteristics compared with the other rights protected under the 1966 Covenants. Article 1 is not placed under Chapter III of the covenants where most (although not all) provisions on rights are placed, and it is not worded as an individual human right, but rather as a collective right due all peoples. As it is a collective right, the UN Human Rights Committee, the monitoring body under the International Covenant on Civil and Political Rights, has interpreted that Article 1 cannot be invoked for individual grievances according to the First Optional Protocol to the Covenant. The reason for this is that Article 1 in the protocol states that there should be one individual (or several individuals) that are directly affected by a claimed infringement of a right protected under the Covenant. This has not been an issue in connection with the International Covenant on Economic, Social and Cultural Rights, as this covenant does not include a procedure for lodging complaints.

The content of the joint Article 1 is described in more detail below. But I would like to just mention here that the provision no doubt has been adjusted in the mandatory reporting process under the covenants, and that in its more recent practice, the Human Rights Committee has recognised that the right to self-determination does affect the interpretation of certain other rights in cases involving individual complaints, but that it still cannot be used as an independent reason for lodging an individual complaint. Both types of practice do illustrate that the application of Article 1 is not limited in scope to people in the meaning of the entire population of a country, but that indigenous peoples may, at least in certain cases, constitute a people protected under Article 1.

In agreement with international law, a distinction is often made under Article 1 of the UN covenants between an internal and external right to self-determination. As the latter in its most extreme form can entail

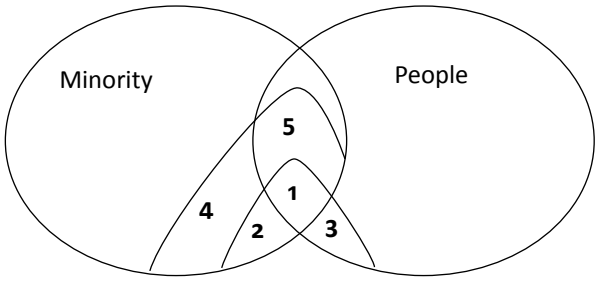
17 International Labour Office, Geneva: «Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169 (1996), page 7.

sovereignty; i.e. a people's right to form their own nation and have it recognised by other nations, it should be emphasised that the external right to self-determination also covers some less ambitious dimensions, such as the right to be represented at the international level, which are not subject to the special requirements under international law for a people being able to claim the right to secede; i.e. the right to form their own nation. In a human rights context, the focus is often on the internal dimensions of the right to self-determination, such as the peoples' right to elect their own leaders and representative institutions as well as participate in the public exercise of power in the country. For the majority population, the internal dimension of the right to self-determination mainly entails a right to a democratic government, while minority people within a state can demand both participation in general democratic structures as well as their own separate structures for democratic participation.

Both the practice of the Human Rights Committee and constitutional development in many states show that the right to self-determination is not a static term, but rather subject to dynamic development. This dynamic development is largely the result of the demands presented by indigenous peoples in various parts of the world in order to have the states and the international community recognise their right to self-determination.

3.3 Summary of the relationship between the right to self-determination and the concept of indigenous peoples

The relationship between the terms people, indigenous peoples and right to self-determination is discussed in more detail below in connection with relevant international conventions, such as the UN's 1966 Covenants as well as ILO 169. A graphic summary of the scope of various concepts for



indigenous people is shown below in order to provide a background for these discussions.[18]

Explanation: The illustration is based on the fact that under international law a group can be both a people and a minority at the same time. Certain of the world's indigenous peoples represent such groups (No. 1 as well as No. 5 that refer to the term "tribal peoples" in ILO 169). Certain other groups calling themselves indigenous peoples, on the other hand, do not comply with the criteria for "peoples" under the 1966 Covenants (No. 2 as well as No. 4 as regards the term tribal peoples). Historical indigenous peoples with their own separate state (No. 3) do not constitute a minority under Article 27 of the ICCPR and are not really protected under ILO Convention No. 169 that deals with the relationship between an indigenous people and a state with a different dominant ethnic group. The Saami is an ethnic group that sorts under Category 1.

18 Source: Martin Scheinin, What Are Indigenous Peoples? (in print)

3. THE RIGHT TO SELF-DETERMINATION ACCORDING TO INTERNATIONAL LAW – IN PARTICULAR REGARDING INDIGENOUS PEOPLES' POTENTIAL RIGHT TO SELF-DETERMINATION

3.1 Indigenous peoples' status as a legal entity under international law

3.1.1 The concept of indigenous peoples in international law

International law does not define the term «indigenous peoples». Article 1 (1) (b) of ILO 169 is sometimes quoted as a definition of indigenous peoples, but formally it only specifies which ethnic groups are covered within the Convention's scope of application. Article 1 (1) (b) reads as follows;

> *«Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.»*

As seen, ILO 169 focuses on the relationship between the State and its indigenous or tribal peoples. Thus, the concept of indigenous peoples in ILO 169 is relational. The Convention assumes that the State is controlled by a different people than the indigenous peoples in question.

In order to qualify as an indigenous people (or tribal people) within the context of ILO 169, however, it is not sufficient to comply with the above objective criteria. The Convention requires that the ethnic group also identifies itself as an indigenous people (or tribal people). Article 1 (2) of ILO 169 states that;

> *«Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply.»*

In comparison with certain other attempts at «defining» the concept of indigenous peoples, Article 1 of ILO 169 is quite broad, with the result that ethnic groups covered by the Convention's scope of application as an indigenous or tribal people do not necessarily constitute a «people» according to the general criteria of international law. On the other hand, this does not entail that groups covered by ILO 169 do not at the same time constitute a «people» according to international law.

In addition to Article 1 of ILO 169, there are also a couple of working definitions of indigenous peoples. In the 1970s, the UN appointed a Special Rapporteur with the task of studying the issue of discrimination against indigenous peoples. Within the framework of the task, this Special Rapporteur used a working definition of indig-

enous peoples, the so-called «Cobo Definition».[19] The Cobo definition is still the one most widely used within the UN system as it is necessary in certain contexts to specify what constitutes an «indigenous people». The Cobo definition is as follows;

«Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

The historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

(a) Occupation of ancestral lands, or at least of part of them;
(b) Common ancestry with the original occupants of these lands;
(c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc);
(d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
(e) Residence in certain parts of the country, or in certain regions of the world;
(f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.»

As can be seen, the self-identification criterion plays an important role in the Cobo definition as well. The importance placed on the ethnic group in question having a link to a specific land area in the Cobo definition should also be noted.

The World Bank has also established an indigenous people policy[20], for the purpose of providing guidelines for the bank's activities in countries with indigenous peoples. This policy has a working definition of indigenous peoples, which reads as follows;

«*The terms «indigenous peoples», «indigenous ethnic minorities», «tribal groups», and «scheduled tribes» describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable of being disadvantaged in the development process.*»[21]

«*Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:*

(a) a close attachment to ancestral territories and to the natural resources in these areas;
(b) self-identification and identification by others as members of a distinct cultural group;
(c) an indigenous language, often different from the national language;
(d) presence of customary social and political institutions; and
(e) primarily subsistence-oriented production»[22]

19 The definition is named after the Special Rapporteur José Martin Cobo, see «Study of the Problem of Discrimination Against Indigenous Populations», UN document E/CN.4/Sub.2/1986/7/Add.4, para. 379 – 382.
20 The World Bank Operational Manual, Operative Directive, OD 4.20.
21 OD 4.20, Point 3.
22 OD 4.20, Point 5.

As we can see, the World Bank's working definition is almost a condensed version of the Cobo definition.[23]

3.1.2 The Saami as an indigenous people according to international law

After a comparison of the criteria considered to characterise an indigenous people according to the working definitions above and what characterises the Saami ethnic group, it is quite clear, regardless of which working definition is used, that the Saami must be regarded as an indigenous people within the context of international law. The Saami have their own culture, including a separate language, their own livelihoods and even a clear historical link to their traditional land and water areas. The Saami have also generally emphasised that they consider themselves to be a separate people apart from the other groups of people that reside in Fennoscandia and the Kola Peninsula.

The Saami even qualify among the indigenous peoples that on an objective basis can be said to comply with general international law requirements for constituting a «people». Various UN bodies have on several occasions confirmed that the Saami are to be regarded as an indigenous people according to international law. The Human Rights Committee, for example, has emphasised in connection with Norway's fourth[24] and Sweden's fifth periodic report[25] that the Saami are to be considered an indigenous people in the respective countries and that Article 1 of the ICCPR applies for the Saami in their capacity as a people.

The Nordic countries have also confirmed that the Saami constitute an indigenous people. Article 17 of the Finnish Constitution states that the Saami are to be regarded as an indigenous people in Finland, which also follows from the Finnish Act on the Sami Parliament. That Norway considers the Saami to constitute an indigenous people is evident from Norway's ratification of ILO 69 as well as the fact that Article 110a of the Constitution and all Saami legislation is based on the recognition of the Saami as an indigenous people, even though the term indigenous people is not used. Neither the Swedish Constitution nor other legislation contain references to the Saami as Sweden's indigenous people, but Sweden has on several other official occasions emphasised the position of the Saami as an indigenous people in the country.

3.1.3 Difference between the rights of indigenous peoples and minorities according to international law

The term «minority» is also not defined in international law. It is easy to ascertain that most of the criteria that characterise an indigenous people, such as a common language and common culture, also characterise many minorities. However, as shown above, one of the most central elements in the working definitions of indigenous peoples is the indigenous peoples' historical link to their traditional land areas, which minorities do not have. The link to a certain land area is the main characteristic that distinguishes indigenous peoples from minorities according to international law. Special emphasis must be placed on the territorial element as the indigenous peoples' opportunity to maintain and develop their distinctive cultures is closely linked to continued access to their traditional land and water areas as well as natural resources. In addition to the territorial link, indigenous peoples have in general been able to preserve their social institutions to a larger extent than minorities have. The distinction between indigenous peoples and minorities is a central element, as the rights that follow from the status as an indigenous people or a minority differ significantly according to international law.

The rights of minorities, which are

23 The World Bank is currently working on revising its indigenous people policy. This revision will probably not entail any material change of significance concerning the working definition of indigenous peoples, see Transcript, World Bank Roundtable with Indigenous Peoples, Washington D.C., October 17 – 18, 2002.

24 UN document CCPR/C/79/Add. 112 (1999)

25 UN document CCPR/CO/74/SWE, dated 24 April 2002, Section 15

26 Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities

expressed most clearly in the UN Minority Rights Declaration[26], are by nature always individual; i.e. that they belong to the individual members of the minority group rather than the group per se, even though several minority rights can only be exercised together with other members of the group. Even international instruments that address the rights of indigenous peoples, e.g. ILO 169 as well as the UN's Draft Declaration on the Rights of Indigenous Peoples, emphasise the importance of respecting the rights of individual members of the indigenous peoples[27] and therefore also include several rights that are individual in their nature. However, ILO 169 and the Declaration on the Rights of Indigenous Peoples also have several provisions that emphasise the rights of the collective; i.e. rights belonging to the indigenous people as such and not the individual members. In other words, contrary to what is the case for minority rights, a significant part of the rights of indigenous peoples are collective.[28]

To simplify matters, the difference between the rights of minorities and the collective rights of indigenous peoples can be said to be that the purpose of minority rights is to enable minority individuals to maintain and develop their specific identity as part of the majority community, while the collective rights of indigenous peoples emphasise the right of indigenous peoples to maintain and develop their specific society and social structures apart from, or if relevant, in parallel with the majority community.[29] Minority rights focus on efficient political participation in the community that the members of the minority group constitute a part of. The aim of the collective rights of indigenous peoples, on the other hand, is to enable the indigenous societies to make their own decisions. To participate in the larger, surrounding society's political system is a secondary – and optional – right. As an example of the above, Article 4 of the Declaration on the Rights of Indigenous Peoples reads as follows;

> *«Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.»*

The most central of the collective rights is the right to self-determination. It is sometimes said that international law has ended up with a focus on the collective rights of indigenous peoples because the problems that the indigenous population struggles with are a result of discrimination against the group (or the people) as such, rather than against any of the individuals belonging to the ethnic group. The measures adopted to correct such injustices must therefore be aimed at the ethnic group per se.[30] This argument can be said to agree well with the situation of the Saami. Even though Saami individuals sometimes are exposed to discrimination, Saami representatives generally emphasise the problems that the Saami have struggled with as a group. The most fundamental problems that the Saami population have to deal with is a result of the difficulty of the countries with a Saami population (at least when it comes to action) to regard the Saami as a collective group with the right to assume responsibility for their own future.

Thus, the Saami, in the context of international law, are primarily to be consid-

27 See Article 3 of ILO 169 and Article 1 of the Declaration on the Rights of Indigenous Peoples, for example. It must be pointed out that the individual rights expressed in the Minority Rights Declaration may be invoked by individuals with a background as a member of an indigenous people if the indigenous people in question constitute a minority in the country/countries in which the indigenous people reside.

28 There is now almost complete agreement that indigenous peoples may be entitled to collective rights. In addition, a large majority of experts on international law as well as most states now agree that several of these collective rights are to be considered as collective human rights. A few states do maintain (still) that none of the collective rights expressed in ILO 169 and the Declaration on the Rights of Indigenous Peoples, or that belong to indigenous peoples according to other sources of law, should be regarded as human rights.

29 Of course, another difference between minority rights and the rights of indigenous peoples is that the right to land, water and natural resources constitutes a central element in rights of the latter. However, the indigenous peoples' right to their traditional land and water areas as well as natural resources, can just as easily be described as the most central element in the very right to maintain and develop their social structures. The indigenous peoples' right to land and water also has an individual element and a collective element.

30 Freeman, Michael, "Are There Collective Human Rights, Political Studies (1995), pp 32-33

31 Another matter is that the Saami, in the semantic meaning of the word, of course constitute a minority in the countries in which they reside and that they, as shown above, also are entitled to minority rights.

ered an «indigenous people» and not just a minority.[31] The question is then how the concept of «indigenous people» is related to the concept of «people» in international law.

3.1.4 Relationship between the concepts of «indigenous peoples» and «peoples» according to international law

International law also does not define the term «peoples». There are certain working definitions here as well, of which the so-called Kirby definition[32] is the one most widely accepted. The Kirby definition, that UNESCO among others have adopted at a Meeting of Experts in 1989[33], defines a «people» as;

"1. a group of individual human beings who enjoy some or all of the following common features:

a. a common historical tradition;
b. racial or ethnic identity;
c. cultural homogeneity;
d. linguistic unity;
e. religious or ideological affinity;
f. territorial connection;
g. common economic life;

2. the group must be of a certain number which need not be large but which must be more than a mere association of individuals within a State;

3. the group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;

4. the group must have institutions or other means of expressing its common characteristics and will for identity.»

An analysis of the Kirby definitions shows that the working definition of «peoples» does not differ significantly from the working definitions of «indigenous peoples» presented above. The only real difference is that the concept of indigenous peoples includes a relationship to another, dominant, group. Indigenous peoples have a common historical tradition, ethnic identity, culture, language as well as religion or ideology to the same extent as other peoples. Note, however, that the working definitions of both people and indigenous people emphasise the importance of a connection to certain land areas as well as that this section of the population has separate institutions that represent the people as such.

