

## **Sami land rights: the Anaya Report and the Nordic Sami Convention**

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### **Abstract**

This essay explores land and self-determination rights of the Sami people in Norway, Sweden and Finland in light of Anaya's UN Report, because this report offers a guideline to advance the difficult legal and political debate on land and self-determination rights in the Nordic states. The article will discuss these developments concerning the legal position of the Sami People(s) according to national and international law. Special focus is given to how national law and public administrations are able to sustain a balance between Sami land and self-determination rights and the interests of the majority population.

A Sami Convention, as proposed by the Nordic states, could be a model for other countries with indigenous peoples living across borders. Therefore, the essay will also examine the rationale underlying land and self-determination rights in the Draft Sami Convention. With a view to using international instruments like the ILO Convention No. 169 as a basis for a Sami Convention, the focus is on how far land and self-determination rights of the Sami Convention secure the Sami an equivalent position against state institutions and non-Sami people.

**Keywords:** Sami people; Sami land rights; Sami self-determination; Sami Parliament; Anaya Report; Sami Convention; Nordic countries; resource rights; environmental rights.

### **Introduction**

About 90,000 Sami (Saami) live in an area in the north of Norway (Finnmark), in Sweden (Lapland) and Finland, and on the Russian Kola peninsula (cf. Koivurova, 2008: 280). Today, the recognition of the Sami as an indigenous people living across several borders is non-

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controversial. Reindeer husbandry has been a central part of their social and cultural life since the 17<sup>th</sup> century. Sami are currently active in all business areas, with about 10% working in the field of reindeer husbandry (Anaya, 2011: 4-5). Sami land- and self-determination rights, especially as composed in the intended Sami Convention,<sup>1</sup> are highly discussed and of special importance for the livelihood and cultural survival of the Sami people(s).

Part 1 of this article will analyse developments in regional land and self-determination rights with regard to the legal position of the Sami People of Norway, Sweden and Finland according to national and international law. It will demonstrate how the three states respond to Sami claims to land and self-determination and where certain rights should be promoted, with reference to the UN Report of a former Special Rapporteur on the rights of indigenous people (Anaya, 2011). The article will achieve this by providing an understanding of the functions of the different legal concepts concerning land and self-determination rights, and by evaluating significant parallels and differences in those rights among the Nordic states in search of possible adequate national solutions. The developments will be assessed with specific reference to ILO Convention No. 169 (ILO 169, ILM 28: 1383) and the new UN Declaration on the Rights of Indigenous Peoples (2007).<sup>2</sup> Notwithstanding its shortcomings, ILO Convention No. 169 still has a far-reaching influence on the position of indigenous peoples, which extends beyond the ratifying States (cf. Fitzmaurice, 2009: 71); the ‘UN Indigenous Declaration’ is the most far-reaching comprehensive instrument concerning indigenous peoples. The main question is how capable national law and public administrations are of sustaining a balance between Sami land and self-determination rights and interests of the majority in Norway, Sweden and Finland.

In part 2, the article examines the rationale underlying land and self-determination rights in the Draft Nordic Sami Convention from 2005. This important, intended ‘social contract’ between the three states and the Sami will shape the future of the Sami and might even influence indigenous rights in other countries with indigenous peoples living across boundaries, as it will recognize the self-determination rights of the Sami as a people and the authority of indigenous (Sami) parliaments. This article will clarify whether the scope of relevant Sami rights – as composed in the Draft Sami Convention – is sufficient. Of particular interest is to what extent the land and self-determination rights of the intended Sami Convention would secure the Sami an equivalent position to state institutions and non-Sami people. The Draft Sami Convention will be analysed by studying its underlying ideas, particularly through investigation of international instruments like ILO Convention No. 169 –

which the Draft Sami Convention is based on – and in light of the mentioned UN Indigenous Declaration. Even though the analysis is focused only on a Draft of the Sami Convention, as Koivurova (2008: 281) explains it establishes an example of how states and trans-national indigenous peoples could negotiate their legal relations in a constructive way.

## **1. Land and self-determination rights and the Anaya Report**

This chapter deals with the domestic regulation of Sami rights in three Nordic states, and asks the following questions:

- How do the states respond to Sami claims related to land (or water), resources, and self-determination?
- To what extent is the law and especially public administration able to balance claims by the Sami minority to land and self-determination and the interests of the majority population?

The findings of the 2011 UN Report on the situation of the Sami people will be taken into particular consideration. The Special Rapporteur's country report evaluates the situation of the indigenous Sami people in three countries – Norway, Sweden and Finland – where the Sami live. The report offers valuable recommendations to governments and other actors (e.g. Sami Parliaments) on how to address – amongst others – land, resource and self-determination issues within the framework of applicable international standards.<sup>3</sup> Former Special Rapporteur Anaya (2011: 1-2)<sup>4</sup> acknowledges the exemplary work that the three countries and their Sami Parliaments have achieved, and emphasises the importance of a Sami Convention.<sup>5</sup> The adoption of this prospective, mutual Convention, which leans on ILO Convention No. 169 (currently only ratified by Norway) should be striven for. However, many rights outlined in the Draft Sami Convention are still controversial, especially land, water, resource, and self-determination rights, and for this reason it has not yet been ratified. Here the Anaya Report, composed by an indigenous lawyer, is of special importance as a guideline to help finally end the difficult legal and political debate concerning land and self-determination rights in the Nordic states, especially with regard to a Sami Convention.

### ***1.1. Analysis of Sami self-determination***

The Anaya Report (2011: paras 32-45) investigates cross-border self-determination of the Sami people and national self-determination (Sami Parliaments). Barriers to self-determination still exist on both levels. The Sami have no intention of separating from the

states in which they live to form a separate Sami state; this is consistent with relevant determinations in international law (ibid.: para. 33).<sup>6</sup> The Sami people have undertaken remarkable attempts to advance their collective self-determination through the development of cross-border institutions and initiatives, although obstacles still exist. The Sami Convention reflects mutual objectives and is a central part of Sami self-determination. However, this Convention is not applicable to Russian Sami, and the adoption of the Convention has been delayed. Nevertheless, representatives of the three participating governments and the presidents of the Sami Parliaments agreed on a negotiation model whereupon three delegations of the aforementioned countries have remained in negotiations with each other since 2011 (ibid.: paras 34-36).

At present, Sami self-government and participation in decision-making processes in Norway, Sweden and Finland are primarily exercised by the Sami Parliaments. According to Anaya, the autonomy and self-government powers of these parliaments have to be strengthened. The potential of the Sami Parliaments needs to be expanded to take part in decision-making related to Sami issues and to actually influence these decisions. Especially in Finland, Sami Parliaments are only regarded as bodies by which the Sami could interact with governmental authorities without having substantial influence or decision powers. Sami Parliaments do not have a special decision power concerning land, waters and natural resources, apart from exceptions as they exist in e.g. Norway (ibid.: para. 37-38).

Although there are consultation procedures which promote Sami participation in decision-making to a certain degree, as in Norway,<sup>7</sup> mutually negotiated and duly conducted consultation procedures could advance Sami rights towards a position in which they have greater influence on governmental politics, and would enhance the relations between the parties. But experiences are often different, as is evident in relation to the conflict between the traditional way of life of Norwegian Sami people and Norwegian industrial development (Norway Report, 2010: para. 24) or government decisions without consultations of the Sami Parliament (Anaya 2011: para. 39).

By contrast, Sweden and Finland have no consultation agreements. However, pursuant to Anaya, even where there are statutory rules – like those in Finland, where the government is obliged to consult with the Sami Parliament – proposals and comments of this Parliament have not been answered by the government.

In Sweden, at least the contentious Sami Bill (Ds, 2009: 40) includes a proposal for a consultation procedure, although it was not debated with the Sami people and does not encompass Sami land and resource rights (Anaya, 2011: paras. 22, 40).

Self-determination implies the exercising of autonomy or self-government in internal and local matters. Anaya (2011: para. 41) therefore assumes that because of statutory requirements related to power and functions of the Sami Parliament there is only a limited possibility for these parliaments to act independently and to autonomously decide for the Sami people on relevant matters. To increase the independent national decision powers of these parliaments, some essential legal and political changes should happen: in consultation and agreement with the Sami Parliaments they could agree on stronger or even exclusive decision-making power for issues which particularly affect the Sami, together with a stronger recognition of the traditional decision power of local Sami institutions like the 'Siidas'.<sup>8</sup>

Of particular interest is the Finnmark Act (Norway), which respects both Sami and non-Sami interests and supports Sami self-determination and the control over land and natural resources on the national level. However, according to the Sami, the composition of the Finnmark Estate (cf. Ulfstein, 2004: 32; Finnmark Act Guide, 2005: 2)<sup>9</sup> concerning the implementation of Sami self-determination is not an ideal one, as the law would not adequately consider the East Sami. That is why Anaya (2011: paras. 44-45) advises special and precise measures for appropriate development and for the protection of endangered indigenous groups (e.g. East Sami).

The Swedish Sami Parliament, which is both a generally elected body and a national administrative authority, would be forced to administrate even those decisions of the Swedish Parliament or of government facilities which do not comply with its politics.

Furthermore, in Sweden and in Norway, restricted financial resources for its own projects and initiatives would limit the ability of a Sami self-government (ibid.: paras. 42-43).

### ***1.2. Investigation of the Sami land rights situation***

Anaya addresses both the (limited) recognition of land and resource rights and the ongoing threat to Sami lands and their way of life (ibid.: paras. 46-61). He emphasizes that in the northern regions of Norway, Sweden and Finland, Sami history is shaped by an ongoing loss of lands and natural resources. This especially applies to land that is essential for reindeer husbandry. In the past, nomadic Sami land use over large regions, which vary according to the

climate and to ecological conditions, have come into conflict with the recognition of land and resource rights (ibid.: 46).

