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**FINLAND FULFILS ITS TREATY LAW OBLIGATIONS  
TOWARDS THE SÁMI, BUT FAILS TO LIVE UP TO  
THE INTERNATIONAL STANDARDS FOR  
PROTECTION OF INDIGENOUS PEOPLES**

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Lokaverkefni til 90 eininga B.A.-prófs  
í Félagsvísinda- og Lagadeild

“Ég lýsi því hér með yfir að ég ein er höfundur þessa verkefnis og að það er ágóði eigin rannsókna”

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“Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A.-prófs í Félagsvísinda- og Lagadeild”

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Ágúst Þór Árnason

The rights of indigenous peoples are emerging sector of international human rights law, which affects many of the contemporary nation states, including Finland. The indigenous peoples of Finland, the Sámi, have been for centuries oppressed by different authorities, but with the emergence of the above-mentioned international law, they have a legal instrument to claim their rights and to improve their position in the society.

International treaty law establishes all the important rights for the Sámi - or indigenous peoples in general. Both cultural and linguistic rights as well as the right to non-discrimination are established in the major international conventions of individual human rights. The collective rights of indigenous peoples, including their right to the lands they occupy, are established in the ILO Convention no.169. Further, these rights are established in legally non-binding documents adopted by various multilateral settings, including the United Nations, which indicates existence of common moral standards on protection of indigenous peoples rights.

Finland has not ratified the ILO Convention no.169 and it clearly indicates, through legislation and national policy, that it considers itself not bound by the right of the Sámi to the land they traditionally occupy.

Despite the fact that Finland fulfils its treaty law obligations towards the Sámi, it can be said that it does not live up to the common moral standards established in both treaty law and in various legally non-binding documents.

Ég þakka Barböru B. Nelson fyrir leiðréttingu á ensku texta.

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## 1. Introduction

In a story about Sampo the Lapp, a small Sámi boy gets an opportunity to participate in the great feast of the sun at the mountain called Rastigaissa by the river Tenojoki. For one hour before the sun comes up, after a very long and dark winter, until one hour after sunrise, all the animals and elves convene at the mountain. For these two hours, when the animals and elves are eagerly waiting for the sun, they live in harmony. But as soon as the sun is up and the time has past, no one is safe. In the story, little Sampo the Lapp is rescued by a reindeer with golden horns; but in the real life, the Sámi people are still waiting for the reindeer to come.

For many centuries now, different authorities in Fenno-Scandinavian territories have oppressed the Sámi of the North. Christian missionaries replaced the religion of the Sámi with their own, Kings levied a tax on their lands, and finally, the nation-states abolished their rights altogether. It was not until the 1970's, when the international movement on indigenous peoples' rights started to draw attention to the problems they experienced, that the situation gradually started to improve.

There exists today a wide range of international treaty law and non-binding legal documents on the rights and status of indigenous peoples. All the significant rights for the survival of the culture and identity of Sámi are established in both treaty law and non-binding legal documents. Nevertheless, because of the voluntary nature of international law not all the rights are enforceable for Sámi in Finland. As the movement for the promotion of indigenous peoples' rights gets stronger, the status of legally non-binding documents also changes. Not only are they valuable indicator of international standards, but they can also be seen as evidence of contemporary views and practices concerning the rights of indigenous peoples. Some scholars even argue that these standard setting documents imply existence of customary international law on the rights of indigenous peoples. Evidence can indeed be found to support this argument. But because there lacks an authoritative establishment of such customary rules and also in the light of the arguments which can be expressed against the existence of such customary rules it can be

maintained that the two main entities in international law concerning indigenous peoples rights still remain the treaty law and the non-binding international documents.

## **1.1 Thesis and Raison d'être**

In this thesis I maintain that Finland fulfils its treaty law obligations towards its indigenous population, the Sámi Peoples, but fails to live up to the international standards for protection of indigenous peoples and their cultural heritage.

It is very important, in this time of globalization, that small political entities and indigenous cultures will be protected in the most effective way. The diversity of cultures is valuable in and of itself and must therefore be preserved for its own sake. In the world today, the interaction between different groups of people continues to increase and it is very important that we familiarize ourselves with different cultures and learn to respect them.

Even though Finland fulfils the legal obligations by which it is bound under international treaty law, it does not do everything in its power to protect the culture and livelihood of the Sámi.

## **1.2 Structure of the Thesis**

The first chapter lays down the thesis and the definition of indigenous peoples is discussed. The second chapter introduces the Sámi people. The definition of Sámi is discussed and the history and characteristics of the Sámi are introduced very briefly. In the third chapter, the international law concerning indigenous peoples is discussed. The treaty law concerning their rights is introduced as well as the relevant non-binding legal documents. In addition, arguments both for and against the existence of customary international law are discussed. The fourth chapter discusses the legal status of Sámi in Finland. The constitution as well as the general legislation concerning the Sámi in Finland is discussed and brief comments are made on what international law obligations



the legislation regulates. In the fifth chapter, the de facto situation of the Sámi in Finland is discussed. The question whether the Sámi really enjoy the rights they are entitled to under international law is considered.

### 1.3 Definition of Indigenous Peoples

Before starting an examination of the rights and status of indigenous peoples, and the Sámi particular, it is very important to clarify both the definition of indigenous peoples and the kind of rights it establishes for the group and for the individual. Some differences in the definition can be found between the opinion of the international community and the indigenous groups themselves.

There exists no general, internationally accepted definition of indigenous peoples or minorities.<sup>1</sup> Under international law, however, minorities and indigenous groups share a significant number of characteristics, which have been identified by a wide range of international instruments.

Minorities are considered to have four main characteristics, which they share with indigenous peoples.<sup>2</sup> The two main characteristics, as the name “minorities” indicates, are the number of persons belonging to the group, and some particular objective characteristics, which separate them from the main population. Such characteristics could be language, religion, and ethnic or national origin. Third requirement is that it is essential for a person wanting to belong to a minority or indigenous group to identify him/herself as a member of that particular group. Finally, the age of the group is important since only groups, which have existed in the society for some extended period, can be called minorities.<sup>3</sup>

Even though indigenous peoples’ rights apply only when the group is a minority in a particular state, three fundamental differences have been identified to distinguish minorities and indigenous peoples. First, to be considered indigenous inhabitants, the

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<sup>1</sup> *The Concept of Indigenous Peoples*. Background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues. U.N. ESCOR, 2004, U.N. Doc. PFII/2004/WS.1/3, p.3

<sup>2</sup> Alfredsson, Guðmundur. *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law* in Nazila Ghanea & Alenxandra Xanthaki (eds.), *Minorities, Peoples and Self-Determination*, Koninklijke Brill NV, 2005. Printed in the Netherlands. pp.163-172

[hereinafter; Alfredsson, Definitions] p.165

<sup>3</sup> Id. p.166-167

group must be the original ethnic population of the area. This does not mean, however, that the group must be the first population in the area but rather that, as peoples, they have inhabited the area prior to the time that the present nation states were established.<sup>4</sup>

Second, indigenous peoples have a very special relationship to their traditional land. It is widely accepted that without that particular territory, they cannot fully enjoy their culture or exercise their traditional means of livelihood. Minorities do not have any comparable relation to a particular territory.<sup>5</sup> Third, whereas minorities have a right to preserve and develop their own group identity within the state as a part of the main population, the rights of indigenous peoples have more to do with protecting and enhancing the group's separate identity from the main population.<sup>6</sup>

This is also the approach taken in ILO convention No.169 when describing the characteristics of indigenous peoples. In article 1, paragraph 1 of the convention it is stated that there are four elements normally used to identify a people as indigenous: namely a separate identity with particular objective characteristics, their own social and political organizations and the status of original inhabitants in the territory.<sup>7</sup> It is very interesting to note that no effort is made in the newly adopted Draft Declaration to define or even describe what or who counts as indigenous, which means that both the indigenous peoples and the states in concern have accepted the widely used characterization of indigenous peoples.

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<sup>4</sup> Eira, Anders, State Secretary, Ministry of Local Government and Regional Development, Norway, "What Defines an Indigenous People?" Resource center for the Rights of Indigenous peoples, Published by: Magne Ove Varsi 19.11.2003. <http://www.galdu.org/english/index.php?artihkkal=27>

This is also clearly established in the article 1 paragraph 1 section b of the ILO convention no.169 stating that peoples "...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 colonization or the establishment of present State boundaries..." ILO 169. art.1 par.1(b).

<sup>5</sup> International Labour Conference, 75th Session. *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (no. 107)*, Report VI (2), Geneva 1988, pp 12–14, in ILO Convention on Indigenous and Tribal Peoples, 1989 (No.169): A manual. Geneva, International Labour Office, 2003. <http://www.ilo.org/public/english/standards/norm/egalite/itpp/convention/index.htm> , p. 29 [hereinafter: ILO manual on Convention no.169].

<sup>6</sup> "The Difference between Minorities and Indigenous Peoples under International Law", Contribution by Saami Council, Sent to the Council of Europe 10th January 2002, The Nordic Saami Council <http://www.saamicouncil.net/files/2004032219000.doc> [Hereinafter: Saami Council definition.]

<sup>7</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991 [hereinafter: ILO no.169] Article 1, paragraph 1 b.

Even though this description of indigenous peoples has been accepted both by states and by indigenous groups, some difference of opinion still exists concerning right of indigenous peoples to self-determination. While it is generally accepted that they do have a right to self-determination, the lack of any official definition of self-determination has led to two different understandings of the concept.

How self-determination is defined and understood by indigenous peoples differs somewhat from the way it is understood by the states. For example, the Saami council, a non-governmental organization concerned with Sámi issues, has clearly stated that self-determination, as described in common article 1 of the 1966 Covenants,<sup>8</sup> is one of the most significant collective rights of indigenous peoples.<sup>9</sup> One of the most important dimensions of common article 1 is that it allows for external self-determination, which grants the possibility of the creation of a new state on the territory of an existing state.<sup>10</sup> Many states have had difficulties accepting this understanding of self-determination as applying also to indigenous peoples. They have stated that indigenous groups do have a right to self-determination, but on an internal level only. It means, that they are willing to grant the indigenous groups autonomy within the state, the state remaining the main political entity in the area, preserving its sovereignty over the territory.