3.1.5 Relationship between «peoples» and «states» as regards the right to self-determination

It is a generally accepted principle in international law that human rights are just for humans. In line with what was discussed above, the majority of experts on international law, and most states, agree that even peoples can have human rights in their capacity as peoples. However, it is agreed that states do not have human rights. Regardless of this, it is sometimes argued that when international law talks of the right to self-determination of all "peoples", "peoples" is to be understood as the total of all inhabitants within a state.

ICCPR and ICESCR do not provide any guidelines as to what is to be understood by the term "peoples" in the joint Article 1. However, in connection with the ratification of these covenants, certain countries have provided statements as to what – according to their opinion – constitute "peoples" in accordance with the ICCPR and ICESCR. These statements do provide some guidelines on how to understand the term "peoples" in Article 1. Upon India's ratification of the 1966 Covenants, the country presented the following reservation regarding the right to self-determination addressed in Article 1;

32 Named after the originator of the definition, Michael Kirby.
33 The UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27-30, 1989.

"With reference to article 1 [of the Covenants] ... the Government of the Republic of India declares that the words «the right to self-determination» appearing in [article 1] apply only to the peoples under foreign occupation/domination?? and that these words do not apply to sovereign independent States or to a section of a people or nation ...»[34]

This means that India was of the opinion that the right to self-determination addressed in the ICCPR and ICESCR only applies for people under foreign domination, and not for independent states or parts of a people or nation; i.e. not for «peoples» in any meaning other than all inhabitants of a state or a territory. France[35], the Netherlands[36] and Germany[37] objected to India's interpretation. The Netherlands and Germany asserted that all peoples have the right to self-determination, and not just peoples dominated by foreign powers. The Netherlands was also of the opinion that all attempts at limiting the scope of the right to self-determination, or to stipulate conditions for this not evident from the ICCPR or ICESCR, entail an undermining of the right to self-determination with the result that its universal nature will be vastly weakened. Germany asserted that India's interpretation is directly contrary to the wording of Article 1 and was also of the opinion that any limitation of the right to self-determination will also be contrary to the objective of the ICCPR and ICESCR. France added that the Indian attempt at limiting the scope of application of the right to self-determination is even against the UN Charter. In other words, as early as at the time of the ratification of the ICCPR and ICESCR, these countries were of the opinion that the right to self-determination is not only applicable in a colonial situation, but constitutes a right for all peoples without any limitations.

In addition, the UN General Assembly's Third Committee, in connection with the ongoing work of reaching an agreement on Article 1 of the ICCPR, stated that;

«Much of the discussions on article 1 had related the questions of self-determination to the colonial issue, but that was only because the peoples of Non-Self-Governing and Trust Territories had yet not attained independence. The right would be proclaimed in the Covenants as a universal right and for all time.»[38]

As we can see, the Third Committee appears to have interpreted certain of the UN's member countries' desire to link the right to self-determination to the liberation of the colonies as a result of the spirit of times. The opinion of the Third Committee, on the other hand, seems to have been that the right to self-determination is not limited to this situation, but instead is universal in nature.

This understanding is even supported by the UN Charter. The parts of it that address the right to self-determination have references, for example, to

«... territories whose peoples have not yet attained a full measure of self-government ...»[39]

The reference to the plural «peoples» can only mean that the «peoples» that the UN Charter believes have the right to self-determination are not necessarily people understood as all inhabitants in a state or within a territory.

It was also indicated in the right to self-determination that was established in international common law in the wake of the Second World War that peoples within existing states may also be entitled to the so-called internal aspects of the right to self-determination should these peoples be denied effective political participation

34 See UN Centre for Human Rights, Human Rights – status of International Instrument (1987), UN Sales no. . 2.
35 Ibid, p 50
36 Ibid, p 19
37 Ibid, p 18 f
38 Report of the Third Committee, 6th session, para. 39, UN Doc: A/C.3/SR.397 (1952)
39 Article 73
40 Cassese, A., Self-Determination of Peoples: A Legal Reappraisal, 67 – 140 (1995)
41 General Assembly Resolution 1541, U.N. GAOR, 15th Session, Supp. No. 16, at 29, U.N. Doc. A/4561 (1960), note 15

and/or representation in political decision-making bodies within the state in question.[40] The text of Resolution 1541 (XV)[41], adopted by the UN General Assembly in 1960, may be interpreted to mean that the opinion of the General Assembly even at this time was that a specific territory may be inhabited by more than one people.

Thus, there are indications that as early as at the time of the ratification of the ICCPR and ICESCR, the intention of the term «peoples» in the joint Article 1 was that it should be understood as all peoples, and not just the people that constitute a nation. However, there are only indications that this was the case, and it is possible that the dominant opinion in the middle of the 1960s was that the term «peoples» in Article 1 shall be understood to mean «peoples» as all inhabitants of a state or in a colony.[42]

3.1.6 All peoples' – including indigenous peoples' - right to self-determination according to international law

At the time of the ratification of the ICCPR and ICESCR it appears that opinion was divided among the member countries of the UN as to whether those "peoples" with a right to self-determination according to Article 1 in these covenants constitute

«As mentioned, international law is dynamic rather than static, and its view of self-determination may develop over time.»

"peoples" in the meaning of all inhabitants of a state or a territory, or whether peoples within existing states may also be entitled to self-determination. But regardless of whether there was uncertainty at the time of the ratification of the 1966 Covenants, this does not entail that there has been no change since then. As mentioned above, international law is dynamic rather than static, and its view of self-determination may develop over time. In recent decades more and more international experts on international law and UN bodies have clarified that the right to self-determination also is a right for non-state peoples and that indigenous peoples are no exception to this.

In 1984, the Human Rights Committee, in a general comment on Article 1, expressed its dissatisfaction with the fact than many of the states reporting to the Committee regarding the implementation of Article 1 of the ICCPR, appear to have misunderstood the full implication of the article. The Committee stated that;

"Although the reporting obligations of all State Parties include Article 1 [of ICCPR], only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore Article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws.»[43]

It follows from the statement of the Human Rights Committee that it is not sufficient that a country reports on its national election laws, that the Committee is of the opinion that the right to self-determination entails more than a right to participate in general elections. Rather, it appears that it is the opinion of the Human Rights Committee that the right to self-determination also includes a right for peoples within a country to control their development in some manner other than just through participation in general elections on the same terms as the rest of the population in the country. In other respects the general comment is brief and fairly repetitive of the text of the article. However, as will be described in more detail below, the Human Rights Committee has developed its practice after 1984 in relation to the right to self-determination.

As shown above, ILO 169 (1989) stipulates specifically that the Convention does

42 Cassesse, A., «Self-determination of Peoples: A Legal Reappraisal» (1995), p 61 f and Higgins, R., «Problems and Process: International Law and How we use It» (1994)
43 The Human Rights Committee's General Comment No. 12 (21), UN doc. HRI/GEN/1/Rev.5, pp 121-122

not take a stand on the issue of indigenous peoples' right to self-determination. Regardless of this, ILO 169 has several provisions closely related to the right to self-determination, as is even indicated by the ILO's own guide to ILO 169[44], which states;

«The newer Convention takes the approach of respect for the cultures, ways of life, traditions and customary laws of the indigenous and tribal peoples who are covered by it. It presumes that they will continue to exist as parts of their national societies with their own identity, their own structures and their own traditions. The Convention presumes that these structures and ways of life have value that needs to be protected.»

The term «newer Convention» refers to ILO 169's predecessor: ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO 107). ILO 107 was adopted in 1957. The main difference between ILO 169 and its predecessors is that ILO 107 clearly had more assimilative aspirations. The aim of ILO 169, on the other hand, is to make it possible for indigenous peoples to preserve their own social structures alongside the majority society in accordance with what was described above regarding the difference between the rights of indigenous peoples and the rights of minorities. As ILO 169 is based on this general principle, it follows that many of the provisions of ILO 169 are closely related to the right to self-determination. It is more or less a precondition for being able to preserve their own society and their own social structures that the indigenous peoples have the right to decide on these themselves. That ILO 169 cannot be viewed outside the context of the right to self-determination is also evident from the fact that ILO 169, in contrast to ILO 107, uses the term «indigenous peoples».

ILO 107 used the term «indigenous populations». The ILO's guidelines for interpreting ILO 160 state that the term peoples is used throughout ILO 169 because this term
«... recognizes the existence of organized societies with an identity of their own rather than mere groupings sharing some racial or cultural characteristics»

Kristian Myntti has called «the right to self-determination» expressed in ILO 169 «*ethno political self-government*». Myntti is of the opinion that even though ILO 169 does not stipulate any right of autonomy, the provisions of ILO 169, primarily Articles 14 and 15, cf. Article 6, include a clear right for indigenous peoples to exercise control of their traditional land areas.[45]

However, the term indigenous peoples in ILO 169 is used in a manner that covers groups that will not constitute a people according to international law. This is partly the reason why Article 1 (3) of the Convention has a clause stipulating that the use of the term indigenous peoples in the Convention shall not be construed to entail any change in the relationship of international law to the concept of peoples.
In 1993, the UN's Working Group on Indigenous Populations (WGIP) agreed on a draft Declaration on the Rights of Indigenous Peoples[46]. The Declaration on the Rights of Indigenous Peoples has several articles that either address or relate to the right to self-determination. Article 3 of the Declaration on the Rights of Indigenous Peoples states that;

«Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.»

The WGIP's parent body, the UN's Sub-Commission on the Promotion and Protection of Human Rights, accepted the

44 Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169 (1996)
45 Myntti, Kristian, "*National Minorities, Indigenous Peoples and Various Models of Political Participation*", in Horn, Frank (ed.); Minorities and their right of Political Participation, Lapland's University Press, Juridica Lapponica n 16, Rovaniemi (1996), p 24
46 Draft UN Declaration on the Rights of Indigenous Peoples, UN Document E/CN.4/Sub.2/1994/2/Add.1.

Declaration on the Rights of Indigenous Peoples as an adequate description of the indigenous peoples' human rights. The sub-commission is composed of 26 independent experts on human rights. In other words, in 1993 a number of the world's leading experts on human rights were of the opinion that not only state peoples, but also indigenous peoples, may constitute a legal entity according to international law. What the Declaration on the Rights of Indigenous Peoples stipulates regarding the right to self-determination will be addressed in further detail below in connection with the material content of the right to self-determination.

In 1996 the UN's Committee on the Elimination of Racial Discrimination (CERD) addressed the right to self-determination in a way that made it clear that the CERD's viewpoint was that the right to self-determination also applies to peoples within independent states. CERD stated, for example, that;

"... it is the duty of States to promote the right to self-determination of peoples.» [47]

Surely this statement can be understood as just a reference to Article 1.3 of the ICCPR, which stipulates that states are obliged to facilitate the realisation of the right to self-determination. The incorporation of Article 1.3 in the ICCPR and ICESCR, however, can be assumed to be a result of the spirit of the times when the covenants were established. CERD's statement came 30 years later, when the colonies, with some exceptions, had long since won their independence and the national borders in most of the world were relatively stable. It is therefore natural to understand CERD in such a way that the Commission's use of the term «peoples» did not refer to the entirety of all inhabitants of a state or a territory. CERD also stated that;

«The right to self-determination [includes] the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level...» [48]

CERD's linking of the right to self-determination on the one hand, and the right of individuals to participate in public affairs on the other hand, is interesting. By making this distinction (note specifically the word «link») between the rights of peoples and individuals, it appears that CERD distances itself from the viewpoint that the right to self-determination is only a right of people understood as the entirety of all inhabitants of a state. While individuals have a right to take part in available democratic channels on equal terms, peoples; in this context it is reasonable to include peoples within existing states, have the right to self-determination. CERD has not made any specific statements regarding indigenous peoples' right to self-determination.

During the latter part of the 1990s and the beginning of the 2000s, the Human Rights Committee has developed and clarified its opinion on what are to be regarded as «peoples» according to Article 1 of the ICCPR. To a large extent, this development is the result of the Committee having had to take a stand on the legal status of indigenous peoples under Article 1. Without addressing the issue of how the term «peoples» in Article 1 should be defined, the Committee has made it clear that there may be more than one people within a state through its references to indigenous peoples as a legal entity in terms of the right to self-determination. In 1999, partially inspired by the Quebec judgement rendered by the Supreme Court of Canada[49], the Committee applied Article 1 in relation to the indigenous peoples of Canada:

« ... the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived

47 15/03/96 CERD General recom. 21, Section 3
48 Ibid, Section 4
49 See below.
50 Concluding observations on Canada, Section 8. UN Doc. CCPR/C/79/Add.105 (1999)

of their own means of subsistence. … The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.»[50]

Thus, the applicability of the right to self-determination in Article 1 on indigenous peoples was recognised by the Committee for the first time during the consideration of a report from a country where the Supreme Court had confirmed that there were several «peoples» within the State in question. However, the Human Rights Committee has followed the same pattern in relation to many other states with indigenous peoples. There have been specific references to either Article 1 or the concept of peoples' right to self-determination in the Committee's concluding observations concerning reports by Mexico,[51] Norway,[52] Australia,[53] Denmark[54] and Sweden.[55] (Finland's report will be considered by the Committee in October of 2004.) As was the case with the consideration of the report by Canada in 1999, special emphasis has been placed on the resource dimension of the right to self-determination (Article 1, subsection 2) in the Committee's standpoint regarding the application of the right to self-determination in relation to indigenous peoples. In its concluding observations on Australia, the Human Rights Committee emphasised, for example, that Australia «should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources».

Even though the Human Rights Committee in its consideration of the states' reports has applied the right to self-determination in Article 1 as a human right, the Committee has systematically resisted testing the applicability of the provision in the complaints procedure under the Covenant's optional protocol. This attitude is based on Article 1 of the optional protocol, according to which complaints can only be lodged by individuals claiming that their personal covenant-based rights have been violated. As the right to self-determination is a right for peoples, individuals cannot personally suffer from any violation of it according to the interpretation of the Committee. This standpoint was established in the case *Bernard Ominayak (Lubicon Lake Band) v. Canada*. In this case, the Committee renounced its admissibility decision in the 1987 consideration under Article 1, but emphasised at the same time that the facts of the case could still be considered under other provisions of the Covenant, including Article 27 on minority rights.[56]

The Committee's final decision in the case, from 1990, follows the pattern that even though the consideration is based on Article 27, we can see that the complainant's arguments regarding the right to self-determination do influence the Committee's interpretation of the applicability of Article 27. Before the Committee reached its conclusion that Canada had violated Article 27, it reasoned:

«'Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27.»[57]

With this in mind, it is not particularly radical or surprising that the Committee in certain of its more recent cases under the optional protocol has clearly recognised that Article 1 on self-determination, in spite of it being a collective right that cannot be claimed to have been

51 Concluding observations on Mexico, UN Doc. CCPR/C/79/Add.109 (1999)

52 Concluding observations on Norway, UN Doc. CCPR/C/79/Add.112 (1999). The Committee recommended that Norway report on the Saami people's right to self-determination, in particular on its resource dimension (paragraph 2)

53 Concluding observations on Australia, UN Doc. CCPR/CO/69/AUS (2000)

54 Concluding observations on Denmark, UN Doc. CCPR/CO/70/DNK (2000)

55 Concluding observations on Sweden, UN Doc. CCPR/CO/74/SWE (2002). The Committee criticised the Saami Parliament's limited opportunity to influence the decision process for issues that affect the Saami's traditional land areas and economic activities. The Committee recommended that the Saami should be allowed to play a larger role when decisions are made regarding their natural environment and livelihoods

56 *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-eighth session, Suppl. No. 40 (A/38/40), pp 1-30. See also *Ivan Kitok v. Sweden* (Communication No. 197/1985), Views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third Session, Suppl. No. 40 (A/43/40), pp 221–230.

