

**Research on Best Practices for the Implementation of the Principles of
ILO Convention No. 169**

Case Study: 7

**Key Principles in Implementing
ILO Convention No. 169**

by

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Introduction

This is an analysis of a number of case studies documenting best practices in implementing Convention No. 169. It covers selected principles of the Convention: (i) the concept of “Indigenous Peoples”; (ii) the right to be consulted; (iii) the right to decide own development priorities; (iv) the right to education; (v) cross-boundary contacts and co-operation; (vi) indigenous peoples’ institutions; (vii) customs and customary law; and (viii) Indigenous peoples’ participation in/contribution to ILO’s supervisory mechanisms.

The methodology used consists primarily of desk research and direct communication with relevant organizations and individuals during the documentation process.

The topics covered by the document were identified in co-operation with the ILO’s Project to Promote ILO Policy on Indigenous and Tribal Peoples, with the aim to focus on issues that are not covered by current research. It was agreed with the ILO that the practical examples would not be limited to states parties to Convention No. 169 only. This was to ensure a wide substantive and geographical reach to draw out the applications – in both law and practice – of implementing Convention No. 169.

1. The Concept of Indigenous Peoples

There is no universal agreement on the definition of the term “indigenous peoples”. The UN Declaration on the Rights of Indigenous Peoples identifies “indigenous peoples” as being the beneficiaries of the rights contained in the Declaration, without defining the term.¹ Although, there is no general agreement on the need for a definition, there are several definitions which are widely accepted as guiding principles for the identification of indigenous peoples, including the Cobo-definition, and the statement of coverage of the ILO Convention No. 169 (article 1).

While conducting a special study on the problem of discrimination against indigenous peoples, the Special-Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, José Martínez Cobo, formulated a working definition. Indigenous peoples are described as:²

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

¹ UN Document A/61/L.67 12 September 2007: The United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007. The preamble of the Declaration however makes references to certain characteristics normally attributed to indigenous peoples, such as their distinctiveness, dispossession of lands, territories and natural resources, historical and pre-colonial presence in certain territories, cultural and linguistic characteristics, and political and legal marginalization. Similarly, there is no international agreement on the definition of the term “minorities” or the term “peoples”.

² José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Document E/CN.4/Sub.2/1986/7Add.4, Paragraph 379

The Special-Rapporteur outlined a number of factors which may be relevant for identifying indigenous peoples. This emphasizes their historical continuity, for an extended period reaching into the present, and includes: a) occupation of ancestral lands; b) common ancestry with the original occupants of these lands; c) culture; d) language; and e) residence in certain parts of the country, or in certain regions of the world.

The Special-Rapporteur included self-identification as indigenous as a fundamental criterion: An indigenous person is one who belongs to an indigenous people through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group).³

The International Labor Organization (ILO) has adopted a definition of the concept of indigenous peoples on two occasions: the statements of coverage of Convention 107 (1957) and Convention No. 169 (1989) respectively.

The statement of coverage of the ILO Convention No. 169 - article 1 (1) (b) - identifies "indigenous peoples" as being "*peoples in independent countries who are regarded as indigenous on account of their descent from 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 states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*"

In contrast, article 1 (1) (a) of Convention No. 169 describes 'tribal peoples' as: "*peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.*"

³ Ibid, paragraph 380

The description of “indigenous peoples” in Convention No. 169 contains several elements which are not found in its description of “tribal peoples”:

- *Historical continuity* (pre-conquest/colonization societies);
- *Territorial connection* (their ancestors inhabited the country or region at the time of conquest/colonization/creation of the state); and
- *Distinct social, economic, cultural and political institutions* (they retain some or all of their own institutions).

However, these conceptual dissimilarities have no legal implications under Convention No. 169 as far as the actual rights of these two groups are concerned; both groups are entitled to the same rights under the Convention. This however may not be the case in the application of other international instruments; in particular the UN Declaration on the Rights of Indigenous Peoples.

The statement of coverage of Convention No. 169 is largely based on criteria developed by José Martínez Cobo, whereas Convention No. 107 identifies indigenous peoples as a sub-category of “tribal”; the two groups are separate in Convention No. 169. Moreover, article 1 (2) of Convention No. 169 – similar to the Cobo-definition - establishes self-identification as indigenous as a fundamental criterion for determining the groups that are to be identified as indigenous peoples. Convention No. 169 also describes indigenous peoples as ‘peoples’ – whereas Convention No. 107 identifies them as ‘populations’.

Article 1 (3) of Convention No. 169 specifies that the use of the term peoples in the Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law. The objective of this reservation is to avoid challenging international legal questions related to the concept of ‘peoples’ - in particular the right to self-determination, which under international law is acknowledged as a right of ‘all peoples’. This reservation, or

the application of the other provisions of Convention No. 169, shall not – according to article 35 of the Convention – affect rights of the peoples concerned pursuant to *other* international instruments or national legislation.⁴ The reservation in article 1 (3) demonstrates the close link between the problem of finding an international agreement on how indigenous peoples should be identified and legal issues.

1.1 The Concept of Indigenous Peoples in the Context of Rights

The international discourse related to the concept of ‘indigenous peoples’ has largely been centered on the following two main conceptual challenges:

- The question of “indigenoussness”: Who should be identified as ‘indigenous’ – that is being first in a particular country or geographical area before the arrival of the current majority population or the creation of the State, and hence entitled to the specific rights of indigenous peoples?
- The question of “*peoplehood*”: Who is to be identified as a distinct ‘people’ – that is entitled to peoples’ rights under international law?

These two questions have been strongly debated internationally and at the national level for several decades. For instance, during the negotiations on the UN Declaration on the Rights of Indigenous Peoples, a number of African and Asian states advocated a universal definition of indigenous peoples: Many of these states were of the view that there were no indigenous peoples in their countries, as they were all indigenous. Such perceptions were largely based on the concept of “saltwater colonialism”, which in this context means that only those groups which have been faced with overseas colonization or occupation,

⁴ The UN Declaration on the Rights of Indigenous Peoples identifies indigenous as “peoples”, and article 3 of the Declaration states that: “Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

such as in the Americas, Australia and New Zealand, are to be regarded as indigenous peoples.⁵

Although, the debate about the concept of indigenous peoples appears to be of a conceptual and academic nature, it is fundamentally linked to the categorization of rights under international human rights law; in particular (1) the relationship and distinction between the rights of persons belonging to minorities (individual rights) and those of indigenous peoples (collective rights); and (2) the rights of peoples as provided for in common article 1 of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICECSR).

1.1.1 Minority rights – Indigenous Peoples Rights

The rights specific to indigenous peoples and members of indigenous peoples are enshrined in Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples, whereas the specific rights of persons belonging to national or ethnic, religious or linguistic minorities are spelled out in the UN Declaration on Minority Rights, and certain individual provisions in international human rights treaties, including article 27 of ICCPR.

The specific rights of indigenous peoples contained in Convention No. 169 and the Declaration on the Rights of Indigenous Peoples are significantly different from those in the Minority Rights Declaration. The main difference is that the Minority Declaration and other instruments concerning persons belonging to

⁵(a) However, the law and practice in some Asian states provides examples of recognition of the existence of “adivasi”, “indigenous” and “aboriginal” in certain countries, including the Philippines, Malaysia, Nepal, India, Pakistan and Bangladesh (Source: Patrick Thornberry (2002) *Indigenous Peoples and Human Rights*, Juris Publishing, page 38); (b) In Indonesia, a definition of indigenous peoples has been included in the Law on Coastal and Small Island Management (2007); (c) Most recently, the Parliament of Japan adopted a unanimous resolution recognizing the Ainu as an indigenous people.

minorities⁶ aim at ensuring a space for pluralism in the society, whereas the instruments concerning indigenous peoples' rights are intended to allow for a high degree of autonomous development for indigenous peoples. For instance, whereas the Minority Declaration seeks to ensure that members of minority groups enjoy effective participation in the larger society of which they are part of, the provisions of the Indigenous Declaration seek to allocate authority to indigenous peoples in order to enable them to make their own decisions.⁷

The Declaration on the Rights of Indigenous Peoples formulates the right to participate in the larger society as a secondary right: Article 5 of the Declaration states that indigenous peoples have the right to maintain and strengthen their own institutions, while retaining their right to participate fully, *if they so choose*, in the political, economic, social and cultural life of the State.

Another major difference between minority rights and indigenous rights is that international instruments specifically acknowledge indigenous peoples' rights to lands, whereas minority rights instruments and provisions do not contain such rights. In essence, the difference between minority rights and indigenous rights is that minority rights are formulated as rights of *individuals*, whereas those concerning indigenous refer to collective rights of *peoples*.

International instruments establish significantly different and more far-reaching obligations for states vis-à-vis indigenous peoples, compared with their obligations towards minorities. Indigenous peoples' rights, such as their collective rights to lands and natural resources, and their right to maintain and strengthen

⁶ The Capotorti-definition of "minorities": "A group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." (Source: F. Capotorti (1999), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Publication, Sales No. E.91.XIV.2, Geneva, paragraph 568)

⁷ Asbjørn Eide and Erica-Irene Daes (2000) *Joint working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Document E/CN.4/Sub.2/2000/10, 19 July 2000, paragraph 8

their own political, legal, economic, social and cultural institutions, are by some states viewed as a serious challenge to the core functions of the nation state. Consequently, some states seek to identify indigenous peoples within their territories as minorities. This is closely linked to the fact that minority rights are formulated as the rights of individuals to preserve and develop their separate group identity within the process of integration, whereas indigenous peoples' rights tend to consolidate and strengthen the separateness of those peoples from other groups in society.⁸

1.1.2 Peoples Rights - Indigenous Peoples Rights

The controversy about whether indigenous peoples are 'peoples' is linked to the politically sensitive question on whether they are 'peoples' within the framework of common article 1 of ICCPR and ICESCR. If they are, they are entitled to the right to self-determination under these two treaties, and hence entitled to freely determine their political status and freely pursue their economic, social and cultural development, and for their own ends freely to dispose of their natural wealth and resources.

Article 3 of the UN Declaration on the Rights of Indigenous Peoples acknowledges that indigenous peoples have the right to self-determination; it is identical to common ICCPR/ICESCR article 1 (1), with the exception that the term 'all people'⁹ is replaced by the term 'indigenous peoples' in the Declaration; identifying indigenous peoples as holders of the right to self-determination.

⁸ Asbjørn Eide and Erica Irene Daes (2000), *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Document E/CN.4/Sub.2/2000/10, 19 July 2000, paragraph 23

⁹ The so-called Kirby-definition of the term "peoples" under international law, adopted by the International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27 – 30, 1989:

"1. a group of individual human beings who enjoy some or all of the following common features: a) common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; g) common economic life;

Many international legal scholars, including the current UN Special Rapporteur on Indigenous Peoples Human Rights, Professor James Anaya, is of the view that the Declaration resolves the debate about self-determination in favor of recognizing indigenous peoples as entitled to the general right to self-determination.¹⁰ In his view, the right to self-determination, as formulated in the Declaration, should not be viewed as a *sui generis* right – but as an acknowledgement of indigenous peoples’ entitlement to the *general right* to self-determination.

An emerging international legal practice supports the view that indigenous peoples are entitled to the general right to self-determination. Since 1999, the UN Human Rights Committee – the monitoring body under ICCPR – has on several occasions, including its consideration of periodic reports by Finland, Sweden and Norway, concluded that common article 1 is also applicable to indigenous peoples, including the Sami people in the three Nordic countries.¹¹

The Government of Sweden has recently explicitly acknowledged that indigenous peoples, including the Sami in Sweden, have the right to self-determination under

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

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

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

¹⁰ International Conference on Sami Self-determination: Scope and Implementation, Alta, Norway, 4 February 2008: Intervention by professor James Anaya, *The Right of Indigenous Peoples to Self-determination in the Post Declaration Era*

¹¹ UN Documents: Norway: CCPR/C/79/Add. 112, 1999; CCPR/C/NOR/CO/5, 2000, Sweden: CCPR/CO74/SWE, 2002, Finland: CCPR/CO/82/FIN, 2004.

common article 1 of ICCPR and ICESCR:¹² *“It is the view of the Government of Sweden that indigenous peoples have the right to self-determination insofar as they constitute peoples within the meaning of common Article 1 of the 1966 International Covenant on Civil and Political Rights and 1966 International Covenant on Economic, Social and Cultural Rights.”* Another example in this regard is the draft Nordic Sami Convention, formulated by a Nordic expert group in November 2005, which recognizes the Sami as “a people” with the right to self-determination.¹³

The question concerning the right to self-determination does not arise in regard to the Minority Rights Declaration; this is one of the main reasons why a number of states have sought to ‘minoritize’ the indigenous peoples living in their own countries.

1.2 ILO’s Statement of Coverage: Practical Application

The statement of coverage of the ILO Convention No. 169, in particular article 1 (1) (b) and (2), is without any doubt the most applied provision of the Convention. Application of this provision goes beyond the relatively small group of states which have ratified the Convention.¹⁴ The criteria elaborated on in this chapter have been applied widely for the purpose of identifying indigenous peoples in international and national political and legal processes. It is used as an international working definition for the purpose of identifying indigenous peoples, e.g. in the application of the UN Declaration on the Rights of Indigenous Peoples and other instruments relevant to indigenous peoples. The statement of coverage has also been the basis on which various UN specialized agencies have

¹² UN Document: E/C.12/SWE/5 6 September 2006, Fifth Period Report on the implementation of ICESCR (Sweden), paragraph 7

¹³ *Nordisk samekonvensjon*: Utkast fra finsk-norsk-svensk-samisk ekspertgruppe. Oslo, Kopi og distribusjonsservice, 2005. An unofficial English translation of the draft convention is available at the Norwegian Government’s website: <http://odin.dep.no/filarkiv/280873/>.

