



Juridica Lapponica

37

TANJA JOONA

# **ILO Convention No. 169**

in a Nordic Context with Comparative Analysis:  
An Interdisciplinary Approach





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Tanja Joona

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An Interdisciplinary Approach

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# Abstract

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In Finland, the discussion surrounding the historical land rights of the indigenous Saami and the possible ratification of International Labour Organization (ILO) Convention No. 169, concerning the rights of indigenous peoples, has been debated for a long time. This academic study uses practical examples in evaluating its potential ratification and the possible effects that this could have on, for example, persons practicing traditional livelihoods in northern areas. To date, 22 countries, most of which are located in Latin and South America, have ratified the Convention.

This dissertation, a study in the fields of international law and international relations, focuses on indigenous peoples and their special rights to land. As an interdisciplinary study, it adopts a comparative perspective in examining ILO Convention No. 169 with regard to the Nordic countries – especially Finland, Sweden and Norway. Particular importance has been placed on evaluating the reporting processes related to the Convention's ratification. These reports are examined by the Committee of Experts in the ILO (CEACR) and, thus, mostly represent interesting and valuable Latin American examples.

Although ILO Convention No. 169 deals with a variety of indigenous peoples' issues – education, culture, health care, and working conditions, among others – this dissertation primarily focuses on Articles 13-19 regarding rights to land. These articles, especially Article 14, have been a central obstacle for both states considering ratification, as well as states that have already ratified the Convention. Article 14 requires states to “recognise the *ownership and possession* of the peoples concerned over the lands which they traditionally occupy.” Two themes arise within the context of this study: the first theme examines the land rights articles of ILO Convention No. 169, while the second theme concentrates on the subjects, or beneficiaries, of those rights. These are placed within the broader theoretical context of the study through

the explanation of the system of state sovereignty at the beginning of the thesis. The concluding chapter presents liberal perspectives on human rights. It may also be argued that indigenous peoples' claims to prior and continued sovereignty, over their territories, question the source and legitimacy of state authority.

On the basis of the presented research, the final part of the dissertation provides recommendations and suggestions on how Finland could further proceed with issues related to Saami peoples' rights to traditionally occupied lands and water, as well as the possibility of ratifying ILO Convention No. 169. Fundamental questions include issues related to land rights, the identification of and questions related to land, ownership, as well as the subjects of these rights.

Keywords: ILO Convention No. 169, sovereignty, self-determination, indigenous peoples, land rights



# Tiivistelmä

Tanja Joona

ILO Convention No. 169 in a Nordic Context with Comparative Analysis:  
An Interdisciplinary Approach

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Tutkimuksen taustalla on Suomessa pitkään käyty keskustelu toisaalta Lapin historiallisista maa- ja vesioikeuksista ja toisaalta Kansainvälisen Työjärjestön (ILO) alkuperäiskansojen koskevan sopimuksen No. 169 ratifioinnista. Tutkimuksessa tarkastellaan käytännön esimerkkien kautta, mitä mahdollinen ratifiointi voisi tarkoittaa Pohjoismaissa esimerkiksi perinteisten elinkeinojen, kuten poronhoidon kannalta.

Tutkimus on poikkitieteinen ja kuuluu sekä kansainvälisten suhteiden että kansainvälisen oikeuden piiriin. Se tuottaa uutta ja ajankohtaista tietoa alkuperäiskansojen maa- ja vesioikeuksiin liittyvistä poliittisista ja oikeudellisista ulottuvuuksista, tarkastelee kriittisesti perinteistä valtiosuvereniteettia, valtiosopimusten sitovuutta ja noudattamista, sekä sitä poliittista areenaa, jossa valta, taloudellinen hyöty ja vetoaminen esim. ihmisoikeuksiin näyttelevät suurta roolia.

Tutkimus muodostuu johdantoluvusta sekä viidestä erikseen julkaistusta artikkelista, jotka tarkastelevat ILO-sopimuksen No. 169 ratifiointi- ja implementointiongelmia kolmessa Pohjoismaassa: Norjassa, Ruotsissa ja Suomessa. Tutkimus valottaa ILO-sopimukseen liittyviä ongelmia jo ratifioineissa Latinalaisen Amerikan maissa lähinnä sopimukseen liittyvän raportointimenettelyn kautta. ILO:n asiantuntijakomitealle (CEACR) tapahtuvan raportoinnin myötä valtiot sitoutuvat noudattamaan sopimuksen sisältöä sekä lainsäädännössä että käytännön tasolla. Vaikka sopimus säätelee alkuperäiskansojen oikeuksista monilla elämän eri alueilla, tässä tutkimuksessa on keskitytty erityisesti maa- ja vesioikeuksista sääteleviin artikloihin, sekä näiden oikeuksien subjekteihin.

Tutkimus näkee alkuperäiskansat aktiivisina poliittisina toimijoina valtioiden rinnalla ja tarkastelee tätä toimijuutta tekijänä, joka vaikuttaa maa- ja vesioikeuksista käytävään keskusteluun. ILO-sopimuksen No. 169 on ratifioinut vain 22 valtiota, joista suurin osa on Latinalaisen Amerikan maita. Pohjoismaista Norja ja Tanska ovat sopimuksen ratifioineet, Suomessa ja Ruotsissa harkitaan sitä. Suurimpana ongelmana

na nähdään ILO-sopimuksen vaatimus *omistus- ja hallintaoikeuden* myöntämisestä alkuperäiskansojen perinteisesti asuttamille alueille.

Kansainvälisen oikeuden ja kansainvälisten suhteiden tieteenaloilla on hyvin vähän tutkittu sitä, mitä kansainväliset sopimukset voimaantullessaan todellisuudessa merkitsevät ja millaisia käytännön muutoksia esimerkiksi lainsäädäntöön tarvitaan. Sopimus pyrkii joustavuudellaan ottamaan huomioon kunkin maan erityisolosuhteet, mutta tarkkaa tietoa ei ole siitä, mitkä ovat ne tosiasialliset velvoitteet, joihin valtio sitoutuu sopimusta ratifioidessaan. Tutkimuksessa asiaa on pyritty selvittämään arvioimalla niitä ILO:n kannanottoja, jotka liittyvät sopimuksen jo ratifioineiden valtioiden täytäntöönpanoprosesseihin.

Tutkimuksen painopisteessä ovat erityisesti Arktiset alkuperäiskansat, jotka ovat nousseet poliittisesti aktiivisiksi maa- ja vesioikeuksiin liittyvissä kysymyksissä. Laajemmin asia voidaan ymmärtää huolena ympäristöstä ja sen muuttumiseen liittyvistä tekijöistä. Poliittisessa päätöksenteossa sivuun jäävät kuitenkin valitettavan usein tavalliset, perinteisiä elinkeinoja harjoittavat ihmiset, joille oikeudet maihin ja vesiin ovat pitkälti mahdollisuus selviytyä ja erityisesti siirtää perinteitä tuleville sukupolville. Tutkimus tarkastelee ILO-sopimuksen No. 169 tuomia mahdollisuuksia kriittisesti ja arvioi sen merkitystä alkuperäiskansojen maa- ja vesioikeuksien tosiasiallisena turvaajana.

Avainsanat: ILO Convention No. 169, sovereignty, self-determination, indigenous peoples, land rights

## Kulnasatz/My reindeer/Juokse porosein

Kulnasatz nirásam ägas joå audas jordee såde  
Nurte våta vålges skåde  
Abeide kockit laidiede  
Fauruogåidhe sadiede  
Ällå momiaiat kuckan Kaigavarre  
Patzå buårest Källuejaur tuuni  
Måde påti millasam  
Kaigavånaide vaiedin.

Kulnasatz, pieni poroseni,  
meidän on kiirehtiminen ja nopeasti  
matkaa tekeminen eteenpäin.  
Suot ovat suuria aapoja, niin että laulumme loppuvat.  
Älä estä meitä Kaigavaara, hyvästi sinulle, Kelujärvi.  
Paljon ajatuksia nousee mieleeni ajaessani Kaigavuomaa pitkin.  
Poroseni, rientäkäämme nopeammin, niin suoritamme työmme  
pikemmin ja saavumme sinne, mihin aioimme.

This poem or joik was first published in 1673 by Johannes Schef-  
ferus in his book, Lapponia. The joik was given to him by a Lapp  
boy called Olaus Sirma from Orajärvi, Kemi Lappland. The joik  
was usually sung in winter time when being pulled by a reindeer.  
The joik later became a popular Christmas song.

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I believe in destiny. My destiny brought me to Lapland some 15 years ago. As a young student of international relations, I never expected to find myself researching a fascinating and contemporary topic and to live my life in Lapland, as I am today. Despite the lonely journey that comes with this kind of research, interesting discussions with colleagues and friends have made the process worth the effort.

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As I believe in destiny, I also believe in justice and equality before the law. I hope that my work provides tools for people seeking the same.

Raanujärvi 12.1.2012

*Tanja Joona*

# Contents

Abstract.....	5
Tiivistelmä .....	7
Kulnasatz/My reindeer/Juokse porosein.....	9
Acknowledgements .....	10
List of main abbreviations and glossary .....	17
<b>PART I Introduction and Background for the Thesis .....</b>	<b>19</b>
1.1 Introduction .....	19
1.1.1 Human Rights and ILO Convention No. 169 .....	23
<i>Research Questions</i> .....	26
<i>Main Argument of the Work</i> .....	26
1.1.2 The Concept of Indigenous Peoples .....	28
1.1.3 Some Words about the Relationship between International Law and International Relations .....	38
<i>International Law</i> .....	38
<i>States as the Subjects of International Law</i> .....	44
<i>International Organizations as the Subjects of International Law</i> .....	45
<i>Individuals as Subjects of International Law</i> .....	46
<i>Approaches to International Relations</i> .....	48
<i>Realism</i> .....	49
<i>Institutionalism</i> .....	50
<i>Liberal Theory</i> .....	51
<i>Constructivism</i> .....	53
<i>Other [Critical] Perspectives on International Relations</i> .....	54
<i>About Interdisciplinarity</i> .....	55
1.1.4 The Relevance of the Thesis in the Finnish context .....	57
1.1.5 The Structure of the Thesis .....	59
1.2 Theoretical Framework - International Relations and International Law in the Context of Human Rights .....	61
1.2.1 States as Sovereign entities .....	61
1.2.2 State Sovereignty Challenged by the Human Rights Regime and guided by the Liberal Political Theory.....	64
<i>The Approach of Liberal theory</i> .....	66
<i>Different Claims by the Indigenous Peoples</i> .....	69
1.2.3 The Principle of Self-determination and ILO Convention No. 169 ..	72

1.3	Research Materials and the Methodology used in the Thesis .....	80
1.3.1	Previous Research .....	80
1.3.2	Research Materials .....	86
1.3.3	A Note on Methodology.....	90
	<i>Comparative Politics as a Tool for Analysis</i> .....	90
	<i>Why compare?</i> .....	92
	<i>What is compared?</i> .....	93

## **PART II Two Themes**

2.1	ILO Convention No. 169: a State-Oriented Convention recognizing Indigenous Peoples' Rights of Ownership to Land.....	95
2.2.1	Some Words on the History of ILO Work with Indigenous Peoples .95	
2.1.2	The Scope of the Land Rights, Articles 13-19 .....	100
2.1.3	Ownership and/or Control.....	103
2.1.4	On the Complaint Procedures of ILO Convention No. 169 with a Focus on Representations .....	117
	<i>Peru</i> .....	122
	<i>Mexico</i> .....	125
	<i>Bolivia</i> .....	128
	<i>Denmark</i> .....	131
2.2	Subjectivity - Formulating Indigenousness and the Right Holders of the Convention No. 169 .....	139
	Introduction .....	139
2.2.1	States are the Subjects of ILO Convention No. 169.....	142
2.2.2	Indigenous Peoples are the Subjects of ILO Convention No. 169 ...	144
2.2.3	Individuals are the Subjects of ILO Convention No. 169 .....	147
2.3	Concluding Perspectives on Liberalism and the Rights of Indigenous Persons .....	152
2.3.1	Liberalism and the Human Rights Context .....	152
2.3.2	The Importance of Subjectivity in the Context of Land and Liberalism.....	157
2.3.3	Concluding Words .....	165
2.3.4	Recommendations for Future Development – <i>de lege ferenda</i> .....	169



### **PART III The Articles**

No. 1 The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with some comparison to Sweden and Norway <i>Nordic Journal of Human Rights</i> Vol. 23 Nr. 3:2005.....	172
No. 2 International Norms and Domestic Practices in Regard to ILO Convention No. 169 – with special reference to Articles 1 and 13-19. <i>International Community Law Review, Volume 12, No.2, 2010.</i> .....	188
No. 3 Sammenliknende synsvinkel på ILO-konvensjon nr. 169 – spesielt artiklene 1 og 13-19. <i>ARINA, Nordisk tidsskrift for kvensk forskning,</i> Ruija Forlag 2009-2010. ....	236
No. 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen. In Kai T. Kokko (ed.) <i>Kysymyksiä saamelaisten oikeusasemasta. Lapin yliopiston oikeustieteellisiä julkaisuja, Sarja B nro 30. Jyväskylä 2010.</i> .....	257
No. 5 The Historical basis of Saami Land Rights in Finland and the application of the ILO Convention No. 169. <i>The Yearbook of Polar Law, Volume 3, 2011.</i> ..	277
References of the Synthesis.....	315
Appendices.....	327