57 *Idem*, Section 32.2.

violated in relation to individuals, does influence the Committee's interpretation of the other provisions of the Covenant, including Article 27 on minority rights. In the case *Apirana Mahuika et al v. New Zealand* this was done when considering the Maori's fishing rights and the Maori's role in the country's fishing industry.[58] The same pattern was even followed in the case *Diergaardt et al. v. Namibia*, now with reference even to Articles 25 (rights relating to political participation) and 26 (non-discrimination) that potentially may be affected by Article 1.[59] In the case *Gillot et al. v. France* (2002)[60] it can be said that Article 1 is of great importance for the interpretation of Article 25. The case concerned the exclusion of persons without a long period of residency in New Caledonia from decision-making through participation in referendums regarding the future of the territory. In its conclusion that Article 25 had not been violated, the Human Rights Committee referred to the fact that when the referendum was arranged in the context of a process of decolonization and self-determination, it was legitimate to limit participation to persons with close ties with the territory, assuming that the requirements for participation were neither disproportionate nor discriminatory.

As shown below, even the UN's Meeting of Experts on the right to self-determination has presented statements indicating that indigenous peoples can constitute peoples such as must be regarded legal entities under international law.

The issue of who is to be regarded as «peoples» under international law has even been considered at the regional level. In 1998 the Supreme Court of Canada provided a statement regarding the state of Quebec's opportunity to invoke international law to support any demands for independence. In the judgement, the Court stated that;

"While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the «rights» of entities other than nation states – such as the right of a people to self-determination.

The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond «convention» and is considered a general principle of international law»

and went on to say that;

«It is clear that «a people» may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to «nation» and «state». The juxtaposition of these terms is indicative that the reference to «people» does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.»[61]

As shown, the Court states specifically that according to international law, a state may have more than one people.[62] In the Quebec decision, the Supreme Court of Canada even referred to the indigenous peoples of Quebec;

58 *Apirana Mahuika et al. v. New Zealand* (Communication No. 547/1993), Views adopted 27 October 2000, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. II), pp 11–29.

59 J.G.A. Diergaardt et al. v. Namibia (Communication No. 760/1997), Views adopted 25 July 2000, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fifth Session, Suppl. No. 40 (A/55/40), pp 140–160. See Section 10.3.

60 *Marie-Hélène Gillot et al. v France* (Communication No. 932/2000), Views Adopted 15 July 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-seventh Session, Suppl. No. 40 (A/57/40), pp 270–293.

61 Supreme Court of Canada decision [1998] 2 S.C.R., 217

62 In spite of this, the Court did not find that international law does provide the state of Quebec the right of secession contrary to the wishes of the State of Canada. As will be addressed in more detail below, the fact that a people are entitled to self-determination does not entail that the people in question automatically have the right of secession. On the contrary, the right to self-determination for a people within an existing state will only in exceptional cases include the right to secede and form an independent nation.

«We would not wish to leave this aspect … without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples …»

The Court, due to its standpoint on other issues, never specifically addressed the indigenous peoples of Quebec. It does, however, appear that the opinion of the Supreme Court of Canada is that indigenous peoples as such may be legal entities per se.

To sum up, it now appears clear that a group of people that do not form a nation within an existing state may constitute a «people», and thus be regarded as a legal entity according to international law. This applies even to non-state indigenous peoples.

Even the European Union has confirmed that indigenous peoples are entitled to self-determination. The Nordic Dimension Action Plan 2004 - 2006[63] adopted by the EU's European Council on 29 September 2003 has the following provision;

«Strengthened attention to be paid by all Northern Dimension partners to indigenous interests in relation to economic activities, and in particular extractive industry, with a view to protecting inherited rights of self-determination, land rights and cultural rights of indigenous peoples of the region.»[64]

3.2 Interpretation of international conventions. Some principles of interpretation

The Vienna Convention of 1969 established the principles for interpreting international treaties.[65] The principles established in the Vienna Convention are also recognised as general international law principles that apply regardless of whether or not the relevant state has ratified the Vienna Convention.

Chapter 3 of the Vienna Convention describes the general international principles of interpretation. According to Article 31 of the Vienna Convention, a convention must be interpreted in good faith in accordance with the ordinary meaning of the terms used in the convention in light of the objective and purpose of the convention. The English version of Article 31 (1) is as follows: «A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.»

In other words, as a general rule the interpretation must be based on the natural meaning of the terms. The terms may be interpreted with a special meaning that deviates from the natural meaning, if it can be demonstrated that the purpose of the parties was to provide a special meaning for the term in question, cf. Article 31 (4) of the Vienna Convention: «A special meaning shall be given to a term if it is established that the parties so intended.»

As mentioned above, in relation to the issue of whether the Saami have the right to self-determination under international law, it must first be determined what constitutes the meaning of the term «all peoples» in the UN's covenants on (1) civil and political rights and (2) economic, social and cultural rights, respectively, as well as in some other international instruments.

According to Article 31 (1) of the Vienna Convention, the point of departure for the interpretation of the term «all peoples» is the ordinary meaning of the term. What constitutes the ordinary meaning of the term «people» has been addressed above. It is assumed here that all ethnic groups complying with the criteria for «people», in accordance with the ordinary use of this term, must be included in the category «all peoples». This will constitute the basis for the interpretation - unless preparatory work or some other sources of law support a different interpretation.

In pursuance of Article 31 (3) of the Vienna Convention, conventions must be interpreted in light of the application practice agreed by the states that are parties to

63 The Second Nordic Dimension Action Plan 2004 - 2006
64 Commission of the European Communities Document COM (2003) 343 (final), page 21
65 Vienna Convention on the Law of Treaties, 23 May 1969

the treaty («any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation»). Even though the Vienna Convention is primarily intended for conventions implemented and monitored by the states themselves, and the Convention is mute on the role of international monitoring bodies regarding the interpretation of a convention, it is justifiable to interpret the reference to «subsequent practice» in a manner that also comprises the practice of international monitoring mechanisms. This applies in particular if the state parties have not distanced themselves from the interpretation of the monitoring bodies. International case law is therefore of notable significance during the interpretation of conventions, in particular interpretations used as a basis by competent international bodies when applying relevant provisions of the conventions. Such competent bodies may include the UN's International Court of Justice and special international bodies established to monitor individual conventions (so-called «treaty bodies») - for example the UN's Human Rights Committee.

Article 32 of the Vienna Convention states that it will be natural to seek recourse to supplementary means of interpretation, «including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31». This can also be necessary when the application of the principles of Article 31 provides an ambiguous/uncertain or obscure result, or leads to a result which is absurd or unreasonable. The science of law is naturally also a source of law of significance during the interpretation of international conventions.

3.3 Recent theory pertaining to international law

Indigenous peoples' right to self-determination has been the subject of research to an increasing degree, and this has resulted in increased recognition that this fundamental right is also a right of indigenous peoples, or at least certain indigenous peoples.

Patrick Thornberry, professor and British member of the UN's Committee on the Elimination of Racial Discrimination, makes a reference to the fact that the Human Rights Committee in its general comment[66] has established that the right to self-determination does not only apply to the decolonisation of territories, but that it also applies to «peoples» in independent countries.[67] He refers, for example, to the Human Rights Committee's observations in connection with the Canadian periodic report (1999), in which the Committee recognises indigenous peoples as «peoples» in relation to international law.[68] Thornberry also refers to the fact that some governments, including New Zealand, accept that international law is under development and that there is a development towards increased recognition that the right to self-determination also applies to peoples within existing states.[69]

Kristian Myntti states that indigenous peoples obviously are «peoples», at least in social, cultural and ethnological terms. He also says that indigenous peoples may possibly be regarded as «peoples» under international law, without this entailing that indigenous peoples may demand secession from existing states. Myntti emphasises that only indigenous peoples in states that are essentially undemocratic or suppressive can demand secession. He concludes that the states' resistance against recognising indigenous peoples' right to self-determination, with reference to the fear of secession, therefore appears to have no justifiable basis.[70]

Ted Moses is of the opinion that the joint Article 1 in the two above-mentioned UN covenants does not establish or create the right to self-determination, but that

66 CCPR General Comment 12 (21), UN Doc. A/39/40 Sections 142-143

67 Patrick Thornberry, Self-determination and Indigenous Peoples, in the book «Operationalizing the Right of Indigenous Peoples to Self-Determination» (2000), eds. Pekka Aikio and Martin Scheinin, Institute for Human Rights Åbo Akademi University, page 47

68 UN document CCPR/C/79/Add. 105, Section 8

69 Contribution – New Zealand – the UN's Working Group on the draft Declaration of the rights of indigenous peoples (1999) – point on the agenda for general debate: «an emerging usage of international law, which sees the right of self-determination applying to groups within existing states.»

70 Kristian Myntti, «The Right of Indigenous Peoples to Self-determination and Effective Participation» in the book «Operationalizing the Right of Indigenous Peoples to Self-determination» (2000), Institute for Human Rights Åbo Akademi University, eds. Aikio and Scheinin

it confirms and recognises that this right exists and is the entitlement of all peoples. He emphasises that it is quite obvious that the right to self-determination also applies to indigenous peoples. In this connection, Moses refers to the conclusions of the UN's Meeting of Experts on indigenous peoples' right to self-determination,[71] where it emerges that indigenous peoples are separate peoples with a right to self-determination.[72]

James Anaya is also of the opinion that indigenous peoples must be regarded as «peoples» in the context of international law, and that the right to self-determination therefore also applies to indigenous peoples.[73] He argues that there is a clear international practice indicating that terms must be interpreted in accordance with their ordinary meaning, for example by the International Court of Justice. He also refers to the fact that several competent UN bodies have accepted indigenous peoples as «peoples», including the UN's Human Rights Committee as well as CERD. He rejects the traditional viewpoint that only colonies and the entire population of states have the right to self-determination, because this is a discriminatory viewpoint as it excludes self-determination for a large number of «non-state peoples». He goes on to say that the conservative state-based understanding of the right to self-determination is an anachronism in a world where the significance of national borders has been reduced.

Anaya also states that it is unacceptable in legal terms to attempt to interpret the term «peoples» in such a manner that indigenous peoples are excluded from the group having this right. He makes a reference to the principles of interpretation for international conventions (cf. the Vienna Convention) that establish that terms must be interpreted in accordance with their ordinary meaning. An interpretation of

«Anaya also states that it is unacceptable in legal terms to attempt to interpret the term «peoples» in such a manner that indigenous peoples are excluded from the group having this right..»

the term «peoples» resulting in indigenous peoples not being included will be contrary to these principles of interpretation.[74]

Anaya also makes another important point in the debate regarding indigenous peoples' right to self-determination as he is of the opinion that much of the basis for the resistance against recognising the indigenous peoples' right to self-determination is a consequence of the misconception that self-determination is realised through the formation of an independent nation. He is critical to this state-based approach because it is based too much on Western theoretical thinking, in which the State is presented as the most important and essential unit in how humans organise their society.

The former chairperson for the UN's Working Group on Indigenous Peoples, Erica-Irene A. Daes, is also of the opinion that indigenous peoples must be regarded as «peoples» in terms of international law. She states that she is not convinced that there is any difference between «indigenous peoples» and «peoples» in general, other than the fact that those identified as «indigenous peoples» have not had the opportunity to realise their right to self-determination.[75]

Sharon Venne has a very interesting approach to the question of whether indigenous peoples are to be regarded as «peoples». She demonstrates how indigenous peoples throughout the ages have been discriminated against by reference to the fact that the European colonial powers recog-

71 Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government, United Nations Meeting of Experts, Nuuk, Greenland, September 1991. UN document: E/CN.4/1992/42 and Add. 1

72 Ted Moses, «The Right of Self-determination and its Significance to the Survival of Indigenous Peoples» in the book «Operationalizing the Right of Indigenous Peoples to Self-determination» (2000), Institute for Human Rights Åbo Akademi University, eds. Aikio and Scheinin

73 James Anaya, «Indigenous Peoples in International Law» (1996), Oxford University Press. See also: James Anaya: «Understanding the Contours of the Principle of Self-determination and its Implementation: Implications of Developments Concerning Indigenous Peoples» in the book «The implementation of the Right to Self-determination as a Contribution to Conflict Prevention» (1999), UNESCO, eds. Michael C. van Walt van Praag and Onno Seroo

74 Vienna Convention on the Law of Treaties, 23 May 1969

75 Erica-Irene A. Daes, «Working Paper by the Chairperson-Rapporteur on the Concept of Indigenous Peoples», UN document: E/CN.4/Sub.2/AC.4/1996/2, Section 72

nised the American indigenous peoples as «peoples» when entering into agreements with indigenous peoples regarding the use of parts of the indigenous peoples' land areas by the immigrants. However, as soon as the immigrants achieved control of these new areas, the indigenous peoples' status as «peoples» was no longer recognised.[76] She uses this example to demonstrate how unreasonable it is to refuse indigenous peoples the recognition of being «peoples».

The UN's Special Rapporteur on agreements between indigenous peoples and states, Miguel Alfonso Martinez, also is of the clear opinion that indigenous peoples constitute «peoples» in terms of international law, and that they have the right to self-determination on equal terms with all other peoples. He also states that indigenous peoples, regardless of the fact that they in many cases constitute a numerical minority in the country in which they reside, do not constitute minorities according to the UN definition of these groups. [77]

Howard Berman states that the recognition of indigenous peoples' right to self-determination is important because the right to self-determination is the basis for their rights. The right to self-determination does not necessarily entail formation of a separate nation, as indigenous peoples, on the contrary, often consider it a right to determine their own political status within their own territories without outer dominance.[78]

Tony Simpson is also very clear in his conclusion as to whether indigenous peoples have a right to self-determination. He states that indigenous peoples' right to self-determination is a fundamental human right, and that their other rights to a large extent are based on the right to self-determination.[79]

Hurst Hannum is of the opinion that the UN Charter's use of the term «peoples» clearly encompasses groups that extend beyond states and that it at least covers peoples that still have not fully achieved self-government.[80] He also says that there is nothing to indicate that «peoples» must be understood to be synonymous with «state» in relation to the UN covenants. He also points out that the reference to «all» peoples in the joint Article 1 in the two most central human rights covenants – with a universal scope – indicates that the right to self-determination does apply outside the traditional colonial situations.