¹⁴ As of 5 August 2008, the following countries have ratified Convention No. 169: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and Venezuela.

developed their own operational definitions of the term indigenous peoples, including the World Bank and United Nations Development Programme.¹⁵

The ILO-definition is also widely used at the national level, including in some countries that are not parties to the Convention. Although, most countries which are seeking to address indigenous peoples' rights tend to view the question of definition within the context of its national constitutional and historical framework, the statement of coverage of Convention No. 169 - is widely used as an overall guiding principle in the development of a nationally applicable definition.

Example 1:

Indonesia (not party to Convention No. 169)

The issue of definition of indigenous peoples remains a sensitive issue and has not been fully resolved. Different definitions are used in various official documents:

- The Second Amendment of the Constitution identifies indigenous peoples as “traditional legal communities” and as “traditional peoples”.
- The National Assembly’s Decree on Agrarian Reform and Natural Resource Management (Decree No. 9 of 1999) also identifies indigenous peoples as “traditional peoples”.
- Presidential Decree No. 111/1999 and Social Ministry Decree No. 06/PEGHUK/2002 defines indigenous communities as ‘remote indigenous communities’: *“Remote indigenous community is a local social (cultural) group, which is spread-out and lacks access to public social, economical and political services.”*
- The Law on Coastal and Small Island Management (2007) incorporates a

¹⁵ UNDP and Indigenous Peoples: A Policy of Engagement

definition which has been developed by AMAN (Aliansi Masyarakat Adat Nusantara)¹⁶ - the national indigenous peoples umbrella organization: *“Indigenous communities are a group of people who have lived in their ancestral land for generations, have sovereignty over the land and natural resources, and who govern their community by customary law and institution which sustain the continuity of their livelihood.”*¹⁷

The AMAN-definition is largely inspired by and based on the ILO-definition. It is gradually being accepted by national institutions and authorities, e.g. the Ministry of Fisheries and the National Human Rights Commission.¹⁸ This example shows that the statement of coverage of Convention No. 169 is having implications beyond the territories of states that have ratified the Convention.

Example 2:

Norway (Part to Convention No. 169)

In 1990, Norway became the first State party to ratify Convention No. 169. In the ratification process, the National Parliament of Norway (the Storting), acknowledged the Sami people as an indigenous people in Norway in accordance with the statement of coverage of the Convention. This was a natural conclusion as the Sami territory, history, culture, traditions, language, livelihood, dress and feeling of belonging stretch beyond the territory of Norway. The Sami define themselves as an distinct people, different from the Finish, Russian, Norwegian and Swedish people.

The Sami Act of 12 June 1987 which was adopted by the National Parliament three years prior to the ratification of the Convention rests largely on the notion that Norway as a state is established on the territory of two peoples, the Norwegians and the Sami, and that the Sami have lived within the territory of the

¹⁶ English translation: The Indigenous Peoples' Alliance of the Archipelago

¹⁷ Adopted at the First AMAN Congress, 17 March 1999

¹⁸ Phone interview with AMAN: 27 March 2008

present Norway prior to the establishment of the State. This fact distinguishes the Sami from minority groups in the country.¹⁹

Apart from the criteria in Section 2-6 of the Sami Act, which are connected with the right to participate in the elections to the Sami Parliament, there is no formal definition of the term “Sami”. Although, these criteria have no formal legal relevance and significance outside the Act’s area of application, these criteria nevertheless indicate who are considered to be a Sami. The Sami Act stipulates the following criteria for the right to participate in the Sami Parliament elections: *“Everyone who declares that they consider themselves to be a Sami, and who either (i) has Sami as home language, or (ii) has or has had parents, grandparents or great-grandparents with Sami as home language have the right to be enrolled in the Sami census in the region of residence.”*

The Sami Act uses both objective and subjective criteria in identifying who is to be regarded as a Sami. The fundamental element is the subjective self-identification as Sami; that a person considers himself/herself to be a Sami and therefore belonging to the Sami people. The objective criterion is related to the Sami language; that the person himself/herself, one of his/her parents or one of his/her grandparents or great-grandparents have or had Sami as first language or as home language. The term ‘Sami’ does not only identify the Sami as a distinct people, it is also linked to the traditional territory of the Sami people – known as ‘Sápmi’.

The definition of the term ‘Sami’ in the Norwegian Sami Act is based on the notion of ‘indigenusness’ – although the term is not used. It is based on an acknowledgment that the Sami people have a particular and historical association with the traditional Sami territory, and that they inhabited this area prior to the establishment of the Norwegian State. It is based on recognition of the Sami society as a distinct society, very different from the majority Norwegian

¹⁹ White Paper No. 52 (1992-93): Stortingsmelding nr. 51 (1992-93) – Om norsk samepolitikk

society. The language criterion in the Sami Act is used as an objective indicator to identify members of the Sami community.

Example 3:

Finland and Sweden (Not parties to Convention No. 169)

The Sami Acts of Finland and Sweden respectively contain similar criteria for participation in the election of the Sami Parliaments in their respective countries; although there are minor differences in the criteria. Despite the fact that none of these two countries have ratified Convention No. 169, the provisions of the Convention have nevertheless strongly influenced political and legal developments in these countries, including as far recognition of the Sami as an 'indigenous people' is concerned.

Example 4:

Bolivia (Party to Convention No. 169)

The Supreme Decree 23.858 (1994) in Bolivia describes indigenous peoples as human communities descending from populations that settled prior to the time of conquest or colonization and that are comprised within the present State boundaries. They have a history, organization, language or dialect and other cultural characteristics their members identify with acknowledging themselves as pertaining to the same social and cultural unit, they retain a territorial bond in terms of managing their habitat and their social, economic, political and cultural institutions.²⁰

²⁰ www.minedu.gov.bo/pre/ley/DS23858.pdf

Example 5:

The World Bank

The World Bank uses the term ‘indigenous peoples’ in a generic sense to refer to a distinct group with the following characteristics in varying degrees:²¹ “(a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (d) an indigenous language, often different from the official language of the country or region.”

This operational definition of the term indigenous peoples is based on the statement of coverage of Convention No. 169, and includes all the main elements of the ILO-definition; self-identification as indigenous, historical attachment to ancestral territories, distinct cultural, economic, social and political institutions.

²¹ World Bank, Operational Policy 4.10 on Indigenous Peoples (2005), www.worldbank.org

2. Participation and Consultation

International human rights norms require that indigenous peoples are able to effectively participate in decision-making processes which may affect their rights or interests, including by being consulted. The main objective of these norms is to ensure that indigenous peoples can effectively participate in mainstream political and legislative processes which may affect them directly. Logically provisions concerning indigenous peoples' right to be consulted are not applicable when decisions are being considered or made by autonomous indigenous peoples' institutions. The core area of application for the concept of participation is in the context of indigenous peoples – state relations.

The UN Declaration on the Rights of Indigenous Peoples (2007) distinguishes between indigenous peoples' rights within the realm of their right to self-determination, and their rights in the larger political order of the state. The Declaration affirms indigenous peoples' right to develop and maintain their own decision-making institutions, parallel to their right to participate in “external” decision-making processes which affect their rights (article 18).

The distinction between “internal” and “external” spheres is also reflected in article 5 of the Declaration, which affirms that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state.

Article 3 of the Declaration affirms that indigenous peoples have the right to self-determination, including the right to freely pursue their economic, social and cultural development. Article 4 of the Declaration addresses the internal aspects of this right; it states that ‘indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions’.

International human rights provisions affirming indigenous peoples' right to participate in decision-making processes are not logically applicable in cases where indigenous peoples are exercising self-governance in relation to internal and local affairs. Consequently, the remaining parts of this chapter elaborates on these norms in the context of the "external" sphere or decision-making processes in the mainstream society.

Article 6 (1) (a) of Convention No. 169 obliges governments to consult indigenous peoples, through appropriate procedures and through their genuine representatives, whenever it is considering legislative or administrative measures which may affect them directly. Article 6 (1) (b) requires that indigenous peoples "can freely participate... at all levels of decision-making". This applies to decision making at all levels within the state; national, regional and municipal levels.

Anaya (2004) is of the view that this requirement applies not only to decision-making within the framework of domestic or municipal processes but also to decision-making within the international realm. Anaya argues that UN bodies and other international institutions have already increasingly allowed for, and even solicited, the participation of indigenous peoples' representatives in their policy-making and standards-setting work²² in areas of concern to indigenous peoples.²³

The applicability of the rights of indigenous peoples, including the concept of participation, has been clarified through the adoption of the UN Declaration on the Rights of Indigenous Peoples: Article 41 of the Declaration specifies that the

²² For example, indigenous peoples' representatives participated actively throughout the negotiations on the UN Declaration on the Rights of Indigenous Peoples; The UN Permanent Forum on Indigenous Issues was created to give indigenous peoples more voice within the UN system – and half of its members are indigenous peoples' representatives; The UN Expert Mechanism on Indigenous Peoples' Rights has been established, and all of its members are of indigenous origin.

²³ Anaya, James S. (2004) *Indigenous Peoples in International Law* (Second edition), Oxford University Press, pages 153-154

UN, its bodies, and specialized agencies are obliged to promote respect for and full application of the provisions of the Declaration.

The establishment of processes of consultations with indigenous peoples is obviously the most important way of ensuring effective indigenous peoples' participation in decision-making. Article 6 (2) requires that consultations are carried out 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent' to the proposed measure. Although, the obligation to consult under the provisions of the Convention is interpreted as not requiring that an agreement is reached with indigenous peoples, article 6 (2) nonetheless requires that there shall be an '*objective of achieving agreement or consent*' to the proposed measure.

In addition to provisions establishing an obligation to consult indigenous peoples in matters which affect them, Convention No. 169 also contains numerous other elements of the concept of participation:

- right to '*participation*' (articles 2, 5, 6, 7, 15, 22, 23);
- right to be '*consulted*' (articles 6, 15, 17, 22, 27, 28);
- obligation to '*cooperate*' with indigenous peoples (articles 7, 20, 22, 25, 27, 33);
- right for indigenous peoples to '*decide their own priorities*' (article 7);
- obligation *not* to take measures contrary to the freely-expressed wishes of indigenous peoples (article 4);
- obligation to seek '*agreement or consent*' from indigenous peoples (article 6);
- obligation to seek '*free and informed consent*' from indigenous peoples (article 16);
- right to '*exercise control*' (article 7); and
- right to '*effective representation*' (articles 6, 16).

2.1 Case Study: Norway

2.1.1 Procedures for Consultations

In May 2005, the Government of Norway and the Sami Parliament agreed on procedures for consultations between state authorities and the Sami Parliament (Procedures for Consultations).²⁴ These procedures apply in matters that may affect Sami interests directly, and are applicable to the Government and its ministries, directorates and other subordinate State agencies or activities. The procedures were approved in the Cabinet. The consultation procedures are also binding for the Sami Parliament. Among other things, it is implicit that the Sami Parliament must give clear feedback to the authorities' proposals within agreed deadlines. The consultation procedures are regarded as normative guidelines.

Consultations between the Sami Parliament and state authorities will in some instances lead to decision-making processes and administrative procedures that are more time-consuming than normal. Satisfactory consultations will, however, in the last instance secure a more flexible and prompt implementation of the measures in question. Decisions with a disputable basis of legitimacy may, whether in the local community or the international community, be difficult to implement.

The preamble of the agreement recognizes that the Sami, as an indigenous people, have the right to be consulted in matters that may affect them directly. The agreement's objective is manifold: (1) to contribute to the implementation in practise of the State's obligations to consult indigenous peoples under international law; (2) to achieve agreement between State authorities and the Sami Parliament whenever consideration is being given to legislative or administrative measures that may directly affect Sami interests; (3) to facilitate the development of a partnership perspective between State authorities and the

²⁴ Prosedyrer for konsultasjoner mellom statlige myndigheter og Sametinget, 11.05.2005. Signed by Ms. Erna Solberg, Minister of Local Government and Regional Development, and Mr. Sven-Road Nystø, President of the Sami Parliament

Sami Parliament that contributes to the strengthening of Sami culture and society; and (4) to develop a common understanding of the situation and developmental needs of the Sami society.

The rationale for the consultation procedures is grounded on the right of indigenous peoples to be consulted on matters that may directly affect them, in particular as proclaimed in article 6 of ILO Convention No.169. The Convention was ratified by Norway in 1990, and the Sami people clearly meet the requirements to be described as an 'indigenous people' under the Convention.²⁵ The agreement was triggered by the National Parliament (the Storting) questioning the government whether it had fulfilled its obligations under Convention No. 169 to consult the Sami Parliament before submitting governmental proposals on Sami affairs, and other matters of concern to the Sami, to the national parliament. The national parliament raised this issue on several occasions during the preceding years.

Section 2 of the agreement establishes that the procedures apply to the Government and its ministries, directorates and other subordinate State agencies or activities. The procedures apply in matters that may affect Sami interests directly, including legislation, regulations, specific or individual administrative decisions, guidelines, measures and decisions. In accordance to the agreement, the obligation to consult the Sami Parliament include all material and immaterial forms of Sami culture, including music, theatre, literature, art, media, language, religion, cultural heritage, immaterial property rights and traditional knowledge, place names, health and social welfare, day care facilities for children, education, research, land ownership rights and rights to use lands, matters concerning land administration and competing land utilization, business development, reindeer husbandry, fisheries, agriculture, mineral exploration and extraction activities, wind power, hydroelectric power, sustainable development, preservation of

²⁵ For instance: the Supreme has stated that ILO Convention No. 169, Article 1 (1) (b) unquestionably gives the Sami status as an indigenous people in Norway (the so-called Selbu case of 21st June 2001)

cultural heritage, biodiversity and nature conservation. Matters which are of a general nature, and are assumed to affect the society as a whole are in principle not covered by the agreement, and such matters shall not be subject to consultations.