The existing protection of Sami lands for reindeer herding was only developed by the Nordic states incrementally. At present, considerable areas are continuously used for reindeer herding. According to the relevant legislations of the three states, the Sami should enjoy rights concerning land and resource use for reindeer activities, although in Finland reindeer husbandry is not exclusively reserved for the Sami. Even if the Sami's *usufruct* rights on land are legally recognized, these rights would often be subjugated to competing interests.

Indeed, Norway, Sweden and Finland have, in principle, acknowledged that Sami land use results in ownership rights related to the land; nevertheless, Sami people often would not succeed in the implementation of their rights (ibid.: para. 47).

Anaya (2011: paras. 48-49, 53-54) closely responds to land and resource rights, starting with Norway, where the Finnmark Act offers a “possible basis and mechanisms to identify and effectively protect land and resource rights of the Sami people in Finnmark”. The act tasked the Finnmark Commission with the mandate to precisely determine land and resource rights which have yet to be recognized, and with an obligation to report on recognized rights.<sup>10</sup> Although the identification process pertaining to existing land rights in accordance with the Finnmark Act is currently underway, pursuant to Anaya the adequacy of the established procedures is by no means evident. However, the Finnmark Act is an important development and possibly a good practical approach to securing indigenous land rights. Although decisions that assume ownership and user rights, individually or as a group, come into effect occasionally in the regular Norwegian court system, the issue remains that outside of the Finnmark areas there are no special procedures for the identification of Sami land and resource rights.

There are specific doubts concerning the land rights situation as it pertains to Sweden (ibid.: paras. 50-51): Even though the Swedish Supreme Court acknowledged in principle that “traditional land use and occupation through the Sami could lead to ownership rights” (“Skatefjäll decision”, 1981), special reindeer herding areas have not yet been subject to official demarcation. Despite the fact that the National Border Commission has identified traditionally used Sami lands and submitted its 2006 report, the government is hesitant to implement the Committee's demands (SOU: 14). The “Committee on the Elimination of Racial Discrimination” criticizes the marginal progress towards the solution of central legal Sami issues, and states that Sweden should undertake effective measures to secure concrete

action for Sami rights, for example in the adoption of new legislation (CERD/C/SWE/CO18: para. 19).

A particular difficulty in securing land rights is the burden of proof laid upon Sami claimants with regards to land ownership and pasture rights (Anaya, 2011: para. 51):<sup>11</sup> In spite of the lack of traditional physical attributes on the land, at least 90 consecutive years of traditional use have to be documented. In cases when other parties have relevant information, the legal regulation of a flexible distribution of the burden of proof would be preferable (CCPR/C/SWE/CO/6: para. 21). Cost-intensive procedures could be avoided, particularly because Sami often would not have the necessary financial means and because the Swedish legal aid system does not yet offer appropriate support (CERD/C/SWE/CO18: para. 20).

On the other hand, in Finland, where 90% of the Sami homelands are state lands, a national study was composed between 2003 and 2006 to clarify the rights of Sami land use in Lapland (Anaya, 2011: para. 52). In this regard, effective and concrete measures like new Finnish laws should be introduced and affected communities should be consulted (CERD/C/FIN/CO/19: para. 14). Despite negotiations between the state and the Finnish Sami Parliament, the legal status of the traditional lands used and occupied by the Sami remains unsettled.

The reindeer industry, which mainly in northern regions is still the primary means of Sami living, is especially endangered through competing land use (Anaya, 2011: para. 55).<sup>12</sup> In all three Nordic states the exploitation of natural resources by the state or other development projects decreases grazing areas significantly.

However, some of the laws of these states would – to various extents – encompass a special consideration of the Sami people and their way of life or of their land. Anaya (2011: para. 55) makes note of the relevant forestry laws.

Nevertheless, he criticises the laws and politics concerning the exploration of natural resources and development in Norway, Sweden and Finland, which offer inadequate protection of Sami rights and their way of life. The Sami people and its parliaments would not be sufficiently included in the development process, and there are only rare opportunities to participate in financial and other advantages that result from mining, oil or gas extraction (Anaya, 2013: 3). With the exception of the Norwegian Reindeer Herding Act, almost no compensation is given for the loss of pasture areas when natural resources are exploited or development projects are realized (Anaya, 2011: para. 55).

In Northern Norway Anaya (2011: para. 56) sees the herding of reindeer as especially threatened by oil and gas extraction. Although cultural life is protected in the Norwegian Mineral Act of 2009, and although the Finnmark Act provides rules for the Sami Parliament and for land owners to have the opportunity for comment during an approval process, the Norwegian Sami Parliament has expressed concerns: it criticises the inadequate consultation of the Sami Parliament in cases of applications for a licence under the Mineral Act for areas within the Finnmark, and total lack of consultation on applications in traditional lands that fall outside of the Finnmark.

According to Anaya (2011: paras. 57, 60), in Sweden the main issues are mining and wind power stations. There would be no Sami rights in the present Mining Act; mining politics would not protect Sami rights and interests in a sufficient way.

Finally, the reindeer husbandry activities of the Finnish Sami have been impaired by logging for decades. Pursuant to the state-owned Finnish company Metsähallitus the amount of logging in reindeer herding areas has decreased considerably, due to agreements with reindeer herders. In 2010, the company and the reindeer herders' association decided on a forest use agreement, but logging still continues and endangers the areas used for reindeer husbandry. Therefore, Finnish legal protection of Sami land and resource use is still insufficient (ibid.: para. 58).

### ***1.3. Evaluation and critique - Meaning of investigation and proposals***

How can Anaya's investigations and proposals regarding land and self-determination rights be assessed?

#### ***1.3.1 Investigation***

Cross-border institutions and agreements related to the Sami, like the Sami Convention, are legitimately described as important examples to secure indigenous peoples' rights worldwide. However, the hesitation towards adopting the Sami Convention is considerable, as Anaya and other experts correctly observe (e.g. Fitzmaurice, 2009: 127). Nevertheless, the continuing negotiations between governments and Sami Parliaments are evidence of serious intent to adopt the Convention.

As asserted by Henriksen (2001: 6-21) and Fitzmaurice (2009: 146), the existence of the Sami Parliaments is a good example of autonomy. Anaya affirms that the requirements for consultation with existing Sami Parliaments on indigenous issues can be seen as an important institutional progress within the scope of indigenous self-government. This kind of

cooperation is by no means self-evident in other states where indigenous populations live. A critical point is indeed that Sami Parliaments are also governmental authorities. Therefore the Sami Parliament should not be forced to administrate decisions of the state parliament or of governmental institutions if these decisions are not in accordance with Sami Parliament politics. A legal situation such as the one in Sweden is contrary to the idea of self-determination. Even if the Sami Parliaments in Norway and Finland dispose of consultation rights in a similar manner to their examples, the Australian Land Councils (cf. Carstens, 2000: 170, 340, 347), Sami Parliaments can only be called an extenuated version of indigenous self-determination. The absence of jurisdiction over traditional land is particularly relevant.<sup>13</sup>

Anaya's demand for jointly negotiated and correctly realized consultation procedures would certainly be a good start for the participation of the Sami Parliaments in decision making and to further expand the autonomy and self-government powers of the parliaments. However, in all relevant Sami matters, independent actions and autonomous decisions need appropriate legal and political changes on the national level, according to consultation and agreements with Sami Parliaments. The granting of increased or even exclusive decision power in all Sami issues, together with a higher recognition of traditional decision power of local Sami institutions, could achieve adequate internal self-determination, especially – as Koivurova (2008: 289) correctly underlines – in light of Articles 3 and 4 of the UN Indigenous Declaration.

In agreement with Sara (2009) and Josefsen (2007: 26), to secure Sami self-determination and to enhance mutual goals among all Sami, the respective governments and the Sami themselves should not remain with indigenous self-administration simply because it is often easier to realize (as the Norwegian reindeer institution 'Siida' shows).

In order to prevent discrimination against the Sami, legal security and special concrete measures for the adequate development of indigenous groups such as the Norwegian East Sami seem to be urgently necessary.

Finally, the expansion of financial resources for indigenous projects and initiatives might support the capacity for self-government in all three countries.

It is common practice for the land-based *usufruct* rights of the Sami to be legally recognized and yet in Nordic countries these rights have been often sacrificed to competing interests. This is demonstrated by the comment of the Human Rights Committee to the periodical report of the Norwegian Government (cf. Henrikson/ Scheinin/ Åhrén, 2007: 92).<sup>14</sup> The Committee emphasized the Sami's right to use their natural assets and to not be hindered

in their livelihood. Although legislative reforms pertaining to Sami land and resource rights are advancing, the traditional means of Sami livelihood secured in Article 27 do not enjoy complete protection if competing public or private land use occurs (*ibid.*, 92).<sup>15</sup> The regulations of ILO Convention No. 169 – only ratified by Norway – are more far-reaching than the protection offered by Article 27 ICCPR. Norwegian rules include a distinct right of indigenous peoples to exercise control over their traditional land (*ibid.*: 92-93). In this context Article 7 I ILO Convention No. 169 is of special significance, as it applies to the right of indigenous peoples to determine their own priorities for the development process as far as it has an impact on their occupied or used land, and furthermore encompasses, as far as possible, the right to exercise control over economic development, and to participate in development plans and programs.<sup>16</sup>

Altogether, due to its early ratification of ILO Convention No. 169, Norway is a positive example worldwide with regards to the entitlement of the Sami Parliament, legal developments and not least the consultation agreement. However, the Norwegian implementation of ILO Convention No. 169 is in need of improvement. There is an apparent lack of legal remedies against official procedures dealing with the controversial use of uncultivated land and insufficient participation in relation to profits from mining activities on traditionally used land. Neither the protection offered by Article 27 ICCPR nor by Articles 14 I, 7 I ILO 169 are useful where legal remedies, like rights to object, are missing (*cf.* Fitzmaurice, 2009: 96-97, 98-99; Josefsen, 2003: 26-27).<sup>17</sup>

By signing ILO Convention No. 169, the Swedish and the Finish legislators would also be forced to cope with Article 14 of ILO Convention No. 169 to ensure possession and ownership rights, since there is often only a right to participation in management (Joon, 2012).<sup>18</sup> This could further balance Sami land and self-determination rights and the interests of the majority in the Nordic states concerning possession and ownership rights to land.

