

Status of Indigenous Peoples in International Law

*Agnieszka Szpak**

Abstract

The article briefly examines the most relevant representative factors of the status of indigenous peoples in light of international law with special references to the Sami rights.

1. Introduction

For many years indigenous peoples, their needs, rights, culture and identity have been neglected and destroyed. These bitter remarks also refer to the Sami in the Arctic. This situation is slowly changing in practice while on paper in the international instruments both of ‘hard law’ and ‘soft law’ one may find provisions ensuring respect for the rights of indigenous people such as *inter alia* right to self-determination, to respect for their traditions and customs, cultures and languages, to participate in decision-making on matters that would affect their rights, land rights, to the improvement of their social and economic position or to maintain and develop their traditional knowledge. Many of those rights are guaranteed in the non-binding UN Declaration on the Rights of Indigenous Peoples¹⁵² (hereinafter: UN Declaration) adopted in 2007 and legally binding ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries¹⁵³. Below a few remarks will be devoted to the UN Declaration. With reference to the ILO Convention it should just be added that it aims to protect the rights of indigenous peoples, their way of life and their culture. Its adoption was at that time (in 1989) an improvement compared to the previous Convention 107 of 1957 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries¹⁵⁴ which aimed at assimilation of indigenous peoples. One may

* Assistant Professor in International Law Dr. Agnieszka Szpak (Poland; Nicolaus Copernicus University in Torun, Faculty of Political Science and International Relations, Department of International and European Law), aszpak@umk.pl

¹⁵² *UN Declaration on the Rights of Indigenous Peoples* (UN GA res. 61/295) is available at <http://research.un.org/en/docs/ga/quick/regular/61> (29.01.2016).

¹⁵³ *The ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries* is available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 (29.01.2016).

¹⁵⁴ *The ILO Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* is available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312252 (29.01.2016).

conclude that there are legal provisions protecting the indigenous peoples, but unfortunately law in books does not always transform into law in action.

2. Indigenous Peoples and the right to self-determination

In 1994 the UN General Assembly declared years 1995-2004 the International Decade of the World's Indigenous Peoples¹⁵⁵. The second decade (2005-2015) was the continuation of the first one¹⁵⁶. The first decade was supposed to be crowned by the issuance of the UN declaration on indigenous peoples but this happened in the middle of the second decade when in 2007 the UN Declaration on the Rights of Indigenous Peoples was adopted.

UN Declaration is the most important, however non-binding, instrument on the rights of indigenous peoples. It affirms that indigenous peoples *contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind*¹⁵⁷. According to the Declaration, indigenous peoples have a collection of rights: individual ones that persons have as members of the group and collective ones that inhere in the group as a whole (such as land rights) (Art. 1 of the UN Declaration). Art. 3 refers to the right of self-determination of indigenous peoples which means the ability to *freely determine their political status and freely pursue their economic, social and cultural development*. Self-determination is connected to the right to autonomy or self-governance in matters relating to internal and local affairs of indigenous peoples (Art. 4 of the UN Declaration). This formula indicates that self-determination should be exercised first of all in the form of autonomy. To make things even clearer the UN Declaration contains a clause stating that *Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States* (Art. 46). Many States fear that according to the indigenous peoples, the right to self-determination may lead to secession. Those fears are however unjustified as indigenous peoples do not want to create a separate State but be able to make free and independent

¹⁵⁵ UN GA res. 48/163 of 21 December 1993 is available at <http://research.un.org/en/docs/ga/quick/regular/48> (29.01.2016).

¹⁵⁶ UN GA res. 59/174 of 20 December 2004 is available at <http://research.un.org/en/docs/ga/quick/regular/59> (29.01.2016).

¹⁵⁷ *UN Declaration on the Rights of Indigenous Peoples*, preamble.

decisions in their own matters¹⁵⁸. Consequently, indigenous peoples have the right to *maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State* (Art. 5 of the UN Declaration). But as Erica-Irene Daes, the former Chairperson of the UN Working Group on Indigenous Populations stated, *there is no distinction between indigenous and other peoples, save the indigenous people have not been able to exercise the right to self-determination*¹⁵⁹.