Geographically the Procedures for Consultations are applicable to traditional Sami areas; this includes the counties of Finnmark, Troms, Nordland and Nord-Trøndelag, and the municipalities of Osen, Roan, Åfjord, Bjugn, Rissa, Selbu, Meldal, Rennebu, Oppdal, Midtre Gauldal, Tydal, Holtålen and Røros in the county of Sør-Trøndelag, and Engerdal and Rendalen, Os, Tolga, Tynset and Follidal municipalities in Hedmark county, and Surnadal and Rindal municipalities in the county of Møre- og Romsdal.

Section 3 of the agreement states that state authorities shall fully inform the Sami Parliament about all matters that may directly affect the Sami, as well as about all relevant concerns and queries at all stages of the process.

State authorities preparing legislative or administrative measures are required to inform and facilitate dialogue with the Sami Parliament as early as possible in the process. Information at an early stage in the process is a prerequisite for the Sami Parliament's potential ability to influence the process and the final result. The responsible State authority is obliged - based on its substantive knowledge - give an orientation regarding which Sami interests may be affected in the relevant case. On its side, the Sami Parliament is responsible for giving feedback on this as swiftly as possible, and for also informing the authority concerned whether the matter raises other issues in relation to Sami interests.

Transparency about all aspects of the matter concerned is a prerequisite for good and effective consultations. The agreement requires that relevant and complete information must be given to the Sami Parliament. The authorities are responsible for presenting the information in such a way that the contents of the

matter are understood; this might in some cases mean that the information must be given in the Sami language.

The obligation to inform the Sami Parliament about all relevant aspects of the matter implies that the information must be sufficient enough to enable the Sami Parliament to assess all aspects of the matter, and thereby make an opinion on the matter on the basis of sound analysis. In cases of draft legislation of great impact on Sami culture, it is required that the Sami Parliament considers the draft legislation in its entirety before it can take a position in the matter.

Section 4 establishes that Information exchanged between state authorities and the Sami Parliament in connection with consultations may be exempted from public disclosure provided it is authorised by law. However, the final positions of the parties in individual matters shall be made public.

Section 5 of the agreement stipulates that regular half-yearly meetings shall be held between the Minister responsible for Sami Affairs and the President of the Sami Parliament. Other governmental ministers may attend these meetings when required. At these meetings, the situation and developmental needs of the Sami society, issues of fundamental and principle importance, and ongoing processes, shall be discussed. Moreover, regular half-yearly meetings shall also be held between the Sami Parliament and the Inter-Ministerial Coordination Committee for Sami Affairs. Information about relevant current Sami policy matters shall be provided at these meetings.

Section 6 of the agreement contains general provisions concerning the consultation procedures. It establishes that the consultations carried out with the Sami Parliament, in application of the agreement on consultation procedures, shall be undertaken in good faith, with the objective of achieving agreement to the proposed measures. This provision establishes requirements in line with article 6 (2) of Convention No. 169.

In its commentary on individual provisions contained in the agreement on procedures for consultations, the Government states that the point of departure for all consultations shall be good faith, and an objective of achieving an agreement with the Sami parliament. The Government informs its entities that *“consultations shall take place in good faith, with the objective of achieving agreement to the proposed measures. This means the process of consultations with the Sami parliament is something more than an ordinary public process through which appropriate bodies are invited to consider various proposals (process of hearing), as the parties must sincerely and genuinely seek to reach an agreement to the proposed measures. This also means that State authorities are under an obligation to initiate consultations with Sami Parliament and make all necessary efforts to achieve an agreement even though the State authority concerned may believe that the likelihood of achieving an agreement is limited. However, the agreed procedures for consultations do not dictate that an agreement or consent to the proposed measures must always be reached.*

The required extent of the consultations may vary in specific situations. The most important requirement is that necessary consultation processes and procedures are established in order to enable the Sami Parliament to exert real influence on the process and the final result. A simple information meeting will thus normally not fulfill State authorities obligation to consult indigenous peoples under ILO Convention No. 169.”

The explanatory commentary issued by the Government, intended to inform state entities about the agreement, provides with further explanation about the contents of the consultation obligation:

“Fulfillment of the consultation obligation requires that both parties are informed about the counterpart’s position and assessments. The State party shall ensure that its interests and views are communicated to and understood by the Sami Parliament, and that the State party has understood the position of the Sami

Parliament. The Sami Parliament has a corresponding responsibility to communicate its points of view on the matter concerned. If the parties do not reach an agreement, they are expected consider compromises and possible changes in the original proposal with the aim to narrow the gap between their positions. When necessary, provisions shall be made for further consultations.”

Moreover, section 6 of the agreement states that as early as possible state authorities shall inform the Sami Parliament about the commencement of relevant matters that may directly affect the Sami, and identify those Sami interests and conditions that may be affected. After the Sami Parliament has been informed on relevant matters, it shall inform the relevant State authority as soon as possible whether further consultations are required. However, the Sami Parliament can also independently identify matters which in its view should be subject to consultations.

The agreement also elaborates that in cases when state authorities and the Sami Parliament agree that further consultations shall be held on a specific matter, they shall then seek to agree on a plan for such consultations, including the dates and venues for further contact (e.g. meetings, video-conferences, telephone contact, exchange of written material), deadlines for responses, whether consultations at the political level are required and the type of political proceedings. Sufficient time shall be allocated to enable the parties to carry out genuine and effective consultations and political consideration of all relevant proposals. In case it is necessary for the Sami Parliament to consider and debate the matter concerned in a plenary session, such debate and consideration must be conducted as early as possible in the process.

The agreement dictates that whenever necessary, provisions shall be made for further consultations, and that consultations shall not be discontinued as long as the Sami Parliament and State authorities consider that it is possible to achieve an agreement. When a matter is submitted for consideration to the Government

(Cabinet), the ministerial submission document shall clearly inform other governmental ministries about the concluded agreement with the Sami Parliament and, if necessary, also to include information about matters where agreement has not been reached. In governmental propositions and reports to the national parliament, the Storting, on matters where the governmental position differs from that of the Sami Parliament, the views and positions of the Sami Parliament shall be reflected in the documents submitted.

Section 7 of the agreement requires that minutes to be kept of all consultation meetings between State authorities and the Sami Parliament. The minutes shall include a brief account of the subject matter, the views and positions of the parties, and the conclusions made at the meeting. This means that minutes shall be kept of all consultation meetings, unless both parties agree otherwise. The agreement also stipulates that the proceedings should also identify matters where an agreement has been achieved through the State party's telephone conversations with the Sami Parliament. In matters where it is considered particularly important to be able to document agreement, minutes should be kept of relevant telephone conversations, and other conversations.

Section 8 of the agreement states that the ministry responsible for Sami Affairs and the Sami Parliament shall jointly appoint a specialized analysis group which shall submit an annual report concerning the situation and developmental trends of the Sami society on the basis of Sami statistics. The report shall be used as the basis for consultations on specific matters and for consultations concerning the developmental needs of the Sami society at one of the half-yearly meetings between the Minister responsible for Sami affairs and the President of the Sami Parliament.

Whenever state authorities or the Sami Parliament consider there to be a need for background studies to strengthen the factual or formal basis for assessments and decisions, this shall be raised as early as possible, and both parties shall

include questions concerning the terms of reference for such studies into the consultation process. The Government and the Sami Parliament shall seek to reach an agreement on the terms of reference for such a study, and who shall carry out the study. The Government and the Sami Parliament are obliged to assist in providing information and materials necessary for carrying out the study.

Besides consultations with the Sami Parliament, state authorities may also in certain instances need to consult other Sami entities. Section 9 of the agreement addresses this possibility, and decides that in matters where state authorities plan to consult local Sami communities and/or specific Sami entities that may be directly affected by legislation or administrative measures, state authorities shall as early as possible notify which Sami entities or organizations it regards as affected by the matter, and discuss the coordination of such consultation processes with the Sami Parliament.

2.1.2 Proposed Legislation on Consultations²⁶

The Sami Rights Committee, which was reappointed in June 2001, and mandated to examine the Sami people's legal position as regards the rights to and disposition and use of land and water in traditional Sami areas from an including the county of Troms and southwards, submitted its recommendations in December 2007. The recommendations of the Committee also include draft legislation on consultations applicable in traditional Sami areas in Norway (the administrative procedure and consultation act).²⁷

In the view of the Committee, Norway's international legal obligations require specific legislation on administrative procedures and consultations in the case of measures that may have an influence on natural resources in traditional Sami areas, in particular articles 6, 7 and 15 of Convention No. 169, and article 27 of

²⁶ Norges Offentlige Utredninger (NOU) 2007:13 Bind A *Den nye sameretten*, pages 121 -136

²⁷ Forslag til lov om saksbehandling og konsultasjoner ved tiltak som kan få virkning for naturgrunnet i tradisjonelle samiske områder (saksbehandlings- og konsultasjonsloven)

the International Covenant on Civil and Political Rights (ICCPR). The draft law aims at implementing and concretizing articles 6, 7 and 15 of Convention No. 169.

The Committee concluded that Norway's international legal obligations imply that in cases where a planned measure may be of importance to the Sami – as an indigenous people – they have the right to actively participate in the decision-making process, including in the implementation phase of the process. Moreover, it is the view of the Committee that it is required that the Sami are granted a real possibility to influence the process as well as the contents of the decision. The Committee also emphasizes that such consultations must be carried out in good faith and be arranged such that they are a suitable tool to achieving agreement on the measure at issue.²⁸

The scope of application for the proposed provisions are to be valid for legislation, regulations, individual decisions, regulation measures and other measure that may affect the natural resources in traditional Sami areas. In its explanatory notes, the Committee emphasizes that – in accordance with the relevant provisions of Convention No. 169 – it will also be a prerequisite for the consultation provisions being applicable that it is a matter of cases which have a “direct importance” for Sami rights-holders or use-of-area interests.

According to the draft law, the Sami Parliament and other Sami rights-holders and interests, including Sami reindeer herders and representatives of Sami communities, will have the right to consulted to the extent they may be directly affected by the relevant measure. The draft law stipulates that the Government, the ministries and other sub-ordinate government agencies, municipalities and counties shall be obliged to consult Sami entities. Moreover, the provisions are proposed made applicable for any entity which exercises public authority, e.g.

²⁸ Ibid, page 132 (Chapter 2.5.6.2)

bodies that on behalf of the state exercise landowner rights in traditional Sami areas.

The draft law contains provisions stating that the implementation of the consultations shall be made in good faith and with the aim of achieving agreement on the proposed/planned measures; on notification of interests that are entitled to be consulted; on deadlines – aimed at ensuring progression in the consultations; on the keeping of minutes and public disclosure; and on the role of ministries and the Sami Parliament in the consultations.

A principal provision is proposed in chapter 17 of the draft law stating that the Sami Parliament and, as the case may require, representatives of other Sami entities or interests, unless otherwise decided, are entitled to representation in appointed bodies that deal with questions of use and exploitation of land and water in traditional Sami areas.

2.2 Case Study: Finland, Norway and Sweden (Draft Nordic Sami Convention)

The Nordic Expert Group, jointly appointed by the governments and Sami Parliaments in Finland, Norway and Sweden - with the mandate to draft a Nordic Sami Convention - submitted a unanimous proposal on a Sami Convention to the governments and the Sami parliaments in November 2005.²⁹ The Sami Parliaments and the Sami Council have all endorsed the proposed Convention, whereas the governments are still in the process of reviewing the proposal.

²⁹ An English language version of the proposed Nordic Sami Convention is available at:
http://www.regjeringen.no/Upload/AID/temadokumenter/sami/sami_samekonv_engelsk.pdf

The proposed Convention contains several provisions affirming the right of the Sami to participate in decision-making processes that may affect their situation or rights.

Article 15 of the proposed Convention decides that the Sami parliaments should have the right to make independent decisions on all matters where they have the mandate to do so under national or international law. Moreover, it suggests that the Sami parliaments should also have the right to conclude agreements with national, regional and local entities concerning cooperation with regard to the strengthening of Sami culture and the Sami society.

Article 16 establishes a right to negotiations for the Sami parliaments in matters of major importance to the Sami. In such instances, negotiations shall be held with the Sami parliaments before decisions are made by a public authority. The draft provision stipulates that these negotiations must take place sufficiently early to enable the Sami parliaments to have a real influence over the proceedings and the result. Moreover, it is proposed that states should not be permitted to adopt or permit measures that may significantly damage or otherwise impair the basic conditions for Sami culture, Sami livelihoods or society, unless consented to by the Sami parliament concerned.

Article 17 states that the Sami parliaments shall have the right to be represented on public councils and committees when these deal with matters that concerns the interests of the Sami. Matters concerning Sami interests shall always be submitted to the Sami parliaments before a decision is made by a public authority. The provision also stipulates that states are obliged to investigate the need for such representation and prior opinions from the Sami parliaments, and that this must take place sufficiently early to enable the Sami parliaments to influence the proceedings and the outcome. The provision also stipulates that it should be up to the Sami parliaments themselves to decide when they wish to be represented or submit prior opinions during such preparation of matters.

Article 18 decides that national assemblies of the states, or their committees or other bodies shall, upon request, receive representatives of the Sami parliaments in order to enable them to report on matters of importance to the Sami. The provision stipulates that Sami parliaments shall be given the opportunity to be heard during the consideration by national assemblies of matters that particularly concern the Sami people.