76 Sharon Helen Venne (1989) «Our Elders Understand Our Rights: Evolving International Law regarding Indigenous Rights», Theytus Books Ltd

77 UN document: E/CN.4/Sub.2/1999/20, "Study on treaties, agreements and other constructive arrangements between States and indigenous populations" – Final report by Miguel Alfonso Martinez, Special-Rapporteur

78 Howard Berman, (1985) «Remarks by Howard Berman, in Proceedings, Seventy-Ninth Annual Meeting of the American Society of International Law: Are Indigenous Populations Entitled to International Juridical Personality?» New York, 25-27 April 1985

79 Tony Simpson, (1997), «Indigenous Heritage and Self-determination", Document – IWGIA No. 86, Copenhagen

80 Hurst Hannum,(1993), «Rethinking Self-determination», Virginia Journal of International Law, Volume 34, Number 1, Fall 1993

4. THE STATES' OPINION ON THE EXISTENCE OF A RIGHT TO SELF-DETERMINATION FOR INDIGENOUS PEOPLES

4.1 Historical background

As described above, there was disagreement as well as uncertainty as to whether ethnic groups within states may constitute legal entities according to international law and thus be entitled to, for example, self-determination, or whether this was a right only belonging to people understood as the entirety of inhabitants within a state. However, a process started during the 1980s at the latest in which relevant UN bodies and others more and more clearly stated the opinion that the right to self-determination cannot be interpreted in such a restrictive manner. Over time this viewpoint has gradually become more and more accepted, also among the members of the UN.[81]

Regardless of this increased acceptance of even non-state peoples having the right to self-determination, many states rejected for a long time, in both words and action, the idea that non-state indigenous peoples also should be entitled to this right. In addition to the discussion on the applicability of the right to self-determination, this debate was also indirectly reflected in the debate on whether to refer to indigenous peoples in English as «people» or «peoples». This discussion is a reflection of a common viewpoint that a reference to indigenous peoples in plural entails that indigenous peoples may have rights in their capacity as indigenous peoples, including the right to self-determination.

In the debate on whether to refer to indigenous peoples in plural or not, as was the case for the discussion on the right to self-determination in itself, many states were for a long time uncertain as to whether they should accept the right to self-determination for indigenous peoples. However, those with the opinion that indigenous peoples were not entitled to self-determination, were forced to provide rational motives as to why indigenous peoples, in contrast to other non-state peoples, should not be entitled to such a right. Alternatively, they were forced to continue to maintain that no non-state peoples at all were entitled to self-determination. As described above, such a viewpoint is difficult to defend in view of the recent development in international law.[82] In recent years, probably as a reaction to this development, more and more states have stated that they are ready to accept that a right to self-determination exists for indigenous peoples as well.

4.2 Recent developments – Declaration on the Rights of Indigenous Peoples and specifically the Nordic states' opinion on indigenous peoples' right to self-determination

In recent years, the discussions at the interstate level regarding the indigenous peoples' possible right to self-determination have mainly taken place within the frame-

81 As shown above, it appears that some of these were of this opinion as early as in the 1960s.

82 An example of such a discrimination debate is the UN's World Conference against Racism in Durban, South-Africa in 2001. On this occasion a small number of states insisted that the term «indigenous peoples» in the Political Declaration to be adopted by the World Conference should be qualified to clarify that some rights are not necessarily linked to this use of language. The qualification was met by strong protests, and not just by representatives of indigenous peoples. The UN was criticised for racial discrimination at its own conference against racism. The Political Declaration adopted one year later in Johannesburg, South-Africa at the UN's World Summit on Sustainable Development, refers to «indigenous peoples» without any qualifications.

work of the Working Group on the United Nations Draft Declaration on the Rights of Indigenous Peoples (WGDD). Especially during the last two sessions, the WGDD has had detailed and specific discussions on the existence of a right to self-determination for indigenous peoples, and even to some extent the material content of such a right.

At the eighth session of the WGDD (September 2002), Norway presented a proposal regarding some of the articles in the Declaration on the Rights of Indigenous Peoples that addresses, or is related to, the indigenous peoples' right to self-determination. The Norwegian proposal entailed among other things that Article 3 of the Declaration on the Rights of Indigenous Peoples shall remain in the Declaration in its present form. As shown above, Article 3 reads as follows;

«Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.»

The Norwegian proposal included a new preambular Article 15 based on language obtained from the UN's Declaration on the Granting of Independence to Colonial Countries and Peoples as well as other declarations, etc. with a similar language. The article emphasises that the limitations that follow from the principle of the sovereignty of states, and specifically their territorial integrity, for the realisation of the right to self-determination, will apply even for those rights stipulated in the Declaration on the Rights of Indigenous Peoples. Thus, the preambular Article 15 appears to reflect already established international law that would have applied for the Declaration on the Rights of Indigenous Peoples regardless of whether it had specifically been incorporated into the Declaration. In other words, it appears that the Norwegian proposal does not add anything to the content of the Declaration on the Rights of Indigenous Peoples, but rather makes it (obviously) clear that the principle of the states' territorial integrity shall apply also for the right to self-determination for indigenous peoples, and that a recognition of this right therefore does not automatically entail any right for indigenous peoples to secede.

Regardless of the fact that the Norwegian proposal apparently does not add any new content to the Declaration on the Rights of Indigenous Peoples, the result of the proposal was that some states that previously had been in doubt as to whether they were to recognise indigenous peoples' right to self-determination – as this appears to be based on some uncertainty regarding how such a right will be related to the right of secession – with this amendment can accept that the Declaration on the Rights of Indigenous Peoples confirms indigenous peoples' right to self-determination. Some states proposed alternative language, others that corresponding language should be included in the (operative) Article 3 rather than the preamble. However, it appears that more or less all states participating in WGDD were prepared to recognise the existence of a right to self-determination for indigenous peoples, assuming that a provision more or less in line with the Norwegian proposal was amended to the Declaration on the Rights of Indigenous Peoples.

In connection with the ninth session of WGDD (September 2003), the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) presented a joint proposal regarding indigenous peoples' right to self-determination, see Appendices. The Nordic proposal included, just like the previous Norwegian proposal, an acceptance of Article 3 of the Declaration on the Rights of Indigenous Peoples in its present form. In comparison with the previous Norwegian proposal, it should be mentioned that preambular Article 15 is adjusted by adding «*... , and thus possessed of a government representing the peoples belonging to the territory without distinction of any kind*». The term «*the peoples belonging to the territory*» appears to confirm that the opinion of the Nordic countries is that there may be more than one people within a country or territory. Like the

previous Norwegian proposal, the Nordic proposal was widely supported among the government delegations that participated at the ninth session of the WGDD.[83]

To sum up, this demonstrates that the absolute majority of states now appears to be prepared to accept the consequences of the development of international law and confirm the existence of a right to self-determination for indigenous peoples - as long as this is exercised within the borders of existing states. However, it must be noted that very few African and Asian states have participated in the WGDD, which makes it difficult to know their attitude towards the issue of self-determination. It must also be pointed out that a few of the states that have stated they are prepared to accept a right to self-determination for indigenous peoples, are at the same time rather hazy as to what they consider to be included in this right. The language used by these states indicates that the right to self-determination that they allude to does not constitute any more for individuals belonging to indigenous peoples than participation in general elections, etc. on equal terms with the rest of the population. However, based on what has been described above, such an attitude would more or less correspond to no recognition of indigenous peoples' right to self-determination at all. On the contrary, this entails a return to the standpoint that the term «peoples» in the context of self-determination constitute «peoples» in the meaning of the entirety of inhabitants of a state.

Another issue discussed in connection with a possible right to self-determination for indigenous peoples, is how such a right is related to the permanent right to sovereignty over natural resources as claimed by certain states. Of course, the right to dispose of a people's natural resources is a central element in the right to self-determination, not least for indigenous peoples. It is not all that easy to know for certain what the states' position is on this issue, because, as shown above, the recent discussions in WGDD have been dominated by the issue of how the territorial integrity of the states relates to the indigenous peoples' right to self-determination. However, a number of states have traditionally argued that it is the State that has the permanent sovereignty over natural resources. And this position is often reflected in national legislation. There is nothing to indicate that these states have changed their opinion. However, as will be shown below, it is almost meaningless to talk of a right to self-determination for indigenous peoples that excludes a right to land and natural resources. These states also open up for a new discussion on discrimination in line with what was addressed above. It is difficult to provide rational motives as to why, in those cases where it has been determined that indigenous peoples are entitled to self-determination, that this right should not encompass any right to natural resources contrary to what is the case for other peoples. Most states, including the Nordic countries, therefore appear to be ready to accept that the indigenous peoples' right to self-determination at least includes some rights to land and natural resources. In this context, it should be noted that the Nordic proposal states that;

> *«Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources,».*

In Norway, the issue of Saami self-determination has been the subject of political and legal discussions for a long time. In their respective Storting White Papers on Saami policy, two successive governments have been positive to the existence of a Saami right to self-determination (Storting White Paper No. 55, 2000-2001, as well as Storting White Paper No. 33, 2001-2002). In the latter Storting White Paper it is stated that *«the question of a Saami right of self-determination is an important issue that will also require thorough discussions between the Government and the Saami Parliament. The point of departure for the Government*

83 As was the case in the eighth session, some states presented alternative solutions, but most of these subscribed to the principles behind the Nordic proposal.

is that an interpretation of the Saami's right of self-determination must be in accordance with provisions in international law and the development in international norms within this area. .. The Government would like to continue the dialogue with the Saami Parliament in order to reach a common understanding on how to interpret the international law provisions regarding the right to self-determination, and how to convert these into a practical policy in Norway.»[84]

In recent years, there has also been a discussion in Sweden regarding the Saami's right to self-determination. The Swedish Saami Parliament Study[85], for example, stated that the Saami are entitled to self-determination, even though it is doubtful that the limitation of the material scope of the right to self-determination presented by the Saami Parliament Study is in agreement with international law. The Finnish Constitution states that the Saami people are entitled to cultural autonomy within their homeland.

84 Storting White Paper No. 33 (2001-2002); Supplemental Paper to Storting White Paper No. 55 (2000-2001) On Saami policy, page 18, Section 4.1. Self-determination
85 Sametingets roll i det svenska folkstyret (The Role of the Saami Parliament in the Swedish Democracy), SOU 2002:77

5. INDIGENOUS PEOPLES' VIEW OF THE RIGHT TO SELF-DETERMINATION

5.1 General

As shown above, the right to self-determination is now considered to be one of the most central human rights, as recognition of the right to self-determination is regarded to constitute a precondition for efficient exercise of other human rights and fundamental freedoms. It is therefore not surprising that the right to self-determination in recent years has come to play a central role in the fight of indigenous peoples for their rights. Indigenous peoples currently focus on the demand for recognition of the indigenous peoples' right to self-determination ahead of any demand for other rights.

In their struggle to have their rights recognised, representatives of indigenous peoples generally emphasise the importance of non-discrimination and justice. This applies for the right to self-determination as well. Representatives of indigenous peoples have repeated that they do not demand more - or more comprehensive rights - than other people. (Another matter is that all peoples' rights may materialise in a different way than for other peoples when they are adapted to the specific situation of the indigenous peoples). This basic tenet has been very clear in the debate on self-determination. However, in the discussions regarding the right to self-determination that have taken place, for example within the framework of WGDD, all representatives of indigenous peoples have emphasised that they will not accept a right to self-determination that is different from; i.e. less comprehensive than, the right to self-determination that other peoples have. All representatives of indigenous peoples have objected to proposals that qualify indigenous peoples' right to self-determination to a greater extent than is the case for other peoples. On the other hand, the representatives of indigenous peoples have also not demanded a right to self-determination that extends beyond other peoples' rights. Indigenous peoples have generally accepted that limitations imposed by international law regarding the exercise of the right to self-determination, such as the principle of the states' territorial integrity, will also apply for indigenous peoples, but only to the same extent that such principles impose limitations for other peoples' exercise of the right to self-determination.

As regards the states permanent sovereignty over natural resources, all representatives of indigenous peoples have generally emphasised that the indigenous peoples' society is so closely linked to their traditional land areas that a right to self-determination for indigenous peoples must include a right to control land, water and natural resources. The representatives of indigenous peoples also maintain that this is in line with the principle of non-discrimination, as discussed above. A correct and adequate implementation of the indigenous peoples' right to self-determination must, according to the indigenous peoples, take into consideration the indigenous peoples' close ties to their traditional land areas.

The opinion of the representatives of indigenous peoples regarding the Nordic proposal may be described as divided. As stated above, the basic attitude of the majority of the representatives of indig-

enous peoples is that it can be accepted if it does not discriminate against indigenous peoples in comparison with other peoples. Many representatives of indigenous peoples are prepared to accept that some text on territorial integrity is included in the Declaration on the Rights of Indigenous Peoples, assuming that it is clearly stated that this does not entail negative discrimination of indigenous peoples. However, several different interpretations of the Nordic proposal were presented, and a number of representatives of indigenous peoples believed that the Nordic proposal entailed a qualification of the indigenous peoples' right to self-determination, even though it may be somewhat difficult to see the reasons for this viewpoint. It must also be emphasised that the analysis of the indigenous peoples' attitude towards various aspects of the right to self-determination is rendered more difficult by a few of the representatives of indigenous peoples still being of the opinion, due to historical or principal reasons, that not a single word in the draft Declaration on the Rights of Indigenous Peoples shall be changed. Other representatives, that certainly have abandoned this «no-change» position in principle, still have the practice of making statements regarding the Declaration on the Rights of Indigenous Peoples that deviate from its current version.

5.2 On the Saami's view of the right to self-determination

It is not easy to provide an account of the opinion of the Saami on the right to self-determination. The debate on this issue is relatively new in the Saami community. The Saami Parliament in Sweden has initiated, but not concluded, the work of establishing a self-determination policy, nor have the other Saami parliaments adopted such a policy. The discussion of the Saami's opinion on the right to self-determination is therefore based on input in the debate by individual Saami representatives, primarily those that represented Saami interests during the negotiations concerning the Declaration on the Rights of Indigenous Peoples in Geneva, as well as statements made by spokespersons for the Saami parliaments.

Regardless of the above, there is no doubt that the Saami people feel that they are entitled to self-determination, in accordance with international law. In general, it can be said that the viewpoint on the right to self-determination expressed by Saami representatives generally is in agreement with the opinion of other representatives of indigenous peoples regarding this issue. Thus, the Saami have not asserted that the right to self-determination entails a right for the Saami people to secede from the states that now share the traditional land areas of the Saami. On the other hand, Saami representatives have generally emphasised that the Saami right to self-determination cannot be more restrictive than the right of the Saami's neighbouring peoples. They maintain that the Saami right to self-determination includes a right for the Saami to control their economic, social, political and cultural development, including the right to dispose of land, water and natural resources in the Saami areas. Saami representatives have, for example, criticised the draft Finnmark Act, partly because it does not grant the Saami self-determination over land and natural resources. In the Finnmark Act, the emphasis is on Saami co-determination rather than self-determination.

6. THE MATERIAL SCOPE OF THE RIGHT TO SELF-DETERMINATION

6.1 External aspects of the right to self-determination

The peoples' right to freely determine their own political position and relationships to the international community is often categorised as the external aspect of the right to self-determination. The external aspect is typically invoked as a basis for a people's right to secession and formation of their own state. However, it should be emphasised that there is disagreement as to whether international law in any manner establishes a positive right to secession. However, it is generally agreed that international law at least does not grant an unqualified and unilateral right to secession.