A positive fact is that Norway, Sweden and Finland have acknowledged in principle that Sami land use results in land ownership rights; e.g. in ‘Svartskogen’ the Norwegian Supreme Court affirmed an ownership right of the Sami community concerning their traditional areas (*cf.* Permanent Forum, 2007: 2).

Nevertheless, as noted by Anaya (2011: para. 81), Sami people often miss out on the implementation of rights. His demand for further demarcation of indigenous land is justified in light of Art. 14 II of ILO Convention 169 (“Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee

effective protection of their rights of ownership and possession”; cf. Fitzmaurice, 2009: 74). Identification procedures related to land rights in the Norwegian Finnmark Act are not appropriate. Agreeing with Fitzmaurice (2009: 109 referring to Graver and Ulfstein, 115), one can challenge the compatibility of the Finnmark Act with ILO Convention No. 169 (especially Art. 14 I as it regards ownership and rights of use, as there are no special rights for Sami exploitation of resources in the Finnmark Act) and the UN Indigenous Declaration. The law replaces the acknowledged rights of possession and ownership in ILO Convention No. 169 with a lower classified right to participation in management. This is in line with Jooa (2006, 178), who argues that this could be a violation of Article 14 II of ILO Convention No. 169. Nevertheless, the Act is a model for a practical approach to securing indigenous land rights. Certainly, it is a disadvantage that no special procedures related to the identification of Sami land rights exist outside of the Finnmark. Sami land ownership rights have to be revised, and land use management rights have to be extended.

Furthermore, information and consultation rights of the Sami should be enhanced. Though in 2007/2008, both the Sami Reindeer Herder’s Association of Norway and the Sami Parliament were consulted by the government concerning the intended Mineral Act, unfortunately the Anaya report does not refer to the fact that the act was adopted without the approval of the Sami Parliament. Anaya’s statement that information and consultation rights have been “sufficiently acknowledged” in the Norwegian Mineral Act must be contradicted, because Sami interests outside of the Finnmark have not been included in the act. As a consequence the Sami Parliament will not be informed if companies outside the Finnmark are awarded rights to exploit minerals (Andersen, 2010: 32-33). Later in his report, Anaya also considers the demand of the Norwegian Sami Parliament for adequate consultation as legitimate if applications for licences on matters inside the Finnmark according to the Mineral Act occur,<sup>19</sup> and finally demands that the consultation rights concerning applications that affect traditional land outside of the Finnmark be regulated and implemented.

In addition, the consultation agreement reached by the Norwegian Sami Parliament and the national government could be a model for Sweden and Finland as well (HRC WG, 2009: 14-15), although in practice there often are disagreements regarding compliance with procedures (CEACR, 2010), which is a matter that has to be solved to ensure a better management of consultation agreements for all parties.

Moreover, the 2009 agreement on cross-border grazing rights in Norway and Sweden descriptively demonstrates how conflicts of interests can be solved (IWGIA, 2008). Finally,

the 2007 agreement by the Norwegian Sami Parliament and the Environmental Ministry on conservation principles in Sami areas should also be positively mentioned (cf. Andersen, 2010: 32).

The approach of the Swedish government has to be criticized, as despite the Skatelfjäll ruling (1981) special reindeer herding areas have not yet been officially demarcated. The Swedish government has unfortunately delayed the implementation of the demands by the Border Committee; only slight advances have been made towards the solution of central legal questions concerning Sami rights. However later in 2011, after the Anaya report was completed, the High Court of Sweden recognized Sami winter grazing rights as common law, clarified the conditions under which winter grazing rights exist, and developed concepts on the examination of the legality of reindeer husbandry.

The Swedish Mining Act must include Sami rights, combined with a mining policy that takes Sami issues seriously. This is essential for the swift resolution of mining issues where Sami rights are affected. The participation rights of the Swedish Sami have to be revised, especially concerning wind craft constructions. As long ago as 2002, the Human Rights Committee determined in its fifth report on Sweden that the right to self-determination includes a Sami right to participate in decisions that pertain to Sami areas and living conditions. But in reference to Article 1 ICCPR the Committee expressed its legitimate concerns related to “the narrow extent in which the Sami Parliament can play a considerable role in the decision finding processes on questions concerning traditional land and economic actions of the Sami people” (cf. Henrikson/ Scheinin/ Åhrén, 2007: 92-93).<sup>20</sup>

In addition, the burden of proof currently imposed on the Sami, as far as the proof of land ownership and pasture rights is concerned, has to be reversed in Swedish court procedures to secure Sami land rights. In cases in which other parties have relevant information it makes sense to at least establish a flexible distribution of the burden of proof.

Moreover, the limited financial support of the Sami in court cases often prevents a claim through legal means. The Swedish legal aid system must be changed accordingly. Actions are too time consuming (e.g. the Skatelfjäll case, the proceedings of which lasted 15 years).<sup>21</sup> Hence, in future, effective, less time intensive legal means would be desirable.

Today, the Swedish Sami are increasingly able to successfully claim their (reindeer herding) rights. Compensation is paid in some cases, there have been instances of judicial determination of possession in case of indigenous long term use, and a bilateral user agreement has even been reached. This trans-border agreement between the Swedish and the

Norwegian government on pasture use not only influences the management systems in Sweden (and Norway), but in future might prevent some of the conflicts between Sami and non-Sami people in the region. Although it establishes meaningful rules regarding reindeer hunting, issues concerning the distribution of reindeer grazing lands remain unresolved in the border area of Sweden and Norway (Strömngren, 2010: 30).

Finnish national rules on traditional reindeer herder rights offer a certain protection. In agreement with Anaya, new laws on Sami land use rights in Finnish Lapland enacted subsequent to consultation of the affected Sami communities and other effective, concrete measures taken after such consultations are justified. Considering Åhrén and Fitzmaurice (2009: 85), the fact that in Finland reindeer herding is not a specific Sami right should be questioned, because only exclusive rights on traditional Sami land would be consistent with customary Sami rights. With a look back to Helander-Renvall (2005: 21), the Anaya Report should have criticized the merging of the Finnish administration of agriculture and reindeer husbandry due to conflicting interests. Finally, the legal status of traditional land used and occupied by the Sami should be clarified. Important agreements to solve logging issues – such as the Metsähallitus Agreement – are mentioned in the report (cf. Korhonen, 2010).<sup>22</sup> User agreements like this have an important impact, provided that finalizing an agreement does not take years.

Existing Sami rights agreements are the “North European way” of reaching agreements, and to some extent follow (e.g.) the model of Australian land rights agreements which exist in various forms. Similar to Norway and Sweden, agreements between the Sami and the state were reached in Finland as well, partly in order to prevent long and cost-intensive court procedures regarding conflicting uses of traditional areas. To avoid judicial disputes of this kind, new agreements between the Sami and the state or between the Sami and third parties (non-indigenous people, firms, environmental groups) and, if necessary, between different Sami groups (border conflicts) should be negotiated.

For all three countries it can be assessed that in cases where previously court procedures were sought in order to reach state recognition of traditional land rights, there is now a better chance of achieving the practical implementation of rights. This is especially noticeable in the implementation of reindeer grazing rights in Sweden and Finland.

Additionally, in Sweden and in Norway, the time-consuming process of determining land affected by the objections of state authorities should be optimised.

In summary, the Sami Parliaments can be characterized as a new modern model of indigenous self-government and participation in decision-making processes, however there is still room for improvement.

Mutual Sami initiatives and institutions across borders are extensive and remarkable, even though there are still deviations with regards to the contents of the Sami-Convention.

Legal protection of land rights, in particular the protection of Finnish Sami land rights, must be revised. As the situation stands today, the land and the way of life of the Sami people are under constant threat. The reindeer economy is especially endangered by competing land use. All three Nordic states have to be held responsible for the fact that they have reduced the grazing lands of the Sami reindeer herds through national exploitation of natural resources and through development projects.

Some of the laws, e.g. forest laws, imply (a different) special regard of the Sami, of the indigenous way of life or indigenous land. However, laws and politics in Norway, Sweden and Finland currently offer inadequate protection of Sami rights concerning the exploitation of natural resources. There has long been a demand for fair distribution of profits from the economic use of resources in states with a Sami population.<sup>23</sup>

Conflicts of interests such as those in Finland, where the responsible government authority is also the approving authority and consequently receives advantages from resource extraction, are no longer supportable.

There is an increasing demand that the Sami and their parliaments be involved in the development process and share in the advantages. Moreover, compensation for loss of pasture rights due to natural resource exploitation or realisation of development projects must be provided. Norway can be seen as a model due to its compensation efforts for lost grazing areas regulated in the Reindeer Herding Act, for the protection of cultural life in the Mineral Act (2009) and for granting the Sami Parliament and land owners the opportunity to express themselves during an approving process in the Finnmark Act.

Logging issues are still prevailing and up to this point have only partly been resolved in a satisfactory way, such as in Finland between the reindeer herders and the national Finnish forest corporation, where negotiated agreements on forest use prevented lawsuits as early as 2010. Today, agreements often occur as a practical, flexible solution between the state, indigenous groups and/or environmental organisations to clarify conflicting claims of Sami people with the non-indigenous population or the state.

### *1.3.2. Recommendations<sup>24</sup>*

As stated by Eide (2009: 281), only a slow and moderate expansion of self-management can be expected. Therefore, agreeing with Anaya (2011: paras. 73-77), generally much more has to be done for the Sami to be able to exercise self-determination in the sense of internal self-government, and to develop common goals as a cross-border people. In each country extensive rights must be guaranteed, oriented on the respective international instruments of indigenous peoples. Indigenous rights involve not only equal rights and non-discrimination but special features as well, such as the possession of land and benefits from natural resources (Fitzmaurice, 2009: 132, citing Alfredsson).