## List of main abbreviations and glossary

ACHPR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
ABS	Australian Bureau of Statistics
CAT	United Nations Convention Against Torture
CERD	Committee on the Elimination of Racial Discrimination
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECOSOC	UN Economic and Social Council
HRC	UN Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICSECR	International Covenant on Economic, Social and Cultural Rights
IGO	Inter-governmental organization
IO	International Organization
IL	International Law
ILO	International Labour Organisation
ILO Convention No. 107	ILO Convention No. 107 concerning the rights of Indigenous and Tribal peoples
ILO Convention No. 169	ILO Convention No. 169 concerning the rights of Indigenous peoples in independent countries
INGO	International nongovernmental organization
IR	International Relations
IWGIA	International Work Group for Indigenous Affairs
NGO	Non-governmental organization
OAS	Organization of American States
MNC	Multinational corporations
PCA	Permanent Court of Arbitration
TWAIL	Third World Approach to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on Indigenous Peoples
UNESCO	United Nations
WGIP	Working Group on Indigenous Populations



# PART I Introduction and Background for the Thesis

Part I contains an introduction to the thesis. It presents the theoretical framework, objectives and methodological issues, as well as an overview of the relevant political and legal research, in the respective fields, with respect to ILO Convention No. 169 and indigenous peoples land rights. The objective of this thesis is twofold. The first, in brief, aims to analyse the effects of the ratification of ILO Convention No. 169 on domestic legal and political practices. The second compares the situation in Finland to that in other countries. Part I of the thesis introduces the theoretical framework underpinning the study, which reflects the approaches of the two disciplines used in this thesis: international relations and international law. The theoretical background is necessary in order to provide a better understanding of and background to the complex issues related to indigenous peoples' rights to land. Among other things, traditional state sovereignty might be challenged by indigenous peoples' demands for greater self-determination over their traditional territories. It is also important to highlight the dichotomy between the subjects and objects of international law, a distinction which becomes highly relevant in the context of ILO Convention No. 169 when determining the beneficiaries of the land rights articles of the Convention. This is a multidimensional question touching upon very delicate issues, such as land as the foundation for the identity of many indigenous peoples.

## 1.1 Introduction

For thousands of years, the indigenous Saami have lived in the area that is now known as Norway, Sweden, Finland, and Kola - Russia and which has been claimed by the respective states. It is widely recognised that the Saami in Sweden-Finland had a right to their land and water that was comparable to ownership.<sup>1</sup> They inhabited an area called "Lapland" and were called "Lapps" by others.<sup>2</sup> In 1673 and 1695, King Carl XI promulgated the Settlement Bill of Lapland, which allowed other people to cross the border of Lapland<sup>3</sup> to settle there. This was the beginning of colonisation, assimilation and integration. It was also the beginning of several conflicts of interests that have

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1 See the article forming part of this study: Joona Tanja and Joona Juha: The Historical Basis of Saami Land Rights in Finland and the Application of ILO Convention No. 169, published in the Yearbook of Polar Law, Volume 3, 2011.

2 Indigenous peoples of Northern Fennoscandia were previously called Lapps. Lapp is an old exonym, a name used by others. Historically, it is closely associated with the term Lapland (Lapponia in Latin) used to refer to the area. See more *ibid.*

3 The historical area of Lapland was separated by the Lappland border from the area around the Gulf of Bothnia. Historical Lapland was administratively divided into six separate areas: Ångermanland, Ume, Pite, Lule, Torne and Kemi Laplands. These were in turn divided into Lapp villages, which were further subdivided between clans and families into inherited lands, later known as Lapp tax lands. See more *ibid.*

since arisen between the different parties. Over the years – from the mid-17<sup>th</sup> century until late into the 20<sup>th</sup> century – the state actively encouraged settlers, as well as others, to cultivate areas that the Saami previously had exclusive use of for reindeer herding, fishing, and hunting. This led to competition for land and subsequent conflicts.<sup>4</sup> Over 300 years later, the Nordic States have initiated the reconciliation process with relatively small steps. The process began in the 1970s with United Nations' studies and reports on the rights of indigenous peoples and the drafting of a declaration in the mid-1980s (UNDRIP). The revision of ILO Convention No. 107, at the end of the 1980s, led to the establishment of an international convention, ILO Convention No. 169, concerning the rights of indigenous peoples.<sup>5</sup> It should, however, be pointed out that for most of the peoples, reconciliation has come too late. With the help of the Lutheran church, the state has actively rooted out these peoples' languages, cultural heritage, livelihoods, land and water, as well as their most important quality, their identity. An additional and important step forward has been the Draft Nordic Saami Convention. This is a proposed international agreement among Norway, Sweden, and Finland that would recognise Saami rights to self-determination as a distinct people, as well as the authority of the national Saami Parliaments, without infringing on the sovereign rights of the three signatory states.<sup>6</sup> Thus far, the negotiations have only slowly progressed and it remains to be seen how things will evolve.

Indigenous peoples' right to their traditionally occupied lands and water areas, as well as other natural resources, is an important and controversial issue in contemporary international politics and law. There is a delicate balance between the sovereignty and territorial integrity of states, on the one hand, and the promotion and protection of minority culture and identity, on the other. The Nordic countries, especially Norway, Sweden and Finland, have faced a situation where traditional state sovereignty and indigenous peoples' demands for greater self-determination have compelled the states to investigate and clarify issues related to land rights. The debate on indigenous ownership of northern lands appears to be an inexhaustible topic with an endless number and variety of legal and political pro and con arguments. Over the years, these arguments have become mixed in many ways and the crucial starting point is now difficult to trace.

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4 See SOU 1999:25, *Samerna – ett ursprungsfolk i Sverige, Frågan om Sveriges anslutning till ILO:s konvention nr 169*. Betänkande av Utredningen om ILO:s konvention nr 169. Stockholm 1999, 23-33.

5 ILO Convention No. 169 from 1989 concerning Indigenous and Tribal Peoples in Independent Countries. Place: Geneva, Session of the Conference: 76, Date of adoption: 27 June 1989. Came into force 5<sup>th</sup> of September 1991. Hereinafter ILO Convention No. 169 or Convention No. 169.

6 See more for example: Mattias Åhrén, Martin Scheinin, John B. Henriksen. *The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions* Gáldu Čála – Journal of Indigenous Peoples Rights N o. 3/2007.

This academic dissertation, titled "ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach", represents a study in the fields of international law (IL) and international relations (IR) with a focus on indigenous peoples and their special rights to land. This interdisciplinary study adopts a comparative perspective in regard to the most important convention dedicated to indigenous peoples, International Labour Organization Convention (ILO) No. 169 concerning the rights of Indigenous peoples (hereinafter ILO Convention No.169, or Convention No. 169). The Convention has been ratified by 22 countries,<sup>7</sup> of which two – Norway and Denmark – are Nordic countries. Sweden and Finland are currently considering ratification. However, the main obstacles are related to the land rights articles of the instrument; Article 14 requires states to recognise the *rights of ownership and possession* of the peoples concerned to their traditionally occupied lands.<sup>8</sup>

Globally, Norway was the first country to ratify ILO Convention No. 169; it did so in 1990. In conjunction with the ratification, the Norwegian Government's assessment was that the Saami usufructuary right to land in Norway, applicable at the time, satisfied the conditions of the Convention. Later, the Samerettsutvalget, the Royal Sámi Rights Commission, appointed by the Norwegian Government, came to a different conclusion. In 2005, a Finnmark Act was approved by the Stortinget (Norwegian Parliament), which reorganised the land rights situation in Finnmark county.<sup>9</sup> The arrangement has prompted a wide variety of feedback and the issue (ownership) does not appear to have been finally resolved in Norway.<sup>10</sup>

As in Finland, in the recent past, the Governments of Sweden have expressed a desire to be able to ratify ILO Convention No. 169, which is a matter of some importance for the country's indigenous peoples. Sweden, like Finland, has a long tradition of commitment to weak, disadvantaged groups and has acceded to all key international treaties, which seek to protect minority groups. In international terms, respect for the traditional ways of life of the indigenous peoples of the world has grown in recent years. It is clear that the Saami, located within these countries, should be given the opportunity to develop within the framework of their own culture. The Swedish Saami urge Sweden's ratification and have, in highly unfavourable terms, pointed out the injustice of a system in which they do not have full control over their own hunting

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7 Others: Argentina 2000, Bolivia 1991, Brazil 2002, Colombia 1991, Chile 2008, Costa Rica 1993, Dominica 2002, Ecuador 1998, Fiji 1998, Guatemala 1996, Honduras 1995, Mexico 1990, Netherlands 1998, Paraguay 1993, Peru 1994, Bolivarian republic of Venezuela 2002, Nepal 2007 and Spain 2007, Central African Republic 2010, Nicaragua 2010.

8 ILO Convention No. 169, Article 14.

9 See more on the Finnmark Act, access at [www.finnmarksloven.no](http://www.finnmarksloven.no), Justis og Politidepartement i Norge. Accessed 11.4.2011.

10 See more Ström-Bull Kirsti, *Historisk fremstilling av retten til fiske i havet utenfor Finnmark*, NOU 2008; *Ström-Bull Kirsti*, *Finnmarksloven - Finnmarkseiendommen og kartlegging av rettigheter i Finnmark*, Lov og Rett 2007.

and fishing rights. In the late 1990s, the Swedish Rapporteur Sven Heurgren arrived at the conclusion that the strong protection under law, in regard to reindeer herding and use of land, would satisfy the minimum conditions of the land rights articles of Convention No. 169.<sup>11</sup> However, the Swedish state has recently not proceeded with the ratification process.

A major trend in contemporary political systems is the proliferation of different kinds of governance structures that recognise the unique position of indigenous peoples. The trend has brought a diversity of new agreements and institutions. Indigenous peoples worldwide are fighting for land and self-determination rights, which culminated in the adoption of the first truly universal legally relevant instrument focusing on indigenous peoples and their self-determination, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>12</sup> Indigenous peoples' aim is to regulate their affairs in their own way in order to survive as culturally distinct peoples, mostly within nation states. Fundamental questions arise concerning the limits of state sovereignty and the content of the highly and emotionally debated indigenous right to self-determination.

The thesis presents different structural models for land management, especially in Latin America. The comparison to Nordic situations is considered valuable because of the difference between the approaches. In some areas, legal titles to land have, to a large extent, been secured and, now, the major challenge is the defence and management of those territories. In other places, the legal recognition of territories, or other forms of protection, is still far from being a reality. However, the objectives remain the same and the recognition of indigenous peoples' rights to their land and resources is considered to be a fundamental global responsibility when it comes to safeguarding cultural diversity and the right and possibility of all peoples to determine their own future.

At times, the study refers to the Draft Nordic Saami Convention<sup>13</sup>, as it poses challenges to nation states that are similar to those encountered in the implementation of ILO Convention No. 169. The Draft mainly is referred to in situations related to the issue of the subject of rights, which is covered by Article 4. The issue is crucial as it is the basis for other rights within the Draft. The same question - Who actually has these rights? - may also be asked in regard to ILO Convention No. 169. The

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11 SOU 1999:25, Samerna – ett ursprungsfolk i Sverige, Frågan om Sveriges anslutning till ILO:s konvention nr 169. Betänkande av Utredningen om ILO:s konvention nr 169. Stockholm 1999.

12 Adopted by General Assembly Resolution 61/295 on 13 September 2007. <http://www.un.org/esa/socdev/unpfii/en/drip.html> Accessed 16.5.2011.

13 The Draft Nordic Saami Convention is a Convention submitted by an expert Committee to the Nordic Governments and the Saami Parliaments in October 2005, the text in English can be found at: <http://www.regjeringen.no/upload/BLD/Nordic%20Sami%20Convention.pdf>, Accessed 1.3.2011. See more: Koivurova Timo, "The Draft Nordic Saami Convention: Nations Working Together" *International Community Law Review* 3 (2008): 279-293; Åhren Mattias, Scheinin Martin, Henriksen John B., "The Nordic Saami Convention: International Human Rights, Self-determination, and other Central Provisions" *Galdu Cala: Journal of Indigenous Peoples Rights* (2007).



answer is, by no means, a simple one and will be analysed in more detail in the following chapters.

This introduction sets out to clarify certain concepts, despite further clarification below and in the individual articles. However, several issues must be mentioned in regard to terminology. The relationship between IL and IR is rather carefully examined in order to provide the reader with a better understanding of this relationship and how it actually affects the language in which indigenous peoples' rights have been articulated in legal and political spheres. However, it is impossible to write on such subjects without running into the serious risk of offending peoples. Language has become a minefield of conflicting use and interpretations. There are few, if any, terms that may be comfortably use. The content of the concepts that I have chosen to apply in this study is explained and only describes my outlook. Different interpretations may also exist as well.