This is also the approach, which has been adopted in the existing legal documents. ILO convention no.169 clearly states in article 1, paragraph 3 that the term “peoples” does not suggest in any way that the description used in the convention should be attached to the term under international law and therefore to the external dimension of the self-determination.<sup>11</sup> In addition, in the newly adopted Draft Declaration on the Rights of Indigenous Peoples<sup>12</sup> the much-debated article concerning self-determination is written in

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<sup>8</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter: ICCPR], art.1.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 [hereinafter: ICESCR] art. 1.

<sup>9</sup> Saami Council definition. Supra note 6, p.2

<sup>10</sup> Alfreðsson, Guðmundur. *The Right of Self-Determination and Indigenous Peoples* in C. Tomuschat, *Modern Law of Self-Determination*. 1993. Kluwer Academic Publishers. The Netherlands. p. 41-45. [hereinafter: Alfreðsson, *The Right to Self-Determination*].

<sup>11</sup> ILO no.169, Supra note 7, Article 1 par. 3.

<sup>12</sup> United Nations Draft Declaration on the Rights of Indigenous Peoples. E/CN.4/SUB.2/1994/2/Add.1 (1994). [hereinafter: Draft Declaration]

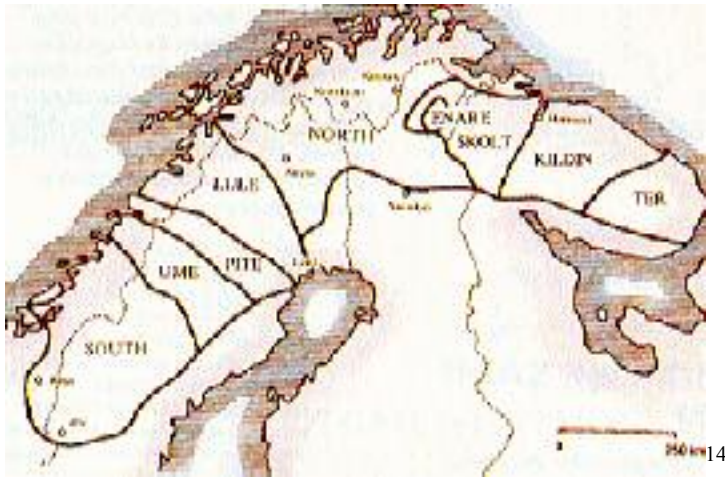
such a way as to leave it open to different interpretations. It is very interesting that the wording in the article was changed from indigenous peoples having the right to self-determination in accordance with international law<sup>13</sup> to simply stating that they have the right to self-determination. Thus during the debate, the wording which connects the article to common article 1 from the 1966 covenants was abolished, leaving no clear definition of what the term “self-determination” in the declaration actually means.

In conclusion, it can be said that whereas the definition of indigenous peoples is, for the most part, generally accepted by all the parties concerned, the question of whether they have a right to self-determination in accordance with international law still remains an open and debated issue. While the trend seems to be moving towards the idea that indigenous groups should have more say about matters which directly affect their livelihood, this applies only to their rights as a separate group within the existing state, and not to any right to external self-determination.

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<sup>13</sup> This is the wording of the article as it was after the 10<sup>th</sup> session of the UN Working Group on Indigenous Populations on July 1992. Alfredsson, *The Right to Self-Determination*, Supra note 10, p.41.

## 2. The Sámi people



### 2.1 Definition of Sámi

The Sámi people are the indigenous peoples of northern Europe. They live in an area covering part of what is now Finland, Sweden, Norway and the Kola Peninsula in north-west Russia. There are today approximately 70 to 80 thousand Sámi living in this area, most of them in Norway.<sup>15</sup> According to the Election Board of the Finnish Sámi Parliament there are approximately 8000 Sámi living in Finland, or 0.03 per cent of the total population of Finland.<sup>16</sup> In reality, it is quite difficult to say how many Sámi individuals there still are because of the difficulties in defining the Sámi. A large number of them live outside the Sámi Homeland nowadays and do not speak the language.

There is no official definition of just what or who is Sámi. The contemporary description of Sámi is based on the Act on Sámi Parliament. According to the Act a Sámi is a person “*who considers him- or herself as a Sámi, provided, that he himself or at least*

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<sup>14</sup> The Sámi in Finland - Virtual Finland, Produced by Ministry for Foreign Affairs of Finland Department for Communication and Culture/[Unit for Promotion and Publications](http://virtual.finland.fi/netcomm/news/showarticle.asp?intNWSAID=25786). Published August 2000. <http://virtual.finland.fi/netcomm/news/showarticle.asp?intNWSAID=25786> [hereinafter; Virtual Finland]

<sup>15</sup> Id.

<sup>16</sup> Salonen Annamari & Susan Villa (eds.) ”Rasismi ja etninen syrjintä Suomessa 2005”, Ihmisoikeusliitto, 2006, p.19 [hereinafter: Ihmisoikeusliitto].

*one of his parents or grandparents has learnt Sami as his first language; that he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or that at least one of his parents has or could have been registered as an elector for an election to the Sami Delegation or the Sami Parliament.”*<sup>17</sup> This definition has been criticized by international human rights organizations and by the Sámi themselves especially because of its required connection to not only knowledge of the Sámi language but also the old taxation registers.<sup>18</sup> The Sámi Parliament rejects the definition because, in their opinion, it is so wide that almost any non-Sámi living in the area of the Sámi Homeland can be defined as Sámi. According to them, this could result in a situation where the Sámi would no longer have cultural self-determination, but rather Sámi issues would be decided under the joint supervision of the Sámi and non-Sámi populations in the Sámi Homeland.<sup>19</sup>

## 2.2 History of the Sámi in Fenno-Scandinavia

It is not known exactly when the Sámi arrived in the area they occupy today or where they came. The Sámi themselves say that they have come about as the result of a number of settlements over a long period.<sup>20</sup> It is generally believed that they were the first inhabitants of the area, but recently other theories have also been introduced. It is estimated that the Sámi have inhabited the area since the end of the last ice age. Despite the intermittent attacks of Vikings on their settled areas, it was not before the middle of the 15<sup>th</sup> century that the existing states in the region started to show real interest in

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<sup>17</sup> Act on Sámi Parliament (974/1995), Finland. Section 3.

<sup>18</sup> Report of the Committee on the Elimination of Racial Discrimination, Sixty-third session, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on the Elimination of Racial Discrimination on Finland, UN Doc. CERD/C/63/CO/5, 2003 p.1 [hereinafter: CERD on Finland].

<sup>19</sup> “Land Rights, Linguistic Rights, and Cultural Autonomy for the Finnish Sami People”, Finnish Sami Parliament, Arctic Circle, [Reprinted with permission from *Indigenous Affairs*, No.33/4, July-December, 1997] <http://arcticcircle.uconn.edu/SEEJ/sami1.html>.

<sup>20</sup> Virtual Finland, supra note 14

settling this northern area and started taxation of it.<sup>21</sup> At this time, the Sámi were considered the owners of the lands on which they paid the taxes and were even granted representation in the Swedish Diet.<sup>22</sup> During the period of Russian rule over Finland, the situation of the Sámi started to decline. They were removed from the Swedish Diet, and the land they owned became part of the territory of three different states. When Finland became independent, the situation got even worse. Finnish settlers moved to Lapland, making it more difficult for the Sámi to maintain their traditional hunting culture, and gradually the land rights of the Sámi were taken away and the land claimed as public land owned by the state.<sup>23</sup> Because of the gradual awakening of the international community to issues concerning indigenous peoples, a movement in which the Sámi have been very active promoters, their situation is getting better. For the past 15 years now, the Finnish parliament has been passing legislation for the protection of the Sámi and the land ownership issue is regularly discussed in the media. After the involvement of the U.N. Human Rights Committee in response to particular Sámi complaints, it will be difficult for the Finnish government to ignore the Sámi land rights any longer.

### **2.3 Characteristics of Sámi culture and livelihood**

The Sámi in Finland speak three different Sámi languages, Inari Sámi, Northern Sámi and Skolt Sámi. Each of these is a separate language, which the other Sámi language speakers cannot understand without learning it especially. The Sami languages belong to the same Finno-Ugric language family as Finnish, Estonian and Hungarian. Some sources even claim that at one point in history Sámi and Finnish were one language, but separated from each other around the time that Christianity came to Finland.<sup>24</sup>

Today the Sámi are Christians, but originally, before the Christian missionaries destroyed the old Sámi religion, their religion was shamanism. The shaman,

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<sup>21</sup>Hicks, Christian J. B. "Historical synopsis of the Sami/United Nations relationship", Stefansson Arctic Institution, 2000 <http://www.thearctic.is>

<sup>22</sup> Virtual Finland, *supra* note 14

<sup>23</sup> Id.

<sup>24</sup> Id.

or naoide as the person was called in Sámi, was considered to have special spiritual gifts that made it possible for him or her to connect with the other side. The noaide was not only a spiritual leader, but also a healer who, with the help of the rune drum and traditional Sámi singing, yoik, cured sickness and gave advice.

The main source of livelihood of the Sámi has always been reindeer herding. Traditionally the Sámi lived in a good harmony with nature and subsisted by fishing, hunting and gathering in addition to reindeer herding. Still today, approximately 40 per cent of the Sámi in the Sámi Homeland get their main income from the reindeer herding; another notable source of income is the service industry, which now occupies another 40 per cent of the Sámi.<sup>25</sup> As the situation is today, many of the Sámi herding lands have been destroyed and the remaining lands are in danger of being logged by the state-owned and private lumber companies. The Sámi reindeer herders are using all the means provided by law to save the valuable land still existing, and to gain exclusive rights for the use of certain grazing areas.

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<sup>25</sup> Id.



### **3. Status of Indigenous Peoples under International Law**

International law as a legal order is quite different from the domestic legal systems where the state authorities; the legislature, executive and judicial organs are entitled to exercise power upon the individuals within the state. In international law, there is no single authority to create law or demand compliance. The states create the law in multilateral settings by adopting treaties or by following a general behavior of states, which amounts to customary international law.<sup>26</sup> The main instances initiating international treaty law are the United Nations and comparable regional state communities, such as Council of Europe and Organization of American States.

The rights of indigenous peoples are primarily established in international treaty law. They have both collective human rights, which protect their way of life and therefore their survival as a group, but also individual human rights which protect the rights they have as persons. In addition, there exists a wide range of international legally non-binding documents, which cannot be considered as treaty law, but can be argued to be evidence of existing international customary law for the protection of indigenous peoples. In this chapter, the treaty law concerning the rights of indigenous peoples will be discussed first and after that, the relevant legally non-binding documents will be introduced and the possible existence of international customary law considered.