Article 19 of the draft Convention states that the Sami parliaments shall represent the Sami in inter-governmental matters/processes, and that states shall promote Sami representation in international institutions and Sami participation in international meetings.

Finally, article 21 of the draft Convention establishes an obligation for states to consult Sami communities; it is stated that states shall respect and when necessary consult Sami villages, communities, reindeer herders' communities, village assemblies, and other competent Sami organizations or local Sami representatives.

3. Social, Economic, Cultural and Political Institutions

Indigenous peoples' right to retain and develop their own social, economic, cultural and political institutions is a fundamental right under international human rights law. The existence of such institutions is also a core element in the description of groups that are recognized as 'indigenous peoples'. The statement of coverage of Convention No. 169 identifies those peoples who have retained some or all of their own social, economic, cultural and political institutions as 'indigenous peoples'; irrespective of their legal status.³⁰

Such institutions are an integral part of what it means to be an indigenous people – or as a distinct people. Their social, economic, cultural and political institutions are largely what distinguish them from other sections of the national population. International human rights provisions on indigenous peoples' rights are in essence about the promotion and protection indigenous peoples' collective right to maintain, control and develop their own social, economic, cultural and political institutions – including their practices, customs, customary law and legal systems.

International human rights provisions concerning indigenous peoples' rights in relation to their institutions are frequently misinterpreted to apply only to their traditional organizations or bodies/entities. The concept of institutions also encompasses various forms of traditional practices, customs, customary law and legal systems; this is often ignored. In some instances it is clear that international provisions use the term in the context of physical institutions or organizations, e.g. provisions which oblige governments to consult indigenous peoples through their 'representative institutions'. However, in other instances, the concept of institutions has a broader meaning, one that includes indigenous peoples' practices, customs, and cultural patterns.

³⁰ ILO Convention No. 169, article 1 (1) (b)

The preamble of the UN Declaration on the Rights of Indigenous Peoples recognizes the inherent inter-connectivity between indigenous peoples' institutions and traditions or customs. The Declaration recognizes 'the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic, and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources."³¹

Article 4 of Convention No. 169 obliges governments to adopt special measures, as appropriate, for safeguarding indigenous peoples' institutions in a way which is not contrary to the freely-expressed wishes of the indigenous peoples concerned. The term 'institutions' in article 4 should be understood as also encompassing institutionalized or traditional practices and customs of indigenous peoples; a contrary interpretation would be contradictory to the underlying principles of the Convention. Article 7 (1) of the Convention stipulates that indigenous peoples have the right to decide their own priorities for the process of development as it affects their institutions, and to the extent possible exercise control over their own economic, social and cultural development. This provision deals with indigenous peoples' institutions in the context of their right to development - in accordance to their own interests and needs - and cannot be separated from their traditional cultural, social, and economic practices and customs. The concept of institutions, when applied in this broader perspective, encompasses the entire political, economic, social and cultural life of indigenous peoples.

Convention No. 169 also distinguishes between various forms of institutions; institutionalized practices and concrete/physical institutions. Article 5 (a) of the Convention obliges governments to respect the integrity of indigenous peoples' values, practices and institutions. Whereas article 6 (1) (a), establishes an obligation to consult indigenous peoples on matters that may affect them directly,

³¹ UNDRIP Preamble, paragraph 7.

which requires that such consultations are carried out through indigenous peoples representative institutions. Article 6 (1) (b) obliges governments to establish means for the full development of indigenous peoples' own institutions, and in appropriate cases provide the resources necessary for this purpose. Also of relevance in this context, article 8 (2) affirms that indigenous peoples have the right to retain their own customs and institutions, where these are compatible with the national legal system and international human rights norms.

The protection of indigenous peoples' right to retain and develop their institutions aims at ensuring the *survival and continued development* of the cultural, social and religious or spiritual identity of indigenous peoples. Indigenous peoples' cultures and traditions are dynamic and responsive to the realities and needs of their time. Hence, these provisions should not be understood as being restricted only to traditional institutions, but to also apply to current practices of indigenous peoples' economic, cultural and social development. In other words, indigenous peoples' cultural adaptations and technological development should not in any way reduce or impair the applicability of these provisions.

International human rights law recognizes this dynamic and developmental aspect as an integral part of indigenous peoples' social, economic and cultural rights. For example, under article 27 of the International Covenant on Civil and Political Rights (ICCPR), the UN Human Rights Committee has affirmed that processes of cultural adaptation or development in indigenous societies do not reduce the applicability of internationally recognized rights of indigenous peoples.

UN Human Rights Committee - Jurisprudence

In the *Länsman v. Finland* case (1992)³², which was related to the harmful effects of a stone quarry to reindeer herding activities of the indigenous Sami in Finland, the Committee emphasized that article 27 of ICCPR does not protect only traditional means of livelihood but even their adaptation to modern times.³³

The Committee stated that the right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. Therefore, the fact that the authors (the Sami party) may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.³⁴

In its General Comment No. 23 on ICCPR article 27, the Committee recognizes that culture can manifest itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.³⁵

Thus, traditional reindeer herding is of such a vital importance to the Sami people, in particular in relation to their language, culture, economy and social relations, that it cannot only be regarded as a livelihood, but should also be regarded as a cultural, economic and social institution.

Article 5 of the UN Declaration on the Rights of Indigenous Peoples affirms that 'indigenous peoples have the right to maintain and strengthen their distinct

³² *Ilmari Länsman et al. v. Finland* (Communication 511/1992), Views adopted: 26 October 1994, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40), pp. 66–76.

³³ Scheinin, Martin (2204) *Indigenous Peoples' Land Rights under the International Covenant on Civil and Political Rights*

³⁴ *Ilmari Länsman et al. v. Finland* (Communication 511/1992) – UN Human Rights Committee

³⁵ UN Human Rights Committee, General Comment No. 23 on Article 27 of the International Covenant on Civil and Political Rights (ICCPR)

political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.'

Article 5 is one of the many provisions of the Declaration elaborating on the Declaration's foundational principle: indigenous peoples' right to self-determination (article 3). The emphasis is on indigenous peoples' right to maintain and strengthen their own institutions. Their right to participate in the political, economic, social and cultural life of the State is formulated as an optional or secondary right – it is up to indigenous peoples to decide if, and how, to take part in the life of the state. In most cases, indigenous peoples seek solutions through which both options can be implemented: (1) autonomy and self-government in matters relating to their internal and local affairs, including culture, religion, education, social affairs, economic activities, land and resource management; and (2) full and effective participation in the political, economic, social and cultural life of the State, including through regular democratic processes.

The coverage of statement of Convention No. 169 makes it clear that the right to self-determination is not addressed in any of the provisions of the Convention, or more precisely that the term 'peoples' – as used in the Convention – shall not be construed as having any implications as regards the right to self-determination. However, the substantive provisions of the Convention cannot be interpreted in an international legal vacuum. It has to be taken into account that the Declaration recognizes that indigenous peoples, based on the right to self-determination, have the right to freely pursue their economic, social and cultural development. It is not possible for indigenous peoples to realize their right to self-determination unless their practices, customs, priorities and institutions are fully acknowledged. The right to self-determination also implies that indigenous peoples are entitled to establish contemporary institutions, if traditional institutions are no longer adequate to their needs and interests. The right to self-determination, similar to

the right to development, is of a dynamic nature – without a uniformed application.

Anaya (2008) is of the view that the Declaration's explicit affirmation that indigenous peoples in particular have a right of self-determination represents recognition of the historical and ongoing denial of that right and the need to remedy that denial (article 3). The remaining articles of the Declaration elaborate upon the elements of self-determination for indigenous peoples in light of their common characteristics and in *sui generis* fashion mark the parameters for measures to implement a future in which self-determination for them is secure.³⁶

Accordingly, the Declaration requires that states, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration (article 38); including “autonomy or self-government” for indigenous peoples over their “own internal and local affairs” (article 4), in accordance with their own institutions, practices and customs. Article 20 of the Declaration stipulates that indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions.

³⁶ Anaya, James (2009) Presentation entitled “*the Right of Indigenous Peoples to Self-Determination in the Post Declaration Era*” – held in Alta, Norway, 4 February 2008 at the International Conference on Sami Self-determination: Scope and Implementation. The article is not yet published

Bangladesh³⁷ (not party to Convention No. 169, but party to Convention No. 107)

Bangladesh has a unitary system of government. However, the legal and administrative system in the Chittagong Hill Tracts (CHT) is nevertheless separate and distinct from those in other parts of the country. There are eleven indigenous peoples in the CHT, with their own language, customs and cultures.³⁸

Those not regarded as being indigenous or tribal are predominantly members of the Bengali people. The indigenous peoples of the CHT are recognized as “indigenous” to the CHT region by the CHT Regulation of 1900 and Act No. 12 of 1995.

The traditional indigenous institutions (traditional chiefs/rajas, headmen and karbaries), contemporary elected councils (at the district and regional levels), and the central government (through its district and sub-district officers) share the administrative authority in the CHT region with.

The *karbari*, normally an elderly man, is the traditional head or chief of a hamlet or village. In practical terms, the *karbari* position is in almost all cases *de facto* hereditary. Several villages form a *mauza*. The *mauza* is a unit of land revenue administration in Bangladesh that has fixed and demarcated geographical boundaries. In the CHT, the *mauza* is also a unit of civil and judicial administration under the charge of the traditional *headman*, in addition to being a unit of revenue administration. The *headman* is responsible for resource management, land and revenue administration, maintenance of law and order, and the administration of customary indigenous justice, including as an appellate authority over the *karbari*'s judicial functions. The 369 *mauza* in the CHT are part

³⁷ Raja Devasish Roy (2004) *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh* Defending Diversity: Case Studies (Ed. Chandra Roy), the Sami Council

³⁸ These are the Bawn, Chak, Chakma, Khumi, Khyang, Lushai, Marma, Mru, Pankhua, Tanchangya, and Tripura.

of one of the three administrative and revenue “circles” of the three *chiefs* or *rajas*. The raja’s jurisdiction – at one time based upon tribal and clan divisions was territorialized during British rule through the demarcation of fixed geographical areas.

Although, traditional indigenous traditional institutions play an important role in the politics and administration of the CHT, the most powerful institutions with regard to day-to-day administrative functions, the elected district councils are today more powerful than the traditional institutions. These district councils are in charge of matters such as primary education, public health, fisheries, livestock, small and cottage industries. According to the 1997 CHT Accord, land administration, law and order, and secondary education are also to be transferred to these councils, which are directly subordinated to the CHT Regional Council.

However, indigenous leaders of the CHT are largely dissatisfied with the status of indigenous peoples’ rights in the CHT, and call for, among other things, a meaningful revival of autonomy for the indigenous peoples of the CHT and efforts to reduce discrimination against indigenous peoples on the part of non-indigenous politicians, civil servants, and mainstream society.

Roy (2004) notes that the 1997 CHT Accord, and the legislation consequent thereupon, contain strong references to customary rights and customary personal laws of the indigenous peoples of CHT.³⁹ Customary rights have been acknowledged more directly by formal legislation in recent years, as a direct consequence of the 1997 CHT Accord. He elaborates on whether ILO Convention 107, which Bangladesh has ratified,⁴⁰ in any way contributed to the inclusion of such provisions – which largely are in line with a number of

³⁹ Raja Devasish Roy (2004) *Challenges for Juridical Pluralism and Customary Laws of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh* Defending Diversity: Case Studies (Ed. Chandra Roy), the Sami Council, pages 137-138

⁴⁰ Ratified in 1972

provisions of Convention No. 107 that seek to protect the customary land rights and other economic, social and cultural rights of indigenous people/populations. Roy is of the view that Convention No. 107 may have influenced the Government of Bangladesh into being reasonably receptive towards customary law matters.

Norway (party to Convention No. 169)

In 1988, a specific section on Sami rights was included in the Constitution of Norway, establishing constitutional guarantees for Sami language, culture and society. Section 110a states that it is the obligation of the State to create the conditions necessary for the Sami to protect and develop their language, their culture and their society.

The establishment of the Sami Parliament in 1989 is regarded as an important part of the implementation of section 110a of the Constitution. There has been an ongoing debate in Norway about the extent of legal obligation that the constitutional provision assigns to the State versus the political and moral obligations, i.e. whether, or to what degree, it is more of a political manifestation than a legally binding provision. It is obvious, however, that the constitutional provision has a substantive legal content, even though this dimension has not been given much attention until now. The White Paper concerning the constitutional provision suggests that the provision should be considered as an incorporation of Article 27 of the International Covenant on Civil and Political Rights, at the level of the Constitution. If this indeed is the case, the same must apply to Article 1 of the Covenant, as the Sami peoples right to self-determination is a prerequisite for the protection and development of the Sami language, culture and society.

Section 2-1 of the Norwegian Sami Act provides that the Sami Parliament's mandate includes all questions that Parliament considers to relate to the Sami. The Parliament can on its own initiative raise and issue statements on all

questions within its mandate, and raise questions before public authorities and private institutions. Moreover, it has the authority to make decisions when this follows from legislative or administrative provisions.

In Norway, there is no clearly defined Sami Homeland area as the case is in Finland. This is largely due to historical factors, among others. The Sami in Norway are spread over wide parts of the country so that many of the traditional Sami areas appear today as Sami “islands” or enclaves. The Sami in Norway have also been reluctant to attempt to define such a geographic area, for fear that some traditional Sami areas would be excluded.