### 1.1.1 Human Rights and ILO Convention No. 169

Human rights are "rights and freedoms to which all humans are entitled." Proponents of the concept usually assert that everyone is endowed with certain entitlements merely as a result of being human.<sup>14</sup> Human rights are, thus, conceived in a universalist and egalitarian manner. Such entitlements may exist as shared norms of actual human moralities, as justified moral norms or natural rights supported by strong reasons, or as legal rights either at a national level or within international law.<sup>15</sup> However, there is no consensus as to the precise nature of what should or should not be regarded as a human right in the preceding sense. The abstract concept of human rights has, thus, been a subject of intense philosophical debate and criticism.<sup>16</sup>

The human rights movement has its roots in the aftermath of the Second World War. Initially developing as a discussion, the Universal Declaration of Human Rights was subsequently adopted on December 10<sup>th</sup>, 1948. The preamble of the Declaration emphasises that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."<sup>17</sup> Moreover, in contrast to most international regimes, human right regimes are primarily not designed to regulate policies arising from societal interactions across borders, but to hold governments accountable for purely internal activities. According to Moravcsik, in contrast to most international regimes, human

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14 Feldman, David. *Civil Liberties & Human Rights in England and Wales*. Oxford University Press, 2002, 5.

15 Nickel, James. "Human Rights". In Irise, Edward N.. *The Stanford Encyclopedia of Philosophy*. <http://plato.stanford.edu/archives/spr2009/entries/rights-human/>, 2009.

16 *ibid.*

17 <http://www.un.org/en/documents/udhr/>

rights regimes are generally not enforced by interstate action. Instead, such regimes lie in their empowerment of individual citizens to bring suit to challenge the domestic activities of their own government.<sup>18</sup>

In recent years, international bodies that have been mandated with the protection of human rights -- the UN Committee on the Elimination of Racial Discrimination (CERD), the UN Human Rights Committee (HRC), the International Labour Organization's Committee of Experts (CEACR) and the Inter-American Commission on Human Rights (IACHR) -- have paid particular attention to indigenous peoples rights. These bodies have contributed to the progressive development of indigenous rights by interpreting the general application of human rights instruments in a manner that accounts for and protect the collective rights of indigenous peoples.<sup>19</sup> Even the African Commission on Human and Peoples' Rights (ACHPR), by far the weakest human rights body, began addressing indigenous peoples' rights by taking the important step of establishing a working group on indigenous peoples in Africa.<sup>20</sup>

According to Mackay, indigenous peoples throughout the world are suffering the serious abuse of their human rights. In particular, they are experiencing heavy pressure on their lands from logging, mining, roads, conservation activities, dams, agribusiness and colonisation.<sup>21</sup> These are also common threats to the Saami people who are confronted with problems related to competing land use forms in northern Fennoscandia. Although many states have laws that recognise and protect indigenous peoples' rights, to varying degrees, these laws are often violated and conflicts occur between the different stakeholders. In some other cases, adequate laws are not in place. Mackay also notes that, in many states and under international human rights law, national laws are inconsistent with the binding obligations of these same states. This poses an enormous challenge to these countries.<sup>22</sup>

The International Labour Organization (ILO), a specialised agency of the United

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18 Moravcsik Andrew, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*. In Beth A. Simmons and Richard H. Steinberg (eds.) *International Law and International Relations*, Cambridge University Press, 2006. See also Shaw Malcolm N. *International Law*, Fourth Edition, Cambridge University Press, 1997. See also Steiner Henry J. *International Protection of Human Rights* in Malcolm D. Evans, *International Law*, Oxford University press, 2003; Moyn, Samuel, *The Last Utopia: Human Rights in History*, Harvard University Press, 2010.

19 Instruments of general application refer to those human rights instruments applying to all persons rather than instruments focused exclusively on the rights of indigenous peoples.

20 African Commission on Human and Peoples' Rights, *Resolution on the Rights of Indigenous People/Communities in Africa*, Cotonou, Benin, 6 November 2000. The mandate of the Working Group is described in the resolution as to: 'examine the concept of indigenous people and communities in Africa; study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to: the right to equality (Articles 2 and 3) the right to dignity (Article 5) protection against domination (Article 19) on self-determination (Article 20) and the promotion of cultural development and identity (Article 22); [and to] consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities'.

21 Fergus Mackay, *A Guide to Indigenous Peoples' Rights in the International Labour Organization*. Forest Peoples Programme, Stratford Road, 2002, 3.

22 *ibid.*

Nations, has developed international agreements and mechanisms designed to address these very real problems. These agreements place binding obligations on the states that have ratified them. The ILO has also established a procedure that allows indigenous persons to complain if they believe that their state is not fulfilling these obligations. The ILO's Governing Body is competent in receiving and reviewing such complaints. It has examined a number of past cases involving indigenous peoples, which have resulted in the jurisprudence recognising indigenous rights.<sup>23</sup> Part two of the thesis will present further information on the history of the ILO with regard to indigenous peoples' rights as well as the structure of the organisation in this regard. It will also examine the complaints received by the Governing Body in the case of ILO Convention No. 169.

Even though this study only concentrates on the legally binding convention dedicated to indigenous peoples' rights, there are other relevant international instruments, binding and non-binding, which also have effects on the rights of indigenous peoples. These include:

- The International Covenant on Civil and Political Rights (ICCPR) 1966
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted 1966, entry into force: 1969)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (adopted 1979, entry into force: 1981)
- The UNESCO Convention against Discrimination in Education. Adopted by the General Conference at its eleventh session, Paris, 14 December 1960
- The UNESCO Declaration on Race and Racial Prejudice. Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session, on 27 November 1978
- The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Adopted by the General Conference, October 2005.
- The United Nations Convention Against Torture (CAT) (adopted 1984, entry into force: 1984)
- The Convention on the Rights of the Child (CRC) (adopted 1989, entry into force: 1989)
- The Convention on the Rights of Persons with Disabilities (CRPD) (adopted 2006, entry into force: 2008)
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW or more often MWC) (adopted 1990, entry into force: 2003)

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23 *ibid.*

- The United Nations Declaration on Indigenous Peoples. (UNDIP) Adopted by General Assembly Resolution 61/295 on 13 September 2007

There are also many considerable cases worldwide concerning indigenous peoples' lands and territories. However, due to spatial limitations, these are not examined in detail in this work. Those directly referring to ILO Convention No. 169 are discussed in chapter 2.1.4, and certain others are taken up when relevant.

### **Research Questions**

The purpose of this study is to evaluate how four (three)<sup>24</sup> similar Scandinavian countries have had different views about the most important convention concerning the indigenous peoples. The research problem can be defined in terms of three questions: 1) *How have ILO Convention No. 169 and/or land rights been recognised in Finland and in Sweden? How does this recognition compare to countries, especially Norway and Denmark, which have already ratified the Convention?* 2) *How are the provisions of ILO Convention No. 169 interpreted and incorporated in the domestic legal and political practices of states?* And 3) *What do/could certain important concepts of ILO Convention No. 169 mean in practice, especially in the Finnish case when taking into consideration the historical information of these issues?*<sup>25</sup> In particular, I will aim to highlight the national discussions and different interpretations of the Convention, which are identified in the reports submitted by states to the Committee of Experts (CEACR).

I am especially interested in the implementation of the Convention, the different possessive and administrative models developed in regard to land rights and indigenous peoples' possibilities to influence matters in the focal countries. The implementation has, in many cases, been a political process aiming to reconcile different points of views. Consensus is difficult to find in cases where stakes are high and actors have very different goals.

### **Main Argument of the Work**

Two themes arise within the context of this study: the first are the land rights articles of ILO Convention No. 169 and the second are the subjects, or beneficiaries, of those rights. These two themes are placed within the broader context of the study through the explanation of the system of state sovereignty at the beginning of thesis.

<sup>24</sup> Mainly Finland, Sweden and Norway with their relationship with the Saami, but also Denmark as it has ratified the ILO Convention No. 169.

<sup>25</sup> eg "the rights of ownership and possession (14.1)", "lands which they traditionally occupy, "Identification of lands" (14.2.)" resolve land claims"

The concluding chapter presents the liberal perspectives on human rights. It can be argued that indigenous peoples' claims to prior and continued sovereignty over their territories question the source and legitimacy of state authority.

Although it does not grant the right to self-determination, it may be argued that, where ratified, Article 14 of ILO Convention No. 169 will challenge the sovereignty of the state concerned. This requires states to recognise the ownership and possession of traditionally occupied lands by the peoples concerned. As the knowledge of the particular consequences associated with ratification are based on the individual situations of each ratifying state, it is difficult to estimate the practical meaning of the Convention's land rights provisions. There are diverse existing forms of ownership among indigenous peoples and different national legal systems. However, Articles 34 and 35 of the Convention require that:

the nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country, and that the application of the provisions shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

It must be recognised that the concepts of "land rights/land ownership" and "self-determination" are separate concepts and rights but are often interlinked.<sup>26</sup> It is relatively obvious that the rights to land and resources are the key questions for many of the world's indigenous peoples. Those rights are regarded as an integral part of their right to self-determination. According to Henriksen, indigenous peoples right to freely dispose of their own natural wealth and resources may, however, often be a threat to states that oppose the international recognition of indigenous peoples' right to self-determination and fear the simultaneous loss of political power.<sup>27</sup> Often, there are large state economic interests that are located in indigenous peoples' territories. Consequently, these prevent states from recognizing those peoples' rights.

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<sup>26</sup> Article 26 of the UNDRIP

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

<sup>27</sup> The economic or resource dimension of the right of self-determination is emphasized in common paragraph 2 of Article 1 of the Covenants: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence." Henriksen 2001, 10.

In regard to the right to self-determination, the recognition of indigenous peoples' right to self-determination at multiple levels, as well as in many international and local declarations and conventions, is regarded as a trend in international law and politics. Examples include, among others, the UN Declaration on the Rights of Indigenous Peoples<sup>28</sup> and the Draft Nordic Saami Convention, a proposed international agreement between Norway, Sweden, and Finland. Presented in 2005, the Convention recognized Saami rights to self-determination as a distinct people, as well as the authority of the Saami Parliaments.<sup>29</sup>

In the Finnish context, traditional state sovereignty faces challenges from<sup>30</sup> 1) inside the state, where the Saami Parliament, the representative body of the indigenous community, pressures the state to ratify ILO Convention No. 169, 2) outside the state, where the international community pressures Finland to fulfil its human rights obligations towards the Saami and to ratify Convention.<sup>31</sup>

It should be recognised that the mechanism for all ILO conventions provides an effective reporting process whereby states are obliged to send reports to the *Committee of Experts on the Application of Recommendations and Conventions* (CEACR) on how the Convention has been implemented in the domestic sphere. This means that a state must constantly be aware of the situation of indigenous peoples. If the state does not meet the requirements of a convention, it receives a notice requesting the rectification of the situation. This process *may* grant the full ownership to areas occupied by indigenous peoples, even if this is not the case at the time of ratification. The content of the concept of ownership and national situations are to be evaluated in the respective national context, as recommended in Articles 34 and 35 of ILO Convention No. 169.

### 1.1.2 The Concept of Indigenous Peoples

As there is no universal definition of indigenous peoples, this thesis will only examine some of the characteristics of the many existing definitions. Indigenous peoples<sup>32</sup> are often referred to as the disadvantaged descendants of the peoples that

28 *Article 3 of the UNDRIP*

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

29 See more for example: Mattias Åhrén, Martin Scheinin, John B. Henriksen. The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions Gáldu Čála – Journal of Indigenous Peoples Rights N o. 3/2007.

30 See more Young Iris Marion, Hybrid Democracy: Iroquois Federalism and the Postcolonial project in Ivison, Patton and Sanders, Political Theory and the Rights of Indigenous Peoples. Cambridge University Press, 2007, 248- 253.