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<sup>26</sup> Shaw, Malcolm N. "International Law", 5<sup>th</sup> ed., (Cambridge: Cambridge University Press, 2003) p.6 [hereinafter: Shaw]

### **3.1 Treaty law**

#### **3.1.1 Collective Rights of Indigenous Peoples**

The contemporary collective rights of indigenous peoples are established in the convention adopted by the International Labour Organization, ILO convention No.169. This is the only convention establishing collective rights of indigenous peoples and the right of them to own and use the land they traditionally occupy. It is quite interesting since the ILO is a specialized UN agency promoting the human rights of workers. The principal organs of the United Nations have not been able to establish a legally binding convention on the rights of indigenous peoples. The Council of Europe has adopted two conventions, which establish rights that can be considered as collective in nature. The European Charter for Regional or Minority Languages protects the traditional languages still existing in Europe and the Framework Convention on the Value of Cultural Heritage for Society specifies the legal principles, which states are supposed to adopt in order to ensure the protection of national minorities.

The very difficult political situation concerning the rights of indigenous peoples can be seen in the fact that only 17 of the 178 member states of the ILO have ratified Convention no. 169.<sup>27</sup> Norway was the first country to ratify it, thus awarding Sámi with Norwegian citizenship a legal instrument for enhancing their rights in the society. Finland, Sweden, and Russia have not ratified the convention, and in fact, the vast majority of countries, which have ratified the convention, are Latin-American. The US, Canada, and all the Asian states have yet to ratify the convention.

To understand why the rights of indigenous peoples have been and are still such an issue, we must look at the convention and the rights, which are established therein.

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<sup>27</sup> The states which have ratified ILO convention no.169 are Bolivia, Brazil ,Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, The Netherlands, Norway, Paraguay, Peru and Bolivarian Republic of Venezuela. ILOLEX, Database of International Labour Standards, International Labour Organization. 2005. <http://www.ilo.org/ilolex/english/convdisp1.htm>

## **ILO convention no.107**

The beginning of public awareness of indigenous issues dates back to the 1920 when the ILO, drafting material for rural workers, noticed the weak position indigenous populations had in society. Not only were the indigenous populations socially and economically in the lowest class in their respective societies, but their culture and way of life were jeopardized because of the policies of the main population.<sup>28</sup> In the early 1950's, the ILO started to acknowledge the fact that the conventions in force at that time, though also concerning indigenous peoples, were not enough to assure their position in the societies in which they lived, and that special measures solely concerning indigenous issues needed to be undertaken. In 1957 Convention no.107, the Indigenous and Tribal Populations Convention, was adopted by the ILO.<sup>29</sup> It was the first international legal instrument to establish the legal rights of indigenous populations and the obligations of states towards these peoples. The main purpose of Convention no.107 was to integrate the indigenous populations into the main populations of the state in which they lived and thus help them enjoy the benefits their modern societies had to offer.<sup>30</sup> It was only a secondary goal of the convention to protect the indigenous cultures and it was considered an option only when integration would be too difficult.<sup>31</sup> Despite these shortcomings, the convention did cover some very important issues. Article 11 of the convention establishes the right of indigenous peoples to ownership over the lands, which they traditionally occupy.<sup>32</sup> Article 12 elaborates the land issue further stating that indigenous groups should not be removed from their traditional lands without their consent.<sup>33</sup> This article was, however, somewhat negated by paragraph 2 of the same article, which stated that in cases where their removal was necessary they should be provided with equal lands

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<sup>28</sup> ILO manual on Convention no.169, *supra* note 5, p.3.

<sup>29</sup> Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (no.107), 1957, International Labor Organization. Geneva, 1957, [hereinafter: ILO no.107].

<sup>30</sup> This was very clear and was established both in the preamble of the convention and in the paragraph a of the article 2 of the convention stating that , "Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." ILO no.107, *supra* note 29, art.2

<sup>31</sup> See Article 3 of the ILO convention no.107, "So long as the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong, special measures shall be adopted for the protection of the institutions, persons, property and labour of these populations." *Id.*, Article 3.b

<sup>32</sup> *Id.* Art.11.

<sup>33</sup> *Id.* Art.12.

elsewhere. In spite of these obvious drawbacks in the convention, it is quite clear that as a first step towards the realization of indigenous peoples' rights, the convention was revolutionary. Gradually, the ILO realized the shortcomings of Convention no.107, and by 1986, it was clear that the convention did not correspond to the needs of indigenous populations. Times had changed, and the value of these ancient cultures gained recognition in the international community. The language of Convention no.107 was thought to be patronizing, and there had been a major change in public opinion concerning the main goal and subject of the Convention. The work of the United Nations in the field of human rights, and the establishment of the UN Working Group on Indigenous Populations played a significant role in this development. In June 1989, after two years of preparation, Convention no.107 was revised and the new Convention, no.169, replaced the previous one.<sup>34</sup>

### **ILO convention no. 169**

This time, it was not only the ILO who worked on the draft, but, for the first time, the indigenous populations themselves were able to have a say on what were the most important issues concerning their survival as a group. As a result, the convention took a new approach towards indigenous peoples. The main purpose and goal of Convention no. 169 was to preserve the cultures of indigenous peoples and in that way, strengthen their position as groups separate from the main population. Like its predecessor, the main purpose was to enhance development among indigenous peoples, but in this revision, development is to be achieved while still respecting and protecting the traditional way of life of indigenous peoples.

Convention no. 169 has two fundamental principles: consultation and participation.<sup>35</sup> The convention promotes the idea that indigenous groups should have control over their own affairs. Even though, under Article 2 of the convention, the responsibility for the development of indigenous peoples still rests with the states, the ultimate decision-making on their own matters is supposed to be in the hands of the indigenous peoples

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<sup>34</sup> ILO Manual on Convention no.169, supra note 5. p.4.

<sup>35</sup> ILO manual on Convention no. 169, supra note 5. pp.15, 18.

themselves.<sup>36</sup> The principle of participation is further elaborated in Article 7, where it is said that indigenous peoples must be able to take part not only in the decision making about any process of development they are to undergo but also, when general decisions in the society affect them as a group directly.<sup>37</sup> Articles 8 and 9 of the convention establish a special status for the traditional customary laws of indigenous peoples. Article 8 establishes equal status for both the national laws and the traditional indigenous customary laws, though with the requirement that the customary laws must meet the contemporary human rights standards, while Article 9 gives the traditional penal customs the same status in respect to the national criminal law.

The convention not only establishes the principles of protection and development, but also regulates a wide range of specific subjects from health care and social security, to education and working conditions. It also establishes one very controversial right, one that has been an obstacle for the promotion and ratification of the convention. This right is the right of the indigenous peoples to possess and gain ownership over the lands they traditionally occupy.<sup>38</sup> Convention no. 169 recognizes the very special relationship the indigenous groups have with the lands on which they live. The land is the basis for their economic survival, their spiritual well-being, and their cultural identity.<sup>39</sup> Article 13, paragraph 2 elaborates further by defining “lands” in this context as the whole territory the indigenous group occupies, not merely the agricultural land of the group or their place of residence. As mentioned before, these articles concerning land and its use have made it very difficult for many states to ratify the convention. In many cases, these areas contain economically valuable raw materials for industry or other use, and are already being exploited. In cases where the land is not being used, the states are often still reluctant to waive their rights to the land simply because they consider it a violation of their sovereignty. This has resulted in the before mentioned situation, where very few states have been willing to ratify the convention.

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<sup>36</sup> This is established in Article 4 of the convention which clearly says that special measures adopted to safeguard their way of life shall not be contrary to the freely-expressed wishes of the peoples concerned. Furthermore, Article 6.1 establishes a right of indigenous peoples to be heard and consulted in decision making in society as a whole in matters, which will affect their life directly or indirectly. ILO no.169, supra note 7. Articles 4 and 6, par.1.

<sup>37</sup> Id., Article 7, par.1.

<sup>38</sup> Id., Article 14, par.1.

<sup>39</sup> ILO manual on Convention no.169, supra note 5, p.29. ILO no.169, supra note 7. Article 13 par.1.

## **European Charter for Regional or Minority Languages<sup>40</sup>**

Despite the general non-discrimination provision in the European Convention on Human Rights, the Council of Europe considered the status of minority languages in Europe not sufficiently protected.<sup>41</sup> The European Charter for Regional or Minority Languages, adopted in 1992, was designed to rectify the situation. The approach of the Charter is cultural, meaning that it protects minority and regional languages as part of Europe's cultural heritage.<sup>42</sup> The charter is very clear on the point that it protects the languages, not the minorities using them. Moreover, it is meant to protect traditional languages in European countries, not those that have become an issue because of immigration into Europe in recent years.<sup>43</sup> The main purpose of the Charter is to ensure the general use of these traditional languages in the society. It promotes their use in education, administration, and the media, as well as for economic, social, and cultural purposes. The states parties to the Charter are obliged to report periodically to the Secretary General of the Council of Europe on their policies for achieving the goals of the Charter and the measures taken to realize those goals.<sup>44</sup> There is one very interesting feature in the Charter. Each of the state party to the Charter specifies itself which of the minority languages spoken within the state qualify as minority or regional languages under the meaning of the Charter.<sup>45</sup> This means that the states have the power to select which languages the Charter protects.

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<sup>40</sup> European Charter for Regional and Minority Languages (CETS No. 148), Strasbourg, 5.XI.1992, Council of Europe [hereinafter: CoE Minority Languages].

<sup>41</sup> Explanatory Report on the European Charter for Regional and Minority Languages, (CETS No. 148), Strasbourg, 5.XI.1992, Council of Europe  
<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=148&CM=8&DF=8/24/2006&CL=ENG> [hereinafter: CoE Minority Languages Report] p.1.

<sup>42</sup> Id., p.2.

<sup>43</sup> CoE Minority Languages, supra note 40. Article 1, paragraph 1a.

<sup>44</sup> Id., Article 15, paragraph 1

<sup>45</sup> Id., Article 3, paragraph 1

### **Council of Europe Framework Convention on the Value of Cultural Heritage for Society<sup>46</sup>**

At the end of the year 2005, the Council of Europe opened for signature a new convention concerning the value of cultural heritage for society. The aim of the convention is to provide a framework for the protection of the diversity of cultures in Europe, and to ensure that this valuable heritage will be taken into consideration in the globalized world.<sup>47</sup> For national minorities and indigenous peoples this convention is an important addition to the legal framework that helps protect their way of life and cultural identity. The adoption of this convention clearly represents the changing atmosphere and the increasing attention, which the international community has started to bestow on diverse and divergent cultures and their importance for the well-being of the community as a whole.