According to Fitzmaurice (2009: 127) the ratification of ILO Convention No. 169 by Sweden and Finland would be an especially important step to leverage Sami politics based on the principle of non-discrimination, the respect of human rights and the rule-of-law principle. To ratify the Convention, Sweden must determine such issues as the land areas referred to, which rights follow and whom the rights shall include (Sametinget: 2015). Securing rights over their land and natural resources is fundamental to the Sami self-determination (OHCHR, 2015).

Indeed, the Sami could not directly complain at the International Labour Organisation (ILO) or directly report to the ILO, unless the state in which they live has ratified ILO Convention No. 169. In contrast, surprisingly practicable solutions exist in Norway. Here, the Sami deliver an annotation pertaining to the respective government report with a later transfer of the official answer to the ILO (Yupsanis, 2010: 449).<sup>25</sup> This procedure is unusual and also dependant on the respective government. Nevertheless, it is effective.

With regards to self-determination rights Sami people have undertaken enormous efforts to obtain and to strengthen their relationships, and to assert their claims as a people. Next to the considerable cross-border initiative of a common Sami Convention this also distinguishes the “Parliamentary Council of the Sami” as their representative institution and as an institution of joint action since 2000. Cross-border institutions founded to represent Sami interests are remarkable and play an important role in Sami politics beyond borders, as Koivurova (2008:169-192) has correctly found. The approach of the Nordic governments not to interfere with cross-border Sami relations but rather to provide (even minimal) support is unfortunately not common in countries with an indigenous population.

According to the latest international rights related to indigenous peoples (Article 6 II, Article 16 II ILO 169; Article 30 UN Indigenous Declaration) the free and prior, informed<sup>26</sup>

consent (PIC) of the Sami has to be obtained in all issues relevant to them.<sup>27</sup> The provision of effective indigenous rights to consent would be desirable for an ideal arrangement of Sami rights. Often the only procedural requirements are consultation and participation, without the obligation for consent. If this is the current status, at least the consultation procedures should be generally enhanced. Particularly, adequate consultation procedures should be facilitated to include the Sami Parliaments. Even if it is – with view to non-indigenous peoples rights – not easy, it is conceivable to confine certain areas (e.g. land rights) in agreement with the Sami Parliaments, so that the Sami Parliaments can make a prior or exclusive decision. They should be able to decide independently from national institutions to sufficiently execute their right to self-determination. It makes sense to advise the Swedish government to undertake legislative changes. In future, the autonomy and self-government powers of the Sami Parliaments should be strengthened.

Finally, an adequate financial basis of the indigenous parliaments to effectively administrate the Sami self-government functions is necessary.

The safety of their rights to land, waters, and natural resources is essential for the indigenous self-determination and the further existence of the Sami. Consequently, Sami rights to their traditionally used lands and natural resources have to be improved in the future to guarantee a sustainable and resource-conservative Sami economy as well as adequate social and cultural development.

Especially in Norway the process of clarification and security of land and resource rights inside and outside of the Finnmark has to be finalized. In consultation with the Sami Parliament, the Mineral Act must be revised and clarified with respect to Sami rights (UN News Centre: 2015). Moreover, the results of the Coastal Fisheries Committee have to be included more precisely, which may also clarify sea resource rights, e.g. salmon fishing.<sup>28</sup> This is in line with Ragna (2013: 1589; cf. *ibid.*, 2014 on Norway's international legal obligations), who emphasizes that the debate on the right to fish in the coastal areas of Sápmi will continue into the future and that questions about Sami self-determination and the extent of rights to both non-renewable and renewable natural resources on land have not yet been resolved in Norway.

In Sweden, the proposal to strengthen the demarcation of traditional Sami areas and to adopt laws which reverse the burden of proof to verify traditional land rights in legal actions (or at least to adapt them if other than the claiming Sami have information) must be endorsed. Moreover, affected Sami should receive legal aid to be able to fight for their rights in

necessary lawsuits. Anaya and other experts correctly demand the adoption of required laws for the Swedish Sami, of course with inclusion of their Parliament. Only through future clarification and further protection of Sami land and resource rights, especially the protection of reindeer husbandry and salmon fishing, can the livelihood and the Sami culture be secured (cf. Hughes, 2014, Schertow, 2011). In my opinion, Anaya should have demanded the overdue separation of the administration of agriculture and of reindeer husbandry in Finland. In addition, a reference to the Finnish Vihervuori Report would have been useful since – according to indigenous demands in Finland – it suggests the introduction of land councils and a land fund (Hannikainen, 2002: 193)<sup>29</sup>.

For all three countries, Anaya's suggestion is to adapt laws and administrative regulations concerning the exploitation of natural resources in Sami areas according to international standards related to the rights of indigenous peoples. In order to achieve this, sufficient arrangements and consultation with the affected indigenous communities are essential; their free, prior and informed consent has to be obtained, and negotiations must include mitigation measures, compensation and benefit sharing. The recent commitment of the Swedish Government to revisit its Mineral Act and the increased safeguards for Sami rights and livelihoods in the Finnish Mining Act (UN News Centre: 2015) are current positive developments.

Certainly, the protection against interferences in customary rights<sup>30</sup> is still unclear. Given the multiplicity of land use conflicts in reindeer areas and the currently unsatisfying “case to case solution”, strict requirements to realize customary Sami rights would be reasonable. In order to support the sustainable use of reindeer herding areas, a precise understanding of Sami customary rights is particularly essential.

Fortunately, today many Nordic authorities no longer limit Sami usufructuary rights, such as reindeer husbandry, and even accept Sami ownership of land instead of a minor land rights title based on traditional use.<sup>31</sup>

Furthermore, in Norway, Sweden and Finland, very often there is a lack of adequate action concerning the implementation of Sami rights: measures for the attenuation, for compensation and the sharing of the advantages are fundamental for cultural and environmental protection. Although there are often only compensation payments and special measures instead of a restitution of land, it can be stated that the three states increasingly act to prevent violations of Sami land and water rights. There is an increasing tendency to act in accordance with international human rights standards.

Legal remedies within the scope of land use administration need to be extended to enable the Sami to defend themselves against harm to the Sami economy and the Sami way of life.

Examples of different agreements in Norway itself and between the states of Sweden and Norway demonstrate how forward-looking agreements can be. In practice they are more helpful than long-lasting court suits. Anaya should have elaborated on this topic in much more detail.

In future, stronger powers of the Sami Parliaments and an independent status of these indigenous bodies would be necessary (Hannikainen, 2002: 196) in order to optimize their effectiveness as institutions.

The disagreement on the compliance of procedures must be resolved to ensure better management of consultation agreements.

Moreover, in future, the three Nordic states must also extend their measures related to the adverse consequences of climate change on the Sami, of course after consultation of the Sami Parliaments. Grazing areas are currently shifting southwards due to the effects of climate change. Sustainable land management with preventative measures for climate change should be advanced in conjunction with the Sami. In addition, in times of increasing alternative energy production it has to be guaranteed that measures to support renewable energy resources do not negatively influence the Sami way of life.

Finally, the need to combine environmental law and especially nature resource rights of Nordic states even more with indigenous rights law of these countries must be emphasised in future<sup>32</sup> - something Anaya unfortunately did not discuss in his 2011 report.

It has to be acknowledged that there is a mutual alliance of environmental law and the relevant aspects of indigenous rights law in Swedish law (Allard, 2006: 3). Moreover, it should be positively noted that Norway, Sweden and Finland increasingly implement the Biodiversity Convention by inclusion of indigenous rights,<sup>33</sup> although Sami inclusion in environmental concerns is still insufficient. With regard to the environmental demands of those engaged in reindeer husbandry, one should not rely on the general rules, as special norms might be even more effective to support sustainable goals and specific Sami interests through reasonable inclusion of regional or local circumstances.

## **2. The Sami Rights Convention**

In 2005, an expert group established by the governments of Norway, Sweden and Finland and the three Sami Parliaments agreed on a Draft Nordic Sami Convention (Fitzmaurice, 2009: 117-124, 127; Koivurova, 2008)<sup>34</sup> to consistently regulate the interests of indigenous people in these countries.<sup>35</sup> This Convention on the rights of the Sami people would be a new international instrument, a human rights contract, with the objective (Article 1) to “affirm and strengthen such rights of the Saami people that are necessary to secure and develop its language, its culture, its livelihoods and society, with the smallest possible interference of the national borders.” A Sami Convention will regulate the rights of the Sami people and the members of this people in a way that complies with indigenous rights developments that have taken (and are taking) place in international law (Scheinin, 2007: 41; cf. Åhrén, 2007: 12). The Sami Convention’s status will be one of a legal binding treaty between states under public international law.<sup>36</sup> The condition that the Sami Convention cannot enter into force or be amended without consent of the Sami Parliaments reflects the nature of this Convention as a ‘social contract’ between the Sami people and the Norwegian, Swedish and Finnish governments (Scheinin, 2007: 51; cf. Åhrén, 2007: 12; cf. Koivurova, 2008: 288: no parties).

After the Nordic governments and Sami Parliaments have agreed upon the final contents of the ‘Sami Convention’, it has to be signed by the three Nordic governments and forwarded to the Sami Parliaments for acceptance, as well as to the respective federal parliaments for parliamentary procedures under consideration of the Constitutions (Scheinin, 2007: 50).

Prior to these procedures, Finland has to overcome its prejudices concerning the regulations on ownership, self-determination and land use; in Sweden these issues exist to a lower degree (Arctic Centre, 2009-2011). The fact that a central part of the Convention text deals with the recognition of Sami land and resource rights and that the understanding of indigenous peoples’ property rights (cf. Bankes/ Koivurova, 2013)<sup>37</sup> has to be clarified in the Sami Convention prevents its adoption.<sup>38</sup>

By means of international instruments, Part 2 of this article analyses and assesses the extent and meaning of the central issues of land, resource and self-determination rights. How far do the land and self-determination rights of this Convention secure the Sami an equivalent position against state institutions and non-Sami people?

### ***2.1. Emergence and status of the Draft Convention***<sup>39</sup>

In 1986, the concept of a Nordic Sami Convention was raised by a conference of the Sami Council. The Sami conference repeated its proposals in 1992. The concern was later reported again at a mutual meeting of the Norwegian, Swedish and Finnish Sami Rights Committees.