In addition to the above, it must be assumed that the external aspect of the right to self-determination may also include other considerations, such as the peoples' right to participate in international decision processes. The UNESCO's Conference of Experts, for example, has stated that the peoples' right to participate in decisions at the international level is a very important dimension of the external aspect of the right to self-determination. In many contexts, this dimension may be realised without the formation of a separate nation.[86]

The provision on Saami autonomy in the Act on the Sami Parliament in Finland may be used as a specific example of the recognition that a non-state people have the right to participate in international decision processes. Section 6 of the Act on the Sami Parliament stipulates that the Saami Parliament in Finland shall represent the Saami [in Finland] at the national as well as the international level.[87]

Another specific example of the fact that the external aspects of the right to self-determination may be safeguarded without the formation of a separate nation is Greenland's loose ties to the EU. Greenland - which is part of Denmark - automatically became part of the EU [EEC] when Denmark joined the EU [EEC] in 1972. However, as there was a lot of resistance against a membership on Greenland, there was a separate EU referendum on Greenland in 1982. Based on the results of the referendum on Greenland regarding an EU membership, Greenland's Home Rule Government negotiated an agreement under which Greenland would no longer be considered part of the EU - in spite of the fact that Denmark remained a member of the EU.[88]

Problems in relation to the external aspect of the right to self-determination occur when some states argue that this only applies to peoples in traditional colonial situations. The primary focus is then on the right to secede from an existing state.

Such a reservation appears to be relatively unfounded because international law does not establish an absolute and unilateral right of secession from existing states. This is clearly stated in UN General Assembly's Resolution No. 2625:

«Nothing in the foregoing paragraphs shall

86 Report of the International Conference of Experts on the Implementation of the Right to self-determination as a Contribution to Conflict prevention, 21-27 November 1998 UNESCO (Division of Human Rights), p 29.

87 John Bernhard Henriksen, «Betenkning om samisk parlamentarisk samarbeid» (Opinion on Saami parliamentary collaboration), Sami Instituhtta, Diedut no. 2, 1998, p 23

88 John B. Henriksen, «Implementation of the Right of Self-determination of Indigenous Peoples within the Framework of Human Security», in the book «The Implementation of the Right to self-determination as a Contribution to Conflict Prevention», eds. van Walt van Praag & Seroo (1999).

be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above.»

In this unanimous resolution, the General Assembly establishes that this right to self-determination does not entail a right to actions that will partly or totally divide or impair the states' territorial integrity or political status, provided that the states act in accordance with the principle of equal rights for peoples - including the right to self-determination. This means, for example, that recognition of indigenous peoples' right to self-determination will not represent a threat to the states' territorial integrity – unless the state in question appears fundamentally undemocratic and persistently suppressive.

The CERD describes the external aspect of self-determination in the following manner:[89]

«The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights.»

With reference to General Assembly Resolution No. 2625, CERD goes on to say that the Committee's comments on the external aspects of the right to self-determination must not be interpreted as a recognition of or an incitement to impairment of the states' integrity. In this context, the Committee assumes that international law does not recognise a right of unilateral secession from an existing state.

The Human Rights Committee's General Comment No. 12 on the external aspects of the right to self-determination is limited to a very general reference to General Assembly Resolution No. 2625 on peaceful coexistence.[90] However, this reference must be interpreted to mean that the Committee is of the opinion that current international law does not provide a legal basis for unilateral secession.

As regards the question of whether indigenous peoples also shall be regarded as legal entities in relation to the external aspect of the right to self-determination, it is interesting to note that the observation of the Human Rights Committee concerning Saami self-determination does not include any reservations regarding the external aspect of the right to self-determination.[91] The Committee quite simply requests that Norway report on the implementation of the Saami right to self-determination in accordance with Article 1 of the Covenant. It must therefore be assumed that the Committee is of the opinion that the Saami's right to self-determination also comprises the external aspect – of course with the clear restrictions already established under international law.

The Supreme Court of Canada's consideration of the issue of the right to self-determination in the Quebec case in 1998, demonstrates the international understanding of the conditions that apply for recognising a people's right to secession.[92] The case is important, partly because the Court recognises that there may be more than one people within a single state; i.e. that the term «peoples» as the subject of self-determination is not identical to the term «population», which is evident from the quote from the decision on p 23 above.[93]

The Supreme Court of Canada then moves on to the main issue at stake in the case. The Court is clear in its conclusion that a people's right to self-determination, in accordance with international law, does not automatically include a right to seces-

89 General Comment 21 – Right to self-determination, adopted - 48th session 1996.
90 Human Rights Committee, General Comment No. 12 – The Right to Self-determination (Art.1), 13 April 1984.
91 UN document CCPR/C/79/Add 112.
92 See Section 3.1.
93 Reference re Secession of Quebec, [1998] 2 S.C.R. 217, Section 217. In Section 139, the Court refers to the position of indigenous peoples in Quebec, but as the conclusion in the case was that Quebec was not entitled to a right of unilateral secession, the Court reasoned that it was not necessary to review the issue of indigenous peoples' position in the event of a unilateral secession by a province.

sion. According to the Court, international law recognises realisation of an external right to self-determination only under special circumstances:

> *«In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.»*[94]

As regards the language used by the Supreme Court of Canada, it should be pointed out that the Court uses the term «external self-determination» when referring to a possible unilateral secession by the province of Quebec. As mentioned above, the term external self-determination is used in a more nuanced manner in the present report. In this report, the term is used in a manner that also includes international relations of a type that does not require secession and therefore is not subject to the extensive preconditions proscribed by international law for secession. An indigenous people's right to elect their own representatives to advocate the group in international organisations or at international conferences constitutes a form of such external self-determination. [95]

6.1.1 «Colonised peoples» versus «other peoples»

Making a distinction between colonised peoples and other peoples in relation to the external aspect of the right to self-determination is problematic. The objection to such a classification of «peoples» is partly based on it excluding large sections of the world's peoples from the external aspects of self-determination. Most indigenous peoples, for example, will not be in a traditional colonial situation – without this necessarily meaning that the scope and character of the suppression is changed to any significant degree.[96] As mentioned before, indigenous peoples' objection to this classification is not because indigenous peoples want to establish their own states. The idea of a nation-state is a Western concept that indigenous peoples do not find very appealing as a means of organising their own community. The resistance is more due to the opinion that this classification is contrary to the principle of equality between peoples under international law and that such a classification will result in different classes of people.[97]

Another matter is that the term «indigenous peoples» sometimes is used in a manner that includes groups that do not comply with the general criteria of international law for constituting «peoples» with a right to self-determination. The present report has no analysis of which groups of indigenous peoples are to be regarded as peoples in terms of international law, and thus have a right to self-determination, and which groups, regardless of whether or not they label themselves indigenous peoples, do not comply with the criteria of international law for «peoples». As discussed above, recent development in international law, including the practice of the Human Rights Committee, confirms that certain indigenous peoples shall be regarded as «peoples» with a right to self-determination in accordance with the joint Article 1 of the UN Covenants of 1966. The Saami are an example of indigenous peoples also regarded as «peoples» in terms of international law. The general consensus is that the Saami constitute one of the indigenous peoples accorded the status of «peoples» in terms of international law, for example through the practice of the Human Rights Committee.

94 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, Section 138
95 See, for example, Section 6 of Finland's Act on the Sami Parliament (974/1995)
96 The UN estimates that there are approximately 300 million persons belonging to indigenous peoples across the world.
97 Reports from the Human Rights Committee's Working Group on the Draft UN Declaration on the Rights of Indigenous Peoples: E/CN.4/1996/84; E/CN.4/1997/102; E/CN.4/1998/106; E/CN.4/1999/82; E/CN.4/2000/84.

UNESCO's Conference of Experts on the right to self-determination[98] is very critical to making a distinction between various peoples:

«..it was argued that this approach [to limit external self-determination to situations of de-colonisation is] tantamount to saying that there are different categories of «people:» a first class that possesses the full right to self-determination, and a lesser class which possesses only a limited right to internal self-determination. The distinction is arbitrary, limits the right of choice and runs counter to the plain meaning of all instruments which state that «all peoples» have the right to self-determination, including the right to «freely determine their political status.» It was pointed out that even using a positivist «hard law» approach, one comes to the conclusion that there is no valid international instrument in force today which makes such a distinction or affirms a right to internal self-determination... Moreover, it is important to stress that claims of self-determination do not necessarily imply claims to secession, indeed, they generally are limited to demands for rights to be exercised within boundaries of existing states.»[99]

In other words, it is argued here that this classification is tantamount to accepting that there are different categories of «peoples»; a higher class of peoples with a full right to self-determination, and a lower class of peoples with only a limited right to internal self-determination. It is further argued that such a classification will be completely random and that it limits the peoples' right to freely make choices. Also that the classification is contrary to the ordinary meaning of the principle that «all peoples» have the right to self-determination, including the right to «freely determine their political status.»

UNESCO's Conference of Experts went on to state that even with a positivist legal approach, the conclusion will be that there are no international instruments that make this distinction or only recognise the right to internal self-determination. The experts also emphasise another important point regarding this issue; namely that the demand for self-determination does not necessarily entail a demand for secession, and that the right to self-determination as a point of departure must be realised within existing state borders.

6.1.2 Secession

The states' lack of recognition of indigenous peoples' right to self-determination is to some extent due to the fear that this will legitimise demands for secession from existing states presented by indigenous peoples. Is this fear warranted?

«Secession may be considered a natural element of a people's right to defend itself, as secession is a defence against a fundamentally suppressive system.»

The basis for an evaluation of this issue must be that all relevant UN resolutions place the principle of the states' national community and territorial integrity higher than the right to self-determination of non-state peoples. This is because the right to self-determination cannot be realised through secession unless there are special circumstances that legitimise secession at the expense of a state's territorial integrity. The conditions for secession are considered fulfilled in purely colonial situations and in the event a state is fundamentally and consistently undemocratic or suppressive vis-à-vis a people.

Secession may be considered a natural element of a people's right to defend itself, as secession is a defence against a fundamentally suppressive system.

There may be good reasons for secession if the relevant people's continued physical

98 Held in Barcelona on 21-27 September 1998.
99 UNESCO Division of Human Rights, Report of the International Conference of Experts, held in Barcelona, 21-27 November 1998. See page 26.

existence is threatened or if the people are excluded economically in a persistent manner.[100]

It is also claimed by some that secession may be regarded as a necessary remedial measure («remedial secession») in some cases. It must then be assumed that the relevant people are consistently suppressed by the State and that no other standards of international law will contribute to alleviate the situation.[101]

If a people's continued physical existence is threatened – for example due to attempted genocide – or in the event of very strong discrimination of a people, the UN's Declaration of Human Rights also allows for measures that may result in secession. In the preamble of the Declaration, «rebellion against tyranny and oppression» is recognised as a «last resort».[102]

Any fear that recognition of the Saami right to self-determination will result in the Saami seceding from the nation states appears unfounded on the basis of the above. It does appear that there is nothing to indicate that there is a Saami movement for independence with secession as its objective, and the legal and political situation for the Saami is also such that any Saami demand for secession will not be recognised under international law.

In spite of the fact that there is currently neither a wish, will nor condition for Saami secession, and regardless of whether this will or will not be relevant in the foreseeable future, it must be understood that the Saami have problems accepting such a limited right to self-determination. First of all, it is very difficult for the present Saami to waive such a right on behalf of future Saami generations, secondly, the Saami do not have any guarantee that the current national political regime and system will be maintained forever.

In the post-war period, the nation state has been regarded as the fundamental unit for organising society. Thus, the establishment of a separate nation state has for a long time been regarded as the full and real implementation of the right to self-determination, as the realisation of the right to self-determination has almost automatically been assumed to result in secession and formation of a separate nation state.

However, there is now increased acceptance of the right to self-determination being a dynamic concept that cannot easily be given a static content. UNESCO's Conference of Experts on the peoples' right to self-determination points out that the right to self-determination must be regarded as being a process rather than a predefined result.[103] The Conference of Experts refers to General Assembly Resolution No. 2625, where it is stated that:

> *«The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitutes modes of implementing the right of self-determination by the people.»*

Through this, the General Assembly states that the formation of an independent state, association or integration with another independent state, or the establishment of another political status only represents some modes of implementing the right to self-determination. This is also in accordance with the viewpoint of the International Court of Justice regarding the implementation of the right to self-determination. The Court has expressed that the basic condition is that the result of the implementation of the right to self-determination is in accordance with the peoples' free and voluntary choice.[104] If the Saami want to implement the right to self-determination in the form of autonomy, this is to be regarded as the Saami people's free and voluntary choice.

UNESCO's Conference of Experts also stated that the right to self-determination should not be regarded as something that

100 Benyamin Neuberger, (1986), National Self-determination in Postcolonial Africa
101 Lee C. Buchheit, Secession (1978)
102 Universal Declaration of Human Rights, Preamble, Section 3
103 Report of the International Conference of Experts on the Implementation of the Right to self-determination as a Contribution to Conflict prevention, 21-27 November 1998 UNESCO (Division of Human Rights)
104 Advisory opinion on Western Sahara, 1975 ICJ 12, 32-33

grants the right to make a one-time choice, but rather as a continuous, ongoing process that ensures the people's participation in decision processes and control of their own future:

«Self-determination should not be viewed as one time choice, but as an ongoing process which ensures the continuance of a people's participation in decision making control over its own destiny.»

It is also stated that the right to self-determination, as is the case for most other rights, cannot be deemed an absolute right. In those cases where the realisation of the right to self-determination will be in conflict with other internationally recognised rights and principles, a balance must be found between the various rights. In such cases, maintaining peace and security is the paramount objective according to UNESCO's Conference of Experts.

6.2 Internal aspects of the right to self-determination

6.2.1 General comments on the internal aspects of the right to self-determination

As described above, the joint Article 1 (1) of the ICCPR and ICESCR states that;

«All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In this context it should be noted that the UN's Special Rapporteur on indigenous peoples' human rights and fundamental freedoms[105] has emphasised that;

«The International Covenant on Economic, Social and Cultural Rights ... sets out in article 1 the following rights which relate directly to indigenous peoples: all peoples have the right to self-determination and, by virtue of that right, may freely determine their political status and freely pursue their economic, social and cultural development (art. 1 (1) and all peoples may freely dispose of their natural wealth and resources (art. 1 (2)).»[106]

CERD has, also with reference to all peoples' right to self-determination, described the internal aspect of the right to self-determination in this manner;

«The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.»[107]

Other documents that refer to the right to self-determination generally repeat that the peoples' right to self-determination includes a right to determine their own economic, social and cultural development. As described above, it appears that the states that participate in the WGDD are prepared to accept the existence of a right to self-determination for indigenous peoples. Even though these states have not made any statements as to the detailed content of the internal aspects of the right to self-determination, it may still be interesting to take a closer look at what the Declaration on the Rights of Indigenous Peoples has to say regarding the material content of the right to self-determination.

The first thing to note is, as described above, that Article 3 is a repetition of Article 1.1 of the ICCPR and ICESCR, and stipulates that the right to self-determination includes a right for indigenous peoples to determine their own economic, social and cultural development. Article 31 of the WGDD also lists elements included in the right to self-determination according to the Declaration on the Rights of Indigenous Peoples.