However, in Norway, there is something called the administrative area for Sami language. This area encompasses the municipalities of *Karasjok*, *Kautokeino*, *Nesseby*, *Porsanger* and *Tana* in Finnmark County, the municipalities of *Kåfjord* in Troms County, and the municipality of *Tysfjord* in Nordland County. Within this area, the Sami and Norwegian languages have equal status as national languages.

Successive governments have stated that the goal for the Sami policy of the Norwegian State is to develop and implement a Sami policy which is as comprehensive as possible, based on Sami premises. Consecutive governments have identified the Sami people’s right to self-determination as an issue of high priority. It is stated that the question concerning Sami self-determination need to become subject to detailed discussions between the Government and the Sami Parliament. In 2002, the Government informed the National Parliament (the Storting) that it is of the view that the interpretation of the scope of the Sami people’s right to self-determination must be based on international law and emerging international practise. Moreover, that Sami self-determination must be implemented within the territory of the existing democratic Norwegian State.⁴¹

⁴¹ Stortingsmelding nr. 33, 2000-2001, page 18

In April 2003, the Government announced its proposition concerning land rights in Finnmark County through the submission of the Finnmark Act to the National Parliament (the Storting). The proposed legislation was strongly criticized and rejected by the Sami Parliament and various Sami bodies and organization. It was argued that the proposed legislation did not meet the requirements of international law, including article 14 of the ILO Convention No. 169.

In 2004, the Standing Committee on Justice of the National Parliament established a dialogue process with the Sami Parliament and the County Council of Finnmark on the Finnmark Act. This process concluded with an agreement on the content of the Finnmark Act between the National Parliament and the Sami Parliament. This process carries certain constitutional significance, as this the first time that here has been direct substantive dialogue between the National Parliament and the Sami Parliament. Although, the process by the National Parliament was identified as a “dialogue” it was conducted through negotiations between the national parliament and the Sami Parliament. It remains to be seen whether this establishes any kind of precedence as to how, in the future, the national parliament might deal with matters which are regarded as being of great importance to the Sami society.

The Finnmark Act, as agreed between the National Parliament and the Sami Parliament, transfers approximately 95 per cent of Finnmark County (about 46,000 sq. km – an area approximately the size of Denmark) to a new agency called the Finnmark Estate. This area was previously owned by the Norwegian State. The purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in an ecologically sustainable manner for the residents of the county, and “particularly as a basis for Sami culture and reindeer husbandry”. The basic principle of the Act is to legally recognize that the indigenous Sami people, through long-term use of land and natural resources, including water resources, have the right of use and ownership of the territory concerned. Recognition of these rights is an important element in the Finnmark

Act. A Commission and a tribunal are set up for the purpose of further identifying the use and ownership of lands and resources in Finnmark, based on the principle of established custom and immemorial usage. According to section 3 of the Finnmark Act, it shall be implemented in conformity with international law concerning indigenous peoples and minorities. The Act establishes a co-management regime for the Finnmark Estate between the Sami Parliament and the County Council of Finnmark.

The National Parliament established direct contact with the Sami Parliament concerning the substantive content of the Finnmark Act, when it became clear that the proposed legislation did not meet international standards, as referred to earlier. The Government had also not undertaken proper consultations with the Sami Parliament in developing the legislation, and in 2005, this process was concluded by the signing of an agreement between the Government and the Sami Parliament on procedures for consultations between State authorities and the Sami Parliament.

The position and power of the Sami Parliament in Norway has gradually been strengthened. However, the Parliament is formally still an advisory body, with limited decision-making power.

The Sami Parliament in Norway is a contemporary indigenous political institution, to which members are elected through Nordic-style democratic elections – by and among the Sami living in Norway. It is organized in a manner very similar to the National Parliament of Norway, where the majority group/party/coalition forms the government. In the case of the Sami Parliament, based on a western inspired parliamentary system, the governing entity is called the Council of the Sami Parliament. The Sami Parliament was not established as a consequence of Norway's ratification of Convention No. 169 in 1990, as it precedes the ratification by one year. However, the Sami Parliament has been recognized,

including by the ILO Committee of Experts, as a representative political institution of the Sami living Norway – with the right to decide the priorities for the process of Sami development (article 7 of Convention No. 169), and as the body which should be consulted by authorities whenever consideration is being given to legislative or administrative measures which may affect the Sami directly (article 6 of Convention No. 169).

The legal re-introduction of another Sami institution – the traditional Sami reindeer husbandry *siida* system/institution – was however to a large extent influenced and justified by international legal provisions, including article 5 (b) of Convention No. 169.

Siida

Traditionally, the Sami lived in groups, *siida*, varying in size, determined by the resources available in the area. Within the *siida* there was no social stratification. The form of governance was a stateless local democracy, with a leader. The leader presided at meetings, was responsible for dividing hunting spoils, asserted the rights of the *siida* to neighboring groups, mediated in internal conflicts and was the spokesperson for the *siida*.⁴²

Within Sami reindeer herding communities, the *siida* system was functional until the 1970's – when new reindeer husbandry legislation nullified the role of the *siida* as a legal and social entity. A new system was introduced, through which the *traditional collective siida* system was replaced by a system of *individual reindeer herding license or operational units*. Individuals now had to apply for reindeer herding license (“*driftsenhet*”) from state reindeer authorities, and reindeer herding was re-organized into reindeer herding districts (“*reinbeitedistrikt*”); the boundaries between such areas were more often than

⁴² Hætta, Odd Mathis (1993) *The Sami– Indigenous People of the Arctic* (Davvi Girji OS)

not arbitrarily drawn - in conflict with traditional *siida* boundaries. This resulted in internal grazing conflicts and over-grazing, as the traditional system for managing grazing resources and disputes was no longer functional, and individual reindeer owners were forced to compete about scarce resources.

The reindeer husbandry Act of 2007 ("*reindriftsloven*")⁴³, which replaces the reindeer husbandry Act of 1978, re-introduces the *siida* as a significant legal entity. The amendment is based on the recognition that the system of individual reindeer herding license and the organization into reindeer herding districts do not work well with the traditional Sami reindeer husbandry economic and social system. Although, the system of licensing and districts are maintained, the *siida* has been given a prominent role in the organization and management of Sami reindeer husbandry in Norway, as of 1 July 2007.

⁴³ Act No. 40 of 15.06.2007

4. Education

Indigenous peoples have historically been among the poorest and most excluded and disadvantaged social sectors in the world. One of the biggest factors contributing to the disadvantaged position of indigenous peoples is lack of quality education. Millions of indigenous children around the world are deprived of the right to education.⁴⁴

Example:

In Guatemala indigenous people have had half the years of schooling as non-Indigenous people; in Mexico adult Indigenous people have had an average of three years of schooling compared to six years of schooling for non-Indigenous people; and in Peru Indigenous adults average six years of schooling while non-Indigenous average nine. Moreover, Indigenous schools tend to have teachers with less experience and less education, and bilingual education is poorly implemented. One of the biggest factors contributing to the disadvantaged position of indigenous peoples in Latin-America is lack of quality education.⁴⁵

The problem for many indigenous peoples in relation to education is not only the inferior schooling, or complete lack of formal education, but also the content and objective of education made available to them. There are numerous examples where education has been a core element in state policies - aimed at assimilating indigenous peoples into mainstream societies – and to eradicate their cultures, languages and ways of life.

⁴⁴ http://portal.unesco.org/education/en/ev.php-URL_ID=30859&URL_DO=DO_TOPIC&URL_SECTION=201.html

⁴⁵ Williams, Sandra (2007) *Indigenous Education Latin America*
http://poverty.suite101.com/article.cfm/indigenous_education_latin_america

Example:

The Nordic states have historically adopted and implemented policies aimed at repressing the indigenous Sami culture, in particular through the educational system. During the 19th century, in an effort to support a nationalist agenda, Norway decided to make the Sami people as Norwegian as possible. The Sami language was effectively banned in Norwegian schools until the late 1960's.

International human rights law recognizes the right to education as a fundamental human right for everyone. Education enables individuals to achieve the full development of their personality and abilities, as well as enabling them to participate effectively in the society. When elaborating on indigenous peoples right to education, it is necessary to take into account two categories of human rights provisions: (1) those provisions reaffirming that everyone has the right to education (individual right to education), and (2) the specific international instruments acknowledging indigenous peoples' collective educational rights – as found in Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples.

4.1 The Individual Right to Education

Articles 13-14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and articles 28-29 of the Convention on the Rights of the Child (CRC), contain universally applicable standards for the right to education.

Article 13 of ICESCR establishes education as a fundamental human right, and as an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty. Education is important in empowering women, safeguarding children from exploitative and hazardous labor, promoting human rights and democracy etc.

ICESCR article 13 (1) obliges states to ensure that all education shall be directed towards the aims and objectives which are identified in these provisions, including the full development of the human personality and the sense of its dignity. However, the precise and appropriate application of the right to receive an education will depend upon the conditions prevailing in a particular state. This is because state obligations under ICESCR are based on the *principle of progressive realization* (article 2). This means that the Convention only imposes a duty on state parties take steps to the maximum of its available resources, with a view to progressively achieving the full realization of the rights recognized in ICESCR. However, the principle of progressive realization does not mean that states have no immediate obligations. Article 2 (2) establishes that states are obliged to guarantee that the right to education can be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Discrimination in relation to the right to education, deliberate or *de facto*, is one of the main problems faced by indigenous individuals in their attempt to exercise this right. According to the UN Committee on Economic, Social and Cultural Rights, the right to education imposes three types or levels of obligations on states parties: (1) to respect, (2) protect and (3) fulfill the right. In turn, the obligation to fulfill incorporates both (a) an obligation to facilitate and (b) an obligation to provide.⁴⁶ Indigenous peoples are often faced with a situation where the state is neither facilitating nor providing necessary resources for the enjoyment of their right to education on an equal footing with the rest of the national community.

Article 28 of CRC reaffirms the right to education as a fundamental right, and clarifies that this right is applicable to every child. The UN Committee on the Rights of the Child has adopted a comprehensive set of recommendations on the

⁴⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 12, Right to Education, E/C.12/1999/10 8 December 1999, paragraph 46

rights of indigenous children, including recommendations concerning the right to education.⁴⁷ The Committee recommends that states parties ensure access for indigenous children to appropriate and high quality education while taking complementary measures to eradicate child labor, including through the provision of informal education where appropriate.

Similar to ICESCR and CRC, ILO Convention No. 169 (article 26) obliges states to take measures to ensure that indigenous individuals have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community. This provision is formulated as an *individual right* to education, and it should be interpreted in line with the corresponding provisions in other international human rights treaties.

4.2 Collective Aspects of the Right to Education

International human rights law acknowledges that the individual right to education, even if it is fully implemented, is not sufficient to guarantee that this meets the needs of indigenous societies. Hence, ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples acknowledge certain collective educational rights for indigenous peoples.

Article 27 of Convention No. 169 reflects the fundamental philosophy of the Convention, which is to promote and protect indigenous peoples' right to simultaneously be able to maintain and develop their own cultures, ways of life, traditions and customs, and to continue to exist as parts of their national societies; with their own identity, cultures, structures and traditions.

Article 27 (1) stipulates that education programs for indigenous peoples shall be developed and implemented in *co-operation* with them to address their specific

⁴⁷ UN Committee on the Rights of the Child, *Recommendations on the Rights of Indigenous Children*, 3 October 2003 (Day of General Discussion on the Rights of Indigenous Children)

needs. The provision also stipulates that such programs shall incorporate their histories, knowledge, technologies, values systems, and their social, economic and cultural aspirations.

This implies that indigenous peoples are entitled to fully participate in the development and execution of such education programs, in order to ensure that education programs effectively meet their specific needs and that their values, cultures etc become an integral part of such programs. The provision also emphasizes that education programs shall reflect indigenous peoples own *aspirations for the future* as far as social, economic and cultural matters are concerned. This is a reflection of an acceptance that education is an important way of ensuring that indigenous societies can develop in accordance to their own priorities and aspirations.

Article 27 (2) encourages a progressive transfer of responsibilities for the conduct of education programs to indigenous peoples themselves. In addition, article 27 (3) recognizes that indigenous peoples have the right to establish their own educational institutions and facilities, and obliges states to provide appropriate resources for this purpose. The criterion however is that such institutions meet minimum national standards for education. In practical terms, these two provisions acknowledge that indigenous peoples have the right to a certain degree of *educational autonomy* - in the implementation of general education programs and services, and through the establishment of their own educational institutions.

Article 14 of the UN Declaration on the Rights of Indigenous Peoples reaffirms that indigenous peoples have the right to establish their own educational systems and institutions. The provision also clarifies that indigenous peoples not only have the right to establish such institution, but also the right to control their educational institutions. This should be interpreted in light of articles 3 and 4 of the Declaration. Article 3 reaffirms that indigenous peoples have the right to self-

determination, whereas article 4 clarifies that indigenous peoples, in exercising their right to self-determination, have the right to autonomy and self-government in matters relating to their *internal and local affairs*. It is natural to consider education as being a matter relating to indigenous peoples “internal and local affairs” – entitling indigenous peoples the *right to educational autonomy*. The main role of the state in relation to indigenous education, whenever indigenous peoples wish to implement such autonomy, is to ensure that their educational systems and institutions meet the national minimum standards for education. It is however required that such an assessment takes place in co-operation, and with the full participation of indigenous peoples. Moreover, the state is obliged to provide with adequate financial resources for the establishment and administration of such institutions.