3. Indigenous Peoples and the land rights

The UN Declaration takes into account the special relationship of indigenous peoples to their lands. It should be recalled that when the incomers arrived indigenous lands were regarded *terra nullius*. This doctrine has been rightly rejected by the International Court of Justice in the Western Sahara case of 1975¹⁶⁰. Those lands were obviously not *terra nullius* and as N. Oskal rightly claims, *Saami customary rights to the usage of land and water, like any other usage right, are established and based on age-old use, and do not rest on the law alone*¹⁶¹. In accordance with Art. 25, *Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard*. The relationship between

¹⁵⁸ L.-A. Baer, *The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi*, „International Journal on Minority and Group Rights” 2005, no. 12, p. 257; O. Ch. Okafor, Entitlement, Process, and Legitimacy in the Emergent International Law of Secession, „International Journal on Minority and Group Rights” 2002, no. 9, p. 41-70.

¹⁵⁹ L.-A. Baer, *op.cit.*, p. 255.

¹⁶⁰ The ICJ stated that at the time of colonization by Spain Western Sahara was not *terra nullius* (para. 75). In para. 80 of the advisory opinion the ICJ stated: *Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of terra nullius by original title but through agreements concluded with local rulers. On occasion, it is true, the word "occupation" was used in a non-technical sense denoting simply acquisition of sovereignty; but that did not signify that the acquisition of sovereignty through such agreements with authorities of the country was regarded as an "occupation" of a "terra nullius" in the proper sense of these terms. On the contrary, such agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of terrae nullius*. The Western Sahara advisory opinion is available at

<http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=69&case=61&code=sa&p3=4> (29.01.2016).

¹⁶¹ N. Oskal, *Political Inclusion of the Saami as Indigenous People in Norway*, „International Journal on Minority and Group Rights” 2001, no. 8, p. 261. See also: A. Eide, *Legal and Normative Bases for Saami Claims to Land in the Nordic*, „International Journal on Minority and Group Rights” 2001, no. 8, p. 137. On the social structure of the Sami see: M. Ahrén, *Indigenous Peoples' Culture, Customs, And Traditions And Customary Law-The Saami People's Perspective*, „Arizona Journal of International & Comparative Law” 2004, vol. 21, no. 1, p. 65-73.

the Sami and nature is regarded in a holistic and integrated way. Lands are important as the Sami have used them with their forests and lakes for hunting, reindeer husbandry, fishing and extracting raw materials¹⁶². Art. 27 of the International Covenant on Civil and Political Rights (1966), which is a binding international treaty, states that *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*¹⁶³. Human Rights Committee has pointed out that the right to culture from Art. 27 includes a right to traditional lands and territories¹⁶⁴. In its General comment no. 23 the Committee stated that *With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law*¹⁶⁵.

Many times the UN Declaration emphasises the necessity of free, prior and informed consent of the indigenous peoples for actions or enterprises that might affect their rights (Arts. 10, 11 (2), 19, 26 (2), 28 (1), 29 (2), 32 (2)). For the Sami, who live in four different States (Sweden, Norway, Finland and Russia¹⁶⁶), it is important to be able to maintain and develop relations and cooperation in spiritual, political, cultural, social and economic spheres with other Sami and other peoples across borders. Such a right is granted in Art. 36 of the UN Declaration.

4. Conclusions

For many years indigenous peoples have been marginalized in national and international politics. Since about 1980, however, international community became interested in indigenous peoples and started to recognize their rights and needs and regulate their status

¹⁶² L.-A. Baer, *op.cit.*, p. 248.

¹⁶³ International Covenant on Civil and Political Rights is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (29.01.2016).

¹⁶⁴ See: *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (1984) available at <http://www1.umn.edu/humanrts/undocs/session45/167-1984.htm>, *Kitok v. Sweden* (1985) available at <http://www1.umn.edu/humanrts/undocs/197-1985.html>, *Länsman et al v. Finland* (2001) available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (29.01.2016).

¹⁶⁵ General comment 23, para. 7, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11 (29.01.2016). See also: H. P. Graver, G. Ulfstein, *The Sami People's Right to Land in Norway*, „International Journal on Minority and Group Rights”, 2004, no. 11, p. 343.

¹⁶⁶ For more details see: L.-A. Baer, *op.cit.*, p. 247.

in international law. Despite all the efforts and international instruments that were adopted, the legal, social, economic and cultural situation of indigenous peoples, the Sami including, is far from perfect. Their special needs such as specific and almost sacred relationship with their lands and their right to maintain and develop their culture, customs, language and education must be respected. International community should appreciate and respect traditional knowledge and customs of indigenous peoples as the latter definitely is a part of the cultural heritage of mankind. Indigenous people should be recognized as subject of international law with rights to self-determination, self-governance and self-identification¹⁶⁷.

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