105 Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples
106 Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, UN Document E/CN.4/2004/80/Add.1, para. 88
107 CERD General Comment No. 21 – Right to Self-determination, 15 March 1996

«Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and for financing these autonomous functions.»

The Nordic countries have proposed that the list of examples be deleted from the Declaration on the Rights of Indigenous Peoples, and that only the first subsection of Article 31 shall remain. Norway has specified that what motivated the deletion of the passage was *not* that these elements should not be part of indigenous peoples' right to self-determination. The proposal was presented strictly for tactical reasons, as the Nordic countries believed that this will ease the negotiations in the WGDD. Also of interest in the present case is Article 4 of the Declaration on the Rights of Indigenous Peoples, which states that;

«Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.»[108]

and Article 21, which stipulates that;

«Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in their traditional and other economic activities…»

Article 23 should also be mentioned, which starts;

«Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development…»

Even though ILO 169, as described above, does not directly address indigenous peoples' right to self-determination, Article 7.1 of ILO 169 should still be noted, as it states that;

«The peoples concerned shall have the right to decide their own priorities for the process of development as it affects … the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.»

Thus, it appears to be clear that indigenous peoples' right to self-determination does include a right to determine their own cultural, social and economic development. Under these circumstances, it would be reasonable to assume that the internal aspects of the right to self-determination in principle should cover all issues of significance for maintaining and developing the cultural, social and economic aspects of the indigenous peoples' communities.

As regards what specifically is considered to be political, economic, social and cultural development, some guidelines are provided in the Human Rights Committee's comments to the periodic reports submitted by the states that have ratified the Declaration, which are referred to above. In these, as described, the Human Rights Committee has generally focused on the resource dimension of the right to self-determination (Article 1.2). These comments will be addressed in more detail below. Over the years, the Human Rights Committee has also established a relatively extensive practice as regards the interpretation of Article 27 of the ICCPR. As

108 As regards the reference to «if they so choose», see the difference between the rights of minorities and indigenous peoples as described above.

described above, the Human Rights Committee has on several occasions stated that Article 27 and Article 1 of the ICCPR deal with closely related rights, even though the legal entities are different (individuals vs peoples). Thus, guidelines for the scope of the right to self-determination can therefore be found in the Committee's interpretation of Article 27.

6.2.2 Participation in economic activities

As regards all peoples' right to control their economic development, the joint Article 1 (2) of the ICCPR and ICESCR states that;

«All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.»

Note also Article 31 of the WGDD, which stipulates that indigenous peoples shall receive funds to allow them to realise the elements of the right to self-determination that follow from Article 31 («*... as well as ways and for financing these autonomous functions.*»)

In this context, the Human Rights Committee's statement in connection with the periodic report from Denmark should be noted, as the Committee;

«... commends Denmark for ... the promotion of Greenland's financial independence ...»[109]

In its comments on the periodic report from New Zealand, the Human Rights Committee stated that;

«The approach of providing compensation from public funds helps to avoid tensions that might otherwise hamper the recognition of indigenous land and resource rights.»[110]

In this context it should also be noted that the Human Rights Committee requested that Sweden grant the Saami people real influence over their «*economic activities*».[111]

6.3 On the resource dimension of the right to self-determination

6.3.1 The right to traditional land and water areas, traditional livelihoods as well as traditional natural resources

As indigenous peoples' cultures and communities are closely linked to their traditional land and water areas as well as natural resources, the parts of the right to self-determination that affect land and natural resources are of central importance for indigenous peoples. It does not make sense to talk of a right to self-determination for indigenous peoples without including a resource dimension. The then chairperson for the UN's Working Group on Minority Rights, Asbjörn Eide, noted, for example, that cultural autonomy for indigenous peoples has no meaning if it does not include a right to control land and natural resources.

It is therefore natural when it comes to indigenous peoples, that UN bodies and others have primarily focused on the parts of the internal aspects of the right to self-determination that affect indigenous peoples' right to make decisions on and/or right to have influence over their land and water areas, natural resources as well as ways of life. On several occasions, the Human Rights Committee has stated its opinion on Article 1 (2) in relation to indigenous peoples. The Committee was especially clear in the above-mentioned statement regarding the fourth periodic report from Canada, in which the Committee stated that;

«The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, re-

109 UN Document CCPR/CO/70/DNK, point 6
110 UN Document CCPR/CO/75/NZL, point 7
111 UN document CCPR/CO/74/SWE, dated 24 April 2002, Section 15

grets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next report.

The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains «the most pressing human rights issue facing Canadians». In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full and implementation of the RCAP recommendations on land resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.» [112]

In the Human Rights Committee's comments on Australia, the Committee stated, directly related to the observations concerning self-determination, that;

«The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.»[113]

As regards the right to land and water, the Human Rights Committee has also, in the comments on the periodic report from New Zealand, stated that;

«The Committee welcomes the further progress made in the protection and promotion of the rights of Maori under the Covenant, in particular the amendments introduced by the Maori Reserved Land Amendment Act … the Committee notes with satisfaction that the Act provides for compensation to be paid to lessors for delays in carrying out rent reviews and to ensure fair annual rents, and providing for compensation to be paid to (largely non-Maori) lessees under certain circumstances ...

…While recognizing the positive measures taken by the State party with regard to the Maori, including the implementation of their rights to land and resources, the Committee continues to be concerned that they remain a disadvantaged group in New Zealand society with respect to the enjoyment of their Covenant rights in all areas of their everyday life. The State party should continue to reinforce its efforts to ensure the full enjoyment of the Covenant rights by the Maori people.»[114]

112 CCPR/C/79/Add.105/1999 points 7 and 8
113 UN Document CCPR/CO/69/AU, para. 509 – 510
114 UN Document CCPR/CO/75/NZL, points 7 and 14

«In relation to the Saami people's right to self-determination, the Human Rights Committee has focused on the resource dimension here as well.»

In relation to the Saami people's right to self-determination, the Human Rights Committee has focused on the resource dimension here as well. In the Committee's statement regarding the Norwegian Government's fourth periodic report mentioned above, the Committee, with reference to Article 1 (2) of the ICCPR, emphasises the Saami's right to dispose of their natural assets and not be deprived of their ways of making a living. The Human Rights Committee also requested that Norway in its next report to the Committee, report on how Norway intends to implement Article 1 (2) in relation to the Saami people. The Committee goes on to say, directly related to its comments regarding self-determination, that it;

« … remains concerned that while legislative reform work in the field of Sami land and resource rights is in progress, traditional Sami means of livelihood, falling under article 27 of the Covenant, do not appear to enjoy full protection in relation to various forms of competing public and private uses of land.»[115]

There was also a reference to Sweden's fifth report above, where the Human Rights Committee states that the right to self-determination includes a right for the Saami to participate in decisions that affect the Saami people's areas and livelihoods. With reference to, inter alia, Article 1 of the ICCPR, the Committee expresses its concern regarding;

«the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people» [116]

It should also be noted that in a case involving Article 27 of the ICCPR, the Human Rights Committee has stated that sea fishing is covered by Article 27 of the ICCPR. In line with what has been discussed above, there are therefore good reasons for assuming that as regards indigenous peoples, the right to self-determination does encompass a right to decide, or at least exercise influence, over sea fishing to the extent that sea fishing is a traditional livelihood for the indigenous people in question.

The Committee on Economic, Social and Cultural Rights (CESCR) has also made statements to the effect that it is also the opinion of this Committee that indigenous peoples are entitled to dispose of their assets and natural resources themselves. The CESCR has, with reference to Article 1.2 of the ICESCR, stated that;

«State parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.»

Note also the statement by the UN's Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples referred to above[117], that;

«The International Covenant on Economic, Social and Cultural Rights ... sets out in article 1 the following rights which relate directly to indigenous peoples:... all peoples may freely dispose of their natural wealth and resources (art. 1 (2)).»[118]

Regardless of the fact that ILO 169 does not have any specific provisions regarding indigenous peoples' right to self-determination, Kristian Myntti has good reasons for stating that the provisions of ILO 169 include a clear right for indigenous peoples

115 UN document CCPR/C/79/Add.112/1999, point 16. Note also the link to Article 27
116 UN Document CCPR/CO/74/SWE, dated 24 April 2002, point 15
117 Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples
118 See the Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, UN Document E/CN.4/2004/80/Add.1, para. 88.

to exercise control over their traditional land areas. In this context, note especially what Article 7.1 of ILO 169 states regarding indigenous peoples' right to decide over their land areas. It is generally very difficult to make a clear distinction between indigenous peoples' collective rights to land, as expressed in ILO 169, and the aspect of the right to self-determination that involves the right to decide over land and water areas as well as natural resources. In the present context, it should also be noted that CERD and ILO are of the opinion that the Norwegian draft Finnmark Act does not comply with the requirements of international law.

As regards the resource dimension of the right to self-determination, it is of course interesting to see what the Declaration on the Rights of Indigenous Peoples has to say regarding this. Relevant articles in this context include Article 7 b;

«Indigenous peoples have the ... right not to be subject to … any action which has the aim or effect of dispossessing them of their lands, territories or resources;»

Article 26

«Indigenous peoples have the right to … develop, control and use the lands and territories, including the total environment and … resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources …»

and Article 21

«Indigenous peoples have the right to ... be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.»

See also Article 31, quoted above, which states that «*land and resource management*» constitute part of indigenous peoples' right of self-determination.

It appears that the UN's member countries are now prepared to accept a right to self-determination that includes such a resource dimension. The Nordic proposal to the WGDD, in addition to what was described above, also includes some amendments of Article 30 of the Declaration on the Rights of Indigenous Peoples, which currently reads;

«Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.»

According to the Nordic proposal, the underlined text should be moved to the part of the Declaration on the Rights of Indigenous Peoples that specifically addresses the right to self-determination, while the remaining text that follows should be incorporated into those articles in the Declaration on the Rights of Indigenous Peoples that address land rights.[119] A large majority of the states participating in the WGDD supported also this part of the Nordic proposal.

The resource dimension of the right to self-determination must include genetic resources, traditional knowledge and traditional cultural expressions (TCEs). As

119 The proposal that deal with land rights is not addressed in this report.

shown above, a central element of the right to self-determination is all peoples' right to determine their own cultural development. The Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples state that;

«To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems.»[120]

Closely associated with the right to determine their cultural development is peoples' right to decide over their creative output. An appropriate reference here will be Article 15 of the ICESCR, which emphasises that;

«... the right of everyone ... to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.»[121]

Article 15 of the ICESCR is worded as an individual right with the purpose of protecting creations by individual creators according to the text. However, the right to traditional knowledge and TCEs is - as defined - a collective right. Traditional knowledge and TCEs are the result of a people responding as a collective group to changes in the environment in which it lives in accordance with its specific traditions. It is therefore normally not possible to identify a single creator or group of creators behind traditional knowledge or TCEs.[122] As traditional knowledge and TCEs per definition are created by a people, it is reasonable that such cultural knowledge and expressions belong to the people as such, mainly based on the corresponding argument that individual songs, texts, etc. belong to the creator of these works; i.e. the author or songwriter.

Article 29 of the Declaration on the Rights of Indigenous Peoples should also be mentioned in this context, as it confirms indigenous peoples' right to control and own their traditional knowledge and TCEs, and Article 12, which states that;

«Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historic sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature ...»

An important aspect of indigenous peoples' right to self-determination is respect for indigenous peoples' customs and practice and common law. All communities must be managed based on norms and will therefore develop legal systems. Indigenous societies are no exception to this. The legal systems of indigenous peoples generally are composed of a complicated pattern of customs and practice and common law norms rather than codified legislation, which is usually the case in other cultures. As the legal systems of indigenous peoples have not been codified, they are often regarded as primitive, and colonial powers have thus often assumed that they need not respect the legal systems of indigenous peoples. This is not necessarily correct. The fact that the legal systems of indigenous peoples are based on unwritten law rather than codified, is not in itself sufficient to draw the conclusion that the legal systems of indigenous peoples do not deserve respect in the same measure as codified legislation. Both are legal systems established to

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121 See also WIPO Document WIPO/GRTKF/IC/4/8, Section 28, which states that «Because its generation, preservation and transmission is based on cultural traditions, traditional knowledge is essentially culturally-oriented or culturally-rooted, and it is integral to the culture identity of the social group in which it operates and is preserved. From the point of view of culture of the community in which it has originated, every component of traditional knowledge can help define that community's own identity.», as well as WIPO Document WIPO/GRTKF/IC/3/8, Section 14, which states that «By contrast, the cultural identity dimension of traditional knowledge may have a dramatic impact on any future legal framework for its protection, because, being a means of cultural identification, the protection of traditional knowledge ... ceases to be simply a matter of economics or of exclusive rights over technology as such. It acquires a human rights dimension indeed».

122 See for example WIPO Document WIPO/GRTKF/IC/3/8, WIPO/GRTKF/IC/3/9 and WIPO/GRTKF/IC/4/8. This does not entail, however, that individual creators cannot build on traditional knowledge or other elements from traditional cultures. On the contrary, as this is very common, and the result is the creation of individually identifiable objects with an identifiable creator.

manage the behaviour of human beings in a community, and respect for indigenous peoples' common law systems is a central element when the right to self-determination is to be implemented. Given the strong ties between the culture of indigenous peoples and their traditional land and water areas, the indigenous peoples' common law management of land, water and natural resources will naturally be important.

Articles 8 and 9 of ILO 169 state that states shall respect the customary laws of indigenous peoples upon implementation of national legislation. Article 4 of the Declaration on the Rights of Indigenous Peoples also states that indigenous peoples have the right to maintain and develop their distinct legal systems, and the CESCR has also emphasised the importance of facilitating that indigenous peoples be able to practise and preserve their customs and practices.[123] Regional bodies have also emphasised the importance of respecting the customary law systems of indigenous peoples. In the *Awas Tingni* case, the Inter-American Court of Human Rights stated that

«The communal concept of land – including as a spiritual place – and its natural resources form part of their customary right; their bond with the territory, although unwritten, is integral to their daily life, and the right to communal property itself has a cultural dimension. In sum, the habitat forms an integral part of their culture, transmitted from generation to generation.»[124]

6.3.2 The right to minerals, oil and other non-traditional natural resources within traditional Saami territories

From the comments of the Human Rights Committee on Sweden's periodic report, referred to above, it is evident that the opinion of the Committee is that the Saami's right to self-determination is not limited to just being regarded as a right to manage natural resources traditionally used by the Saami. After having determined that the Saami shall be granted a significant role in decision-making regarding their traditional land areas and businesses, the Committee goes on to say that;

«The State party should take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence»

The Committee then specified that the term the Saami's «*economic activities*» includes activities such as hydroelectric power, mining, forestry as well as privatisation of land.

As described above, the EU has also confirmed indigenous peoples' right to self-determination, and in connection with this stated that;

«Strengthened attention to be paid by all Northern Dimension partners to indigenous interests in relation to economic activities, and in particular extractive industry, with a view to protecting inherited rights of self-determination, land rights and cultural rights of indigenous peoples of the region.»