The UN Committee on the Rights of the Child also recognizes that the indigenous child’s right to education is not only a matter of access but also of content. The Committee recommends that states parties, with the active participation of indigenous peoples, review and revise school curricula and textbooks to develop respect among all children for indigenous cultural identity, history, language and values.⁴⁸

Moreover, the Committee is of the view that indigenous children have the right to be taught to read and write in their own indigenous languages, or in the language most commonly used by the group to which they belong, as well as in the national language(s) of the country in which they belong. This recommendation echoes article 28 (1) of Convention No. 169, and makes it applicable to all states parties to CRC. The Committee also recommends that states parties take effective measures to increase the number of teachers from indigenous

⁴⁸ UN Committee on the Rights of the Child, *Recommendations on the Rights of Indigenous Children*, 3 October 2003 (Day of General Discussion on the Rights of Indigenous Children)

communities, and allocate sufficient financial, material and human resources to implement indigenous educational programs and policies effectively.⁴⁹

Norway

The 1999 Education Act in Norway has strengthened Sami child's right to study and be taught in the Sami language.

All pupils in primary and lower secondary school in areas defined in the Act as Sami districts are entitled to study in, and be taught in the Sami language. Outside the Sami districts, any group of ten pupils, regardless of their background, who so demand, have the right to study and be taught in the Sami language. They retain this right for as long as at least six pupils remain in the group. Pursuant to the Education Act, Sami pupils in upper secondary schools have the right to study the Sami language.

A special state grant is provided to day care centers that have adopted statutes to the effect that they are oriented towards Sami language and culture. The intention of the grant is to cover the additional expenses incurred in providing Sami day care places, thereby ensuring that Sami children at day care centers have the possibility of developing and strengthening their Sami language skills and their culture. The special grant for Sami day care centers was transferred to the Sami Parliament on 1 January 2001. The Government said that this is in line with the efforts to strengthen the Sami right to self-determination.⁵⁰

As far as the content of education is concerned, in areas defined as Sami districts and according to specific criteria elsewhere in Norway, teaching is given in accordance with the special Sami curriculum. For Sami pupils, this teaching is intended to build a sense of security in relation to the pupils' own culture and to

⁴⁹ Ibid

⁵⁰ CRC/C/129/Add.1 6 October 2004, paragraph 589

develop Sami language and identity, as well as equipping Sami pupils to take an active part in the community and enabling them to acquire education at all levels. State support is provided for the development of textbooks written in the Sami language. The Sami University College has a special responsibility for training Sami teachers.

However, several challenges remain on the implementation of the Sami curriculum in Sami schools in Norway. New research illustrates a number of problems related to the implementation of the curriculum:⁵¹

- The research suggests that the entire school culture needs to change, in particular the way a school attempts to familiarize pupils with the Norwegian society while at the same time teaching the role and value of the Sami culture;
- Schools need to pay more attention to Sami conception of time, place, and nature when teaching is organized;
- The focus on traditional Sami knowledge needs to be strengthened; and
- The main problem is that the Sami curriculum is built on the national curriculum. Hence, the Sami content is not included in every subject.

⁵¹ http://www.eurolang.net/index.php?option=com_content&task=view&id=3081&Itemid=1&lang=sv

5. Indigenous Peoples' Customs and Customary Law

ILO Convention No. 169 recognizes the important role indigenous peoples' customs and customary law can have in the application of national legislation. Article 8 (1) of Convention No. 169 establishes that states shall pay due regard to indigenous peoples' customs and customary law in the implementation of national laws and regulations.

This is a core criterion for effective implementation of many fundamental indigenous peoples' rights under international human rights law, including land and resource rights, and cultural, social and economic rights. Any attempt to identify the scope and content of indigenous peoples' rights, without taking into account their customs and customary law would be incompatible with the underlying principles for the contemporary international provisions on the rights of indigenous peoples.

According to article 8 (2) of the Convention, only those customs and institutions that are incompatible with fundamental rights defined by the national legal

system and with internationally recognized human rights are exempt from the principle enshrined in article 8 (1). This provision establishes cumulative exemption criteria: the customs must be incompatible with both (a) national legislation as well as (b) international human rights provisions. Thus, national legal provisions that are incompatible with rights recognized under international human rights law cannot be used to justify ignorance of indigenous peoples' customs in the application of national legislation. On the other hand, some indigenous customs can not be justified and are in violation of fundamental human rights, such as female genital mutilation⁵² – which is performed in some indigenous communities as a customary practice, or the ritual of burying disabled children or children of unwed mothers alive – prescribed by cultural norms.⁵³

Article 34 of the UN Declaration on the Rights of Indigenous Peoples reaffirms the principle contained in article 8 (2) of the Convention, that it is international human rights law which establishes standards to determine which customs are unacceptable; international human rights law establishes *minimum universal standards* for human rights and freedoms – derived from the inherent dignity of the human person. It states that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards. Moreover, article 35 of the Declaration states that indigenous peoples have the right to determine the responsibilities of individuals of their communities. This provisions is closely linked to the issues of customary law, as such laws are

⁵² Commonly practiced by some indigenous peoples, for instance, the Maasai in Kenya and Tanzania

⁵³(a) Hugo Marques (2008) *The Indian Child who was Buried Alive* Life Site News Com, 26 February 2008 (cultural norms of the Kamaiurás in Brazil require that children of unwed mothers be buried alive)

<http://www.lifesitenews.com/ldn/2008/feb/08022604.html>

(b) O'Brien, Elisabeth (2007) *Anthropology Professor says Tribal Killings of Disabled Babies should be Respected* (Certain tribes in Brazil believe that some babies are "cursed" and therefore do not have souls. Such children include those with physical disabilities, females (or any children of an undesired gender), babies born to unwed mothers, twins or triplets. These "cursed" children are sometimes smothered by leaves, poisoned, buried alive by parents or simply left to die of exposure.)

<http://www.lifesitenews.com/ldn/2007/jul/07070403.html>

important sources for the description of the rights and responsibilities of indigenous individuals residing in indigenous communities.

Whether indigenous peoples customs and customary laws are recognized and taken into account by national authorities in policy decisions and in the application of national laws and regulations largely depends on two main factors: (1) the level of general acceptance of legal pluralism within the national juridical system; and (2) the issue at hand on which the custom or customary law is sought to be made applicable for. The general tendency is that indigenous customs and customary law are much more accepted when they are applied in relation to individuals within indigenous communities and do not create any concerns for state authorities, this applies to customary personal law, and various religious, cultural or social customs and rituals within communities. On the other hand, indigenous customs and customary laws are more reluctantly, if at all, taken into account in relation to matters of concern for the wider society, economic interests of the state or third parties. This is often the case in relation to indigenous peoples' rights to lands, territories and resources. Most states are inherently reluctant to take into account indigenous customs and customary law when considering policies and legislation affecting indigenous peoples' lands, territories and resources. The level of acceptance of legal pluralism – through state acceptance and application of indigenous peoples' customs and customary law - is indeed very selective and pragmatic, and determined largely by the overall interests of the state, in particular the economic interests of the majority population or certain sectors of the national community.

Bangladesh (not party to Convention No. 169, but party to Convention No. 107)

The situation in Bangladesh is an example of the effect state recognition or acceptance of indigenous customs and customary law is closely related to the nature of the issues at hand.

The personal laws of the indigenous peoples of the Chittagong Hill Tracts (CHT) in Bangladesh on marriage, inheritance, and related matters are regulated by unwritten customs, practices and usages. The state accepts this situation, as customary family laws of the different indigenous peoples of the CHT normally do not come into conflict with other laws and systems, since the region has its own partially autonomous indigenous-majority self-government system that acknowledges indigenous law and jurisprudence. Customary personal laws of the indigenous peoples of the CHT are regulated substantively by the traditional institutions of the CHT; village leaders, headmen, and traditional chiefs or rajas.⁵⁴

Unlike indigenous peoples' customary law with regard to their family matters, which to a limited degree have been directly interfered with by national laws and state authorities, the legal status of their customary laws with regard to lands and natural resources is far more contested. Thus, customary land and forest rights are enjoyed usually only where, and to the extent, they do not conflict with state law.⁵⁵

Kenya (not party to Convention No. 169)

This situation of the Maasai in Kenya also provides evidence that whether state authorities recognize, accept or tolerate indigenous peoples' customs and customary law is issue-dependent. Like most other indigenous customary law systems, the Maasai customary law lacks a codified system of records, and hence customs and judicial matters in the traditional sense are preserved through elders.

Maasai female teens between 12 to 14 years of age are circumcised – or

⁵⁴ Raja Devasish Roy (2004), *Challenges for Juridical Pluralism and Customary Law of Indigenous Peoples: The Case of the Chittagong Hill Tracts, Bangladesh*, *Defending Diversity: Case Studies* (Ed. Chandra Roy), the Saami Council, pages 89-158

⁵⁵ Ibid

subjected to female genital mutilation (FGM) - as a social rite of passage. Circumcision as a rite of passage is deeply entrenched in Maasai society, and it is regarded by many as wrong not to circumcise girls; an uncircumcised girl is often perceived as incomplete, and she carries a social stigma – despite the fact that mutilation is likely to result in serious and long-lasting physical complications.⁵⁶ FGM is considered as an act of violence against women, or rather female children, and as a human rights violation.

Although no governmental institution perform circumcisions on girls in Kenya anymore, and the Children's Act of 2001/No. 8 prohibits circumcision of girls, the practice of FGM is still widespread in Maasai communities in Kenya. This is partly due to inadequate preventive measures from authorities to protect Maasai girls from being forcibly mutilated. From a human rights law perspective, this is an unacceptable custom – and the State is obliged to ensure that it is not practiced, despite the fact that this phenomenon in some cases may be defined as an indigenous customs.

Whereas the cruel custom of FGM is *de facto* tolerated by the state as a consequence of inadequate action to eradicate it, the Maasai customs regulating rights to lands and resources are to a limited degree recognized or taken into account.

Article 26 (3) of the UN Declaration on the Rights of Indigenous Peoples, stipulates that states, in giving legal recognition and protection to indigenous peoples' lands, territories and resources, shall do so with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. Consequently, the identification of such lands, territories and resources, and the identification of the scope of the rights pertaining to such

⁵⁶ G. Nasieku Tarayia (2004) *Legal Perspectives of Maasai Culture, Customs and Traditions* Defending Diversity: Case Studies (Ed. Chandra Roy), the Saami Council

lands and resources, cannot only be based on state adhered legal concepts and traditions – which are frequently in direct conflict with those of indigenous peoples.

The specific land rights provisions of Convention No. 169 should be interpreted in light of the corresponding provisions in the Declaration, including article 26 (3), due to the fact that many of the provisions of the Declaration reaffirm general international legal principles. For example, the Supreme Court of Belize is of the view that article 26 of the Declaration reflects a general principle of international law on indigenous peoples' rights to lands and resources.⁵⁷

Finland, Norway and Sweden

Although, in principle, Sami customs and customary law are applicable sources under the respective national legal systems, they are to an extremely limited degree taken into account in policy decisions or in the development and application of national legislation.

Article 9 of the draft Nordic Sami Convention, addresses the issue of Sami legal customs, and reads as follows:

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

Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist, and if so, consider whether these customs should be afforded protection or in other manners be

⁵⁷ See the Supreme Court of Belize, Claim No. 171 of 2007 between Aurelio Cal in his own behalf and on behalf of the Maya village of Santa Cruz and the Government of Belize, and Claim No. 172 of 2007 between Manuel Coy in his own behalf and on behalf of the Maya village of Conejo and the Government of Belize, paragraphs 131.

reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.”

Convention No. 169 also establishes that indigenous peoples' traditional methods of punishment shall be respected. Article 9 (1) establishes that to the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by indigenous peoples for dealing with offences committed by their members shall be respected. Moreover, article 9 (2) states that the customs of indigenous peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such issues. Article 10 (2) establishes that in imposing penalties on members of indigenous peoples, preference shall be given to methods of punishment other than confinement in prison.

Consequently, State parties to Convention No. 169 are, under article 9 (1) obliged to respect indigenous peoples' customary methods for dealing with offences - criminal and other offences - to the extent such methods are compatible with the national legal system and international human rights law. Customary punishment methods that violate individual human rights are however not legitimized under this provision. The other criterion – compatibility with the national legal system – is not limited to the question of substantive legal compatibility, as it is also a question about whether this is compatible with the overall system of administration of justice in the country concerned. Many indigenous peoples still practice their traditional methods for dealing with minor offences committed by their members, without state interference - whereas more serious offences normally are dealt with under the applicable national legal procedures. However, also in cases where general legal procedures are applied in response to offences committed by indigenous individuals, the customs of the indigenous people concerned shall be taken into account by authorities and courts dealing with such issues (article 9 (2)).

Denmark (Greenland) (Denmark is party to Convention No. 169)

The Criminal Code in Greenland is partly based on customary law of the Inuit. This is specially the case insofar as sanctions for criminal offences are concerned, whereas guilt is determined as in Danish criminal law.

Imprisonment as a sanction is only applicable in relation to extremely serious offences, and when it is deemed necessary. Individual sanctions normally consist of measures such as caution, fine, suspended imprisonment, and community service sentence. Hence, there is no closed prison facility in Greenland, only nighttime correctional institutions. During the day inmates can leave the correctional institution to work, study, and other activities, including fishing and hunting.

The judicial system of Greenland also differs markedly in other ways from judicial systems of other countries. For instance, districts judges, assessors and defense counsels are lay locals and not trained lawyers. Only when a case is brought before the appeal court, the High Court of Greenland, do legally trained prosecutors, judges and attorneys become involved.⁵⁸

The rights of indigenous individuals are not perceived as a threat to national integrity; therefore indigenous personal laws are more easily accommodated by the national legal systems. The situation differs when considering indigenous peoples' collective rights, and especially of rights which are regarded as more political or hard law, such as customary rights over lands and resources.⁵⁹ The

⁵⁸ Commission on Greenland's Judicial System, Report No. 1442/2004

⁵⁹ Chandra Roy (2004) *defending Diversity: Case Studies*, the Saami Council 305 -312

collective aspects of indigenous customary law is often regarded as a threat to the national legal system, whereas it should be seen as an additional and valuable contribution to the development of legal pluralism – which is a prerequisite for multi-culturalism.