During the 1995 meeting of the Nordic Council, a common board of the mentioned Nordic states, the ministers responsible for Sami matters in Finland, Norway and Sweden decided to start with the actual work on a Nordic Sami Convention. Finally, in 2002, the responsible ministers and the presidents of the Sami Parliaments (Samediggis) of the three countries established an expert group which prepared the Sami Convention (Eide, 2009: 257-258). In 2005, the experts reported their proposal at the annual Helsinki conference to the ministers responsible for Sami matters and to the presidents of the Sami Parliaments. The expert group suggested that the Convention should be ratified by Finland, Norway and Sweden, but this ratification should not take place before the Sami Parliaments have given their consent. In general, the Sami Convention is supported by all members, despite difficulties caused by the Finnish representative with accepting parts of the Convention (e.g. Article 3 on self-determination, chapter 4 on Sami land and water rights and Article 42, which applies to reindeer husbandry as a central content of Sami livelihood). The proposal had to undergo a consultation process and was considered by the respective governments (Josefsen, 2003: 12). In 2008, the Draft was advanced and checked against existing national legislations.

Since March 2011, further negotiations between government delegates and Sami Parliaments have taken place. Central questions to be agreed upon include land rights and reindeer herding. A common Sami position has been worked out in the “Parliamentary Council of the Sami”, which coordinates the work of the Sami Council and of the Sami Parliaments. A representative of the Finnish Sami Parliament expressed that they are “quite satisfied” with the draft and that the final Convention hopefully “will be close to the 2005 draft” (IPS, 2011).

However, whether the draft stays fairly unchanged is very much in doubt. In 2009, Fitzmaurice even commented that the fate of the Convention is undecided, precisely because in Finland Sami self-determination issues and constitutional rights issues have been articulated (Fitzmaurice, 2009: 127, Koivurova, 2008: 18).<sup>40</sup> Nevertheless, matters are more optimistic in light of the rendition of the goals to accept and to ratify the final convention by all three countries in 2016 (UN News Centre: 2015), although it is still necessary to solve new practical challenges, such as the change of reindeer husbandry areas because of climate change, to secure the Sami an equivalent position against non-Sami people and state authorities.

## ***2.2. Extent and critique of self-determination rights***

The preamble of the Sami Convention makes clear that the governments of Norway, Sweden and Finland recognize a right to self-determination of the Sami people (sentence 5).

Moreover, the preamble emphasizes in sentence 13 that the mentioned governments include as a basis for the debate that “the Sami Parliaments of the three states underline the importance that the right to self-determination that the Sami as a people enjoy is respected”.

Article 3 of the Convention then responds to the Sami right to self-determination.

The expert group to the Sami Convention concluded that the right to self-determination of the Sami people neither contains a right of secession from the existing states in which they live, nor does such a right belong to them according to international law. This view of the expert group, combined with Article 3 of the Sami Convention, determines that the right to self-determination will be implemented according to international law and that the explanation of the Sami Parliaments in the preamble of the Sami Convention – that the Sami people strives to live as “one people” – considers the issue of territorial integrity (Fitzmaurice, 2009: 124-125; Åhrén, 2007: 8-40, esp. 15-18).<sup>41</sup> Koivurova (2008: 285) refers to the “limited self-determination without the (present) possibility to constitute an own state.” Eide (2009: 259) explains convincingly that the interpretation of the Sami Convention according to the ‘UN Declaration on Friendly Relations and on Cooperation among States in Compliance with the UN Charter’ implies that the exertion of self-determination respects the territorial integrity of the states. To advance the functional Sami autonomy, including participation functions concerning land, there is intent to transfer increasing autonomy from the central parliaments to the respective Sami Parliaments and to increase cooperation between the Sami Parliaments and their emerging and executing authorities.

Moreover, Åhrén (2007: 16) argues, the right to self-determination pursuant to Article 3 sentence 2 of the Sami Convention explicitly contains a Sami right “to dispose, to their own benefit, over its own natural resources”.

Thereafter the Articles 14-22 of the Sami Convention deal with the issue of how the Sami right to self-determination shall be implemented. Today, there is a mixed population in an essential part of the traditional Sami areas. Sami people use certain areas exclusively, and sometimes they hold the majority in traditional areas, however they are more often a minority. Consequently, the Sami rights to self-determination are in competition with the self-determination rights of non-Sami. In these cases, according to the Draft Sami Convention, the solution is a diversified degree of influence on decision-making processes according to the

following principle: the more important a matter is for the Sami, the more influence they can exert.<sup>42</sup> Hence, the position of the Sami is as equitable as possible.

Pursuant to Article 14 sentence 1, the respective Sami Parliaments represent “their” Sami people in each of the states that sign the Sami Convention. They will hold decision and participation rights to effectively implement the right to self-determination (Art. 14 sentence 4). Sami Parliaments have a right to independent decisions in all matters in which they are entitled to an independent decision according to national or international law (Art. 15 sentence 1).

The Sami Parliaments have an early right to negotiate in matters of major concern to the Sami before official decisions on such matters are reached (Art. 16 sentence 1 and 2). Without the consent of the concerned Sami Parliament, the fundamentals of the Sami culture, Sami livelihood or the Sami society may not be affected (Art. 16 sentence 3). In other words: the states shall not adopt or permit measures that may significantly damage these basic conditions. Consequently, the Sami people have the key voice in cases where an activity or legislation could cause considerable damage.

Furthermore, financial support of the Sami Parliament, for example for expertises, leads to real equality (Anaya, 2001: 20, para. 77). Sami Parliaments have the right to represent the Sami in national committees and similar bodies if these are concerned with matters relevant to the Sami. As stipulated by Åhrén (2007: 17), the Sami Parliaments have to be duly informed in matters of relevance (Art. 17 sentence 1 and 2). Anaya (ibid.) even demands “appropriate procedures to consult with Sami Parliaments towards this end”.

In addition, Sami Parliaments have a right to participate in national assemblies (Art. 18) and represent the Sami on the international level (Article 19). Åhrén (2007: 17-18) and Koivurova (2008: 285) emphasize that the Sami-Parliament exercises external self-determination (as the Saami Parliamentarian Council/SPC does).

Sami Parliaments can establish joint organisations (Art. 20 sentence 1) like the SPC. It is worth noting that the state can transfer jurisdiction to these joint organisations (Article 20 sentence 2). Other Sami organizations such as civil society institutions must also be respected by the state and, if necessary, must be consulted (Art. 21). This secures the traditional structures and decisions of the Sami communities (“Siidas”). Finally, areas where Sami exercise their rights have to be identified and have to be developed (Art. 22).

Pursuant to Åhrén (2007: 18) and Koivurova (2008: 284-285), it can be asserted that the Sami Convention reflects a modern position on self-determination by taking recent developments in international law into account. The Sami Convention emphasizes that the Sami – as a people equal among other peoples – enjoy the same right to self-determination as other peoples do. This includes internal and external aspects of self-determination. The right to self-determination in the Sami Convention comprises a right that is based on ethnicity, rather than on territoriality. This makes the implementation of this right much easier. The Sami Convention responds to this issue by submitting a concrete and detailed proposal of how the right to self-determination can be implemented if an indigenous people today shares a large part of its traditional areas with other peoples who have an equal right to self-determination. Nevertheless, as Anaya states (2011: 20, para. 75), implementation procedures with governments and authorities in Norway, Sweden and Finland should be enhanced and monitored, particularly because history has shown that these non-indigenous institutions have difficulties respecting indigenous self-determination.

Unfortunately, even the Sami Convention does not demand that non-Sami courts, management authorities and the legislator respect the customary Sami law.<sup>43</sup>

### ***2.3. Contents and critique of land and resource rights***

In the preamble, the participating governments to the Sami Convention confirm that lands and waters are the basis of Sami culture, the Sami must have admission to them (sentence 8). It highlights that the governments of the signatory states view a new Sami Convention as a renewal and a development of Sami rights established through historical use of land, which were codified in the Lapp Codicil of 1751 (sentence 12).<sup>44</sup>

The Sami right to land and waters is regulated in-depth in Article 34 to 40 (cf. Åhrén, 2007: 26-30).<sup>45</sup> Rules on land rights are defined with reference to the respective regulations in ILO Convention No. 169, adapted to the special situation of the Sami people. They regulate traditional land and water use, the protection of Sami rights to land and waters, fjords and coastal waters, the use of natural resources, compensation and the distribution of benefits, land and resource management as well as environmental protection and management.

Article 34 I states that a “protracted traditional use of land or water areas constitutes the basis for individual or collective ownership rights to these areas for the Sami”, but only “in accordance with national or international norms concerning protracted usage.” Thereby, the Convention does not clarify the relation of collective rights to land to individual rights. Furthermore, the Convention does not declare anything on how land and natural resources

should be distributed in the Sami society, nor is it evident in the Sami Convention that certain Sami have privileges (Åhrén, 2007: 27, fn. 75). Anaya especially emphasises, that - amongst others - issues concerning the distribution of reindeer grazing lands stay unresolved, despite (border area) agreements. In my view, in addition to the agreements and existing guidelines of the Sami Convention, customary Sami law and institutions could be used to find proper solutions concerning the distribution of Sami land and natural resources in Sami society.

Article 34 II (corresponding to Art. 14 I of ILO Convention No. 169)<sup>46</sup> states that: “If the Saami, without being deemed to be the owners, occupy and have traditionally used certain land or water areas for reindeer husbandry, hunting, fishing or in other ways, they shall have the right to continue to occupy and use these areas to the same extent as before.”<sup>47</sup> “If these areas are used by the Sami in association with other users, the exercise of their rights by the Sami and the other users shall be subject to due regard to each other and to the nature of the competing rights.” A balancing of these rights must take into account that Sami rights are human rights, but competing rights of non-indigenous people often are not. Article 34 II clarifies that particular regard has to be paid to the interests of reindeer-herding Sami.