Compare this with the CERD's criticism of Sweden;

«Concern is expressed over the issue of land rights of the Sami people, in particular hunting and fishing rights which are threatened by, inter alia, the privatization of traditional Sami lands. The Committee recommends that the Government introduce legislation recognizing traditional Sami land rights and reflecting the centrality of reindeer husbandry to the way of life of Sweden's indigenous people.»[125]

Disappointed, the CESCR noted that;

123 O'Keefe, Roger, «*The Right to Take Part in Cultural Life*», Under Article 15 of the CESCR, ICQL, vol. 47, 1998, p 918 (pp 904 – 923)
124 Awas Tingni v. Nicaragua, p 2, para. 6.
125 CERD/C/304/Add.103

«the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture…»

and then recommended that the State in question (Colombia);

«… ensure the participation of indigenous peoples in decisions affecting their lives. The Committee particularly urges the State party to consult and seek the consent of the indigenous peoples concerned.»[126]

In conclusion, it appears clear that indigenous peoples' right to self-determination includes a right to have influence even over non-traditional natural resources. It is more uncertain to what extent indigenous peoples have a right to an economic share in such natural resources. The Human Rights Committee's comments regarding Sweden's periodic report indicate such a right. It must also be noted that there is at least some support for transferring economic resources to indigenous peoples to allow their right to self-determination to be realised, as described above.

6.4 The solidarity dimension

The third subsection of Article 1 in the 1966 Covenants addresses another dimension of the right to self-determination, namely the state parties' joint responsibility for promoting other peoples' self-determination anywhere in the world; i.e. primarily outside the country's own territory. The Human Rights Committee has referred to this dimension in the reporting procedure, especially with reference to the states' responsibility to promote the Palestinian people's and the South-African peoples' right to self-determination.[127]

6.5 Rewording of the social contract with the Saami

As emphasised by James Anaya and others, the right to self-determination has a clear dimension of compensation as regards indigenous peoples and the historical injustice suffered by many of them. For indigenous peoples that feel that they have fallen under the power of a modern nation state without their own consent and often without being heard, it is often a goal in itself that the State should recognise the indigenous people as a people with a right to self-determination, regardless of the consequences that follow from this recognition. Except in extreme cases where international law would allow for secession by the indigenous people, the State's recognition that the indigenous people have a right to self-determination entails a new social contract between the nation state and the indigenous people. This applies even to the work on a Nordic Saami Convention through which Finland, Norway and Sweden will recognise the Saami as the indigenous people of these countries and recognise the Saami as having a right to self-determination.

126 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia 30/11/2001. E/C.12/Add. 1/74, para. 12 and 33
127 Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N. P. Engel, 1993), p 23

7. BRIEFLY ON THE IMPLEMENTATION OF THE RIGHT TO SELF-DETERMINATION

7.1 Self-determination through the indigenous peoples' own social structures

As described above, indigenous peoples' right to self-determination is primarily exercised through the indigenous peoples' own social structures[128], and in the case of the Saami, primarily through the Saami parliaments. It should be emphasised that the Saami's right to self-determination need not necessarily be realised through the Saami parliaments. In the end, it should be up to the Saami themselves to determine their own decision-making processes within the framework of the right to self-determination. The right to maintain and develop their own social institutions constitutes a central element in the indigenous peoples' right to self-determination.

Thus, in principle the Saami people have the right to keep and develop their own political and social institutions and structures. In issues that only affect the Saami people or are of marginal interest for the non-Saami community, the Saami should therefore be able to make decisions through their own social institutions.

7.2 Self-determination through participation in national decision-making structures

As described above, indigenous peoples are also, in addition to keeping their own social institutions, entitled to participate in the social life of the majority society[129], if they so desire. Article 4, last subsection of the Declaration on the Rights of Indigenous Peoples reads;

> *« ... while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State»*

As regards implementation of indigenous peoples' right to self-determination through consultation with the surrounding community, note also the statement by CERD that;

> *«The Committee notes with concern ... the failure of the parts of the authorities to maintain communication with the indigenous population... the Committee calls upon State parties to ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without informed consent»*[130]

As described above, ILO 169 does not formally address the right to self-determination of indigenous peoples, even though ILO 169's break with the former assimilation-based relationship to indigenous peoples entails in practice that the Convention must be viewed in a self-determination context. ILO 169 emphasises the states' obligation to consult indigenous peoples «*in*

128 Note again Article 4 of the WGDD; «Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State».

129 Including the right to participate in general elections

130 Concluding observations of the Committee on the Elimination of Racial Discrimination : Costa Rica, 20/03/2002

good faith»[131] and the ILO's own guidelines on implementation of ILO 169, after having emphasised indigenous peoples' right to keep their own social institutions, goes on to state that

> *«It also presumes that these peoples are in most cases able to speak for themselves and to take part in the decision-making process as it affects them. It also presumes that they have the right to take part in this decision-making process, and that their contribution will be a valuable one in the country in which they live.»* [132]

Thus, ILO has clarified that it is necessary to consult affected indigenous peoples, for example before authorising exploration of natural assets underground.

131 Article 6
132 Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169 (1996)

Annex

Text of the Draft Convention in English (unofficial translation)

NORDIC SAAMI CONVENTION

The Governments of Finland, Norway and Sweden, affirming

- that the Saami is the indigenous people of the three countries,
- that the Saami is one people residing across national borders,
- that the Saami people has its own culture, its own society, its own history, its own traditions, its own language, its own livelihoods and its own visions of the future,
- that the three states have a national as well as an international responsibility to provide adequate conditions for the Saami culture and society,
- that the Saami people has the right of self-determination,
- that the Saami people's culture and society constitutes an enrichment to the countries' collected cultures and societies,
- that the Saami people has a particular need to develop its society across national borders,
- that lands and waters constitute the foundation for the Saami culture and that hence, the Saami must have access to such,
- and that, in determining the legal status of the Saami people, particular regard shall be paid to the fact that during the course of history the Saami have not been treated as a people of equal value, and have thus been subjected to injustice,

that take as a basis for their deliberations

- that the Saami parliaments in the three states
- want to build a better future for the life and culture of the Saami people,
- hold the vision that the national boundaries of the states shall not obstruct the community of the Saami people and Saami individuals,
- view a new Saami convention as a renewal and a development of Saami rights established through historical use of land that were codified in the Lapp Codicil of 1751,
- emphasize the importance of respecting the right of self-determination, that the Saami enjoy as a people,
- particularly emphasise that the Saami have rights to the land and water areas that constitutes the Saami people's historical homeland, as well as to natural resources in those,
- maintain that the traditional knowledge and traditional cultural expressions of the Saami people, integrated with the people's use of natural resources, constitutes a part of the Saami culture,
- hold that increased consideration shall be given to the role of Saami women as custodians of traditions in the Saami society, including when appointing representatives to public bodies,
- want that the Saami shall live as one people within the three states,
- emphasize the Saami people's aspiration, wish and right to take responsibility for the development of its own future
- and will assert the Saami people's rights and freedoms in accordance with international human rights law and other international law,

that have elaborated this convention in close cooperation with representatives of the Saami, deeming it to be of particular importance that the Convention, before

being ratified by the states, be approved by the three Saami parliaments and that commit themselves to secure the future of the Saami people in accordance with this convention,
have agreed on the following Nordic Saami Convention.

Chapter I
The general rights of the Saami people

Article 1
The objective of the Convention
The objective of this Convention is to affirm and strengthen such rights of the Saami people that are necessary to secure and develop its language, its culture, its livelihoods and society, with the smallest possible interference of the national borders.

Article 2
The Saami as an indigenous people
The Saami people is the indigenous people of Finland, Norway and Sweden.

Article 3
The right of self-determination
As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to its own benefit, of its own natural resources.

Article 4
Persons to whom the Convention applies
The Convention applies to persons residing in Finland, Norway or Sweden that identify themselves as Saami and who

1. have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or
2. have a right to pursue Saami reindeer husbandry in Norway or Sweden, or
3. fulfil the requirements to be eligible to vote in elections to the Saami parliament in Finland, Norway or Sweden, or
4. are children of a person referred to in 1, 2 or 3.

Article 5
The scope of the State's responsibility
The responsibilities of the State pursuant to this Convention apply to all state bodies at national, regional and local levels. Other public administrative bodies and public undertakings also have such responsibilities. The same applies to private legal entities when exercising public authority or performing other public duties.

In applying this Convention, the Saami parliaments and other Saami bodies, regardless of their legal status under national or international law, shall not be deemed to fall under the concept state, except when exercising public authority.

Article 6
State measures with respect to the Saami people
The three states shall effectively establish conditions enabling the Saami people to secure and develop its language, its culture, its livelihoods and its society.

The states shall create favourable conditions for maintaining and developing the local Saami communities.

To a reasonable extent, the states' responsibility to take measures pursuant to this Convention shall apply also to Saami persons who are residing outside the traditional Saami areas.

Article 7
Non-discrimination and special measures
The Saami people and Saami individuals shall be ensured protection against all discrimination.

The States shall, when necessary for the implementation of Saami rights pursuant to this Convention, adopt special positive measures with respect to such rights.

Article 8
Minimum rights
The rights laid down in this Convention are minimum rights. They shall not be construed as preventing any state from extending the scope of Saami rights or from adopting more far reaching measures than contained in this Convention. The Convention may not be used as a basis for limiting such Saami rights that follow from other legal provisions.

Article 9
Saami legal customs
The states shall show due respect for the Saami people's conceptions of law, legal traditions and customs.

Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist and, if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.

Article 10
Harmonization of legal provisions
The states shall, in cooperation with the Saami parliaments, strive to ensure continued harmonization of legislation and other regulation of significance for Saami activities across national borders.

Article 11
Cooperation on cultural and commercial arrangements
The states shall implement measures to render it easier for the Saami to pursue economic activities across national borders and to provide for their cultural needs across these borders. For this purpose, the states shall strive to remove remaining obstacles to Saami economic activities that are based on their citizenship or residence or that otherwise are a result of the Saami settlement area stretching across national borders. The states shall also give Saami individuals access to the cultural provisions of the country where they are staying at any given time.

Article 12
Cooperation on education and welfare arrangements
The states shall take measures to provide Saami individuals residing in any of the three countries with the possibility to obtain education, medical services and social provisions in another of these countries when this appears to be more appropriate.

Article 13
The symbols of the Saami people
The states shall respect the right of the Saami to decide over the use of the Saami flag and other Saami national symbols. The states shall moreover, in cooperation with the Saami parliaments, make efforts to ensure that the Saami symbols are made visible in a manner signifying the Saami's status as a distinct people in the three countries.

Chapter II
Saami governance

Article 14
The Saami parliaments
In each of the three countries there shall be a Saami parliament. The Saami parliament is the highest representative body of the Saami people in the country. The Saami parliament acts on behalf of the Saami people of the country concerned, and shall be elected through general elections among the Saami in the country.

Further regulations concerning the elections of the Saami parliaments shall be prescribed by law, prepared through negotiations with the Saami parliaments pursuant to Article 16.

The Saami parliaments shall have such a mandate that enables them to contribute effectively to the realization of the Saami people's right of self-determination pursuant to the rules and provisions of international law and of this Convention. Further regulations concerning the mandate of the

Saami parliaments shall be prescribed by law.

The Saami parliaments take initiatives and state their views on all matters where they find reason to do so.

Article 15

Independent decisions by the Saami parliaments

The Saami parliaments make independent decisions on all matters where they have the mandate to do so under national or international law.

The Saami parliaments may conclude agreements with national, regional and local entities concerning cooperation with regard to the strengthening of Saami culture and the Saami society.

Article 16

The Saami parliaments' right to negotiations

In matters of major importance to the Saami, negotiations shall be held with the Saami parliaments before decisions on such matters are made by a public authority. These negotiations must take place sufficiently early to enable the Saami parliaments to have a real influence over the proceedings and the outcome.

The states shall not adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless consented to by the Saami parliament concerned.

Article 17

The rights of the Saami parliaments during preparation of other matters

The Saami parliaments shall have the right to be represented on public councils and committees when these deal with matters that concerns the interests of the Saami.

Matters concerning Saami interests shall be submitted to the Saami parliaments before a decision is made by a public authority.

The states shall investigate the need for such representation and prior opinions from the Saami parliaments. This must take place sufficiently early to enable the Saami parliaments to influence the proceedings and the outcome.

The Saami parliaments shall themselves decide when they wish to be represented or submit prior opinions during such preparation of matters.

Article 18

The relationship to national assemblies

The national assemblies of the states or their committees or other bodies shall, upon request, receive representatives of the Saami parliaments in order to enable them to report on matters of importance to the Saami.

The Saami parliaments shall be given the opportunity to be heard during the consideration by national assemblies of matters that particularly concern the Saami people.

The national assemblies of the individual states shall issue further regulations concerning which matters this applies to and concerning the procedure to be followed.

Article 19

The Saami and international representation

The Saami parliaments shall represent the Saami in intergovernmental matters.

The states shall promote Saami representation in international institutions and Saami participation in international meetings.

Article 20

Joint Saami organizations

The Saami parliaments may form joint organizations. In consultation with the Saami parliaments, the states shall strive to transfer public authority to such joint organizations as needed.

Article 21

Other Saami associations

The states shall respect and when necessary consult Saami villages (samebyar), siidas, reindeer herders' communities (renbeteslag), the village assemblies of the Skolt Saami (*byastämma)* and other competent Saami organizations or local Saami representatives.

Article 22
A Saami region
The states shall actively seek to identify and develop the area within which the Saami people can manage its particular rights pursuant to this Convention and national legislation.

Chapter III
Saami language and culture

Article 23
Saami language rights
The Saami shall have the right to use, develop and pass on to future generations its language and its traditions and have the right to make efforts to ensure that knowledge of the Saami language is also disseminated to Saami persons with little or no command of this language.

The Saami shall have the right to decide and retain their personal names and geographical names, as well as to have these publicly acknowledged.

Article 24
The states' responsibility for the Saami language
The states shall enable the Saami to preserve, develop and disseminate the Saami language. To meet this end, states shall ensure that the Saami alphabet can be used effectively.

It shall be possible to use the Saami language effectively in courts of law and in relation to public authorities in the Saami areas. The same shall also apply outside these areas in disputes and cases first dealt with in the Saami areas or which in any other manner have a particular association with these areas.

The states shall promote the publication of literature in the Saami language.

The provisions of this article shall also apply to the less prevalent Saami dialects.

Article 25
Saami media
The states shall create conditions for an independent Saami media policy which enables the Saami media to control its own development and to provide the Saami population with rich and multi-faced information and opinions in matters of general interest.

The states shall ensure that programmes in the Saami language can be broadcast on radio and TV, and shall promote the publication of newspapers in this language. In cooperation with the Saami parliaments, the states shall also promote cooperation across national borders between media institutions that provide programmes or articles in the Saami language.

The provision of the second paragraph concerning the Saami language shall also to a reasonable extent apply to the less prevalent Saami dialects.

Article 26
Saami education
The Saami population residing in the Saami areas shall have access to education both in and through the medium of the Saami language. The education and study financing system shall be adapted to their background. Such education shall enable attendance of further education at all levels while at the same time meet the needs of Saami individuals to continuously be active within the traditional Saami livelihoods. The study financing system shall be arranged in such a way as to enable higher education through the medium of the Saami language.