An effective implementation of internationally recognized indigenous peoples' rights requires that customs, customary law and legal systems of indigenous peoples are recognized and acknowledged, in particular in relation to collective rights of fundamental importance to indigenous peoples.

Constitutional recognition of the rights of indigenous peoples, and their legal customs and systems, is an important measure for the establishment or development of a legal regime which effectively accommodates and enables indigenous customary law and practices to co-exist with the national legal system.

6. Cross-boundary Contacts and Co-operation

The creation of nation states, and the demarcation of national territorial boundaries, has had a serious negative impact on indigenous peoples and their societies. Indigenous peoples were in many instances artificially and involuntarily separated by national borders. For instance, the Sami people and the traditional Sami territory which are separated by state boundaries of four nation states; Finland, Norway, Russia and Sweden due to geopolitical circumstances. In other instances, state boundaries effectively prevent indigenous peoples from maintaining and developing contacts and cooperation with *other* indigenous peoples and communities across state boundaries, e.g. the Chin in Burma.

Convention No. 169 addresses this problem in article 32 which provides that governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields. This provision is not only applicable to those indigenous peoples who have been internally divided by state boundaries, as it is also applicable to indigenous peoples that are not divided by state boundaries, but who would benefit from cooperating with other indigenous peoples across state boundaries.

The UN Declaration on the Rights of Indigenous Peoples contains a similar provision. The Declaration provides in article 36 (1) that indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well

as other peoples across borders. Moreover, article 36 (2) states that national authorities, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

These two provisions, although their overall objective is the same – namely to ensure that indigenous peoples can develop and maintain contacts and cooperation across national frontiers – are formulated relatively differently, and reflect international legal developments in the field of indigenous peoples rights.

Article 36 of the Declaration is formulated in a more explicit and obligatory language than article 32 of Convention No. 169:

- Convention No. 169 obliges governments to ‘facilitate’ cross-border contacts and cooperation between indigenous peoples, whereas the Declaration states that indigenous peoples have **‘the right’** to maintain and develop contacts, relations and cooperation across borders;
- The Declaration obliges states to take “effective measures”, and in consultation and cooperation with the indigenous peoples concerned, to “ensure the implementation of this right”;
- In comparison, Convention No. 169 only requires states to take “appropriate measures’ to facilitate cross-border contacts and cooperation; and
- The Declaration emphasizes that the right to maintain and develop such cross-border relations is particularly of relevance to ‘indigenous peoples divided by national borders’. This emphasis is indeed natural, as it is those indigenous peoples who actually have been divided by national borders who are faced with the most severe consequences of the relative arbitrarily establishment of national boundaries.

The Declaration is, in principle, if not in terms of international *legal* obligations, binding for members states, in particular states that voted in favor of the Declaration. The fact that the Declaration was adopted by an overwhelming majority in the UN General Assembly is an indication that the provisions of the Declaration are widely regarded as general principles of international law – which go beyond conventions (all state parties to Convention No. 169 voted in favor of the Declaration).⁶⁰ The Declaration contains universal minimum standards for the rights of indigenous peoples. Hence, article 32 of Convention No. 169 should be interpreted in line with article 36 of the Declaration.

Indigenous peoples' right to maintain and develop contacts and cooperation across national boundaries is by its nature different from other internationally recognized rights of indigenous peoples, as its implementation requires political, administrative and/or legal measures from more than one state. A precondition for the implementation of this right is that the states concerned have a friendly and cooperative relationship between themselves upon which specific arrangements for the implementation of this right can be established.

The Sami are classical examples of an indigenous people that have involuntarily been divided by national borders. The Sami are the indigenous people of Finland, Norway, Sweden and the Kola Peninsula in the north-western part of Russia. The Sami is one people residing across the national borders of four countries, with their own distinct identity, language, culture, social structures, traditions, livelihoods, history, and aspirations.

For centuries the Sami were subjected to constantly changing geopolitical situations, legal and political regimes; Denmark, Finland, Norway, Russia and Sweden have all occupied, or colonized, the Sami territory, either independently or as part of various nation state configurations. Eventually the traditional Sami

⁶⁰ Four States voted against the adoption of the Declaration (Australia, Canada, New Zealand and USA)

territory was divided between Finland, Norway, Russia and Sweden. The Sami people were henceforth forcibly divided by state boundaries.⁶¹

However, there has been some state recognition of cross-border Sami rights ever since the boundaries between Sweden and Norway, and Finland and Norway, were established in 1751 – as these border cut across the traditional Sami territory. The recognition of such rights is still evolving and no final settlement has been reached – although the process has been ongoing for more than 250 years. However, there are no recognized Sami rights across the border between Norway and Russia, and Finland and Russia. The main reason for this is that the political and legal systems in the Nordic countries and Russia have been, and still are, very different. Hence, there have been no serious political discussions at the state level about the need to redress Sami cross-border rights in the Russian-Nordic context.

6.1 Cross-border Reindeer Husbandry

The *Lapp Codicil* of 1751, an addendum to the *Strömstad Border Treaty* of 1751 between Norway and Sweden, recognizes the Sami as the “*Lapp nation*” [Sami nation]. The Lapp Codicil is often referred to as the *Sami Magna Carta*, as it formalized the rights of the Sami across state boundaries, including the right to continue their traditional nomadic reindeer herding across the border between Denmark/Norway and Finland/Sweden.⁶²

The Lapp Codicil recognizes that the Sami in Norway have the right to use pastures in Sweden in accordance to Sami customary use; likewise it recognizes that the Sami in Sweden have the right to use pastures in Norway. Although, the two countries disagree on the exact legal understanding of the Codicil, it remains in force, and cannot be terminated unilaterally by any of the two parties. The

⁶¹ Ibid

⁶² Ibid

Codicil has been supplemented by detailed treaties concerning cross-border Sami reindeer husbandry. However, at the present there no such treaty, as the previous one has expired and the two parties have not been able to renegotiate a new supplementary treaty. In the absence of such a treaty, the Lapp Codicil of 1751 is the regulatory instrument for cross-border reindeer husbandry.

On the other hand, Sami reindeer husbandry across the borders of Finland and Sweden are regulated by a cross-border reindeer husbandry treaty of 1925.

The draft Nordic Sami Convention, which is an attempt to develop a contemporary treaty between the Nordic countries to protect Sami rights across state boundaries also addresses cross-boundary reindeer husbandry rights (see section 9.2 below for further information and details about the draft convention).

Article 43 of the draft Nordic Sami Convention states that the right of the Sami to reindeer grazing across national borders is based on custom. The draft Convention seeks to ensure Sami autonomy in relation to the management of grazing lands across national boundaries. Article 34 states that, if agreements have been concluded between Sami villages or communities concerning the right to reindeer grazing across national borders, these agreements shall be respected by state authorities and they shall prevail. In the event of a dispute concerning the interpretation or application of such an agreement, a party (Sami villages/communities) shall have the opportunity to bring the dispute before an arbitration committee for decision. The composition of such an arbitration committee and its rules of procedure shall be jointly decided upon by the three Saami parliaments. A party dissatisfied with the arbitration committee's decision of the dispute shall have the right to file a suit on the matter in a court of law in the country on which territory the grazing area is situated.

According to the draft Convention, it is only in the absence of an applicable agreement between Saami villages or communities across state boundaries, that

bilateral treaties between states regarding reindeer grazing shall apply. However, notwithstanding any such treaty, a person/community asserting that he or she has a reindeer grazing right based on custom that goes beyond what follows from a bilateral treaty between states, shall have the opportunity to have his or her claim tried before a court of law in the country on which territory the grazing area is situated.

6.2 Draft Nordic Sami Convention

In 1986, the pan-Sami non-governmental organization, the Sami Council, proposed that Finland, Norway, Soviet Union and Sweden, together with the Sami people, should start discussions on a possible Sami Convention. The Sami Council argued that it is required because the State boundaries are causing severe problems for the Sami unity. The Sami Council appointed a legal committee to start to elaborate on a possible Sami Convention. In 1995, the legal committee submitted its proposal, including a draft Sami Convention, to the Sami Council, which in turn raised the matter with the governments of Finland, Norway, Russia and Sweden, and the Sami parliaments.⁶³

The governments of Finland, Norway and Sweden together with the three Sami parliaments agreed to follow-up this proposal by considering whether it would be possible to develop a Nordic Sami Convention. Due to the fact that this agreement was made within the overall Nordic political cooperation, and the differing political and legal situation obtaining in Russia, the Russian authorities were not invited to join this process.⁶⁴

In 1996, the three States appointed a committee to investigate whether a Sami Convention was required. In 1998, the Committee concluded and recommended that an expert group should be appointed to develop a Nordic Sami Convention.

⁶³ Henriksen, John B. (2008), *The continuous process of recognition and implementation of the Sami people's right to self-determination*, The Cambridge Review of International Affairs, Volume 21, Number 1, Center of International Studies – University of Cambridge, pages 27-41

⁶⁴ Ibid

In November 2001, a joint decision by the governments of Finland, Norway and Sweden, and the three Sami parliaments, established a Nordic expert group mandated to develop a draft Nordic Sami Convention. The Expert Group commenced its work in January 2003, and submitted a unanimous proposal on a Nordic Sami Convention to the governments and the Sami parliaments in November 2005.⁶⁵

According to article 1 of the proposed Sami Convention, the objective of the Convention is to affirm and strengthen such rights of the Sami people that are necessary to secure and develop the Sami language, culture, livelihoods and society, with the smallest possible interference of national borders. The provisions of the Nordic Sami Convention, as proposed by the Expert Group, are largely based on the acknowledgment that the Sami are one people, with the right to self-determination.

Article 10 of the proposed Convention stipulates that states shall, in cooperation with the Saami parliaments, strive to ensure continued harmonization of legislation and other regulation of significance for Saami activities across national borders.

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

⁶⁵ An English language version of the proposed Nordic Sami Convention is available at: http://www.regjeringen.no/Upload/AID/temadokumenter/sami/sami_samekonv_engelsk.pdf

Article 12 stipulates that states shall take measures to provide Sami individuals residing in any of the three countries with the possibility to obtain education, medical services and social provisions in another of these countries when this appears to be more appropriate.

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

Article 20 of the draft Convention recognized that the Sami Parliaments in Finland, Norway and Sweden have the right to form joint organizations, and that the States, in cooperation with the Sami parliaments, shall strive to transfer public authority to such organizations as needed.

Article 22 decides that the states shall actively seek to identify and develop the area (a Sami region within the respective countries and across state boundaries), within which the Sami people can manage their particular rights pursuant to this Convention and national legislation.

Chapter II of the proposed Convention contains detailed provisions on Sami governance. Article 14 establishes that in each of the three countries there shall be a Sami parliament, as the highest representative body of the Sami people in the country. The Sami parliaments shall act on behalf of the Sami people of the country concerned, and shall be elected through general elections among the Sami in the country. In addition, the Convention contains a number of detailed operative provisions, including on (1) Sami governance through the Sami parliaments; (2) Sami parliaments' relationship with national assemblies; (3)

Sami international representation; (4) Sami legal customs; (5) harmonization of legal provisions in the three countries; (6) cooperation among States on cultural and welfare arrangements; (7) the Sami flag and other symbols of the Sami people; (8) Sami language and culture; (9) Sami education; (10) health and social services; (11) children and adolescents; (12) traditional knowledge and cultural expression; (13) research; (14) Sami cultural heritage; (15) land-, water- and resource rights; (16) Sami rights to fjord and coastal seas; (17) compensation and share of profits from extraction of natural resources; (18) environmental protection and management; and (19) Sami media.

Due to legal technicalities, the Sami are not to be party to the Convention. The Expert group discussed the possibility of developing a convention to which the Sami people would also be a formal party, but concluded that rendering the Sami people a party to the Convention would most likely deprive it of its status as a legally binding instrument under international law. Thus, the Expert Group decided to develop a convention to which only the States are formal parties, but which cannot be ratified or changed without the approval of the Sami parliaments. Detailed provisions in the Convention provide that after being signed by the governments, the Convention shall be submitted to the three Sami parliaments for approval. Moreover, ratification or amendments may not take place until the three Sami parliaments have given their approval.

The proposed Sami Convention, and the process under which it was developed, encapsulates the most progressive sides of the Nordic discourse on the Sami people's rights. However, it remains to be seen whether the States eventually are willing to accept these proposed minimum standards for Sami rights. The respective Sami parliaments have all endorsed the proposed Convention, whereas the states are still reviewing its content. However, it is expected that formal negotiations between the governments and the Sami parliaments in Finland, Norway and Sweden will start in the foreseeable future.

6.3 Cross-border Political and Cultural Cooperation

For centuries the Sami were subjected to constantly changing geopolitical situations, and legal and political regimes. This culminated with the eventual division of the traditional Sami territory between Finland, Norway, Russia and Sweden. The Sami people were henceforth forcibly divided by state boundaries.