#### **3.1.2 Individual Human Rights**

Human rights treaties establishing individual human rights, such as the ICCPR, the ICESCR, the ICERD and the European Convention on Human Rights include also rights, which are vital for the survival of indigenous peoples. Further, there exists a convention, which is solely concerned with the protection of the individual human rights of indigenous peoples and other national minorities in Europe. The Council of Europe Framework Convention for the Protection of National Minorities does not establish collective rights for minorities, but focuses instead on the protection of the individuals who belong to national minorities.

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<sup>46</sup> Framework Convention on the Value for Cultural Heritage for Society, Faro, 27.X.2005,(CETS no.199), Council of Europe [hereinafter: CoE Cultural Heritage]

<sup>47</sup>Explanatory Report on the Framework Convention on the Value of Cultural Heritage for Society, Faro, 27.X.2005, (CETS No. 199), Council of Europe  
<http://conventions.coe.int/Treaty/EN/Reports/Html/199.htm> p.1.

## **International Covenant on Civil and Political Rights**

International Covenant on Civil and Political Rights is one of the most important documents establishing individual human rights. It was adopted in 1966 to give legal force to the political and civil rights established in the Universal Declaration of Human Rights. The covenant includes significant articles such as right to life and prohibition of slavery and torture, but probably the most important article for indigenous peoples is the article 27. The article says that; *“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”*<sup>48</sup> This article does not establish any significant novelties for the protection of indigenous peoples, protecting the objective characteristics, which are essential for the indigenous groups or any other minorities. What makes this article significant is the interpretation of the U.N. Human Rights Committee on the article. In the General Comment no.23, the Committee states that even though the enjoyment of the rights in the article 27 does not prejudice the sovereignty and territorial integrity of a State party, some aspects of the article do establish rights, which are closely connected to the territory and its resources. Such rights are for example the enjoyment of culture for indigenous peoples who without the land cannot fully exercise their own culture and traditional livelihood.<sup>49</sup>

The article 27 will be discussed more detailed in the next chapter, since the interpretation of the Human Rights Committee does not purely qualify as legally binding document.

## **International Covenant on Economic, Social and Cultural Rights**

Another covenant established to give force to the articles of the Universal Declaration of Human Rights is the International Covenant on Economic, Social and Cultural Rights. All the rights established in this covenant are very important both for individuals in general as well as for indigenous peoples. According to the covenant, the responsibility of realization of these rights lies on the State, which has led to the situation

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<sup>48</sup> ICCPR, supra note 8, art.27.

<sup>49</sup> Compilation of General Comments and General Recommendations adopted by Human Rights Bodies, U.N. GAOR, U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004. p.158.



in which it has been difficult for the indigenous groups to maintain their traditional ways of life.<sup>50</sup> The use of lands and overall development has aimed to the best possible outcome from the viewpoint of the State party. These views do not necessarily match with the idea of progress and development of the indigenous groups themselves, but in many cases threaten the fragile structure, which the group is trying to maintain.

### **International Convention on the Elimination of All Forms of Racial Discrimination<sup>51</sup>**

The entire system of the United Nations is built on the principle of equality of men.<sup>52</sup> Nevertheless, it became soon clear that extra measures were needed to realize this goal. In 1963, the General Assembly adopted a Declaration on the Elimination of All Forms of Racial Discrimination. Two years later was adopted legally binding instrument on the same issue, called International Convention on the Elimination of All Forms of Racial Discrimination. The Convention came into force in 1969 after 27 States had ratified it and today 169 member states of the United Nations parties to the convention.<sup>53</sup> According to the convention, all forms of racial discrimination are forbidden and states are obliged to undertake all appropriate means to eliminate it.<sup>54</sup> The article 5 of the convention regulates that every person without distinction as to race, color, or national or ethnic origin, has equal rights. The article covers the equal treatment before the tribunals and all other organs administering justice, the right to security of person and protection by the State against violence or bodily harm, the right to all political and civil rights as well as economic, social and cultural human rights.<sup>55</sup> States parties to the convention are obliged to provide a periodical report to the Committee on the Elimination of Racial

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<sup>50</sup> Id. Art.2 para.1

<sup>51</sup> International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969. [hereinafter: ICERD]

<sup>52</sup> Charter of the United Nations. June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945. Article 1 para. 3

<sup>53</sup> International Convention on the Elimination of All Forms of Racial Discrimination, OHCHR Status of Ratifications of the Principal International Human Rights Treaties as of 09 June 2004, <http://www.unhchr.ch/pdf/report.pdf>

<sup>54</sup> ICERD, Supra note 51, article 2 paragraph 1

<sup>55</sup> Id., article 5

Discrimination.<sup>56</sup> The CERD provides the States with a report on the issues in the periodical report and recommends certain improvements for the States. The convention provides also possibility for individual complaints. Person who has been discriminated can complain to the Committee if he or she cannot get justice in the matter in her or his own country.<sup>57</sup> The CERD has had an active role in pointing out the discrimination against Sámi. It has also regularly suggested that Finland should ratify the ILO Convention no.169 to improve the situation of Sámi and to solve the land dispute.

### **European Convention on Human Rights<sup>58</sup>**

The European Convention on Human Rights was one of the first documents adopted by the Council of Europe. It entered into force September 3 1953 and established all the basic civil and political rights. The relevant Article for the Sámi and other indigenous peoples is the non-discrimination article.<sup>59</sup> It prohibits discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It can thus be considered to establish one of the fundamental rights of indigenous peoples and minorities within the European regime.

### **Council of Europe Framework Convention for the Protection of National Minorities**

In 1994, Council of Europe adopted Framework Convention for the Protection of National Minorities<sup>60</sup>, which has a special standing within the legal instruments concerning this issue. It is the first, and still only, legally binding multilateral convention protecting the rights of national minorities. The Council of Europe had for a long time

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<sup>56</sup> Id., article 9

<sup>57</sup> Id., article 14

The possibility for individual complaints depends on the declaration of State Party to recognize the competence of the Committee to receive and consider communications from individuals or groups of individuals.

<sup>58</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, (CETS No.5), Rome, 4.XI.1950, Council of Europe

<sup>59</sup> Id. Art.14

<sup>60</sup> Framework Convention for the Protection of National Minorities, (CETS No. 157), Strasbourg, 1.II.1995, Council of Europe [hereinafter: FCNM]

been concerned about the situation of national minorities. Inspired by the United Nations Declaration on the rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities<sup>61</sup> the FCNM convention was designed to set out objectives, which the States parties undertake to pursue by way of domestic legislation and governmental policies.<sup>62</sup> The drafting of this convention underwent similar difficulties as the other documents concerning minorities and indigenous peoples. Very difficult was to reach consensus on the definition of national minorities. At the end, it was decided that the definition would be left out from the convention and the States Parties would rely on the general understanding of the concept.<sup>63</sup> The FCNM sets out all the significant rights for the protection of both the minorities and the indigenous peoples. Such rights are among others the right of non-discrimination and equality, the preservation and development of their own culture, religion, language and traditions, education in their own language and in their own institutions and participation in public life. However, because the convention concerns minorities no notion is made on the land issue, which for indigenous peoples is one with the most importance.

### **Rights Established In Treaty Law**

When all the treaties that concern the rights of indigenous peoples are summarized, it can be found that all the significant rights concerning the survival of indigenous peoples and their cultures are established in the international treaty law. The widely ratified individual human rights instruments, ICCPR and ICESCR, protect the separate identity of indigenous individuals by recognizing their right to language and culture. ICERD, on the other hand, recognizes indigenous peoples' equal status to the main population. In addition, the rights to identity, language and culture are established in regional treaties acted under the authority of the Council of Europe. The very important,

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<sup>61</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993).

[hereinafter: Declaration on Minorities]

<sup>62</sup> Explanatory Report on the Framework Convention for the Protection of National Minorities, (CETS No. 157), Strasbourg, 1.II.1995, Council of Europe, <http://conventions.coe.int/Treaty/en/Reports/Html/157.htm> [hereinafter: FCNM Report], pp. 4, 5

<sup>63</sup> Id., p.3

but same time controversial, right of indigenous peoples to the land they occupy is only covered by ILO Convention no.169, which establishes collective rights of indigenous peoples. It means that unless the states ratify the ILO Convention no.169, they are free from the obligation of granting indigenous peoples the ownership of the lands they traditionally occupy. That is how it at least looks like before one looks in to the many non-binding legal documents, which have been adopted mainly by the United Nations.

### **3.2 Non-Binding Legal Documents**

Non-binding legal documents can be declarations, views of semi-judicial or political entities, publications of scholars, reports of treaty monitoring bodies and reports from conferences or non-governmental organizations. It is quite difficult to define, what the exact status of each document is. Nevertheless, it can be said that they constitute common moral standards of the international community in any given time.

These documents can establish a body of law, if they are considered as evidence of customary international law. In the next chapter, will be discussed arguments both for and against the existence of customary international law on the rights of indigenous peoples.