Saami children and adolescents outside the Saami areas shall have access to education in the Saami language, and also through the medium of the Saami language to the extent that may be deemed reasonable in the area concerned. The education shall as far as possible be adapted to their background.

The national curricula shall be prepared in cooperation with the Saami parliaments and be adapted to the cultural backgrounds and needs of Saami children and adolescents.

Article 27

Research

The states shall, in cooperation with the Saami parliaments, create good conditions for research based on the knowledge needs of the Saami society, and promote recruitment of Saami researchers. In planning such research, regard shall be paid to the linguistic and cultural conditions in the Saami society.

The states shall, in consultation with the Saami parliaments, promote cooperation between Saami and other research institutions in the various countries and across national borders, and strengthen research institutions with a primary responsibility for such research referred to in the first paragraph.

Research concerning Saami matters shall be adapted to such ethical rules that the Saami's status as an indigenous people requires.

Article 28

Education and information about the Saami

The Saami people's culture and society shall be appropriately reflected in education outside the Saami society. Such education shall particularly aim to promote knowledge of the status of the Saami as the country's indigenous people. The states shall, in cooperation with the Saami parliaments, offer education about the Saami culture and society to persons who are going to work in the Saami areas.

The states shall, in cooperation with the Saami parliaments, provide the general public with information about the Saami culture and society.

Article 29

Health and social services

The states shall, in cooperation with the Saami parliaments, ensure that health and social services in the Saami settlement areas are organized in such a way that the Saami population in these areas are ensured health and social services adapted to their linguistic and cultural background.

Also health and social services outside the Saami settlement areas shall pay regard to the linguistic and cultural background of Saami patients and clients.

Article 30

Saami children and adolescents

Saami children and adolescents have the right to practise their culture and to preserve and develop their Saami identity.

Article 31

Traditional knowledge and cultural expressions

The states shall respect the right of the Saami people to manage its traditional knowledge and its traditional cultural expressions while striving to ensure that the Saami are able to preserve, develop and pass these on to future generations.

When Saami culture is applied commercially by persons other than Saami persons, the states shall make efforts to ensure that the Saami people gains influence over such activities and a reasonable share of the financial revenues. The Saami culture shall be protected against the use of cultural expressions that in a misleading manner give the impression of having a Saami origin.

The states shall make efforts to ensure that regard is paid to Saami traditional knowledge in decisions concerning Saami matters.

Article 32

Saami cultural heritage

Saami cultural heritage shall be protected by law and shall be cared for by the country's Saami parliament or by cultural institutions in cooperation with the Saami parliament.

The states shall implement measures for cooperation across national borders on documentation, protection and care of Saami cultural heritage.

The states shall make efforts to ensure that Saami cultural heritage that has been removed from the Saami areas and that is of particular interest to the Saami community is entrusted to suitable museums or cultural institutions as further agreed with the countries' Saami parliaments.

Article 33
The cultural basis
The responsibilities of the states in matters concerning the Saami culture shall include the material cultural basis in such a way that the Saami are provided with the necessary commercial and economic conditions to secure and develop their culture.

Chapter IV
Saami rights to land and water

Article 34
Traditional use of land and water
Protracted traditional use of land or water areas constitutes the basis for individual or collective ownership rights to these areas for the Saami in accordance with national or international norms concerning protracted usage.

If the Saami, without being deemed to be the owners, occupy and have traditionally used certain land or water areas for reindeer husbandry, hunting, fishing or in other ways, they shall have the right to continue to occupy and use these areas to the same extent as before. If these areas are used by the Saami in association with other users, the exercise of their rights by the Saami and the other users shall be subject to due regard for each other and for the nature of the competing rights. Particular regard in this connection shall be paid to the interests of reindeer-herding Saami. The fact that the Saami use of these areas is limited to the right of continued use to the same extent as before shall not prevent the forms of use from being adapted as necessary to technical and economic developments.

Assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water and bearing in mind that Saami land and water usage often does not leave permanent traces in the environment.

The provisions of this article shall not be construed as to imply any limitation in the right to restitution of property that the Saami might have under national or international law.

Article 35
Protection of Saami rights to land and water
The states shall take adequate measures for effective protection of Saami rights pursuant to article 34. To that end, the states shall particularly identify the land and water areas that the Saami traditionally use.

Appropriate procedures for examination of questions concerning Saami rights to land and water shall be available under national law. In particular, the Saami shall have access to such financial support that is necessary for them to be able to have their rights to land and water tried through legal proceedings.

Article 36
Utilization of natural resources
The rights of the Saami to natural resources within such land or water areas that fall within the scope of Article 34 shall be afforded particular protection. In this connection, regard shall be paid to the fact that continued access to such natural resources may be a prerequisite for the preservation of traditional Saami knowledge and cultural expressions.

Before public authorities, based on law, grant a permit for prospecting or extraction of minerals or other sub-surface resources, or make decisions concerning utilization of other natural resources within such land or water areas that are owned or used by the Saami, negotiations shall be held with the affected Saami, as well as with the Saami parliament, when the matter is such that it falls within Article 16.

Permits for prospecting or extraction of natural resources shall not be granted if the activity would make it impossible or substantially more difficult for the Saami to continue to utilize the areas concerned, and this utilization is essential to the Saami culture, unless so consented by the Saami parliament and the affected Saami.

The above provisions of this article also

apply to other forms of natural resource utilization and to other forms of intervention in nature in such geographical areas that fall under Article 34, including activities such as forest logging, hydroelectric and wind power plants, construction of roads and recreational housing and military exercise activities and permanent exercise ranges.

Article 37

Compensation and share of profits

The affected Saami shall have the right to compensation for all damage inflicted through activities referred to in Article 36, paragraphs two and four. If national law obliges persons granted permits to extract natural resources to pay a fee or share of the profit from such activities, to the landowner, the permit holder shall be similarly obliged in relation to the Saami that have traditionally used and continue to use the area concerned.

The provisions of this article shall not be construed as to imply any limitation in the right to a share of the profit from extraction of natural resources that may follow under international law.

Article 38

Fjords and coastal seas

The provisions of Articles 34–37 concerning rights to water areas and use of water areas shall apply correspondingly to Saami fishing and other use of fjords and coastal seas.

In connection with the allocation of catch quotas for fish and other marine resources, as well as when there is otherwise regulation of such resources, due regard shall be paid to Saami use of these resources and its importance to local Saami communities. This shall apply even though this use has been reduced or has ceased due to the fact that catch quotas have not been granted or owing to other regulations of the fisheries or other exploitation of resources in these areas. The same shall apply if the use is reduced or has ceased owing to a reduction of marine resources in these areas.

Article 39

Land and resource management

In addition to the ownership or usage rights that the Saami enjoy, the Saami parliaments shall have the right of co-determination in the public management of the areas referred to in Articles 34 and 38, pursuant to Article 16.

Article 40

Environmental protection and environmental management

The states are, in cooperation with the Saami parliaments, obliged to actively protect the environment in order to ensure sustainable development of the Saami land and water areas referred to in Articles 34 and 38.

Pursuant to Article 16, the Saami parliaments shall have the right of co-determination in the environmental management affecting these areas.

Chapter V

Saami livelihoods

Article 41

Protection of Saami livelihoods

Saami livelihoods and Saami use of natural resources shall enjoy special protection by means of legal or economic measures to the extent that they constitute an important fundament for the Saami culture.

Saami livelihoods and Saami use of natural resources are such activities that are essential for the maintenance and development of the local Saami communities.

Article 42

Reindeer husbandry as a Saami livelihood

Reindeer husbandry, as a particular and traditional Saami livelihood and a form of culture, is based on custom and shall enjoy special legal protection.

To that end, Norway and Sweden shall maintain and develop reindeer husbandry as a sole right of the Saami in the Saami reindeer grazing areas.

Acknowledging Protocol No. 3 of its Affiliation Agreement with the European Union concerning the Saami as an indigenous people, Finland undertakes to strengthen the position of Saami reindeer husbandry.

Article 43
Reindeer husbandry across national borders

The right of the Saami to reindeer grazing across national borders is based on custom.

If agreements have been concluded between Saami villages (samebyar), siidas or reindeer grazing communities (renbeteslag) concerning the right to reindeer grazing across national borders, these agreements shall prevail. In the event of dispute concerning the interpretation or application of such an agreement, a party shall have the opportunity to bring the dispute before an arbitration committee for decision. Regarding the composition of such an arbitration committee and its rules of procedure, the regulation jointly decided by the three Saami parliaments shall apply. A party who is dissatisfied with the arbitration committee's decision on the dispute shall have the right to file a suit on the matter in a court of law in the country on which territory the grazing area is situated.

In the absence of an applicable agreement between Saami villages (samebyar), siidas or reindeer grazing communities (renbeteslag), if a valid bilateral treaty regarding reindeer grazing exists, such a treaty shall apply. Notwithstanding any such treaty, a person asserting that he or she has a reindeer grazing right based on custom that goes beyond what follows from the bilateral treaty, shall have the opportunity to have his or her claim tried before a court of law in the country on which territory the grazing area is situated.

Chapter VI
Implementation and development of the Convention

Article 44
Cooperation Council of Saami ministers and presidents of Saami parliaments

The ministers in Finland, Norway and Sweden responsible for Saami affairs and the presidents of Saami parliaments from each of these countries shall convene regularly.

The said cooperation shall promote the objectives of this Convention pursuant to Article 1. The meetings shall consider relevant Saami matters of common interest.

Article 45
Convention Committee

A Nordic Saami Convention Committee shall be established to monitor the implementation of this Convention. The committee shall have six members serving in their independent capacity. Each of the three states and each of the three Saami parliaments appoint one member each. Members shall be appointed for a period of five years.

The committee shall submit reports to the governments of the three countries and to the three Saami parliaments. It may submit proposals aimed at strengthening the objective of this Convention to the governments of the three countries and to the three Saami parliaments. The committee may also deliver opinions in response to questions from individuals and groups.

Article 46
National implementation

In order to ensure as uniform an application of this Convention as possible, the states shall make the provisions of the Convention directly applicable as national law.

Article 47
Economic commitments

The states shall provide the financial resources necessary to implement the provisions of this Convention. The joint expenses of the three countries shall be

divided between them in relation to the Saami population in each country.

In addition to situations referred to in paragraph 2 of Article 35, it shall be possible for the Saami to receive the necessary financial assistance to bring important questions of principle concerning the rights contained in this Convention before a court of law.

Chapter VII

Final provisions

Article 48

The approval of the Saami parliaments

After being signed, this Convention shall be submitted to the three Saami parliaments for approval.

Article 49

Ratification

This Convention shall be subject to ratification. Ratification may not take place until the three Saami parliaments have given their approval pursuant to Article 48.

Article 50

Entry into force

The Convention shall enter into force thirty days after the date that the instruments of ratification are deposited with the Norwegian Ministry of Foreign Affairs.

The Norwegian Ministry of Foreign Affairs shall notify Finland, Sweden and the three Saami parliaments of the deposit of the instruments of ratification and of the date of entry into force of the Convention.

The original of this Convention shall be deposited with the Norwegian Ministry of Foreign Affairs, which shall provide authenticated copies to Finland, Sweden and the three Saami parliaments.

Article 51

Amendments to the Convention

Amendments to this Convention shall be made in cooperation with the three Saami parliaments, and with respect for the provision in Article 48.

An amendment to the Convention enters into force thirty days after the date that the parties to the Convention notify the Norwegian Ministry of Foreign Affairs that the amendments have been approved by them.

In witness whereof the representatives of the parties to the Convention have signed the present Convention.

Which took place at …. on …. 20…. in a single copy in the Finnish, Norwegian, Swedish and Saami languages, all texts being equally authentic.

Mattias Åhrén
comes from the Saami people, indigenous to northern Fennoscandinavia and the Kola Peninsula in the Russian Federation. Originating from Ohredahke reindeer herding community, Mattias Åhrén took up law as profession. He holds L.LM. Master of Law degrees from the University of Stockholm and the University of Chicago. Having worked as a junior judge at Stockholm City Court and as an associate at Mannheimer Swartling and Danowsky & Partners law-firms in Stockholm, Mattias Åhrén in 2002 took up the position as Head of the Saami Council's Human Rights Unit. He has represented the Saami people in numerous UN and other international conferences, e.g. on the successful negotiations on the UN Declaration on the Rights of Indigenous Peoples, and has also represented Saami communities in cases relating to right to land. Since October 2005, Mattias Åhrén is combining the practical work with pursuing a PhD at the University of Tromsø,


Photo: Aile Javo

Norway, and is also lecturing on indigenous peoples' rights and international law at universities around the world. He has published several articles on the rights of the Saami people and indigenous peoples generally, particularly within the field of cultural rights.

Martin Scheinin
is a Professor of Constitutional and International Law at Åbo Akademi University in Finland. He also serves as the United Nation's Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism. The rights of indigenous peoples is one of his specialties, also as a researcher. At the University of Tromsø he lectures as part of the Master Programme in Indigenous Studies as well as on human rights at the Faculty of Law. He is the tutor of Laila Susanne Vars and Mattias Åhren. It should be added that in 2003-2005 he was a member of the expert group that prepared the draft Nordic Saami Convention.


Photo: Karl Torikka

John B. Henriksen
is a Saami from Guovdageaidnu/Kautokeino which is situated on the Norwegian side of the traditional Saami territory. He is a lawyer by profession. He also holds an MSc degree in International Policy from the University of Bristol in the United Kingdom.

John headed a public legal aid office serving Saami municipalities in the county of Finnmark in Norway during 1991-94. He subsequently worked as an advisor to the Saami Parliament in Norway with special responsibility for legal and international issues. John has also for many years served as a Legal Adviser to the Saami Council, a pan-Saami organization, and was its permanent representative to the United Nations. In 1995, at the request of the Saami Parliaments in Finland, Norway and Sweden and within the framework of the Nordic Saami Institute, John outlined the basic principles and modalities leading to the Saami Parliamentary Council, which was established in 2000.

From 1996-99 he served at the Office of the United Nations High Commissioner for Human Rights in Geneva. On his return to Norway, John practised law in a private law firm in Oslo (1999-2002) before taking up an advisory position in the Human Rights


Photo:Per Christian Biti

Department of the Norwegian Ministry of Foreign Affairs (2002-2004). He is currently working as a consultant specializing in human rights and international law.

John was a member of the Norwegian Legal Committee mandated to propose new national legislation against ethnic discrimination, and of the Nordic Group of Experts tasked to develop a new Nordic Saami Convention. He has written extensively on Saami and indigenous peoples' rights, in particular on indigenous peoples' right of self-determination.

Resource Centre for the Rights of Indigenous Peoples (Álgoálbmotvuoigatvuođaid gelbbolašvuođaguovddáš) is located in Guovdageaidnu/Kautokeino, Norway, and aims to increase general knowledge about and understanding of Saami and indigenous rights. Our principal activity consists of collecting, adapting and distributing relevant information and documentation regarding indigenous rights in Norway and abroad. Targeted are seekers of knowledge about indigenous rights, including schools, voluntary organisations, public institutions and authorities.

GÁLDU

Álgoálbmotvuoigatvuođaid gelbbolašvuođaguovddáš
Kompetansesenteret for urfolks rettigheter
Resource Centre for the Rights of Indigenous Peoples

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