Since the territorial basis of indigenous peoples is constantly decreasing (Stavenhagen, 2007: 2), the question arises of whether the scope of Sami territories is protected sufficiently in Article 34 II of the Draft Sami Convention (corresponding with Art. 14 I ILO Convention No. 169) to allow (extensive and/or traditional) indigenous economic activities.<sup>48</sup>

Pursuant to Article 34 II Sami Convention, the Sami “occupy and have traditionally used certain land or water areas for reindeer husbandry, (...) or in other ways (...), and (...) shall have the right to continue to occupy and use these areas to the same extent as before”. Although the scope of Sami land is not *directly* addressed, this norm provides a certain informative basis on the scope of Sami territory (traditionally used land or water areas) and directly addresses (traditional) economic activities with the wording “continue to occupy and use these areas to the same extent as before”. Article 34 further affirms the right of the Sami people to restitution: Article 34 IV “shall not be construed as to imply any limitation in the right to restitution of property that the Saami might have under national or international law.”

The Sami Convention does not define the traditional Sami area - Sápmi - but Åhrén (2007: 30) argues convincingly that at least Article 34 I, II, IV determines this indirectly.

Consequently, it is the sum of land and water areas the Sami have traditionally owned or used and continue to use, whether alone or together with the non-Sami population.<sup>49</sup>

However, the restitution of traditional lands and waters taken without their consent (“lost lands”, see Art. 28 UN Indigenous Declaration) is not fully addressed in the Sami Convention (Fitzmaurice, 2009: 126). Further negotiations in this regard are required. There is at least some chance of positive results, as the Anaya Report shows that the Nordic states increasingly react respectfully to prevent violations of Sami land and water rights, with an increasing tendency to comply with international human rights standards.

Although in ILO Convention No. 169 the scope of indigenous lands is not directly protected (see Articles 7, 13, 14, 16, 19 of ILO Convention No. 169), Article 14 I – the basis of Article 34 of the Sami Convention – could provide evidence of the scope of indigenous lands (and waters) as well as of local (traditional) economic activities. This norm intends to protect indigenous rights to traditionally occupied or used lands (“lands which they traditionally occupy”, right (...) to use lands not exclusively occupied”). The wording can be interpreted to also protect the scope of land (and water) concerning traditionally occupied land, with reference to the present to include recent expulsion or loss of land that occurred within the recent past. However, there is no prerequisite that the land was traditionally occupied, thus indigenous people are free to determine their lifestyle. Moreover, measures shall be taken to protect the indigenous right to use the “land”, not exclusively occupied by them, for their livelihood and for traditional activities (I sentence 3 even includes nomadic peoples). Accordingly, the scope of indigenous land and water areas for (even extensive and/or traditional) economic activities could be protected by Articles 34 II Sami Convention and 14 I ILO Convention No. 169. Both norms provide an informative basis relating a certain, though not sufficient, protection of the scope of indigenous lands (and waters).

In addition, there is a ‘soft law’ argument:<sup>50</sup> The draft of Article 26 Indigenous Declaration (not adopted by the Human Rights Council) included the phrase in relation to the land “which they traditionally owned or otherwise occupied or used”, but the revised Article 26 added the stipulation that “they possess [land] by reason of traditional ownership”. This even limits the scope of the lands to currently owned (Fitzmaurice, 2009: 75 citing Gilbert).<sup>51</sup>

Moreover, Article 34 II of the Draft Sami Convention determines that the Sami lose no rights to continued use of land and water simply because they adapt to necessary technical and economic developments.<sup>52</sup> According to Article 34 III of the Draft Sami Convention, the “assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water” and “bear in mind that Saami land and water usage often does not leave permanent traces in the environment.” This

statement of the Sami Convention is of enormous practical meaning for court procedures if competing non-Sami interests exist. Anaya (2011: para. 51) argues that the difficulty in the protection of land rights would lie in the burden of proof Sami claimants have concerning the proof of land ownership and pasture rights. However, with sentence III Article 34 obliges the courts to accept the burden of proof of the Sami analogous to the traditional land and water use, when it has to clarify whether the Sami are entitled to the traditional use of a certain area (Åhrén, 2007: 28; cf. Ravna, 2013: 177-205).

According to Article 35 of the Draft Sami Convention, states shall take adequate measures to effectively protect the traditional Sami land and water (user) rights of Article 34. To that end, states shall especially identify those land and water areas the Sami traditionally use. Furthermore, adequate procedures shall be available under national law to examine questions concerning Sami rights in land and water. In particular, Sami shall have access to necessary financial support to be able to initiate legal proceedings pertaining to their land and water rights. Article 35 could, if implemented, be called one of the central provisions of this Convention. The Sami would have stronger rights to their traditional areas than the states acknowledge in their respective legislations. Until now, in the absence of sufficient financial resources, they often do not have the option to claim or defend these rights (Åhrén, 2007: 28).

Pursuant to Article 36, Sami rights to natural resources were particularly protected within (those) land or water areas that fall within the scope of Article 34. The necessity of continued access to such natural resources as a prerequisite for the preservation of traditional Sami knowledge and their cultural expressions shall be respected. Before national authorities grant – on a legal basis – a permit for prospecting or extraction of minerals or other sub-surface resources, or make decisions concerning the utilisation of other natural resources within the land or water areas owned or used by the Sami, they shall negotiate with the affected Sami and the responsible Sami Parliament. Article 16 stipulates the prerequisite for the right of the Sami Parliament to negotiate.<sup>53</sup> Permission for the exploration or the extraction of natural resources shall not be granted if this activity makes it impossible or essentially complicated for the Sami to continue using the affected areas. There is an exception to this, however, if the Sami Parliament and the concerned Sami have agreed on it. The provisions of Article 36 are also applicable to the utilization of other forms of natural resources, as well as to other interferences in nature within the geographical areas covered by Article 34. This includes activities such as logging, hydroelectric and wind power plants.<sup>54</sup> It is worth noting that Article 36 Draft Sami Convention (2005) orientates itself on ILO

Convention No. 169. Article 36 II-IV corresponds to the interpretation of Article 27 ICCPR by the UN Human Rights Committee concerning indigenous peoples' rights, in light of Article 1 ICCPR (self-determination right): consequently, in matters of special meaning in terms of Article 16, there must be negotiations with the Sami Parliament. In practice, the interdiction of exploitation mentioned in Article 36 III and IV would be of a special meaning. This was demonstrated in 2006, in a conflict situation pertaining to the extension of a military drill ground in reindeer herding areas.<sup>55</sup>

Thereafter, Article 37 deals with compensation and sharing of profits: for all damages suffered by the Sami through activities referred to Article 36 II and IV, affected Sami shall have the right to compensation. In cases where national law obliges persons granted a permit to extract natural resources to pay a fee or share of the profit from such activities to the landowner, the permit holder shall be similarly obliged concerning the Sami that have traditionally used and continue to use the area concerned. The provisions of Article 37 shall not be interpreted in a way that they imply any limitation in the right to share the profits from natural resources extraction that may follow according to international law. Although this is an improvement in terms of the ILO Convention No. 169, the expert group on the Sami Convention has rightly pointed out, instead of Article 37 I it is time for a general solution concerning division of profits resulting from the exploitation of natural resources in Sami areas. The compromise that has been reached on profits is very similar to the one on compensation. The Anaya Report emphasised the need for improvement of the Norwegian implementation of ILO Convention No. 169, as there is an apparent lack of legal remedies against official procedures due to insufficient participation in profits from mining activities on traditionally used land.

Moreover, the lack of time the expert group to the Sami Convention has had to clarify controversial Sami rights to lost areas and non-traditional resources in Sami areas concerning sharing of profits and compensation should be criticized.<sup>56</sup> Although initial talks are in progress, the Sami Convention offers no solutions pertaining to lost areas, territories and non-traditional resources (Åhrén, 2007: 29). Agreements could be a solution here.

In addition, due to the massive ignorance of indigenous rights in coastal regions, Article 38 responds to Sami rights in fjords and coastal seas.<sup>57</sup> This highlights the great importance of sea and water rights for the Sami culture.

The central issue of land and resource management is addressed in Article 39. In addition to the ownership and usage rights the Sami enjoy, Sami Parliaments shall have the

right of co-determination in the public management of areas referred to in Articles 34 and 38.<sup>58</sup>

Finally, Article 40 addresses environmental protection and management. In cooperation with the Sami Parliaments, states are obliged to actively protect the environment to ensure sustainable development of the Sami land and water areas referred to (Articles 34 and 38).

#### ***2.4. Implementation and development of the Convention***

Article 44 applies to the Council for Cooperation, which is to be composed of the three ministers responsible for Sami matters and the respective presidents of the Sami Parliaments. The norm defines a regular meeting to support the goals of Article 1, during which relevant Sami issues of a common interest shall be discussed. A Nordic Convention Committee shall be introduced to observe the implementation of the Convention (Art. 45). But the Expert Committee did not allow the Convention Committee to be an official complaint body, since the experts chose to focus on having the Convention incorporated into the national legal systems to seek a uniform application of this Convention (cf. Koivuriva, 2008: 286). In Article 46 participating states are assigned with the task of implementing the norms of the Convention and making them directly applicable as national law. Moreover, Article 47 rules that these states should allocate financial resources proportionate to the extent of the indigenous population of the respective country, pertaining to the implementation of the norms of the Convention.<sup>59</sup> Determinations in this Convention related to the implementation and development are quite successful as they are oriented by ILO Convention No. 169<sup>60</sup>, the special Sami Parliaments are included with equal value, and financial aspects are considered. In this way the clarification of fundamental issues does not fail – as happened in the past in some states – due to lack of financial means. Common interests are emphasized. A meaningful adjustment of legal standards in favour of cross-border living Sami is sought through the determination of national implementation.