#### **3.2.1 Customary International Law**

Article 38 paragraph 1b of the Statute of the ICJ describes custom as general practice accepted as law.<sup>64</sup> There are thus two elements, which must be discovered before particular behavior of states can be considered as legally binding customary law. The ICJ elaborated in the Malta/Libya case that these elements are state practice and *opinio juris*.<sup>65</sup> State practice is the material element of custom. It consists of several features, which must be considered when evaluating whether particular behavior of states amounts

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<sup>64</sup> Statute of International Court of Justice. Art.38, par.1(b)

<sup>65</sup> Shaw, *supra* note 26, p.70

to state practice in the sense of the definition of the ICJ. These important features are duration, consistency, repetition, generality and continuity.<sup>66</sup> The other element, *opinio juris*, is the psychological element of custom. It means that states believe that they are under a legal obligation to behave certain way even though this obligation has not been established in international treaty law and it is not a general principle of law.<sup>67</sup>

### **Arguments for the existence of customary international law on indigenous peoples' rights**

Existence of customary international law on the rights of indigenous peoples has not been generally argued either in the case law of the human rights Commissions and Courts or in the field of legal research. However, some arguments can be found on behalf of the existence of the custom. S. James Anaya, a scholar in international law, argues that there exists a common ground about minimum standards concerning the rights of indigenous peoples. He elaborates that such a controlling consensus, which follows from the widely shared values of human dignity, constitutes customary international law.<sup>68</sup> Anaya says that state practice is not anymore only a rigid pattern of behavior, but he points out that intergovernmental institutions establish multilateral settings where dialogue on various matters takes place. This dialogue among authoritative actors, such as states and international organizations, is a form of practice that can be considered to amount to establishment of legally binding custom. However, since the state practice is not the only element, which must be present in legally binding custom, some evidence must also be set forth for the existence of *opinio juris*. Anaya argues that in these international settings the discourse and communication does not only bring about common norms, but it does establish in itself a subconscious obligation toward compliance.<sup>69</sup> When considering the immense amount of non-governmental organizations,<sup>70</sup> state enacted international

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<sup>66</sup> Id., p.72

<sup>67</sup> Id., p.71

<sup>68</sup> Anaya, S. James. *Indigenous Peoples in International Law*. 2.ed. (Oxford: Oxford University Press, 2004) p.61 [hereinafter: Anaya]

<sup>69</sup> Id., p.62

<sup>70</sup> Including: Russian Association of Indigenous Peoples of the North (RAIPON), Moscow, Russia; Asian Indigenous and Tribal Peoples Network, New Delhi, India; Center for International Indigenous Rights and Development, Seattle, USA; Indian Law Resource Center, Montana, USA; Indigenous Council in the Netherlands, Amsterdam, The Netherlands; Indigenous Survival International, Yellow Knife, North West Territories, Canada; International Alliance of Indigenous Tribal Peoples of the Tropical Forest, London,

instruments<sup>71</sup> and the several other multilateral setting,<sup>72</sup> which all aim at protecting the heritage of the world's 350 million indigenous individuals<sup>73</sup> it is impossible to claim that there does not exist any such consensus on protecting indigenous peoples' rights. Indeed, it can be easily maintained that there exists state practice on a wide scale on several international settings, which can be considered to amount to the state practice, which establishes international custom. Using the theory set forth by Mr. Anaya on creation of the international custom this would also lead to the existence of *opinio juris* since the states would be pulled toward the compliance of the outcome of these settings.<sup>74</sup> In particular, three different multilateral settings established within the system of the U.N. have established clear rules concerning the rights of indigenous peoples.

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UK; Asociacion Centro Mapuche, Bariloche, Argentina; Centro Kolla-CENKO, Buenos Aires, Argentina; Central Land Council, Alice Springs, Northern Territory, Australia; Cape York Land Council, Queensland, Australia; Caribbean Organization of Indigenous Peoples, Belize City, Belize AC; Associacao Indigena Terena da Cachoeirinha, Mato Grosso do Sul, Brazil; Dawson Indian Band, Dawson City, Yukon, Canada; Kgeikani Kweni First Peoples of the Kalahari, Ghanzi, Botswana; Indigenous Peoples Secretariat, Copenhagen, Denmark; Greenland Home Rule Government, Nuuk, Greenland; The Saami Council, Ohcejohka/utsjoki, Finland; Murmansk's Regional Association of the Kola Saami, Murmansk, Russia; Murmansk's Organization of Saami People, Murmansk, Russia; Norwegian Sami Reindeer Herders' Association, Tromsø, Norway; Norwegian Sami National Association, Kautokeino, Norway; Swedish Sami National Association, Umeå, Sweden; Sami National Association, Tana, Norway; Sami Parliament, Kiruna, Sweden; Sami Parliament, Inari, Finland; Sami Parliament, Karasjok, Norway; The Nordic Sami Institute, Kautokeino, Norway; see at Indigenous Organizations, Cultural Survival, database, 2005, <http://209.200.101.189/publications/io/index.cfm?action=search>.

<sup>71</sup> Including Draft Declaration on the Rights of Indigenous Peoples, 2006; U.N. Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious or Linguistic Minorities; Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, principle 22, U.N. Doc. A/CONF.151/26 (vol. 1), Annex 1 (1992); Agenda 21, U.N. Conference on Environment and Development, Rio de Janeiro, June 13, 1992, U.N. Doc. A/CONF.151/26 (vols.1, 2, & 3), Annex 2 (1992);

<sup>72</sup> Including: U.N. Human Rights Committee; U.N. Working Group on Indigenous Populations; Resolutions of major U.N. conferences, such as: World Conference on Human Rights; The 1994 Conference on Population and Development; World Summit on Social Development, 1995; 4<sup>th</sup> World Conference on Women, 1995; and European Parliament resolutions on the position of the world's Indians, 1989 and resolution "Measures required to internationally to provide effective protection for indigenous peoples, 1994; Commission of European Union Working Document on support for indigenous peoples in the development cooperation of the community and member-states; Inter-American Commission on Human Rights; The Helsinki Document 1992 – Conference on Security and cooperation in Europe; 1997 Charter of Civil Society for the Caribbean Community; OAS Inter-American Democratic Charter 2001. Anaya. *Supra* note 68, p. 62-68

<sup>73</sup> Action in favor of Indigenous Peoples, United Nations Educational, Scientific and Cultural Organization, 2003, [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=2946&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2946&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>74</sup> Anaya, *supra* note 68 p.62

## United Nations Human Rights Committee

Under the 1.Optional Protocol to the ICCPR, individuals are allowed to file complaints directly to the U.N. Human Rights Committee about alleged violations on the articles of the covenant. The Committee expresses its View on the situation and recommends action to improve it if a violation was detected. The Committee has been able to gain a certain status within the U.N. human rights system and the fact is that quite a few states have started to act upon the Views, recognizing thus the status of the Committee as one of the leading human rights bodies in the world.

As mentioned earlier the U.N. Human Rights Committee has interpreted the article 27 of the ICCPR in its View on complaint brought by Chief Ominayak, the leader of the Lubicon Lake Band of Cree Indians in Canada.<sup>75</sup> The Lubicon Lake Band Cree Indians alleged that Canada violated their right to self-determination by allowing the province of Alberta to use their ancestral lands for industrial purposes. In its View, the Committee stated that Canada did violate the rights of the Lubicon Lake Band, but not under the article of self-determination, but under the article 27. It further stated that the actions taken by the State party did have such an affect on the Lubicon Lake Band that it threatened their way of life and therefore the enjoyment of their own culture.<sup>76</sup> The Committee has also expressed Views concerning the rights of Sámi. In the case of Kitok v. Sweden, the Committee considered a case where Ivan Kitok, originally a Sámi, had been denied a license for reindeer herding according to Swedish legislation since he was no longer a member of an ancestral Sámi community who was granted the right to reindeer herding in traditional Sámi herding areas. The Committee ruled that even though the rights of Kitok were restricted by the Swedish legislation his rights under article 27 of the ICCPR were not violated since the rights of the Sámi community as a whole were protected by the legislation.<sup>77</sup> This ruling clarified that the article 27 does not only protect the rights of the indigenous peoples individually, but also as a group.

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<sup>75</sup> Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990) in Compilation of General Comments and General Recommendations adopted by Human Rights Bodies, U.N. GAOR, U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004

<sup>76</sup> Id. Paragraph 33

<sup>77</sup> Anaya, S. James. *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*. Arizona Journal of International & Comparative Law. Vol 21, No.1. 2004. [hereinafter: Anaya, Arizona Journal] p. 23

The issue of Sámi reindeer herding has been considered further in the Committee in two cases raised against Finland. In the first case, *Länsman et al. v. Finland* from 1994,<sup>78</sup> the case in question weighted the right of the state to development against the right of the Sámi reindeer herders to the land. The Committee ruled that measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessary amount to a denial of the right under article 27.<sup>79</sup> The Committee further stated that the quarrying which had taken place at Mt. Riutusvaara did not amount to such denial, but did warn Finland that increase in quarrying activities might in future do so. With this judgment, the Committee developed the combined test of meaningful consultation of the group and the sustainability of the indigenous or minority economy. The Committee also established several general principles for the interpretation of article 27. It emphasized that article 27 does not protect only traditional means of livelihood but also their adaptation to modern times.<sup>80</sup> In the second case, *Länsman et al. v. Finland* from 1996,<sup>81</sup> the Committee considered the rights of the State to exercise logging and build roads on traditional Sámi reindeer herding lands. In that case, the Committee could not see that the logging already taken place could amount to denial of the Sámi herders' right under article 27. The reasons were that the herders in question were heard when making the decision and the State party had taken into account the possible disturbance when evaluating the possibilities on logging. The Committee also stated that the approved future logging plans for the area did not amount to violation, but followed the earlier decision and warned Finland from increasing the logging from what had been approved.<sup>82</sup> These rulings do not compromise the position, which the Human Rights Committee took in the *Lubicon Lake Band* case, and regulated further in the General Comment no. 23, but only particularize the frame in which the rights are applicable.

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<sup>78</sup> *Länsman et al. V. Finland*, Comm. No. 5117/1992, Hum. Rts. Comm., U.N. Doc. CCPR/C/D/511/1992 (Nov. 8, 1994) in *Compilation of General Comments and General Recommendations adopted by Human Rights Bodies*, U.N. GAOR, U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004

<sup>79</sup> Anaya, *Arizona Journal*, supra note 77, p. 30

<sup>80</sup> Scheinin, Martin. *Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights* in Torkel Oppsahls minneseminar, April 28 2004. Norwegian Centre for Human Rights, University of Oslo. p.6

<sup>81</sup> *Länsman et al. V. Finland*, Comm. No. 671/1995, Hum. Rts. Comm., U.N. Doc. CCPR/C/58/D/671/1995 (Nov. 22, 1996) in *Compilation of General Comments and General Recommendations adopted by Human Rights Bodies*, U.N. GAOR, U.N. Doc. HRI/GEN/1/Rev.7, 12 May 2004

<sup>82</sup> *Selected Decisions of the Human Rights Committee under 1<sup>st</sup> Optional Protocol*, Fifty-sixth to sixty-fifth sessions, Report of the OHCHR, U.N. Doc. CCPR/C/OP/6, p.176



## **UN Working Group on Indigenous Population and Draft Declaration on Rights of Indigenous Peoples**

In 1981, after a comprehensive study of Mr. Jose Martinez Cobo, later the first Special Rapporteur of the Working Group on Indigenous Populations, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now Sub-Commission on the promotion and protection of Human Rights) proposed the establishment of a Working Group on Indigenous Populations. In 1982, the Economic and Social Council authorized the Sub-Commission to create such a Working Group and the first meeting was held the same year. The first chairperson of the Working Group was a Sámi, Mr. Asbjørn Eide.