31 For example, the country report by CERD the Committee on the Elimination of the Racial Discrimination from 2009. <http://formin.finland.fi/public/default.aspx?contentid=67849>

32 Also: Indigenous peoples are people, communities, and nations who claim a historical continuity and cultural affinity with societies predating contact with Western culture. These peoples consider their local cultures to be distinctly separate from contemporary Westernized cultures, and many continue to assert their sovereignty and right to self-determination.

inhabited a territory prior to colonisation or the formation of the existing state. The term “indigenous” is defined by characteristics that relate to the identity of a particular people in a particular area, and that culturally distinguishes them from other people or peoples.<sup>33</sup> Today many indigenous peoples are excluded from society and are often even deprived of their rights as equal citizens of a state. On the other hand, indigenous peoples are determined to preserve, develop and transmit their ancestral territories and ethnic identity to future generations. It should be noted that the self-identification of an indigenous individual and the acceptance, as such, by a group is an essential component of indigenous peoples’ sense of identity. The problem related to group-acceptance will be further evaluated below. Indigenous peoples’ continued existence as a people is closely connected to their possibility of influencing their own fate and in living in accordance with their own legal traditions and cultural characteristics.<sup>34</sup>

Later on, the personal meaning of indigenous identity, as well as an evaluation of the estimated number of indigenous peoples are provided. Today, at least 350 million people globally are considered to be indigenous. Most of these peoples live in remote areas of the world. Indigenous people are divided into, at least, 5000 groups of peoples, ranging from the forest peoples of the Amazon to the tribal peoples of India to the Inuit of the Arctic and the Aborigines of Australia. Often, they inhabit land that is rich in minerals and natural resources. Indigenous peoples face serious difficulties, such as the constant threat of territorial invasion and murder, the plundering of their resources, cultural and legal discrimination, as well as a lack of recognition of their own institutions.<sup>35</sup> A comparison to the situation of the Nordic countries indicates that the Saami way of life has become close to that of the dominant society. Overall human rights are secured for all Nordic citizens and mainly the rights of the Saami to traditionally occupied lands and waters, are those which lack legal recognition and protection.

Indigenous peoples often strongly resist being defined by others. They many times state that they wish to assert their inherent right to define who they are and do not approve of any other definition. This right is recognised by ILO Convention No. 169: ‘Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.’<sup>36</sup>

There appear to be a variety of definitions, among different scholars and institutions, concerning indigenous peoples. A distinction is drawn between the history and

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33 Indigenous peoples - who are they? <http://www.iwgia.org/sw641.asp> Accessed 21.2.2011.

34 *ibid.*

35 *ibid.*

36 Article 1 of the ILO Convention No.169.

definition of the indigenous peoples of the New World and the Old World. Different definitions or approaches are presented here. However, it must be remembered that, in the context of ILO Convention No. 169, one may only speak of the peoples at whom this specific international convention is aimed at protecting, especially those living in the territory of a state party to the Convention.

The Special Rapporteur of the UN Economic and Social Council Sub-Commission on Prevention of Discrimination and Protection of Minorities defines indigenous peoples as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that have developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.<sup>37</sup>

However, some anthropologists believe that this definition of indigenous communities reflects the historical context of the New World (North and South America and Australia). In fact, all three components of the definition are derived from that historical situation. Firstly according to Sahai, it is, for example, in the New World that “[i]ndigenous communities, peoples and nations” had a “historical continuity with pre-invasion and pre-colonial societies that developed in their territories.” Secondly, it was also in the New World where indigenous peoples “consider[ed] themselves [to be] distinct from other sectors of societies now prevailing in those territories or parts of them.” Thirdly, indigenous peoples presently form “non- dominant sectors of society and are determined to preserve, develop and transmit [...] their ancestral territories and their ethnic identity [, to their future generations,] as the basis of their continued existence as people[s] in accordance with their own cultural patterns, social institutions and legal system.”<sup>38</sup>

Instead of offering a definition, Article 33 of the *United Nations Declaration on the Rights of Indigenous Peoples* underlines the importance of self-identification and indigenous peoples ability to identify themselves as, indeed, indigenous. It states:

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37 UN ECOSOC 1986

38 See more: Suman Sahai, the Challenge to indigenous peoples and indigenous culture: An Asian perspective. At <http://www.genecampaign.org/Publication/Article/IK/Challenge-IP-IC.pdf>. Accessed 16.5.2011.



1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.<sup>39</sup>

When the *Asian Development Bank* (ADB) developed a working definition of indigenous peoples to be utilized in Bank operations, several aspects were considered. A starting point was defining indigenous peoples on the basis of displayed characteristics. In this context, two significant characteristics were (i) the descent from population groups present in a given area, most often before modern states or territories were created and before modern borders were defined, and (ii) the maintenance of cultural and social identities, and social, economic, cultural, and political institutions separate from mainstream or dominant societies and cultures. In some cases, over recent centuries, tribal groups or cultural minorities have migrated into areas to which they are not indigenous, but have established a presence and continue to maintain a definite and separate social and cultural identity, as well as related social institutions. In such cases, the second identifying characteristic carries greater weight.<sup>40</sup>

Indigenous peoples are also often described with reference to their ways of life. In many cases, indigenous peoples live in separate communities or cultural and ethnic groups. Such communities and groups are often located in areas that are geographically distant from urban centres and often function on the periphery of political, social, cultural, and economic systems of dominant or mainstream society. According to the definition of the Asian Development Bank, “it is not unusual to find communities of indigenous people on the fringes of urban areas, comprising indigenous peoples who have migrated but remain distinct from the mainstream. Indigenous peoples’ communities in a given country can reflect varying degrees of acculturation and integration into the dominant or mainstream society.”<sup>41</sup>

In specific development interventions supported by the Bank, the national legislation of the country in which the development intervention is taking place provides a basis for defining indigenous peoples. This includes constitutional, statutory, customary, as well as

39 Article 33 of the United Nations Declaration on the Rights of Indigenous People

40 Additional characteristics often described to indigenous peoples include (i) self-identification and identification by others as being part of a distinct indigenous cultural group, and the display of desire to preserve that cultural identity, (ii) a linguistic identity different from that of the dominant society, (iii) social, cultural, economic, and political traditions and institutions distinct from the dominant culture, (iv) economic systems oriented more toward traditional systems of production than mainstream systems, and (v) unique ties and attachments to traditional habitats and ancestral territories and natural resources in these habitats and territories. Asian Development Bank [http://www.adb.org/documents/policies/indigenous\\_peoples/ipp-002.asp](http://www.adb.org/documents/policies/indigenous_peoples/ipp-002.asp) Accessed 4.3.2011.

41 Asian Development Bank, Definition of Indigenous Peoples [http://www.adb.org/documents/policies/indigenous\\_peoples/ipp-002.asp](http://www.adb.org/documents/policies/indigenous_peoples/ipp-002.asp) Accessed 4.3.2011.

international law. Additionally, it includes any international convention that the country is a party to. Other country-specific considerations must also be taken into account.<sup>42</sup>

As a working definition that is to be employed in the Bank's operations, indigenous peoples are to be regarded as individuals with a social or cultural identity that is distinct from dominant or mainstream society, thus, making them vulnerable to being disadvantaged in development processes. The application of any definition of indigenous peoples should be able to differentiate it between indigenous peoples and other cultural and ethnic minorities for which indigenous status is not regarded as an issue; the broader protection of vulnerable groups is an issue addressed in other Bank policies and practices.<sup>43</sup>

The description of Indigenous Peoples, as given by the *World Bank*<sup>44</sup>, reads:

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

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

Another UN Document on the definition of indigenous peoples is the Working Paper by the Chairperson-Rapporteur in the Working Group on Indigenous Populations (WGIP), *Mrs. Erica-Irene A. Daes*, which provides a thorough overview on the concept of "indigenous people" in the UN context.<sup>45</sup> Indigenous representatives have expressed their views on several occasions before the Working Group. Indigenous representatives particularly noted a number of elements related to the issue during the thirteenth session of the Working Group. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. M. Dodson, stated: "[a] scope for self-identification as an individual and acceptance as such by the group.

42 *ibid.*

43 *ibid.*

44 Operational directive 4.20, 1991: See more World Bank, Policy Brief, Indigenous peoples, Still among the poorest of the poor. [http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN\\_indigenous\\_clean\\_0421.pdf](http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN_indigenous_clean_0421.pdf). Accessed 4.3.2011.

45 STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLE, Working Paper by the Chairperson-Rapporteur, Mrs. Daes Erica-Irene A., on the concept of "indigenous people" E/CN.4/Sub.2/AC.4/1996/2 10 June 1996.

Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories.”<sup>46</sup>

Irene A. Daes notes that an important study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities was made by Mr. *F. Capotorti*, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. He argued that the size and power of a group are important considerations in determining whether it should be an object of special international protection. He reasoned that, a “minority”, from the viewpoint of sociology, is not necessarily the same as a “minority” within the context of international human rights law. From his perspective, he proposed the following definition: “A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.”<sup>47</sup>

Finally, the International Labour Organization (ILO) Convention 169 ‘Concerning Indigenous Peoples in Independent Countries’ (1989), describes the peoples it aims to protect. According to Article 1, the Convention applies to:

- (a) tribal peoples in countries whose social cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations, and
- (b) Peoples in countries who are regarded by themselves or others as indigenous on account of their descent from the populations that inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain, some or all of their own social, economic, spiritual cultural and political characteristics and institutions.

As already described in the beginning of the chapter, there are many complexities related to the attempt to formulate a universal definition of indigenous peoples. At this point, the definitions presented above are only views of persons or institutions working with the issues. It should also be realised that many of the definitions are made for specific purposes, such as the definitions of the Asian Development Bank, the World Bank and ILO Convention No. 169.

<sup>46</sup> See E/CN.4/Sub.2/1995/24, 41-51.

<sup>47</sup> Capotorti F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, United Nations publication, Sales No. E.91.XIV.2, Geneva, 1991,568.

Why do we need a definition then? Do we even require one at all? In the context of the ILO Convention, the definition question is the most distinct one. Article 1 enumerates the beneficiaries of the Convention. This is an interesting starting point and, it should be noted that, these defining elements, as noted earlier, only apply to this instrument. In the ILO context, the question is not necessarily about defining indigenous peoples but about “determining” those peoples and individuals with special human rights under the Convention. The same issue arose when the UN Declaration on Indigenous Peoples was drafted.<sup>48</sup> This approach and the above questions are examined in more detail in chapter 2.2, which deals with subjectivity, or the identification of right-holders under ILO Convention No. 169.

In the opinion of Chairperson-Rapporteur Mrs. Daes, at the fourteenth session of the Working Group of Indigenous Populations, it was further explained that the “indigenous” concept is incapable of a precise and inclusive definition that can similarly be applied to all global regions. However, greater agreement may be achieved in identifying the principal factors that have practically distinguished “indigenous peoples” from other groups in the UN system and regional intergovernmental organizations.<sup>49</sup>

In light of the above definitions, it seems that, for certain purposes, a contemporary working definition of “indigenous people” has criteria that seek to include cultural groups (and their continuity or association with a given region, or parts of a region, and who formerly or currently inhabit the region) either before or after their subsequent colonisation or annexation; *or*

- alongside other cultural groups during the formation and/or reign of a colony or nation-state; *or*
- independently or largely isolated from the influence of the claimed governance by a nation-state, and who furthermore:<sup>50</sup>
- have maintained at least in part their distinct cultural, social/organisational, and/or linguistic characteristics, and in doing so remain differentiated in some degree from the surrounding populations and dominant culture of the nation-state.

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48 “This is an appropriate stage at which to review the discussion of these issues by participants at the first meeting of the working group of the Commission on Human Rights which was established by resolution 1995/32. Several delegations of Member States maintained that it was essential to adopt a definition of the concept “indigenous” before negotiating the substantive provisions of a declaration on the rights of these peoples.” E/CN.4/Sub.2/AC.4/1996/2 10 June 1996, 19.

49 E/CN.4/Sub.2/AC.4/1996/2 10 June 1996.

50 “United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)”. *United Nations*. UNPFII. [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf). Accessed 22.3.2011.

A criterion that includes<sup>51</sup> peoples who self-identify as indigenous, and/or those recognized as such by other groups, is often added to the above.

Note that, even if all of the above criteria are fulfilled, some people may either not consider themselves indigenous or may not be considered indigenous by governments, organizations or scholars. The discourse of who is and is not indigenous may also be viewed within the context of postcolonialism and the evolution of post-colonial societies.

To conclude, it is important to define indigenous peoples in a manner that provides these peoples and persons with the possibility to enjoy their inherent rights as (the descendants of) the original inhabitants of a particular territory. The inseparability of cultural distinctiveness and territory from the concept of “indigenous” was noted by the United Nations Conference on Environment and Development in paragraph 26.1 of Agenda 21, adopted by a consensus of the Member States: “Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of those lands.”<sup>52</sup>

The World Bank Operational Manual also identifies “a close attachment to ancestral territories and to the natural resources in these areas” as one of five factors, which to varying degrees, tend to characterize “indigenous peoples”.<sup>53</sup> In 1994, the centrality of land tenure systems and ecological knowledge to the cultures of indigenous peoples was once again consensually reaffirmed, at the International Conference on Population and Development in Cairo.<sup>54</sup> Although ILO Convention No. 169 does not include geographical factors in its definition of “indigenous”, Article 13 nonetheless affirms the “special importance” of continuing the relationship, as well as the “cultural and spiritual values”, between indigenous peoples and their ancestral territories. In other words, the cultural distinctiveness of indigenous peoples, which is central to the concept of “indigenous” in contemporary international law, is inseparable from “territory”.<sup>55</sup>

In summary, factors that modern international organizations and legal experts (including indigenous legal experts and members of the academy) consider to be relevant in understanding the concept of “indigenous” include according to Daes:

51 “Frequently Asked Questions: Declaration on the Rights of Indigenous Peoples” (PDF). *United Nations Permanent Forum on Indigenous Issues*. <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>. Accessed 22.3.2011.