#### ***2.5. Meaning of land and self-determination rights in the Sami Convention***

The work on a Nordic Sami Convention shows that indigenous institutions can act very productively in a trans-national manner (Strömngren, 2008: 29), but the Sami Parliaments must be considered as equal parties. Still, the concept of self-determination must be defined more precisely: the concept of minimal standards surrenders considerable administrative discretion to the member states, particularly as concerns the determination of political autonomy of indigenous communities, self-government powers and certain economic rights (ibid.). Nevertheless, this Convention would give the Sami people a substantial right to have a say in

matters regarding their economic, social and cultural development and might constitute an enormous step onward in the implementation of rights determined in ILO Convention No. 169 (Grote, 2006/2007: 443). It provides innovative regulatory arrangements (Koivurova, 2008: 292). Because Sami culture and communities are closely linked to their traditional land and water areas and to their natural resources, the indigenous peoples' right to self-determination concerning land and natural resources is of central importance (Henriksen/ Scheinin/ Åhrén, 2007: 89-95, 89). It is logical for the resource dimension to be included; indigenous peoples' cultural autonomy only has an impact if there is a right to control land and natural resources (Ibid.). The Sami Convention grants far reaching Sami land and resource rights (Grote, 2006/2007: 436-442). It will provide the foundation for Sami land rights because it has not only tried to implement the controversial Articles 14 and 15 ILO Convention No. 169 on resource rights but is also predominantly in accordance with the contents of land and resources in the UN Indigenous Declaration (Fitzmaurice, 2009: 126).

### **Conclusion and prospects**

What conclusion can be drawn on Sami land and self-determination rights in light of the Anaya Report and the Draft Sami Convention? What are the primary challenges for the future?

Independence is neither an option nor a vision of the Sami people. In comparison to the non-indigenous population in the countries in which they live, the Sami are occupationally, culturally and otherwise integrated to a much higher degree than, for example, the Inuit in Nunavut, Canada (cf. Carstens, 2000: 255), or Greenland.

Several topics are of special importance to the Sami, particularly for their cultural survival: the protection of Sami land rights and their indigenous subsistence strategy, sustainable development of land and sea areas, and a decision-making procedure that includes the Sami effectively where their matters are concerned. For this reason, in Norway, Sweden and Finland the Sami increasingly claim institutional rights and extensive land and water rights in jurisdiction, legislation and in agreements; they seek profit participation if resource extraction occurs and for environmental rights to promote the sustainable use of nature (cf. Allard, 2006).<sup>61</sup>

Similar to other indigenous peoples, the Sami discuss whether they, as an indigenous people, hold land and resource rights on the basis of traditional use due to models of possession and ownership rights, and to what extent these indigenous rights are protected in light of a partial national refusal to observe traditional rights approved by international law.

Anaya's (2011: 1-2, 10) results on Sami land and self-determination rights underline the fact that in comparison to other states (cf. Carstens, 2009: 399-424)<sup>62</sup>, Norway, Sweden and Finland consider issues of their indigenous population to a high degree. An interrelation of developments on indigenous rights exists on the international, national and regional level, especially in Norway, but also in Sweden and in Finland (Eide (2009: 280). In many aspects the Nordic states' initiatives are an important example of how to secure indigenous peoples' rights. This especially applies to the cross-border approach to developing a Sami Convention.

The Anaya Report (2011: 20-21) correctly observes that in the future more has to be done to secure Sami practice of self-determination, especially by solving issues of the Sami Parliaments as governmental authorities and by granting them jurisdiction over traditional land. Self-determination has to be secured by greater independence from state institutions and authorities (review of statutory status and functions of the Sami Parliament). Sami self-determination and constitutional rights issues should be solved by finally answering the question of how rights relating to the Sami as a people comply with rights already granted by the constitution.

Moreover, sufficient answers concerning proposals and comments of the Sami Parliament are needed (ibid.: 11, para. 40). The Nordic states should continue with the existing approaches of a Sami rights reform; self-determination on the national level (e.g. stronger powers and independent status of the Sami Parliament), especially internal self-government practiced by the Sami Parliaments, and Sami rights to their lands, areas and resources are important.

As Anaya states convincingly (ibid.), particularly when it comes to activities that interfere with their land rights, obtaining the (free, prior and informed) consent of the indigenous land owners should be required. This applies to direct and indirect interferences.<sup>63</sup> Corresponding to Article 30 of the UN Indigenous Declaration, consultation and participation as procedural requirements of the Draft Sami Convention are not sufficient. Nevertheless, jointly negotiated consultation procedures and the granting of increased or exclusive decision power in all Sami issues together with a higher recognition of traditional decision power of local

Sami institutions would lead to adequate internal self-determination, as is intended in the Sami Convention.

Accordingly, the expansion of financial resources for Sami projects and initiatives and support in claiming and defending their rights are crucial goals in achieving adequate Sami self-government and equality in court procedures.

Anaya's demand for further official demarcation of indigenous areas, particularly reindeer herding areas, is still relevant in order to comply with (yet to be ratified) Art. 14 II of ILO Convention No. 169 and Art. 35 I 2 of the Sami Convention. As Joona correctly demands (2009-2011), the acknowledgment of indigenous property systems in the Arctic states should be clarified. It is time to solve the above mentioned issues of the Sami Convention such as the relation between collective rights to land and individual rights, the distribution of land and natural resources in the Sami society, and the restitution of traditional lands and waters taken without consent.

Besides these tasks, extended measures to reduce the negative consequences of climate change on the Sami are necessary (Anaya, 2011: 21, para. 85), due to the challenge of shifting pastures. A new Sami Convention must also regulate this issue, which is as yet unresolved. In addition, increasing alternative energy production needs measures to support renewable energy while respecting the Sami way of life (*ibid.*). In my view, in the near future, natural resource rights and environmental rights of the Nordic states must be combined with Sami rights in a meaningful way. This is an exceptional task, and not an easy one. Increased Sami participation in local natural resources management, together with the surrounding societies of the respective states, is foreseeable (Eide, 2009: 281) in order to realize the sustainable development of Sami land.

Finally, the current negotiations surrounding the Sami Convention should consider that the Convention does not demand that non-Sami courts, management authorities and the legislator respect the customary Sami law.

In the long run, a Sami Convention might be of interest for indigenous peoples worldwide, especially where an indigenous people lives scattered across several countries, like for instance the Maya (living in Mexico, Guatemala and in Belize). Already now, as mentioned by Koivurova (2008: 292-293), the special and permanent influence of the Draft Sami Convention as a social contract is apparent, as it shows "an innovative possibility to grow beyond the state-centred paradigm in international relations in a realistic way".

Even if the Sami Convention is not a perfect document, as pointed out by Åhréns (2007: chapter 7) and Fitzmaurice (2009: 127), in future it will nevertheless open a new chapter of the relationship between Sami people and non-Sami people. The Convention advances the status and rights of the Sami as a people within the complex institutional framework in which they are presently located (Koivurova, 2008: 291) and marks a new partnership between the Sami and the colonizing peoples of Northern Europe (Åhrén, 2007: 12).<sup>64</sup> The process of how the Draft was made can be seen as an attempt to establish an equal relation between the Nordic states and the Sami (Koivurova, 2008: 291). The proposed Convention considers the Sami as a people living separated by international borders. Hence, both national and international dimensions of the Draft are of concern. This especially applies to indigenous ownership (property) rights. Here existing issues have to be solved quickly and according to international law.<sup>65</sup> In each of the three Nordic states, aspects of the recognition of ownership interests articulated by the Sami must be specifically investigated further.<sup>66</sup>

At present, the intended Sami Convention contains a minimum of Sami rights under special consideration of Sami interests, orientated on ILO Convention No. 169. For this reason, Anaya (2011: 20, para. 72) demands that Finland complete steps to ratify the instrument, and that Sweden also consider ratification, in consultation with Sami people.

The Sami Convention shall lead to a consolidation of decisive international law, of national Sami rights and to an obligation of the respective states (Strömgren, 2008: 29). With regards to land, resources and environmental rights the Nordic states should orientate on this future convention and even more on the far reaching UN Indigenous Declaration, which took up the main critical points of ILO Convention No. 169 and has carried out numerous improvements to acknowledge land rights (Eide, 2009: 255).<sup>67</sup> That is why Anaya's demand for further ratification of ILO Convention No. 169 does not go far enough to ensure that the Sami can pursue self-determination and sufficiently realize land, resources and environmental rights.

Nevertheless, a future Sami Convention, based on ILO Convention No. 169, will be an already extensive 'modern contract' between the Nordic states and the Sami people, even if admittedly the Sami will not be classified as a formal party next to states (Anaya Report, 2011: para. 35; Koivurova, 2008: 292-293). As Koivurova asserts (2008: 279) the Draft Sami Convention "tries to ensure a position that is as equitable as possible for the Sami in relation to the Nordic states". This altogether remarkable new international instrument would also be within the meaning of Article 36 of the UN Indigenous Declaration.<sup>68</sup>

Finally, in accordance with Grote (2006/2007: 442), a Sami Convention could serve as a successful model for facilitating an international monitoring board; control mechanisms stipulated in this Convention could even lead to an individual petition system.