The mandate of the Working Group contains two major issues. One is the evolution of standards concerning the rights of indigenous peoples; the other is the review of developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples.<sup>83</sup>

One of the main achievements of the Working Group is the newly adopted Draft Declaration on the Rights of Indigenous Peoples.<sup>84</sup> Main articles of the declaration consider the right of indigenous peoples to self-determination, the use of the term “peoples” instead of “people”, the right to the traditionally occupied lands and the right to cultural and intellectual property. The drafting was quite difficult and many disagreements between the parties involved, the states and the indigenous groups, delayed the adoption of the Declaration. Main disagreement concerned the definition of indigenous peoples. Namely, whether they were people or peoples and whether they therefore had the right to external self-determination. The second issue was the indigenous groups’ right to the land they occupy. States were very reluctant to acknowledge the indigenous groups’ property rights over the territory they live on and as a result, a compromise was made concerning these issues in the Declaration. As already mentioned earlier the definition was considered not necessary and the question of self-

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<sup>83</sup> Daes, Erica-Irene, Professor, Dr., Chairperson/Rapporteur of the Working Group on Indigenous Populations, United Nations, *The United Nations and Indigenous Peoples from 1969 to 1999*, Nov 1994, A report from a conference held in Tromsø in 1993 at *Universitetet i Tromsø, Senter for samiske studier* <http://www.uit.no/ssweb/dok/series/n02/en/102daes.htm> Last modified: January 25, 1998. p. 2

<sup>84</sup> The adoption of the Draft Declaration 29.6.2006 was one of the first works of the new UN Human Rights Council established in the 60th session of the General Assembly 15 of March 2006. Draft Declaration, supra note 12

determination was solved by stating that the indigenous peoples have the right to self-determination, but a notion whether an external or internal self-determination is in question was removed from the article. The issue of land was solved differently. Quite surprisingly, the draft declaration grants indigenous peoples wide range of rights concerning their lands. In the three articles of the declaration which deal with the land issue the indigenous peoples are given right to “*own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used by them.*”<sup>85</sup> According to the draft Declaration they also have “*the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent.*”<sup>86</sup> If the restoration is not possible, the indigenous peoples have a right to compensation instead. In the spirit of the ILO Convention no.169, the Declaration does not only talk about their agricultural lands or the actual place of living, but the complete living environment and territory.<sup>87</sup> Finally, after approximately five years of hard work the Working Group finalized the drafting of the declaration at its eleventh session in 1993. It was intended that the draft declaration would have been adopted during the International Decade of the World’s Indigenous Peoples, which was between 1995 and 2004. However, it was not until the new Human Rights Council was established that the majority of the members of the Council could agree on the Declaration and finally adopt it in June 29 2006.

### **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities**

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities was adopted in 18 December 1992 by General Assembly resolution 47/135.<sup>88</sup> The declaration was inspired by the article 27 of the ICCPR and is aimed to further promote the rights of persons belonging to minorities. One of the advantages of the declaration is the fact that it covers wide range of people without

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<sup>85</sup> Draft declaration, supra note 12, art.26

<sup>86</sup> Id., art.27

<sup>87</sup> Id., art.28

<sup>88</sup> Declaration on minorities, supra note 61

having to define them further. Thus, the rights established in the declaration cover most of the significant rights of different minority groups.<sup>89</sup> The declaration clearly distinguishes the rights of peoples from the rights of persons belonging to minorities. The persons belonging to minorities do not have a right to self-determination, but the minorities covered by the declaration can have, in another context, a right to self-determination as a group.<sup>90</sup> In addition, no notice is taken of the land issue of indigenous peoples. Working Group on Minorities, which is one of the working groups of the Sub-Commission on the Promotion and Protection of Human Rights, monitors the declaration.

### **Arguments against the existence of customary international law on indigenous peoples' rights**

Despite the amount of factors supporting the theory of Mr. Anaya, it is very difficult to maintain that customary law exists on indigenous peoples' rights when one looks at the arguments against the existence of customary law.

The strongest arguments for the existence of customary law are the various multilateral settings within the United Nations, which have taken a stance on the protection of the rights of indigenous peoples. The U.N. Human Rights Committee and the Working Group on Indigenous populations with the newly adopted Draft Declaration on the Rights of Indigenous Peoples are the main instruments within this system. The problem is, however, that either of these instruments has the authority to actually establish any binding rules on states. The Views of the HRC are not judicial decisions and they are not legally binding on the States parties to the Optional Protocol. In addition, there is no monitoring mechanism to follow the compliance of the states. It is interesting that the amount of documents, which do not have any legal standing, is so immense, when at the same time very few states have been willing to bind themselves

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<sup>89</sup> Id. Art.4

<sup>90</sup> Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons belonging to National or Ethnic, Religious, and Linguistic Minorities, U.N. GAOR, UN Doc. E/CN.4/Sub.2/AC.5/2005/2 4 April 2005

with the existing treaty law. It is also noteworthy that Canada and the Russian Federation voted against the adoption of the Draft Declaration in the U.N. Human Rights Council<sup>91</sup>, which must be considered a severe set back both for the promotion of the rights of indigenous peoples and for the theory of Mr. Anaya.

Further, the mere participation in multilateral settings cannot be considered enough evidence for the existence of customary law. Wide range of state practice can be detected which points out that it is not the same what states say and what they do.

The Swedish Sámi Parliament has no legal position with regard to the use and management of traditional Sámi land. The Swedish authorities acknowledge the Sámi as indigenous peoples, but the Swedish Constitution does not provide any explicit guarantees or protection for the Sámi as regards their culture and traditional livelihoods. The main case concerning the rights of Sámi to the land in Sweden, “The Taxed Mountains case” from 1981, concerned the claim of Sámi ownership of the northern parts of Jamtland County where the Sámi people have traditionally exercised reindeer husbandry. The Supreme Court concluded that the State had to be regarded as the owner of this disputed area (the Taxed Mountains), and that the rights of the Sámi were limited to rights of use. Based on this opinion the Supreme Court decided that the Swedish State is the owner of the disputed mountains, and that the Sámi only held usufruct rights to this area.<sup>92</sup> In Japan, the Ainu people of Hokkaido Island have been working for decades to improve their position as an ethnic minority in the country. The Ainu Association of Hokkaido was established to improve the livelihood and education level of the Ainu people. It also worked for the provision of welfare services.<sup>93</sup> Despite their work, very little has been achieved and the position of the Ainu in Japan is still far from the norms described in the ILO Convention. In 1997, the Culture Promotion Law was enacted to recognize the Ainu as an ethnic minority. However, the law does not establish property

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<sup>91</sup> Report of the Human Rights Council, first session, U.N. GAOR. A/HRC/1/L.10, 30 June 2006.

<sup>92</sup> Review of Developments pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms. Saami Council. 16 June 1997. <http://www.suri.ee/doc/saamide.html>

<sup>93</sup> Yoichi Tanaka: Ainu People Today - 7 Years after the Culture Promotion Law Asia-Pacific Human Rights Information Center (HURIGHTS OSAKA) [http://www.hurights.or.jp/asia-pacific/no\\_36/03.htm](http://www.hurights.or.jp/asia-pacific/no_36/03.htm) visited: 29.jan.2006

rights for Ainu over the land they occupy.<sup>94</sup> In North America, the rights of indigenous peoples are amongst the most developed, though they do not provide a legal framework that would grant indigenous peoples an undisputable legal ownership of the land. In Nevada, the Yucca Mountain, situated in the traditional lands of indigenous Western Shoshone Tribe, is being used to store nuclear waste.<sup>95</sup> The decision of the government to use the area for nuclear waste and other industrial activities was objected to by the members of the tribe, but without success. The Mountain is currently- and has been for the past 30 years- used to store nuclear waste and it is likely that the nuclear storage dump will grow in future.<sup>96</sup> The Inter-American Court of Human Rights ruled in the case of *Mary and Carrie Dann v. United States*<sup>97</sup> that the US had failed to ensure the petitioner's property rights under the American Convention on Human Rights to the area of traditional lands of indigenous Western Shoshone Tribe where Yucca Mountain is situated.<sup>98</sup> In March 2003, The International Indian Treaty Council filed a written statement, which was circulated in the United Nations. It stated *inter alia* that; "*Since the final decision by the IACHR, the United States has threatened to confiscate horses grazing on Western Shoshone lands, and voiced an intention to reintroduce legislation for the public sale of ancestral Western Shoshone land, as well as the per capita distribution of the Indian Land Claims Commission money.*"<sup>99</sup> In Latin America, domestic cases have also been tried, but again with no consistent outcomes, despite the fact that most Latin American states have ratified the ILO convention no.169. Only seven of the 19 Latin American countries have sufficient legislation establishing the land rights of indigenous peoples<sup>100</sup> and even in those countries, the rights of indigenous

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<sup>94</sup>Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture Law No. 52, May 14, 1997 Amendment: Law No. 160, Dec. 22, 1999

<sup>95</sup>Civil Rights.org <http://www.civilrights.org/issues/indigenous/details.cfm?id=30688> visited 22.jan. 2006

<sup>96</sup> Yucca Mountain Project, Office of Civilian Radioactive Waste Management. <http://www.ocrwm.doe.gov/ym/index.shtml> visited; 30.jan. 2006

<sup>97</sup> Mary and Carrie Dann v. United States, Inter-Am. Ct. H.R., (2002)

<sup>98</sup> Anaya, supra note 68, p.146

<sup>99</sup> Effective Functioning of Human Rights Mechanisms, Written statement submitted by International Indian Treaty Council, a non-governmental organization in special consultative status. U.N. Doc. E/CN.4/2003/NGO/125, 12 March 2003

<sup>100</sup> Roque Roldan Ortiga. Biodiversity Series, paper no.99. Models for Recognizing Indigenous Land Rights in Latin America. October 2004. Distributed by the World Bank Environment Department. The views expressed are those of the authors and should not be attributed to the World Bank. [http://lnweb18.worldbank.org/ESSD/envext.nsf/48ByDocName/ModelsforRecognizingIndigenousLandRightsinLatinAmerica/\\$FILE/Indigenous+PeoplesEDP99.pdf](http://lnweb18.worldbank.org/ESSD/envext.nsf/48ByDocName/ModelsforRecognizingIndigenousLandRightsinLatinAmerica/$FILE/Indigenous+PeoplesEDP99.pdf)

peoples are not respected in practice.