52 Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-4 June 1992), vol. I, resolution 1, annex II. United Nations Publication, Sales No. E.93.I.8. See also chapter 26 of E/CN.4/Sub.2/AC.4/1996/2 page 25. Agenda 21 on “Recognizing and strengthening the role of indigenous people and their communities”.

53 Operational Directive 4.20, para. 5 (a), September 1991. Other factors listed are self-identification, a distinct language, customary social and political institutions, and a subsistence-oriented economy.

54 A/CONF.171/13, para. 6.27.

55 E/CN.4/Sub.2/AC.4/1996/2, 16.

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>56</sup>

I will use the term ‘indigenous’ throughout this work to refer to those peoples and persons whose historical connection with the territory of the state in which they live precedes its development, such that they formed a definite community in it (in some, perhaps historically altered, way) before colonial powers (or the formulation of the present state boundaries) came in contact with them. At times, this refers to a connection that is so long that people are even unable to record their origins by way of historical markers, but rather use mythological and legendary ones.<sup>57</sup> As an antonym to ‘indigenous’ I prefer ‘non-indigenous’. I will, however, extensively make use of the word ‘settler’, simply because it highlights those who have a much shorter connection with the land, more or less dating from the arrival of European colonialists or, in the Nordic context, after the King’s declarations concerning settlement in the territories of Lapp villages in 1673 and 1695.<sup>58</sup> It is not intended to be a pejorative term, but does avoid problems associated with terms like ‘colonial’ and ‘post-colonial’ because, the considerable use of these terms suggests that, as times change, so do issues. Steven Curry argues that indigenous peoples have few reasons to think that colonial independence made any great difference.<sup>59</sup> ‘Colonial’ and ‘post-colonial’ then refers to specific historical relations between imperial metropolises and their satellites. This is easily accommodated with Curry’s view.

In the context of ILO Convention No. 169, subjectivity is an issue of vital importance. Within this connection, it is reasonable to highlight that even though states are considered to be the ultimate subjects of this Convention, the question is not com-

56 STANDARD-SETTING ACTIVITIES: EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS PEOPLE, Working Paper by the Chairperson-Rapporteur, Mrs.

Daes Erica-Irene A., on the concept of “indigenous people” E/CN.4/Sub.2/AC.4/1996/2 10 June 1996. The foregoing factors do not, and cannot, constitute an inclusive or comprehensive definition. Rather, they represent factors which may be present, to a greater or lesser degree, in different regions and in different national and local contexts. As such, they may provide some general guidance to reasonable decision-making in practice.

57 See also SOU 1999:25, Samerna – ett ursprungsfolk i Sverige, Frågan om Sveriges anslutning till ILO:s konvention nr 169. Betänkande av Utredningen om ILO:s konvention nr 169. Stockholm 1999, 23-33.

58 Kulonen Ulla-Maija, Seurujärvi-Kari Irja & Pulkkinen Risto (eds.) *The Saami, A Cultural Encyclopaedia*, Suomalaisen kirjallisuuden seura, Vammala 2005, 188.

59 Curry, Steven, *Indigenous Sovereignty and the Democratic Project*, Ashgate, Cornwall 2004, 8.

pletely unambiguous. The subject-object dichotomy is further examined, in chapter 2.2. However, as this study focuses on the rights of indigenous peoples to land and waters, I am using the concept of “subject” to refer to the *right holders* (states, peoples and individuals) of the Convention. In this respect, subjectivity is two-dimensional:

1. On the one hand, I speak of the subjects (right holders) who fulfil the criteria of Article 1 and the criteria in the land rights provisions of ILO Convention No. 169, meaning Articles 13-19, and especially Article 14.
2. On the other hand, I speak of the subjects (right holders) of the Convention’s remaining provisions. This refers to articles concerning issues such as health care, education, and the working conditions of indigenous peoples.

As noted, this study focuses on the land rights and their beneficiaries. A similar approach has been taken in a 1999 Swedish Committee report.<sup>60</sup> According to the rapporteur, Sven Heurgren, it is the obligation of the state to clarify the right holders of ILO Convention No. 169. In his view, the definition of a Saami in the Swedish Act on the Saami Parliament already contains many of the elements expressed in Article 1 of Convention No. 169. However, Heurgren continues by stating that, even if the definition of Saami is similar to the Convention’s definition, it is not decisive that these persons are those who should be considered as the right holders of the Convention in Sweden. He further explains that the definition of Saami has been created for legislative purposes in order to define persons who have the right to vote in Saami Parliamentary elections. Therefore, where ratification of Convention No. 169 is concerned, there may be a need to establish a separate criterion for those who are to be regarded as the right holders of Convention No. 169 according to the criteria of Article 1. According to Heurgren, the current definition of Saami would be adequate when determining the right holders of the other articles of Convention No. 169, with the exception of the land rights articles. The beneficiaries of the land rights articles are defined in the Swedish reindeer herding legislation. In practice, they are reindeer herders, whose right is based on immemorial prescription.<sup>61</sup>

A similar approach has been taken in the Finnish context by Kristian Myntti.<sup>62</sup> He questions the suitability of the definition of Finnish Saami for the purposes of the land rights provisions of ILO Convention No. 169, much as Heurgren does. The issue has also been discussed by Timo Koivurova in the context of the definition of Saami. He evaluates the

60 SOU 1999:25, 83-84.

61 SOU 1999:25, 83-84, 120-140. It should be noted that contrary to Finland, the Swedish reindeer herding legislation contains a considerable amount of other rights related to traditional livelihoods, e.g., the right to fish and hunt, the right to build with certain limitations, the right to take timber, etc.

62 Myntti, Kristian, Saamelaismääritelmä oikeudelliselta kannalta in Irja Seurujärvi-Kari (ed.) *Beaivvi Mánát, Saamelaisten juuret ja nykyaika*. Tietolipas 164, Suomalaisen kirjallisuuden seura 2000, 216-226.

reports submitted by the Committee on Elimination of Racial Discrimination (CERD),<sup>63</sup> where the Committee has constantly reminded Finland of its excessively narrow definition of a Saami.<sup>64</sup> This is also an important view in the context of ILO Convention No. 169 and its two-dimensional approach described above. In addition, a recent doctoral dissertation by Leena Heinämäki<sup>65</sup> highlights the importance of the relationship between the land and indigenous peoples. In that context, she refers to the environmental rights of indigenous peoples and states: “This dissertation, although acknowledging that culture is an evolving concept, focuses solely on the so-called traditional way of life of indigenous peoples. It is, in the end, the traditional, nature-based culture that makes indigenous peoples a special group benefiting from environmental rights intended to protect their traditional cultural practices.”<sup>66</sup> To conclude, it should be acknowledged that no issue related to the questions of land rights and the beneficiaries of those rights is clearly defined. There are many complexities involved and I am aware of them.

### 1.1.3 Some Words about the Relationship between International Law and International Relations

Often in times, in the context of indigenous peoples’ rights, questions about political and legal aspects become interlinked. There is no distinctive border between the disciplines of international relations and international law, both of which deal with such issues.<sup>67</sup> In this work, the different concepts are explained as understood in the context of the study. However, it is not possible to go into detail; all that can be given is an overview of the historical development of the concepts and their general principles as the guiding elements for the study. The concepts are elaborated in chapter 1.2., where the theoretical framework of the study is presented. A special emphasis is placed on the dichotomy between subjects and objects in international law, as well as on the role of an individual in this context.

#### *International Law*

International law (IL) is the term commonly used to refer to a body of laws that govern the conduct of independent nations in their relations with one another. It dif-

63 See all the reports in <http://formin.finland.fi/public/default.aspx?contentid=67849> Accessed 9.2.2011. More on CERD,

64 Koivurova, Timo, Alkuperäiskansojen asema ja oikeudet kansainvälisessä oikeudessa. In Kai T. Kokko (ed.) Kysymyksiä saamelaisten oikeusasemasta. Lapin yliopiston oikeustieteellisiä julkaisuja, Sarja B. no. 30. Rovaniemi 2010, 26-49.

65 Heinämäki, Leena, The Right to be a Part of nature: Indigenous Peoples and the Environment, Acta Universitatis Lapponiensis 180, Rovaniemi 2010.

66 Heinämäki Leena, 2010, 1.

67 Shaw, Malcolm N. *International Law*. Cambridge University Press; 5. edition. 2003, 1–2.



fers from other legal systems<sup>68</sup> in that it primarily concerns states rather than private citizens. In other words, it is the body of law that is, for the greater part, composed of the principles and rules of conduct that states feel bound to observe, and therefore, *do* commonly observe in their relations with one another. These principles include: (a) The rules of law relating to the function of international institutions or organizations, their relations with each other and their relations with states and individuals; and (b) certain rules of law relating to individuals and non-state entities insofar as the rights and duties of such individuals and non-state entities are the concern of the international community.<sup>69</sup> However, according to Mckeever, the term “international law” may refer to three distinct legal disciplines: 1) Public international law which governs relations between states and international entities, either as an individual or as a group. Public international law includes several specific legal fields, such as treaty law, the law of the sea, international criminal law, and humanitarian law. 2) Private international law, or conflict laws, address questions pertaining to the legal jurisdiction in which different cases may be heard ; and the law concerning which jurisdiction or jurisdictions apply to the issues in the case;<sup>70</sup> and 3) Supranational law or the law of supranational organisations, which currently concerns regional agreements where the particular distinguishing quality is state law, which is inapplicable when conflicting with a supranational legal system.<sup>71</sup>

IL, in various forms, has governed relations between different social groupings, including tribes, cities, sovereigns and, ultimately, states for thousands of years. Throughout that time, the law has been used to a greater or lesser extent at different times.<sup>72</sup> The beginning of modern IL can be traced back to the evolution of the modern state-system in Europe, and, in particular, the Treaty of Westphalia in 1648, which brought an end to the Thirty Years’ War and ‘marked the acceptance of a new political order in

68 The three major legal systems of the world today consist of civil law, common law and religious law. However, each country often develops variations on each system or incorporates many other features into the system. See more Badr, Gamal Moursi, “Islamic Law:Its Relation to Other Legal Systems”, *The American Journal of Comparative Law*25, 1978. Proceedings of an International Conference on Comparative Law, Salt Lake City, Utah, February 24-25, 1977: 187-198; Makdisi John A., “The Islamic Origins of the Common Law”, *North Carolina Law Review*, 77 (5): 1999, 1635-1739.

69 Shaw, Malcolm N. *International Law*. Cambridge University Press; 5. edition. 2003, 1–2.

70 See more Burman, Harold S., *Private International Law*. 32 Int’l L. 591, 1998..

71 Supranational law is a form of international law, based on the limitation of the rights of sovereign nations between one another. It is distinguished from public international law, because in supranational law, nations explicitly submit their right to make judicial decisions, to a set of a common institutions. The European Community la ’is the first and only t example of a supranational legal framework. In the EC, sovereign nations have pooled their authority through a system of courts and political institutions. However, after the Treaty of Lisbon, there exists only the European Union and EU Law. See more for example Cassese Antonio, *International Law*, Second edition, Oxford University Press, 2005, 3-12; Joseph H.H. Weiler, “The Community System: the Dual Character of Supranationalism”.Y.B. *European L.* (F.G. Jacobs ed.) 1981, 267-280.

72 Barker, J. Craig, *International Law and International Relations*. Continuum, New York 2000, 1.

Europe'.<sup>73</sup> One of the key developments in this new European political structure was the emergence of the doctrine of sovereignty, a doctrine first formalized by Jean Bodin in *De Republica* in 1576.<sup>74</sup> The process by which the doctrine of sovereignty came to dominate both IL and IR was consummated by *Thomas Hobbes*, who declared that 'law neither makes the sovereign nor limits his authority; it is might that makes the sovereign and law is merely what he commands'.<sup>75</sup> Sovereignty was also discussed by *Jeremy Bentham* and, most notably, by *John Austin*. According to Barker, for Austin, the two fundamental requirements of law 'properly so called' are the command of a superior backed up by sanctions.<sup>76</sup>

In Austin's time, much of the existing IL did not lend itself to any particular definition of law. If it did exist at all, IL was simply there to recognize 'the delimitation of power among the various members of the international community'.<sup>77</sup> The basic ordering principle was the so-called balance of power, which was based on great power hegemony and the attempts by those great powers 'not to trespass upon their respective spheres of influence in order to avoid friction and conflict'.<sup>78</sup> The balance of power system essentially continued until the outbreak of the First World War. It may also be argued that the balance of power system continued throughout the Cold War and is now emerging between the US and China. Nevertheless, the period covering the end of the nineteenth and the beginning of the twentieth century was the witness of a number of attempts at strengthening the role of IL.<sup>79</sup>

Before the First and Second World War, the effort to more fully develop the rule of law in IR saw the enactment of the Hague Conventions for the Pacific Settlement of International Disputes<sup>80</sup> in 1899 and 1907, which brought about the creation of the Permanent Court of Arbitration (PCA). This period also witnessed the establishment of nascent human rights institutions, such as the British and Foreign Anti-Slavery Society and the International Committee of the Red Cross, as well as various proposals for the creation of a system of world law such as the one put forward by the Universal Peace Congress in 1908. The process culminated in the creation of the League of

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73 Brierly 1963, 5. See more Cassese Antonio, *International Law*, Second Edition, Oxford University Press, 2005, about the emergence of the present international community before and after of the Peace of Westphalia, 22-25.