This cross-border contract still constitutes an enormous challenge. Its acceptance is now expected in 2016 (UN News Centre: 2015; Sami Parliamentary Conference, 2014).<sup>69</sup>

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## Notes

- <sup>1</sup> Published e.g. in Åhrén, 2007: appendix.
- <sup>2</sup> Cited as: UN Indigenous Declaration (a non-binding document, but upcoming customary international law). The Declaration is a reference frame (in detail see e.g. Stavenhagen 2009: 8).
- <sup>3</sup> This report is based on information gathered during the Rapporteur's visit to Norway, Sweden and Finland.
- <sup>4</sup> Cf. UN News Centre: 2015: conclusions and recommendations by the new Special Rapporteur Tauli-Corpuz.
- <sup>5</sup> Rights of Russian Sami are not mentioned in the Anaya Report of 2011. For details Josefsen, 2007: 12-13 (3.7 Russia: Article 27 ICCPR, constitution, Indigenous Peoples Act 2002, etc.)
- <sup>6</sup> Cf. Art. 46 UN Indigenous Declaration.
- <sup>7</sup> As pursuant to the Norwegian Consultation Agreement.
- <sup>8</sup> (Reindeer) organisation with historical roots and principles (Reindeer Herding Act, 1978 (changed in 2007)).
- <sup>9</sup> This legal entity is partly seen as a corporation of land owners, partly as an administration unit.
- <sup>10</sup> Moreover, the Uncultivated Land Tribunal was established, a special land rights court of the Finnmark.
- <sup>11</sup> Pursuant to Swedish courts.
- <sup>12</sup> Cf. Anaya, 2011: paras. 59, 61 on loss and limitation of pasture land, climate change and beast attacks.
- <sup>13</sup> In the legislative procedure the Sami were only represented in politics that affect their cultural survival.
- <sup>14</sup> Citing the comment of the Human Rights Committee (HRC) to the fourth periodical report of the Norwegian Government which applies to the resource dimension (Article 1 II ICCPR), 2007.
- <sup>15</sup> According to the HRC and the General Comment, Art. 27 ICCPR is applicable to land and resource use (cf. Carstens, 2000: 69-70). The individual rights to be able to enjoy a special culture can be interpreted as a protection of a way of life that is closely linked to an area and to the use of the resources in it (Kitok v Sweden). Since the Nordic states ratified the UN Human Rights Conventions, Art. 27 ICCPR is exercised everywhere.
- <sup>16</sup> It is difficult to precisely decide between expressed collective land rights of indigenous peoples and the aspect of self-determination in ILO Convention No. 169 (ILO 169 includes the right to make decisions regarding land and water areas and natural resources. On the resource dimension of self-determination rights see Articles 7 b, 21, 26 UN Indigenous Declaration and its implications. Pursuant to Article 31, land and resource management are part of the self-determination right of indigenous peoples.
- <sup>17</sup> 'Svartskogen Case': no formal right to object to the local land use plan. At least, pursuant to the 'Cultural Monuments Act', the Sami Parliament has a right to object during the planning process. 'Selbu-Case': reindeer herders are not parties to the land use plan in grazing areas, land owners do not have a right to object to local development plans. Instead, only organs of the reindeer authorities are allowed to act for them.
- <sup>18</sup> Cf. on the possible ratification of ILO Convention No. 169 and potential effects on traditionally living people.
- <sup>19</sup> The Finnmark Act already regulates that Sami Parliament and land owners have the opportunity to make comments during a permission process.
- <sup>20</sup> See in addition UN Doc. CC PR/CO/74/SWE, April 24, 2002, point 15.
- <sup>21</sup> When it comes to sovereign derogations of user rights, reference to the Administration Court is feasible.
- <sup>22</sup> In 2009, the conflict of logging in winter grazing areas of indigenous reindeer herders by the state owned company Metsahallitus was resolved through a negotiated agreement in favour of the Sami.
- <sup>23</sup> E.g. by the Norwegian Sami, who demand financial participation in the revenues resulting from exploitation of oil by the state in Sami waters (cf. Comment of the Norwegian Sami).

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<sup>24</sup> Self-determination: for conclusions and recommendations see Anaya, 2011 (V., B.): paras. 73-77; for recommendations (rights on land, waters, natural resources) see *ibid.*, part V., C: paras. 78-79 and 80-86.

<sup>25</sup> With further references to the ‘International Workshop on Free, Prior and Informed Consent (...)’, 2005.

<sup>26</sup> E.g. granted in full knowledge of all circumstances.

<sup>27</sup> Articles 6 and 7 of the ILO Convention No. 169 are central norms and must be included when it comes to indigenous land, resource and self-determination rights (Tomei/ Swepston, 1996: 12).

<sup>28</sup> Effective safety measures on fishing rights of Sami living in coastal areas to secure the traditional livelihood.

<sup>29</sup> With reference to Australian models.

<sup>30</sup> For details of customary rights in Sweden see Allard, 2006: 3 and 519-521.

<sup>31</sup> Until 1997, this was the frequently expressed official opinion (see Sillanpää, 1997: 208).

<sup>32</sup> Regarding the issue of linking environmental damages and the living situation of indigenous peoples, the different understanding of a sustainable use of nature, the adjusted way of life of indigenous peoples and the decisiveness of national and international environmental standards see Carstens, 2000: 122 at seqq. (A. III.).

<sup>33</sup> E.g. Article 8 j.

<sup>34</sup> 4.2. The 2005 Draft Saami Convention: The General Framework; for a summary see Fitzmaurice, 2009: 127.

<sup>35</sup> Sami living in Russia are not included in the Convention, although there live some thousands of Sami close to the border. Russian officials state “no interest” (Josefsen, 2007: 12). Russian Sami have an observer status.

<sup>36</sup> Only states are parties to the Sami Convention. But the entry into force and amendments of the instrument will require appropriate parliamentary proceedings and approval by the Sami Parliaments (Art. 51).

<sup>37</sup> In depth on indigenous property rights.

<sup>38</sup> The controversial question of whether it will be a convention containing concrete rights or only a framework convention that will provide general principles for the states and contains only a few concrete rights has been solved in favour of an advanced “rights convention” (Fitzmaurice, 2009: 117).

<sup>39</sup> Cf. on the background of the Sami Convention Bankes/ Koivurova, 2013: part II.

<sup>40</sup> The question is how the rights of the Sami as a people comply with rights already granted by the constitution.

<sup>41</sup> There are no collective rights norms in the Sami Convention (Åhrén, 2007: chapter 6.2).

<sup>42</sup> The range goes from an exclusive right to decide to being informed on a decision-making process by the respective deciding non-Sami body (Åhrén, 2007: 16).

<sup>43</sup> Cf. Henriksen, and Scheinin, Åhrén, 2007: 52-97.

<sup>44</sup> Sentences 14, 15: The Sami have rights to land and waters areas which contain the historical Sami homeland and rights to natural resources in these areas. Traditional knowledge and the traditional expression of Sami culture, incorporated in the use of natural resources were identified as part of the Sami culture.

<sup>45</sup> Cf. Fitzmaurice, 2009: 120-122, Eide, 2009: 257-259, Koivurova, 2008: 279-293.

<sup>46</sup> Art. 14 I ILO 169 deals with ownership and possession rights to traditional land.

<sup>47</sup> Art. 42 (V) indicates that Norway and Sweden shall preserve and develop the Sami reindeer herding right as the only right in reindeer areas; Finland shall strengthen the position of the reindeer herding Sami.

<sup>48</sup> Challenged in general by Réne Kuppe, University of Vienna (2009, discussion with author).

<sup>49</sup> Included are those areas which were claimed respectively as occupied and/or used and which were lost during colonisation or due to other reasons that require compensation according to international law. Norway and Sweden are now about to define Sami areas. This has led to critique. Although Finland has defined Sami areas, this did not happen within the obligations of the ILO Convention 169 and Art. 35 I of the Sami Convention.

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- <sup>50</sup> Here from the history of origins. From Article 28 II (“lands, territories (...) equal in quality, size and legal status”) of the UN Indigenous Declaration further arguments could be derived concerning the scope of Sami land, from Art. 32 I, II (ibid.) concerning their traditional economic activities.
- <sup>51</sup> Though it is not clear what the “rights to lands, territories and resources” are, nor is the definition of traditionally owned as referred to in Art. 26 I, if Art. 26 II specifies these rights as ownership, use, development and control.
- <sup>52</sup> E.g. by the use of snowmobiles or motor cycles for reindeer herding.
- <sup>53</sup> Article 16: duly right to negotiate of the Sami Parliament concerning official decisions in important matters; no state acceptance or admission of especially damaging measures to Sami culture, environment or society without consent of the affected Sami.
- <sup>54</sup> Moreover the construction of roads, recreational facilities, military exercise activities and permanent exercise ranges.
- <sup>55</sup> The result is a Norwegian agreement (2006) with an impact on Swedish reindeer herders (Åhrén, 2007: 29).
- <sup>56</sup> Resources underneath the surface: oil, gas, minerals (predominantly); wood.
- <sup>57</sup> It regulates that Articles 34 -37 (rights to water areas and use of water areas) shall apply correspondingly to Sami fishing and other use of fjords and coastal seas. In connection with the allocation of catch quotas for fish and other marine resources, and if other regulations of such resources exist, indigenous use of these resources and their meaning for local Sami communities shall be duly considered.
- <sup>58</sup> According to Art. 16: the right of co-determination in the environmental management affecting these areas.
- <sup>59</sup> The Sami receive necessary financial support to be able to judicially clarify important basic questions related to their rights as per the Convention.
- <sup>60</sup> Consultation requirement, reports.
- <sup>61</sup> In detail on environmental law and Sami rights (customary law).
- <sup>62</sup> On Latin American developments.
- <sup>63</sup> This corresponds to the highest standard on the inclusion of indigenous peoples in resource development decisions (Art. 30 of the UN Indigenous Declaration), more than “consultation” in Art. 15 II of the ILO Convention No. 169.
- <sup>64</sup> Åhrén correctly indicates that the Draft Sami Convention was presented prior to the UN General Assembly proclaiming the UN Indigenous Declaration. Its adoption is likely to impact the legal status of treaties entered into between states and indigenous peoples under international law. Especially Art. 37 stipulates that indigenous peoples have the right to the recognition of treaties concluded with states.
- <sup>65</sup> E.g. Articles 14 and 15 ILO 169; in detail 2.3. and 2.5.; cf. Bankes/ Koivurova, 2013: part II, Joona, 2012.
- <sup>66</sup> Cf. continuative Bankes/ Koivurova, 2013: part III.
- <sup>67</sup> On Articles 26, 28 of the UN Indigenous Declaration. Referred to Fitzmaurice (2009: 74-75), the critique concerning this Declaration (vaguely formulated limitation of the contents of present land use, missing obligations on land demarcation) should be kept in mind.
- <sup>68</sup> Co-operation rights of indigenous peoples, separated by international borders.
- <sup>69</sup> The Sami Parliamentary Conference demands that the negotiations are completed at the latest during 2016.

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