The Sami living in the former Soviet Union (USSR) suffered tremendously as a result of the State program of centralized means of production. The Sami were relocated to large towns or centers for the State collectivization program, forced to leave their traditional villages, which were often destroyed to prevent their return. This resulted in the destruction of their traditional social, cultural and economic structures. They were effectively isolated from the Sami living in the Nordic States. After the collapse of the USSR, the Sami in Russia started to rebuild their culture and reestablish contact with the Sami in the other countries.⁶⁶

The situation of the Sami living in Finland, Norway and Sweden was equally difficult. They had to contend with land encroachments, state sponsored settlement programs, discrimination, political-, religious- and cultural oppression, and policies and programs of assimilation. In many Sami communities, state authorities successfully managed to destroy the Sami culture and eliminate the language through aggressive assimilation policies and programs.⁶⁷

Pressure from state policies of assimilation and state sponsored settlers, forced the Sami to mobilize themselves to defend their lands, resources, livelihoods, language, culture, values and traditions, and their way of life. The traditional Sami institutions, i.e. the traditional community structure and leadership, were not

⁶⁶ Henriksen, John B. (2008), *The continuous process of recognition and implementation of the Sami people's right to self-determination*, The Cambridge Review of International Affairs, Volume 21, Number 1, Center of International Studies – University of Cambridge, pages 27-41

⁶⁷ Ibid

suiting to this purpose, and in an effort to fill this gap, some Sami leaders began actively engage themselves in public advocacy to promote Sami language, culture and rights. In Norway, the first Sami newspaper (“*Muitalægje*”) was established in the 1870's. Resourceful Sami individuals started to get involved in local, regional and national politics to address the needs of the Sami people. Sami leaders also started to mobilize and establish contacts within countries as well as across state borders.

The first Sami National Congress took place in Trondheim in Norway on 6 February 1917. February 6th has since been declared and recognized as the Sami National Day, celebrated in all four countries. The Sami also have other recognized Sami national symbols, such as the Sami Flag and the Sami Anthem.

Today, the Sami are organized across national borders in various ways; through the pan-Sami non-governmental organization – the Sami Council, other voluntary organizations, and through the democratically elected Sami Parliaments in Finland, Norway and Sweden.⁶⁸

The creation of the Nordic Sami Council in 1956 was the first tangible political result of the pan-Sami movement. It was established as an umbrella organization for the Sami living in the Nordic countries.⁶⁹ Shortly after the fall of the USSR in 1991, the Sami living in Russia also joined the Council, and it was renamed the Sami Council. The Sami Council is among the oldest modern indigenous organizations in the world. It has been the driving force in articulating Sami rights and interests during the past five decades, in particular cross-boundary rights and interests of the Sami. For instance, at its quadrennial meeting in 2004, the Saami Conference – the parent body of the Saami Council – stated:⁷⁰

⁶⁸ There is no Sami Parliament in Russia.

⁶⁹ The Sami Council is a body for cooperation between Sami organizations in the four countries. It consists of 15 representatives, elected by the Sami Conference – the parent body of the Sami Council - for a four year term (Finland: 4 members; Norway: 5; Russia: 2; Sweden: 4).

⁷⁰ Saami Conference (2004) *The Honningsvåg Declaration* Adopted by the 18th Saami Conference, 7-9 October 2004, (The Saami Council), paragraphs 1-6

“[The Saami Conference] reiterates that we Saami are one people and that national borders shall not infringe on our community;

Emphasizes that the nation states Finland, Norway, Russia and Sweden partly have been established on land and sea territories belonging to the Saami people; areas that Saami have possessed and managed from time immemorial before the formation of the states;

Repeats that the Saami of these four states [Finland, Norway, Russia and Sweden] are one people with common history, culture, language, traditions, civic life, trade and visions for the future and that state borders shall not violate our community;”

The Council is in consultative status with the UN Economic and Social Council, the International Labor Organization, and the Arctic Council. The Sami Council is funded by public funds, including financial contributions from the Nordic Council of Ministers, governments and Sami Parliaments of Finland, Norway and Sweden.

Today, elected Sami parliaments exist in Finland, Norway and Sweden. The Sami Parliament in Finland was established in 1972, whereas the Sami parliaments in Norway and Sweden were established in 1989 and 1993 respectively. Although, these three parliaments do not have identical powers, functions and tasks, they nevertheless share the ability to freely and on their own initiative raise any matter of concern to the Sami in the respective countries. In 1998, the three Sami parliaments formalized their cross-border cooperation through the establishment of the Sami Parliamentary Council. The Parliamentary Council comprises 21 members, appointed by the respective Sami parliaments from among the representatives elected to each of them. The Sami in Russia

only have observer status in the Sami Parliamentary Council, as they do not have their own parliament.⁷¹

Every fourth year, the Sami Parliaments convene a conference of Sami parliamentarians to discuss principal issues of concern to the Sami people as a whole. The Conference of Sami Parliamentarians gathers the members of all three Sami parliaments, and hence it is a joint plenary session of all three parliaments.

There are various other forms of cross-border Sami cooperation and contacts, such as cooperation between the Sami Radio/TV broadcasters in Finland, Norway, Russia and Sweden, various forms of cultural cooperation, Pan-Sami national teams in football and Nordic winter sport disciplines etc.

Cross-border Sami cooperation is primarily funded by the governments of Finland, Norway and Sweden, based on a proportional formula through which the country with the biggest Sami population contributes the most.⁷²

The Sami people are also cooperating with other indigenous peoples across national boundaries, in particular within the framework of the United Nations and other international organizations – such as the Arctic Council and the Barents Euro-Arctic Cooperation.

Inaugurated in September 1996, the Arctic Council is an organization founded on the principles of circumpolar cooperation, coordination and interaction to address the issues of sustainable development, including environmental protection, of common concern to Arctic States and northerners. The eight Arctic states are

⁷¹ Henriksen, John B. (2008), *The continuous process of recognition and implementation of the Sami people's right to self-determination*, The Cambridge Review of International Affairs, Volume 21, Number 1, Center of International Studies – University of Cambridge

⁷² The total Sami population is estimated to be somewhere between 80,000 - 95,000 individuals in the respective countries as follows: Finland 8,000; Norway 50 - 65,000; Sweden 20,000; and Russia 2,000. These figures are estimates only as the national censuses do not include a specific Sami component.

members of the Council; Canada, Denmark/Greenland/Faroe Islands, Finland, Iceland, Norway, Russia, Sweden and USA. Six indigenous organizations/communities have the status of permanent Participants on the Council: The Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Council, Russian Association of Indigenous Peoples of the North (RAIPON), and the Sami Council. The Permanent Participant status enables indigenous peoples to actively participate in the work of the Council.⁷³

The Barents Euro-Arctic Cooperation (BEAC) was established in 1993 to support and promote regional cooperation in the northernmost parts of Sweden, Norway, Finland and North-West Russia. The primary goal of BEAC is to promote sustainable economic and social development in the Barents Region and thus contribute to peaceful development in the northernmost part of Europe. The indigenous peoples of the region are included in this intergovernmental cooperation, mainly through their participation in the BEAC's Working Group of Indigenous Peoples. The Working Group consists of representatives of the Sami, the Nenets and the Vepsian peoples. The group is distinguished from other regional working groups by the fact that, in addition to its operational role as a working group, it also has an advisory role to both the Barents Council (foreign ministers) and the Regional Council (county governors). The Chair of the Working Group represents the indigenous peoples of the Region at the ministerial meetings of the BEAC. The Working Group also has a representative in the Regional Council and the Regional Committee.

⁷³ In addition, there are a number of official Observers to the Arctic Council: France, Germany, Netherlands, Poland, Spain, UK, Arctic Parliamentarians, the International Union for Conservation of Nature and Natural Resources, the International Red Cross Federation, the Nordic Council, the Northern Forum, UNEP, UNDP, the Association of World Reindeer Herders, the University of Alaska, and the WWF-Arctic Programme.

7. ILO's Supervisory System

Article 22 of the ILO Constitution requires member states to submit reports on the implementation of conventions which they have ratified. These reports are examined by the ILO Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts).

There is a time-table which indicates which convention has to be reported against, and at which interval, e.g. every year or every five years. This hierarchy is drawn from the importance and priority placed on a specific convention. As a consequence of the tripartite setup of the ILO, employers' and workers' organizations can submit reports on the application of an ILO convention at any time, irrespective of when a report on that convention is due. This can be done by any workers' or employers' organization, which can be based anywhere and not necessarily in the country concerned.

Indigenous peoples' organizations however do not have a similar opportunity to submit implementation reports despite the fact the ILO has adopted two conventions specifically on indigenous peoples' rights. Indigenous organizations can send information on contraventions of Convention No. 169, or any other standard, through a friendly employers' organization or to a trade union with a request to forward this documentation to the ILO. However, they cannot (formally) send their own reports directly to the ILO.⁷⁴

Shortly after Norway's ratification of Convention No. 169 (1991), the Sami Council, a pan-Sami organization established in 1956, raised this particular concern with representatives of ILO member states, employers and employees. The Sami Council argued that the ILO should be open to receiving reports from indigenous peoples, in particular concerning the implementation of specific "indigenous conventions". This idea was rejected by all three ILO parties

⁷⁴ Chandra Roy and Mike Kaye (2002) *The International Labour Organization: A handbook for Minorities and Indigenous Peoples*, Anti-Slavery International and Minority Rights Group International, London, UK

because it would require amendments to the ILO Constitution, a lengthy and complicated process requiring the endorsement of ILO member-states.

Example: Norway

In 1993, the Government of Norway submitted its first report to the ILO concerning Convention No. 169. The Sami Parliament in Norway disagreed strongly with certain sections of the governmental report, in particular the section addressing land and resource rights. The Sami Parliament submitted a written response to the Government - reflecting the substantive disagreement between the Government and the Sami Parliament on the status of implementation of Convention No. 169, and requested that the views of the Sami Parliament be incorporated into the report or annexed the governmental report.

However, the Government of Norway rejected this request, and the views of the Sami Parliament were not forwarded to the ILO – hence, the ILO only received the governmental report. Governmental officials informed representatives of the Sami Parliament that the government was not in a position to forward the Sami Parliament’s report to the ILO, because the government found it to be too critical towards the views of the Government.

This problem was closely linked to the diverging interpretation and understanding of the core land rights provisions of the Convention: The Government and the indigenous Sami Parliament in Norway differed in their understanding of the substantive content of article 14 of the Convention. The Government interpreted its obligations under article 14 to be limited to ensuring a strongly protected usufruct right to lands and natural resources for the Sami, whereas the Sami Parliament believed the State is obliged to recognize and protect Sami rights of ownership and possession, as well as usufruct rights.

The Sami Parliament informed the ILO about this situation. The ILO Committee

of Experts raised concerns that the report did not contain any information about the views of the Sami Parliament. This was most likely the result of the Sami Parliament initiative.

This incident motivated the Government of Norway and the Sami Parliament to reach an agreement, under which the Government will send its reports on Convention No. 169 to the Sami Parliament for comments, and transmit the Parliament's comments to the ILO as part of its official report. This procedure has been welcomed by the Committee of Experts as a practical expression of the consultation requirement under article of Convention No. 169, and it has been urging other governments to follow this example and consult with their indigenous peoples in the reporting process.

In April 2003, the Government submitted a proposal for a Finnmark Act – on land and resource rights - to the Norwegian National Parliament (the Storting). The proposal was strongly criticised by Sami institutions, in particular the Sami Parliament, for not meeting the international legal requirements for recognition and protection of Sami rights, and the obligation to consult the Sami whenever consideration is being given to legislative measures which may affect them directly.

The Sami Parliament prepared its own independent report/assessment of the proposed Finnmark Act to the ILO. In accordance with the earlier agreement between the Government and the Sami Parliament, the report was officially submitted to the ILO Committee of Experts.

The concluding observations of the ILO Committee of Experts concluded that the

Finnmark Act – as proposed by the Government in 2003 – was incompatible with Norway’s obligations under ILO Convention No. 169.⁷⁵ The Committee stated that the process (lack of consultations) and the substance are inextricably intertwined in the requirements of the Convention and in the conflict concerning the governmental proposal.⁷⁶

As a result of these observations, the National Parliament of Norway entered into a direct dialogue with the Sami Parliament regarding the contents of the Act. This dialogue process concluded with the adoption of a radically revised and amended Finnmark Act by the National Parliament in June 2005 – fully endorsed by the Sami Parliament.

The observations of the Committee of Experts directly influenced the outcome of the legislative process in two ways: (a) convinced the Norwegian National Parliament (the Storting) that an adoption of legislation with direct impact on Sami land rights, without conducting appropriate consultations with the Sami Parliament, would be a violation of Norway’s international obligations; (b) influenced the substantive negotiations between the National Parliament and the Sami Parliament.

⁷⁵ Concluding observations and recommendations from the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) of 2003, responding to the periodic report from the Government of Norway, concerning the implementation of Convention No. 169: ILO CEACR, 2003

⁷⁶ Ibid

What does this example show us?

- 1) A distinct ILO supervisory procedure pertaining to Convention No. 169 - allowing indigenous and tribal peoples' organizations officially to report on contraventions of Convention No. 169 - would significantly strengthen ILO's capability and capacity to promote these standards and norms.

Why?

- 2) Indigenous and tribal peoples, as holders of rights under specific ILO conventions, do not have the same possibilities to access the ILO's supervisory machinery as the other beneficiaries – in particular workers.
- 3) Indigenous and tribal peoples are dependent on the friendliness of governments, employers or workers organizations for the submission of information to the ILO – under the official supervisory procedure.
- 4) Indigenous organizations can submit shadow reports, which the ILO normally takes into account. However, the ILO does not refer to such shadow reports in their official documents.
- 5) This is not a satisfactory situation for indigenous peoples. It is of crucial importance that indigenous peoples have direct and formal access to the ILO's supervisory system, as their interests can often be in conflict to that of governments, employers and workers organizations.