74 *ibid.*, 7.

75 Brierly 1963, 12.

76 Fundamentally for Austin, states, which are themselves sovereign, cannot be *subjected to* the law, they can only agree to limit their own rights through consent. Barker, 2000, 6-7.

77 Cassese 1986, 46.

78 *Ibid.* 45.

79 Barker 2000, 8.

80 At <http://un.by/en/documents/ustav/ustavgl6text.html> Accessed 17.5.2011.

Nations and the International Court of Justice (ICJ) in 1920.<sup>81</sup> Further development led to the establishment of the United Nations (UN) in 1945.<sup>82</sup> The UN Charter<sup>83</sup> provided a framework for the future development of international law. It envisaged fuller economic and social cooperation among states and specifically called for the promotion of universal respect for, and the observance of, human rights.<sup>84</sup>

Over the last fifty to sixty years, the international system witnessed many changes that have had a profound effect on IL. The Cold War was a dominant factor throughout most of this period. So too was the consummation of the decolonization process, which, coupled with the demise of communism and, particularly, the break-up of the Soviet Union and former Yugoslavia, has increased the number of states from approximately fifty in 1945 to over 200 states, today. New perspectives in IL have emerged during this period. These particularly include Soviet and Third World Perspectives (TWAIL)<sup>85</sup>, which have challenged the Western dominance of IL. To conclude, IL has witnessed an enormous development in the number of fields that it encompasses.<sup>86</sup>

Although it is not the core of this study, it is reasonable to take up the binding nature of IL and to, secondly, examine the related, yet separate, question regarding the enforcement of IL. These approaches are, however, taken into consideration as background information. The work only explains a few central concepts without going into detail on the discussion between IR and IL scholars on the binding nature of

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81 The International Court of Justice (French: *Cour internationale de justice*; commonly referred to as the World Court or ICJ) is the principal judicial organ of the United Nations. It is based in the Peace Palace in The Hague, Netherlands. Its main functions are to settle legal disputes submitted to it by states and to provide advisory opinions on legal questions submitted to it by duly authorized international organs, agencies, and the UN General Assembly.

82 *United Nations* (UN) is an international organization whose stated aims are facilitating cooperation in international law, international security, economic development, social progress, human rights, and achievement of world peace. The UN was founded in 1945 after World War II to replace the League of Nations, to stop wars between countries, and to provide a platform for dialogue. It contains multiple subsidiary organizations to carry out its missions. There are currently 193 member states, including every sovereign state in the world but the Vatican City. [www.un.org](http://www.un.org).

83 The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

84 Barker 2000, 12-13.

85 *Third World Approaches to International Law* (TWAIL) is a critical approach to international law that is not a “method” in the strict sense of questioning “what the law is”. Rather, it is an approach to law that is unified by a particular set of concerns and analytical tools with which to explore them. It is an approach that draws primarily from the history of the encounter between international law and colonized peoples. TWAIL shares many concepts with post-colonial studies, feminist theory, Critical legal studies, Marxist theory and critical race theory. TWAIL scholarship prioritizes in its study the power dynamic between the First World and Third World and the role of international law in legitimizing the subjugation and oppression of Third World peoples. TWAIL scholars try to avoid presenting the “Third World” as a unified, coherent place but rather use the term to indicate peoples who have the shared experience of underdevelopment and marginalization. See more for example: Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAIL): Theory Methodology, or Both?* *International Community Law Review* 10 (2008) 371-378; Ibironke T. Odumosu, *Challenges for the (Present!) Future of Third World Approaches to International Law*, *International Community Law Review* 10 (2008) 467-477; Jalia Kangave, ‘Taxing\* TWAIL: A Preliminary Inquiry into TWAIL’s Application to the Taxation of Foreign Direct Investment’, *International Community Law Review* 10 (2008) 389-400.

86 Barker 2000, 13.

IL and whether it is binding on states at all. The debate has been dominated by, for example, *Terry Nardin*,<sup>87</sup> *Herbert L.A. Hart*<sup>88</sup> and *Ian Brownlie*<sup>89</sup>. However, even prior to this debate, international lawyers have, for many years, asserted that the binding principle of IL is the rule of *pacta sunt servanda*, that is, “agreements must be kept”.<sup>90</sup>

Why, then, is IL binding on states? According to Barker, for many international lawyers, the answer is simple – because states accept that it is binding upon them. To others this answer may appear to be too simplistic.<sup>91</sup> According to Brownlie, the binding nature of international law lies in states’ *political* acceptance that rules of IL do exist and are binding upon them. IL is the reality. As Brownlie has noted, “the actual use of rules described as rules of international law by governments is not to be questioned”.<sup>92</sup> He continues:

“All normal governments employ experts to provide routine and other advice on matters of international law and constantly define their relations with other states in terms of international law. Governments and their officials routinely use rules which they have for a very long time called the “law of nations” or “international law”. It is not the case that the resort to law is propagandist – though it sometimes is. The evidence is that reference to international law has been a normal part of the process of decision-making.”<sup>93</sup>

The view of the binding nature of international law is generally accepted amongst political scientists as well as international lawyers. In particular, the work of *E.H. Carr*, one of the leading proponents of the realist school of IR, is fundamentally in agreement with the line of reasoning set out above.<sup>94</sup> However, according to Barker, the assertion of the binding nature of IL is insufficient. If IL is to be taken seriously

87 Nardin, Terry, *Law, Morality and the Relations of States*, Princeton University Press, 1983.

88 Hart, Herbert L.A. *The Concept of Law*, Oxford Clarendon Press, 1961.

89 Brownlie, Ian, *The Reality and Efficacy of International Law*, 52 *British Yearbook of International Law* 1, 1981; *Principles of Public International Law* (5<sup>th</sup> edn) Oxford: Clarendon Press, 1998; *International Law and the Use of Force by States*, Oxford: Oxford University Press, 1963.

90 A basic principle of civil law and of international law. *Black’s Law Dictionary*, 8th ed. 2004. With reference to international agreements, “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” *Pacta sunt servanda* is based on good faith. This entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of treaties implies that a party to the treaty cannot invoke provisions of its municipal (domestic) law as justification for a failure to perform. *Vienna Convention on the Law of Treaties*, signed at Vienna on May 23, 1969, entered into force on January 27, 1980, art. 26.

91 Barker 2000, 19.

92 Brownlie 1981, 1.

93 *ibid.*

94 Barker 2000, 21.

as a factor in states' relations, it is necessary to evaluate the effectiveness of IL.<sup>95</sup> The UN has played a central role in the general enforcement of IL. Aside from the issue of the imposition of forcible sanctions, the UN is heavily involved in the development and strengthening of non-forcible measures in support of IL. One particular area of development has been in relation to the enforcement of human rights law. An example of such development may be found in the implementation machinery of the 1966 *International Covenant on Civil and Political Rights*<sup>96</sup>. State compliance with the ICCPR is monitored by the Human Rights Committee, which reviews the regular reports of state parties on how the rights are being implemented. States must initially report one year after acceding to the Covenant, as well as when requested by the Committee (which is usually every four years). The Committee meets in Geneva or New York and normally holds three sessions per year. A second procedure is envisaged under Article 41(1) of the Covenant and provides for the Human Rights Committee to consider communications from a state party which 'claims that another State Party is not fulfilling its obligations under the ... Covenant'. This procedure is optional and depends upon the hearing of such complaints by both states accepting the competence of the Human Rights Committee. The third procedure is the right of individual petition provided for in the Optional Protocol to the Covenant. As its name suggests, this system is not mandatory on the state parties to the Covenant unless they have become parties to the optional protocol.<sup>97</sup>

In the case of Finland in relation to the rights of minorities and indigenous people, the Covenant is important as it is a legally binding instrument for Finland, whereas ILO Convention No. 169 currently is not. The effectiveness of international human right norms and their entry into the domestic legal and political practices of states are examined in the thesis. They are particularly examined in regard to the Convention and its supervisory mechanism, which, to a certain extent, differs from the mechanism of the Covenant. The supervisory mechanism of ILO Convention No. 169 is explored in more detail in chapter 1.1, as well as in the article titled "International Norms and Domestic Practices in Regard to ILO Convention No. 169 – with special reference to Articles 1 and 13-19".<sup>98</sup>

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95 Barker 2000, 20-21.

96 The *International Covenant on Civil and Political Rights* (ICCPR) is a multilateral treaty adopted by the United Nations General Assembly on December 16, 1966, and in force from March 23, 1976.

97 Barker 2000, 25-26.

98 Published in *International Community Law Review*, Volume 12, No.2, 2010. Buergenthal T., "The U.N. Human Rights Committee", *Max Planck Yearbook of United Nations Law*, vol. 5, 2001, pp. 341–398; Schultz Joseph, J. and M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*, 2nd edition, Oxford University Press, Oxford, 2005; Nowak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd edition*, N.P. Engel, Kehl, 2005; Tomuschat, Ch., *Human Rights: Between Idealism and Realism*, 2nd edition, Oxford University Press, Oxford, 2008.

In the following chapters, the general principles of IL are elaborated through the mainstream view that states are the primary subjects of IL, although the legal subjectivity of international organizations and individuals is also examined. Primary sources of IL, treaties and customary international law, are explored in more detail in chapter 1.2.2, where the research materials are introduced.

### ***States as the Subjects of International Law***

States are considered to be the primary subjects of IL. In order to be considered as a subject of IL, an entity must be capable of possessing rights and duties under IL and have procedural capacity to enforce those rights and duties. Traditionally, only states were considered to fulfil the necessary requirements. According to Barker, IL has developed in a manner that further recognizes subject categories. Thus, it cannot be denied that states remain the primary subjects of IL.<sup>99</sup>

There are four factors pointing toward the primacy of states in IL. First, IL is primarily a system of law between states. It is made by states and is concerned with regulating the interactions of states. Secondly, the ICJ, the principal judicial organ recognized by UN IL, is only open to states in its contentious jurisdiction.<sup>100</sup> Thirdly, where an individual suffers harm abroad, that individual cannot directly bring a claim, under IL, against the state in which he/she was harmed. Such a claim must be brought by his/her national state. Finally, when a state pursues such a claim, it is not acting as an agent of the individual. It is pursuing its own claim.<sup>101</sup> However, more recently in a development considered to be 'one of the more significant features of contemporary international law'<sup>102</sup>, the recognized subjects of IL have expanded to include international organizations and, to a limited degree, individuals. Other putative subjects of IL include insurgents and national liberation movements.<sup>103</sup> However, consideration will only be given to international organizations and individuals as they form the core approaches to the study. Part two of the thesis analyses the international legal status of individuals, indigenous peoples, and states in the context of ILO Convention No. 169.

<sup>99</sup> Barker 2000, 44.

<sup>100</sup> ICJ Statute, Article 34.

<sup>101</sup> In a judgement of the PCIJ in *Mavrommatis Palestine Concessions Case* (Jurisdiction) 1924 PCIJ, Ser.A, No.2, p.12, the court observed that: "Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant."

<sup>102</sup> Henkin et al, 1987, 229. See more on the legal personality of international organisations in Cassese Antonio, *International Law*, Second Edition, Oxford University Press, 2005, 135-140.

<sup>103</sup> Barker 2000, 44-45. About the subjects of the international community see more for example, Cassese Antonio, *International Law*, Second Edition, Oxford University Press, 2005, 71-77. Warbrick Colin, *States and Recognition in international law* in Malcolm D. Evans (ed.) *International Law*, Oxford University Press, 2003, 205-236.

### ***International Organizations as the Subjects of International Law***

According to Henkin, it is, nowadays, commonly accepted that certain international organizations (IO) have an international legal personality. Similar to international legal persons, international organizations are generally understood as having a capacity to enter into international treaties, convene international conferences, send and receive diplomatic missions, present protests to states and put forward international claims.<sup>104</sup> In order for such an organization to have a legal personality, it must distinguish itself from its member states and possess organs with the ability to employ the necessary 'legal capacity and responsibilities' to operate on an international level.<sup>105</sup>

A fundamental question that arises in this context concerns the extent to which IOs are dependent on states for their international legal personality. The concept of international personality was defined by the International Court of Justice in the *Reparation for Injuries case*.<sup>106</sup> In 1949, the ICJ gave an advisory opinion in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*. The UN General Assembly had sought the advice of the ICJ after Count Bernadotte was killed in Jerusalem on September 17, 1948, allegedly by a private gang of terrorists. Count Bernadotte, a Swedish national, was the UN Mediator in Palestine. The question was raised as to whether the UN, as an organization, could claim reparation for these injuries from the responsible state.<sup>107</sup>

The Court stated:

The Court has come to the conclusion that the United Nations is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of the State. Still less is it the same thing as saying that it is 'a super State', whatever that expression may mean. It does not even imply that all its rights and duties of a State must be upon the international plane. What this does mean is that it is a subject of international law and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims.<sup>108</sup>

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104 Henkin *et al.* 1987, 229.