#### **4. Legal Status of Sámi in Finland**

As introduced in the previous chapters both the international treaty law and international legally non-binding documents establish the rights for indigenous peoples.

Finland has not ratified the ILO convention no.169, which is very important to notify, since the ILO convention is the only legal instrument clearly establishing the right of indigenous peoples to the land they occupy. On the other hand, Finland has ratified the ICCPR, ICESCR and the U.N. Convention on Racial discrimination. From the European system, Finland has ratified the Framework Convention on the National Minorities and the European Charter on Regional and Minority languages. This means that the legally binding rights of indigenous peoples, which Finland is obliged to respect, are the right of the Sámi to maintain, use and develop their own language, the right to maintain and develop their separate culture and identity and the right to be free from discrimination.

The following chapter charts out the Finnish legislation concerning the Sámi and evaluates whether Finland fulfils the legal obligations, which it is bound by under the international treaty law.

## 4.1 Finnish Constitution

In 2000, Finland adopted a new constitution. The old one was almost 100 years old and was considered out of date. The 2000 constitution took new perspective, which is evident in the fact that the basic rights of men are in the beginning of the constitution, in the second chapter. This demonstrates the importance of the human rights and their status in Finnish society. Following this new perspective, the cultural and linguistic rights of the Sámi in Finland were included in the constitution giving them therefore greater legal status.

Article 6 of the new Finnish constitution is an article of non-discrimination. It states that; *“No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.”*<sup>101</sup> For the Finnish Sámi population it means the right to the same status and position in the society as the majority population in Finland has.

Article 17 paragraph 3 states that *“the Sámi, as an indigenous peoples, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act.”*<sup>102</sup> This article establishes two different rights for the Sámi population. First, in this article the Sámi are identified as indigenous peoples, which concerning their status under international law is very important. Secondly, the article establishes a special status for Sámi languages and culture and recognizes their separate status from the Finnish language and culture.

Finally, in article 121 paragraph 4 the Sámi people are recognized to have a native region (Sámi Homeland) where they have linguistic rights and cultural self-government. The special rights of Sámi as well as the right to equality are further regulated in Finnish legislation.

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<sup>101</sup> The Finnish Constitution, 731/1999, Article 6

<sup>102</sup> Id., Article 17

## **4.2 Legislation**

### **4.2.1 Act on Sámi Parliament**

The Act on Sámi Parliament entered into force 1<sup>st</sup> of January 1996. The act regulates the Article 121 paragraph 4 of the Constitution, the Article of cultural self-determination, and follows thus the international principles of self-determination and right of indigenous peoples to their own culture. The Sámi Parliament is the highest political organ of the Sámi people in Finland and it operates under the Ministry of Justice. Its purpose is to look after the Sami language and culture and to take care of matters relating to their status as indigenous peoples.<sup>103</sup> The Sámi Parliament is the representative organ of Sámi in national and international connections. It can also make initiatives and proposals to the authorities, as well as issue statements.<sup>104</sup> It decides on the use of the budget allocation for the promotion of Sami culture and the activities of Sami organizations.

The Act on Sámi Parliament regulates the area of the Sámi Homeland in which the Sámi have cultural self-determination as well as linguistic rights. The Sámi Homeland is identified to be the area of the municipalities of Enontekiö, Inari and Utsjoki, as well as the area of the Reindeer Owners' Association of Lapland in Sodankylä.<sup>105</sup>

### **4.2.2 Act on Sámi Language**

The Act on Sámi Language entered into force 1<sup>st</sup> of January 2004. The Act regulates the Article 17 paragraph 3 of the Constitution, concerning the right of Sámi to maintain and develop their language. The main purpose of the Act is to ensure that the Sámi language will be effectively used and developed as an administrative language within the Sámi Homeland and secure the linguistic rights of Sámi.<sup>106</sup> The Act covers all the three Sámi

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<sup>103</sup> Act on Sámi Parliament (974/1995), section 1

<sup>104</sup> Id., Section 5.

<sup>105</sup> Id., Section 4.

<sup>106</sup> Act on Sámi language (1086/2003), Section 1 paragraph 3



languages spoken in Finland, the Northern Sámi, Skolt Sámi and Inari Sámi.<sup>107</sup> The Act establishes, in a broad sense, two different rights to the Sámi people. First, the Act establishes right of Sámi to use Sámi language before the authorities.<sup>108</sup> The State administrative authorities, which hear appeals against decisions of administrative authorities in which Sámi have a right to use their own language, have also an obligation to function in Sámi when so demanded by a native Sámi speaker.<sup>109</sup>

The second right which the Act establishes, is the right to declare Sámi as a mother tongue in the Population Register.<sup>110</sup>

Thus, this act follows the international law in establishing the right to use and develop ones own language and strengthens the maintenance of the Sámi identity by allowing the Sámi language as a mother tongue.

#### **4.2.3 Equality Act**

In February 2004 entered into force Equality Act that concretizes and expands the ban of discrimination. The Act implements Section 6 of the Finnish Constitution as well as discrimination clauses of the ICCPR, European Convention of Human Rights, European Social Charter and the ICERD.

The Act also implements two European Union directives, so called racism directive<sup>111</sup> and discrimination at work directive,<sup>112</sup> by forbidding discrimination on the bases of age, ethnic and national origin, citizenship, language, religion, conviction, opinion, health, disability, sexual orientation, or some other personal feature. The main goal of the Act is to advance equality and improve the possibilities to interfere discrimination. The Act

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<sup>107</sup> Id., Section 3 paragraph 1 b

<sup>108</sup> They have a right to use the Sámi language also outside the Homeland in the provincial government of Lapland, the Chancellor of Justice of the Government and the Parliamentary Ombudsman, the Consumer Ombudsman and the Consumer Complaints Board, the Ombudsman for Equality and the Council for Equality, the Data Protection Ombudsman and the Data Protection Board, and the Ombudsman for Minorities. They have also right to use Sámi before the Social Insurance Institution and Farmers' Social Insurance Institution.

Id. section 2 paragraph 1

<sup>109</sup> Id.

<sup>110</sup> Id., section 7

<sup>111</sup> EU Racial Equality Directive (2000/43/EC)

<sup>112</sup> EU Employment Equality Directive (2000/78/EC)

defines discrimination and describes when positive discrimination is allowed. The novelties of the Act are the obligation of the administrator to draft an equality plan, the possibility of the discriminated to be compensated and shared burden of proof.<sup>113</sup> The Equality Act regulates specifically discrimination on the bases of ethnic origin. This is due to the quite high European non-discrimination standard, which is laid down in the before mentioned directives.

For the Finnish Sámi population the Equality Act is very important concerning their right to identity and culture. The law makes clear distinction between positive and negative discrimination, which makes the protection of minorities, and their rights easier.

#### **4.2.4 Other Legislation**

##### **Act on Forest Administration**

It is noteworthy that the rights of Sámi concerning the lands occupy and preservation of the traditional ways of life are taken into consideration in the legislation concerning the Forest Administration. Article 4 of the Act states that the management, use and protection of the state owned lands, which are under control of the National Forest Administration, must be consistent with the regulations set forth in the Act on Sámi Parliament. In addition, the activities of the Forest Administration must be organized in a way that the cultural rights of the Sámi are not endangered.<sup>114</sup>

##### **Act on Comprehensive School**

The linguistic rights of Sámi are not only established in the special legislation concerning Sámi, but are also noticed in general legislation. Article 10 of the Act on Comprehensive school states that in addition to Swedish and Finnish the teaching language can be Sámi. It is further stated in the Act that within the Sámi Homeland the

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<sup>113</sup> Yhdenvertaisuuslakiesite- Brochure on the Equality Act . 2004. SEIS- Suomi Eteenpäin Ilman Syrjintää, with the contribution of the European Community Action Program to Combat Discrimination. [http://www.yhdenvertaisuus.fi/mp/db/file\\_library/x/IMG/11391/file/yvlakiesite.pdf](http://www.yhdenvertaisuus.fi/mp/db/file_library/x/IMG/11391/file/yvlakiesite.pdf) p.4

<sup>114</sup> Act on Forest Administration (1378/2004), Article 4 paragraph 2

main teaching language amongst the children who speak Sámi must, in major part, be Sámi.<sup>115</sup> The wording of the Act is very open and does not oblige the schools to arrange teaching in Sámi. However, it is positive that the Sámi language is noticed in the legislation concerning basic education.

## **5. De facto Situation in contemporary Finland**

The above-described Finnish legislation implements well the international law, which Finland is bound by. The Finnish constitution establishes rights to self-determination, culture and identity, language and equality as well as recognizes the status of Sámi as indigenous peoples. The legislation, which further implements the constitution, provides measures to enforce these rights and it can be said that the legal situation of the Sámi in Finland is rather good. There is only one important issue, which remains unsolved. It is the land rights. As described earlier, the land rights are considered as a part of the enjoyment of culture and therefore protected in several international documents. The problem is however, that the only document indisputably establishing the legal right of indigenous peoples to the land they traditionally occupy is the ILO convention no.169. Finland has not ratified the convention and clearly considers itself free from the obligations of the treaty.

### **5.1 Land Rights**

As mentioned above, the unsolved dispute of ownership over traditional Sámi lands is the main weakness of the Finnish legislation concerning the rights of Sámi. Many of the international convention-monitoring bodies in their reports have also recognized this.