105 Henkin *et al.* according to Barker 2000, 45.

106 ICJ Rep., 1949, 174.

107 Meijknecht 2001, 23; See also Gautier, Philippe, *Reparation for Injuries Case Revisited: The personality of the European Union*. Max Planck Yearbook of United Nations Law. Kluwer, Netherlands, 2000, 331-336.

108 ICJ Rep. 1949, 179.

The definition of ‘international personality’ by the ICJ has often been quoted in legal literature on this issue. Nevertheless, according to Meijknecht, it must be read carefully.<sup>109</sup> It is not possible to go into detail on the concept, but to only report the discussion on legal personality as a starting point for the analysis in the context of indigenous peoples. For me, the discussion on legal personality, in the discipline of IL, reflects the relevance of the issue, and has, therefore, led to its consideration in connection with ILO Convention No. 169, which seems to address similar questions.

### ***Individuals as Subjects of International Law***

According to Barker, the question regarding the personality of individuals under IL has troubled international lawyers for centuries. It is undisputed that individuals are the primary legal subjects of every municipal legal system globally. Thus, individuals in various states are subject to different laws depending on many factors, including the level of development, political persuasion and the religious heritage of each state. However, it cannot be denied that, even among states with vastly different cultural, social and economic backgrounds, many similar, even identical, laws exist.<sup>110</sup>

In the traditional view of IL, the rights and duties that individuals are subject to are not established by the individuals, but rather by states. Therefore, as long as individuals are the subjects of law, similar to IOs, they are only regarded as possessing derivative rights and duties. Accordingly, Phillip Jessup notes that, ‘[as] long... as the international community is composed of states, it is only through an exercise of their will, as expressed through treaty or agreement or as laid down by an international authority deriving its power from states, that rule of law becomes binding upon an individual.’<sup>111</sup>

Nonetheless, the twentieth century has seen the concerted effort of many international lawyers and IR specialists in recognizing the rights of individuals. The most noticeable development has been the development of the IL of human rights. One cannot deny that the development of international human rights over the past six decades, beginning with the UN Charter, has had a considerable impact on both the fields of IL and IR. The human rights of individuals are recognized in IL. As noted earlier, international instruments, such as the Universal Declaration of Human Rights 1948 (UDHR) and the International Covenants on Civil and Political Rights (ICCPR) and the Economic, Social and Cultural Rights of 1966 (ESCR), serve as the foundation of international human rights law. As only some of the provisions contained in these instruments have evolved into customary law, the recognition of basic human rights

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109 Meijknecht 2001, 25.

110 Barker 2000, 48.

111 Jessup 1949, 17-18.



is necessarily binding on all states. This is also recognized in articles 1 and 55 of the UN Charter. However, the focus is not on whether such instruments are binding on states, but whether holding rights under IL renders individuals as subjects of that law.<sup>112</sup>

In this regard, the crucial question is whether individuals have the capacity to directly enforce those rights under IL. Consequently, the answer would appear to be dependent on the requirements of the international agreement upon which the right is founded, as well as on the attitude of the individual's nation state. A well-known right of individual petition, recognized by a universal human rights treaty, is Article 1 of the First Optional Protocol to the ICCPR, which allows a state party to recognize 'the competence of the Human Rights Committee to receive and consider communications from individuals subject to this jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant.'<sup>113</sup> There are various other international agreements, which allow for a direct right of petition by individuals. These include the 1950 European Convention on Human Rights, the 1957 European Economic Communities Treaty and the 1969 Inter-American Convention on Human Rights. Thus, as Higgins noted, 'there is no inherent reason why the individual should not be able [to] directly invoke international law and [...] be a beneficiary of international law.'<sup>114</sup> However, as Higgins admits, such existing rights are based on the consent of states of which most are liberal democratic states.

It may also be argued that, as states consist of individuals, it is individuals, as opposed to states, who are the ultimate beneficiaries of rights under IL. This approach is particularly easy to comprehend in the context of indigenous peoples, whose legal personality has been under discussion for several decades: Without individuals, there are no indigenous peoples. Since 1945, IL has primarily focused on the protection of individual human rights, as may be seen in the rights contained in the UDHR. Nevertheless, in recent years, increased attention has been given to various expressions of the concept of collective rights. Although, according to Shaw, it is often difficult to maintain a strict differentiation between individual and collective rights. Whereas some rights are purely individual, such as the right to life or freedom of expression, others are individual rights, which are necessarily expressed collectively. These include freedom of assembly or the right to manifest one's own religion. Some rights are purely collective, such as the right to self-determination or the physical protection of the group through the prohibition of genocide. Others constitute collective manifestations of individual

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112 Barker 2000, 49.

113 However, as the name suggests, this aspect of the Covenant is optional even for those parties to the Covenant itself and there are number of state parties to the Covenant which have not in fact signed up to the optional protocol. Barker 2000, 50.

114 Higgings, *Minority Rights: Discrepancies and Divergences between the International Covenant and the Council of Europe System*, In R. Lawson and M. de Blois (eds.) *The Dynamics of the Protection of Human Rights in Europe, Essays in Honor of Henry G. Schermers*, Volume III, Nijhoff, Dordrecht/Boston/London, 1994, 54.

rights, such as the right of persons belonging to minorities to enjoy their own culture, to practice their own religion, or to use their own language. Additionally, balancing the legitimate rights of the state, groups and individuals is crucial in practice and, at times, insufficiently considered. States, groups and individuals have legitimate rights and interests that are not to be ignored. Those within the state have an interest in ensuring the efficient functioning of the state in a manner that is consistent with the respect for the rights of groups and individuals, while balancing the rights of groups and individuals may also, in itself, prove to be difficult and complex.<sup>115</sup>

The subjectivity of indigenous peoples under IL will be examined in chapter 1.1.2. As ILO Convention No. 169 appears to be a puzzle of multiple approaches in regard to legal personability, its connection with the subjectivity of indigenous peoples under IL will also be examined in chapter 2.2. The Draft Nordic Saami Convention is referred to, in this context, as it illustrates that issues related to legal personality appear to be a challenge to the concerned parties and are, generally, an interesting theoretical question to evaluate. The concept of state sovereignty and the challenge posed to it by the human rights regime, particularly indigenous peoples' demands for self-determination, are further examined in chapter 1.2.

### ***Approaches to International Relations***

International relations (IR) is the study of the relations between countries, including the roles of states, inter-governmental organizations (IGOs), international non-governmental organizations (INGOs), non-governmental organizations (NGOs) and multinational corporations (MNCs). It is both an academic and public policy field, and may either be positive or normative in analyzing and formulating the foreign policy of particular states. It is often considered as a branch of political science (especially according to the 1988 UNESCO nomenclature), while an important sector of academia prefers to regard it as an interdisciplinary field of study.<sup>116</sup> The IR discipline is a relatively recent addition to the academic curriculum. However, many of its sub-fields have been in existence for centuries. These include, among others, diplomacy, economics, geography, sociology, psychology and law. Indeed, IL was regarded as the 'best integrated root' discipline by the earliest organizers of IR courses. Particularly in the United States, early scholarly writing in IR is said to have 'sprung from law' as it was dominated by legal approaches.<sup>117</sup>

<sup>115</sup> Shaw, Malcolm N. *International Law*. Fourth Edition. Cambridge University Press 1997, p 209.

<sup>116</sup> Apart from political science International Relations (IR) draws upon such diverse fields as economics, history, international law, philosophy, geography, social work, sociology and social sciences, anthropology and psychology, women's studies/gender studies and cultural studies. It involves a diverse range of issues including but not limited to: globalisation, state, ecological sustainability, nuclear proliferation, nationalism, economic development, global finance, terrorism, organised crime, human security, foreign interventionism and human rights.

<sup>117</sup> Barker 2000, 70.

The following section will present four central schools of thought in IR in connection with IL: *Realism*, *Institutionalism*, *Liberalism* and *Constructivism*, of which Liberalism will be dealt with more extensively, as it is most relevant in regard to the thesis.

### **Realism**

Above all else, realism focuses on state security and power. Early realists, including E.H. Carr<sup>118</sup> and Hans Morgenthau<sup>119</sup>, argued that states are self-interested, power-seeking rational actors, who seek to maximize their security and chance of survival. Cooperation between states is a way of maximizing an individual state's security (as opposed to more idealistic reasons). Similarly, any act of war must be based on self-interest, as opposed to idealism. Many realists regarded the Second World War as a vindication of their theory.<sup>120</sup>

Political realism believes that objective laws govern politics and are rooted in human nature. In order to improve society, one must first understand the laws by which society lives. As the function of these laws is impervious to our preferences, they will only be challenged by the risk of failure. Realism, with its belief in the objectivity of the laws of politics, must also consider the possibility of developing a rational theory that reflects these objective laws, however imperfect and one-sided they may be. It also accepts that there is a possibility of distinguishing politics according to the truth and opinion - between the objective and rational truth, supported by evidence and illuminated by reason, and subjective judgement, which is divorced from facts and is informed by prejudice and wishful thinking.<sup>121</sup>

However, placing realism under positivism is far from unproblematic. E.H. Carr's 'What is History' was a deliberate critique of positivism, and Hans Morgenthau's aim in 'Scientific Man vs Power Politics', as the title implies, was to demolish any conception that international politics or power politics may be studied scientifically.<sup>122</sup>

In the late 1930s, the emerging school of realists considered those who believed that IL could regulate and restrain the struggle for power on the international scene to be idealists. Leading realists consistently questioned the relevance of IL and relied on the

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118 Edward Hallet Carr (1892-1982) was a liberal realist and later left-wing Marxist British historian, journalist and international relations theorist, and an opponent of empiricism within historiography. See the production of Carr for example at <http://www.librarything.com/author/carredwardhallett>.

119 Hans Joachim Morgenthau (1904-1980) was one of the leading twentieth-century figures in the study of international politics. He made valuable contributions to the international relations theory and the study of international law, and his *Politics among Nations*, published in 1948, went through many editions and was for decades the most-used textbook in its field in US universities. See more about Morgenthau for example at <http://www.bookrags.com/biography/hans-j-morgenthau/>.

120 See generally Carr (1939) and Morgenthau (1973)

121 See more Barker 2000, 70-76.

122 *ibid.*

same factors that led Austin to deny the legal character of IL - the lack of a legislature, executive and judiciary. On the other hand, none of the early realists had specifically rejected the existence of IL or its binding nature. For example, Carr opined that ‘the shortcomings of international law, serious as they are, do not deprive it of the title to be considered as law, of which it has all the essential characteristics’.<sup>123</sup> However, Barker notes that Carr does not, specify those characteristics.<sup>124</sup>

### *Institutionalism*

International institutions form a vital part of contemporary IR. Many interactions, at the systemic level, are governed by them and outlaw some of the traditional institutions and practices of IR, such as the use of war (except in self-defence). The institutionalist school was one of the first to directly consider IL as a part of IR. Slaughter Burley notes that many early institutionalists ‘had been explicitly distancing themselves from anything called “law” for twenty years.’<sup>125</sup> Furthermore, while most early analysis was directed at the relevance of formal institutions, later analysis was focused on the relevance of formal institutions. The latter progressed from ‘an emphasis on institutional processes’ to ‘a more general enquiry into how international organisations work in a larger process.’<sup>126</sup>

Burley notes that, “[t]he last step in this progression was the reconceptualization of the entire field of international organization[s] as the study of “international regimes”’.<sup>127</sup> Regime theory is a theory within IR that is derived from the liberal tradition, which argues that international institutions, or regimes, affect the behaviour of states or other international actors. Regimes are defined as instances of international cooperation. As a result, international regime theory assumes that cooperation is possible in the anarchic system of states. International lawyers, on the other hand, define regimes as ‘sets of principles, norms, rules and decision-making procedures around which actor[s] expectations converge in a given issue-area’<sup>128</sup> may be strikingly familiar. For lawyers, regimes may, indeed, merely be ‘international law under another name.’<sup>129</sup> For institutionalists, regimes may lead to formal agreements. However, regimes and agreements are not the same. Thus, Oran Young states:

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123 Carr 1939, 221.

124 Barker 2000, 71.

125 Slaughter Burley 1993, 217.

126 *ibid.*, 218.

127 *ibid.*

128 Krasner, *International Regimes*. Cornell University Press, Ithaca, 1982, 186.

129 Byers, *Taking the law out of international law: a critique of the “iterative perspective”*, 38 *Harvard International Law Journal* 201, 1997, 25.