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<sup>115</sup> Act on Comprehensive School (628/1998), Article 10 paragraphs 1, 2

The land issue is the main concern of the CERD. It states that despite the efforts made in Finland to improve the situation of minorities and to solve the land dispute between Sámi and the state it finds the fact that Finland has not ratified the ILO convention a subject of concern.<sup>116</sup> The European Commission against Racism and intolerance (ECRI) in its second report on Finland also notes that the land issue is one of the main weaknesses of the Finnish legislation. Despite the recent improvements concerning the arrangement of the rights of Sámi to the land, the ECRI notes that Finland should ratify the ILO convention no.169 and thus solve the problem.<sup>117</sup>

The Sámi themselves are more direct and critical. They say that they do not enjoy the rights they are entitled to under international law. According to the Sámi Parliament Finland does not treat the Sámi as indigenous peoples despite the constitutional recognition, but considers them rather as a linguistic minority making therefore no effort for the realization of their rights as indigenous peoples.<sup>118</sup> The Sámi feel that the main reason for this is the lack of knowledge of Sámi culture and livelihood in the government and other administrative organs. The Sámi also point out that the Finnish government does not have any clear policy concerning the Sámi, which results in the existing situation.<sup>119</sup>

The U.N. Human Rights Committee also expressed its concern over the unsolved land rights issue, which resulted in such use of the lands that it affected the Sámi peoples' means of subsistence and thus endangered their traditional culture and way of life. The Committee recommended that Finland should take action to solve the problem in manner, which protects the right of Sámi to enjoy their culture in accordance with the article 27 of the ICCPR.<sup>120</sup> In recent years, the Human Rights Committee has had a key role in the dispute over the traditional lands of the Sámi, because of the individual complaints of Sámi reindeer herders. In the earlier mentioned Länsman cases from 1994 and 1996 the

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<sup>116</sup> CERD on Finland, supra note 18

<sup>117</sup> European Commission against Racism and Intolerance, CRI (2002) 20, Second report on Finland adopted on 14 December 2001 and made public on 23 July 2002. Council of Europe [http://www.coe.int/t/e/human\\_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry\\_approach/finland/finland\\_cbc\\_2.asp#P190\\_36222](http://www.coe.int/t/e/human_rights/ecri/1%2Decri/2%2Dcountry%2Dby%2Dcountry_approach/finland/finland_cbc_2.asp#P190_36222)

<sup>118</sup> The annual report of the Sámi Parliament for 2005, Dnro: 253/D.a.1, The Finnish Sámi Parliament <http://www.samediggi.fi/poytakirjat.html> [hereinafter: Sámi Parliament Report] p.2

<sup>119</sup> Id.

<sup>120</sup> Report of the Human Rights Committee, Finland, 02/12/2004, UN Doc. CCPR/CO/82/FIN.

Committee came into a conclusion that the loggings referred to in that case did not amount to a violation of the article 27 of the ICCPR, but did warn Finland on any increasing loggings in the area. In the beginning of the year 2005, the Finnish Forest Administration started logging in the reindeer winter grazing areas within the Sámi homeland. The loggings were interrupted temporarily soon after because of the immense pressure by the Greenpeace, but were started again in the summer 2005. Because the parties in the dispute could not conclude in the matter, it was taken again to the U.N. Human Rights Committee, which banned the logging temporarily to be able to research the case better. The government of Finland must deliver a plea and after that, the Human Rights Committee will deliver a View in the matter. In this case, as in the earlier Länsmän cases, the Committee must weight the rights and needs of both of the parties. The Committee must find a solution, which respects the rights of Sámi as indigenous peoples, but also the rights of the non-Sámi inhabitants in Lapland whose source of income is also dependent on the forests and their use.

## **5.2 Language and Culture**

While most of the attention has gone into recognizing and commenting on the land issues the problems concerning the Sámi languages have been somewhat left out and the situation without publicity. This is very unfortunate since the situation of the Sámi languages is quite alarming. Two of them, Inari Sámi and Skolt Sámi, are on the European Councils Committee of Ministers list on endangered languages and the third Sámi language, the Northern Sámi, is on the UNESCO list of rare and endangered languages.<sup>121</sup> The Sámi language Act was enacted to improve the language rights of the Sámi and to protect the valuable heritage, which the languages are. Despite the good intentions the reality is that very difficult has been to fulfill the requirements of the Act

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<sup>121</sup> Sámi Parliament Report, supra note 118, p.2

and in many places the Sámi cannot use their own languages when transacting in administration or in education.

According to the Committee of Experts on the European Charter for regional and minority languages the linguistic rights of the Sámi established in the Charter are not respected. Despite of the plans to require basic schooling in all three languages, Finnish, Swedish and Sámi, it has been the reality that only Finnish and Swedish teaching has been possible to arrange. The main problem has been that Sámi speaking teachers and teaching materials are lacking in Finland.<sup>122</sup> Similar problems have been experienced in the administration where the Sámi have a right to transact in their own language. It has been difficult to find Sámi speaking staff to the administration and interpreters have not always been available when needed. In addition, the state allocation for the interpreting services does not cover the costs of it, which makes it impossible for the municipalities to fulfill their duties under the legislation. The Sámi Parliament notes that as well as the Language Act guarantees the language rights of the Sámi it is only approximately half of the Sámi population who can actually enjoy the right, since the other half is inhabited outside of the Sámi Homeland and is thus outside of the effect of the Language Act.<sup>123</sup>

### **5.3 Self-Determination**

The right of Sámi to self-determination is implemented in the Act on the Sámi Parliament. According to the Act, the Sámi have good opportunities to control the decision making affecting them and make decisions which directly have impact on they lives. In reality, the role of the Sámi Parliament has never reached the intended status even though it currently controls the budget allocations from the state. Decision-making has taken place without Sámi consultation and some uncertainty has existed in connection with the actual effect and reach of the Act.<sup>124</sup> In addition, the understanding of the Sámi and the Finnish government on the term “self-determination” is quite different. Whereas the Finnish government clearly considers the cultural self-determination to mean internal

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<sup>122</sup> European Charter for Regional and Minority Languages, Application of the Charter in Finland, 2<sup>nd</sup> Monitoring Cycle, 5 November 2004, ECRML (2004) 7, Council of Europe, p.22

<sup>123</sup> Sámi Parliament Report, supra note 118, p. 2

<sup>124</sup> Advisory committee of Framework Convention for the Protection of National Minorities, Opinion on Finland, 22 September 2000, ACFC/INF/OP/I(2001)002, Council of Europe p.12

self-determination the Sámi are very keen to define the self-determination to mean external self-determination. They also have strong opinion on the definition of culture and thus on the content of the cultural self-determination. The Sámi argue that the issue of land rights is included in the definition of culture and thus a matter, which they should be able to control. The Sámi feel that minority groups within Finland are treated unequally. They point out that the Swedish minority living in Åland Islands does have semi-autonomy, which is considered even by the Finnish government their duty under international law.<sup>125</sup>

#### 5.4 Nordic Sámi Convention

In November 2005 a common group of experts from Sweden, Norway and Finland published a draft for the Nordic Sámi Convention. The Nordic Saami Council initiated the Convention in 1986 to replace the Lapp Codicil of 1751 and the preparation began in 1995 in co-operation with the Nordic Council of Ministers. The purpose of the convention was to establish a common legal instrument for the protection of human rights of Sámi and to improve the position of Sámi as indigenous peoples. It aims to the establishment of both basic human rights according to the current international standards and the vital rights for the survival of the Sámi culture, the right to self-determination, linguistic- and cultural rights and the right to the traditional lands. The main purpose of the convention is to facilitate the co-operation of the Sámi without the distinction to Swedes, Norwegians or Finns and to simplify the practical arrangements, which enable the co-operation.<sup>126</sup> The Nordic Saami Council adopted the Draft in March 2006 and it is now in examination in the Sámi Parliaments and national governments.<sup>127</sup>

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<sup>125</sup> Pedersen, Geir-Tommy, President of the Saami Council, "Observations by the Saami Council on the 16<sup>th</sup> Periodic Report Submitted by Finland under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination", 5 August 2003, Nordic Saami council <http://www.saamicouncil.net/?deptid=2217> p. 10

<sup>126</sup> Ihmisoikeusliitto, *supra* note 16, p. 118

<sup>127</sup> Draft of the Nordic Saami Convention., Text of the Convention in English (unofficial translation), Documents of the Nordic Saami Council <http://www.saamicouncil.net/?deptid=2217> Articles 48 and 49 of the Draft Convention

## 6. Conclusion

The international human rights documentation is respectable. Gradually it has covered all the major sectors of human rights protection leaving little out. The rights of indigenous peoples are emerging and the awareness of their problems is no longer rare. Despite the amount of documentation there can be found only one legally binding convention for the protection of indigenous peoples' rights. Overall, this seems to be the situation of almost all human rights law. For some reason it has been very difficult for the international society to bind itself to international human rights law even though it is on the agenda of almost all the states in the world. It seems that the human rights are not on the agenda for the sake of the people and the real human rights situation, but more for the high human rights profile. The Nordic countries have traditionally had very high human rights profile, due to which the human rights of Sámi are quite well established in the Finnish legislation. Their rights to language and culture as well as the right to cultural self-determination and non-discrimination are indisputably established both in the Finnish constitution and in general legislation. This is mainly because these rights are common to the rights of the minorities and are covered by many of the existing international human rights treaties, such as the ICCPR, ICESCR, ICERD and ECHR. Indigenous peoples right to the land they occupy, however, is only established in the ILO convention no. 169. Finland has not ratified the convention and considers itself therefore not bound by it. What makes the situation interesting is the fact that the U.N. Human Rights Committee has interpreted the article 27 of the ICCPR to include the land rights of indigenous peoples and has enforced this interpretation in many of its Views. Even though the Views are not legally binding, Finland, in most cases, has followed the View of the Committee even though Finland does not recognize the right of the Sámi to the land. The most recent case is currently in the Committee in examination. The Committee banned temporarily the logging exercised by the Finnish Forest Administration in Inari and is now waiting for the written response of the Finnish government to be able to deliver a View on the matter.

It will be very interesting to see whether the Committee considers the logging as a violation of the article 27 of the ICCPR and if so, whether Finland will respect the View



and stop the logging in the area permanently, thus recognizing the competence of the Committee as well as the right of the Sámi reindeer herders.

Even though the rights of the Sámi are established in the legislation, Finland has still work to do to put them into effect in practice. There are many shortcomings in the implementation of the existing legislation and it is possible to say that the Finnish Sámi do not yet fully enjoy the rights granted them in the legislation. The internal self-determination, established in the Act on Sámi Parliament, has not been effectively implemented. Though the Sámi have significant powers, according to the Act, to influence and take part to the decision making concerning matters in which they have interests, the reality has been that quite seldom they have the opportunity to do so. Despite the management of the allocation for promotion of the Sámi culture, the government alone takes the most important decisions, especially concerning the usage of their lands.

Also matters less controversy, such as their right to use their own language, have not been fully implemented. The main reason for the language situation has been the lack of funding. The yearly allocations do not cover the costs of translators and very difficult has been to find Sámi speaking staff to schools and administration. It seems that there is a need for overall change in the policy concerning the Sámi language and much more radical measures are needed to resuscitate the language to the level that the implementation of the Language Act is possible.

As the rights of indigenous peoples gain more status within the international human rights system, it is well probable that also the Sámi will be able to fully enjoy they rights in Finland. It should not take too many years for Finland to ratify the ILO convention no.169, but for that to happen some fundamental change must happen in the official Sámi policy of the Finnish government.

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