Some writers have fallen into the habit of equating regimes with [...] agreements in terms of which regimes are often expressed or codified. In practice, however, international regimes vary greatly in the extent to which they are expressed in formal agreements, treaties or conventions... Though it may be helpful, formalization is clearly not a necessary condition for the effective operation of international regimes.<sup>130</sup>

In accordance with Barker, one may argue that IL does not simply focus on formal agreements, but that the development of ‘soft’ law, as an inherent structural component of IL, recognizes the fact that formalization may neither be possible nor desirable.<sup>131</sup> While institutionalism and regime theory may have provided the most immediate results in the interdisciplinary analysis of IL, two further theories, developed by IR scholars, also provide a basis for further interdisciplinary collaboration in this area. These are liberalism and constructivism.<sup>132</sup>

### ***Liberal Theory***

Liberal IR theory arose after the First World War in response to the inability of states to control and limit war in IR. Early adherents, including Woodrow Wilson and Norman Angell, vigorously argued that states mutually gain from cooperation and that the destructive nature of war rendered it to be essentially futile. Liberalism was unrecognized as a coherent theory until it was collectively and derisively termed as idealism by E. H. Carr. Hans Köchler advanced a novel version of “idealism”, which utilized human rights as the basis for legitimacy of IL.<sup>133</sup>

The precursor to liberal IR theory was “idealism”. Idealism, or utopianism, was a critically applied term by those who saw themselves as ‘realists’, including E. H. Carr.<sup>134</sup> Liberal IR theory is also connected to *Liberalism* (from the Latin *liberalis*, meaning “of freedom”),<sup>135</sup> which focuses on the importance of liberty and equal rights. Liberals espouse a wide array of views based on their understanding of these principles. Most liberals support fundamental ideas, such as constitutionalism, liberal democracy, free and fair elections, human rights, capitalism, free trade, and the freedom of religion. Many of these are even widely accepted by political groups who do not openly profess

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130 Young 1989, 24.

131 Barker 2000, 77.

132 *ibid.*, 79.

133 *ibid.* See also Armstrong David, Farrell Theo and Lambert Hélène, *International Law and International Relations*. Cambridge University Press 2007, 83-92.

134 Schmidt, Brian C., *The political discourse of anarchy: a disciplinary history of international relations*, 1998, 219.

135 Latin Dictionary and Grammar Aid University of Notre Dame. Accessed 16.5. 2011.

a liberal ideological orientation. Liberalism encompasses several intellectual trends and traditions. Its dominant variations are classical liberalism and social liberalism, popularized in the eighteenth and twentieth centuries, respectively.<sup>136</sup>

Liberalism in IR and legal process theory in IL are an obvious interdisciplinary combination as each is sensitive to the other's discipline. Liberals are predisposed to recognising the importance of law in promoting international cooperation. Equally, legal process theory explicitly recognises the importance of policy in establishing conditions where law can serve humanity.<sup>137</sup> Liberal approaches to IR and IL also share the same basic concerns and assumptions. Both offer critiques of power-obsessed and state-centric approaches taken by realists and positivists. Instead, according to Armstrong, Farrell and Lambert, liberalism in IR and IL highlights the normative imperative and multitude of actors in world politics. This serves as a basis for a progressive vision of law-enabled global governance. Simultaneously, the liberal critique of realism and positivism's amoral universe contains a dangerous moral relativism that prioritises liberal values over a world order.<sup>138</sup>

For Slaughter Burley, liberalism constitutes 'a new paradigm' which informs both IR and IL. She highlights three fundamental assumptions of liberal theory, identified by Andrew Moravcsik in 1992. Firstly, 'fundamental actors in politics are members of domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests.'<sup>139</sup> Slaughter Burley notes that, in this regard, liberal theory challenges a state-centred view that is common to realism, institutionalism, and traditional approaches to IL. Secondly, '[a]ll governments represent some segment of domestic society whose interests are reflected in state policy.' Finally, 'the behaviour of states – and hence levels of international conflict and co-operation – reflects the nature and configuration of state preferences.'<sup>140</sup>

Liberal theory presents both opportunities and challenges for IL. Slaughter Burley writes that 'liberal theory provides a powerful theoretical framework for the analysis of transnational law', which includes 'all municipal law and a subset of intergovernmental agreements that directly regulate transnational activity between individuals and state

136 Donohue, Kathleen G.. "Freedom from Want: American Liberalism and the Idea of the Consumer (New Studies in American Intellectual and Cultural History)". Johns Hopkins University Press. Accessed 16.5. 2011.

137 See also emphasis on liberal scholarship in IR and IL in the following prominent interdisciplinary surveys: Slaughter Anne-Marie, International law and international relations: a dual agenda', *American Journal of International Law* 87 1993; Keohane Robert O., International Relations and International Law: Two Optics, *Harvard International Law Journal* 38, 2, 1997, 487-502; Slaughter Anne-Marie, Andrew S. Tulumello and Stepan Wood, International law and international relations theory: a new generation of interdisciplinary scholarship, *American Journal of International Law* 92, 1998, 367-387.

138 Armstrong David, Farrell Theo and Lambert Hélène, *International Law and International Relations*. Cambridge University Press 2007, 83.

139 Moravcsik 1992, quoted in Slaughter Burley 1993, 227.

140 Barker 2000, 79. See also Moravcsik Andrew, *Liberalism and International Relations Theory*. Harvard University and University of Chicago. Paper No. 92-6. [https://www.princeton.edu/~amoravcs/library/liberalism\\_working.pdf](https://www.princeton.edu/~amoravcs/library/liberalism_working.pdf). Accessed 16.5.2011.

and governments.’ A fundamental difficulty with transnational law is that it is often regarded as being outside mainstream public international law. For example, the subject of private international law, which manages ‘international’ or ‘foreign’ aspects of legal transactions among individuals, is regarded as separate and distinct from public international law. Similarly, international trade law is seldom, if ever, the focal point of mainstream texts on public international law, aside from the regulation of such transactions by international agreements between states. Even in the field of *human rights*, international lawyers primarily place their focus on analysing the obligation of states, as opposed to individuals. The conceptualization of human rights in public international law only recognises individuals’ rights and remedies under IL to the extent that states provide such rights and remedies. This includes, for example, the creation of an international human rights tribunal or the right of individual petition.<sup>141</sup>

Liberal IR theory will be further examined in connection with the human rights regime in chapter 1.2.2, as well as in the conclusion. It could be argued that, in the context of human rights, our contemporary understanding challenges the traditional approach to IL. Consequently, we are not only discussing the rights of states, but also the rights of individuals, including their rights within a group. This approach also demonstrates the interconnection of the two disciplines - IR and IL.

### **Constructivism**

Although fundamentally regarded as a ‘critical’ branch of IR theory, constructivism is, perhaps according to Arend, a theory, which best serves mainstream international lawyers. Constructivists, along with structural realists, share the central belief that states behave as unitary actors, that the structure of the international system is anarchic, and that theorizing about the system is critical for an understanding of IR.<sup>142</sup> Most international lawyers would have little difficulty in subscribing to these central tenets. Nonetheless, Wendt notes that, whereas structural realists believe that the international system only consists of a distribution of material capabilities – military might, economic resources, natural and physical resources – constructivists also consider the social relationships of the system.<sup>143</sup> With respect to the last and critical tenet, international lawyers would generally agree with constructivist philosophy.<sup>144</sup>

For constructivists the essential elements of the social construct may be divided

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141 Slaughter Bulrey 1993, 230 and Barker 2000, 80. See also: Meijknecht Anna, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, University of Tilburg, Intersentia – Hart, Antwerpen – Groningen – Oxford, 2001.

142 Arend 1998, 126.

143 Wendt 1995, 73.

144 Barker 2000, 82.

into three: first, the existence of shared understandings, expectations or knowledge; secondly, the existence of material resources; and thirdly, practices. In regard to the third element, constructivists consider that states, via their practices, generate norms of behaviour (shared expectation), which are just as much a part of the structure as its material elements. Constructivists, thus, find themselves closely tied to the so-called 'British School' of IR scholars.<sup>145</sup>

### ***Other [Critical] Perspectives on International Relations***

There are additional IR theories, including feminist theories in the context of minorities and indigenous peoples, among others, which are only briefly examined below.<sup>146</sup>

*Marxism*, is a fundamental theory of IR theory. It argues that liberalism/idealism and realism are self-serving ideologies that are introduced by economic elites in order to defend and justify global inequality. According to Marxists, class is the fundamental unit of analysis in IR and the international system is constructed by upper classes and wealthy nations in order to protect and defend their interests. Two important Marxist-derived bodies of IR theory are: world-systems theory (led by Immanuel Wallerstein) and dependency theory (a Latin American school with advocates such as Andre Gunder Frank). More recent *neo-Marxist* IR work is classified separately as Critical or neo-Gramscianism and is led by scholars such as Robert Cox.<sup>147</sup>

*Feminist approaches* to IR were popularized in the early 1990s. J. Ann Tickner argues that such approaches place an emphasis on the continued exclusion of female experiences in the study of IR, as well as the comparatively lower number of female IR scholars.<sup>148</sup> IR feminists argue that gender relations are integral to the study of IR and, for example, focus on the role of diplomatic wives and marital relations facilitating sex trafficking. Jacqui Trui, a feminist IR scholar differentiates between empirical feminism, analytical feminism, and normative feminism. She argues that the emphasis on anarchy and the power of states marginalises the reproduction of the state system.<sup>149</sup>

*Green Theory* is a sub-field of IR theory, which concerns international environmental cooperation.<sup>150</sup> Other IR theories include *Foundationalism*, *Anti-Foundationalism* and

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<sup>145</sup> *ibid.*, 83.

<sup>146</sup> See for example a recent dissertation by Valkonen Sanna, *Poliittinen saamelaisuus*. Vastapaino, Jyväskylä 2009.

<sup>147</sup> See more on Marxist international relations theories at Alexander E. Wendt (1987). The agent-structure problem in international relations theory. *International Organization*, 41, 335-370.

<sup>148</sup> See more for example J. Ann Tickner *Gender in International Relations, Feminist Perspectives on Achieving Global Security*, Columbia University Press, 1992.

<sup>149</sup> See more on gender issues and international relations at Grant, R. and Newland, K. (eds) *Gender and International Relations*, London, 1991.

<sup>150</sup> See more for example Eckersley, Robin, *Green Theory*. [http://www.oup.com/uk/orc/bin/9780199298334/dunne\\_chap13.pdf](http://www.oup.com/uk/orc/bin/9780199298334/dunne_chap13.pdf) Accessed 16.5.2011.



*Post-Positivism*. The “*English School*” of IR theory, also referred to as the International Society, Liberal Realism or the British institutionalists, argues that there is a ‘society of states’ at the international level, despite a condition of ‘anarchy’. It must, however, be noted that despite its name, many scholars associated with the English school were not from the United Kingdom. *Functionalism* arose from the resulting context and experience of European integration and focuses on common state interests. Functionalists maintain that integration develops unique internal dynamics as states assimilate in limited functional or technical areas and increasingly utilize that momentum for further assimilation in related areas.<sup>151</sup>

*International Regime Theory* focuses on cooperation between actors in IR. An international regime is regarded as a set of implicit and explicit principles, norms, rules, and procedures around which actors’ expectations converge in a particular issue-area. An issue-area comprises interactions in such diverse areas as nuclear non-proliferation, telecommunications, human rights, and environmental problems. A fundamental idea of international regimes is their ability to provide transparent state behaviour and a degree of stability under conditions of anarchy in the international system. International regime analysis has, as a result, served as a meeting ground for various schools of thought in IR theory.<sup>152</sup>

### **About Interdisciplinarity**

As noted, it appears as though the interdisciplinarity of IL and IR is a necessity, as opposed to being merely an interesting approach or a consequence of something else. An interdisciplinary field crosses traditional boundaries between academic disciplines or schools of thought. This particularly occurs as new needs and professions arise. ‘Interdisciplinary’ was first applied within the field of educational and training pedagogies to describe studies that utilized the methods and insights of various established disciplines or traditional fields of study.

Julie Thompson Klein attests that “the roots of the concepts lie in a number of ideas that resonate through modern discourse—the ideas of a unified science, general knowledge, synthesis and the integration of knowledge”<sup>153</sup>, while Giles Gunn notes

151 See more on essay by Holsti Ole R. Theories of International Relations <http://www.duke.edu/~pfeaver/holsti.pdf> Accessed 16.5.2011.

152 See more for example Krasner, S. *International Regimes*. Cornell University Press, Ithaca, 1983; Young, O.R. *Creating Regimes. Arctic Accords and International Governance*. Cornell University Press, Ithaca and London, 1998; Young, O.R. and G. Osherenko (eds.) *Polar Politics: Creating International Environmental Regimes*. Cornell University Press, Ithaca and London, 1993.

153 Klein, Julie Thompson. *Interdisciplinarity: History, Theory, and Practice*. Detroit: Wayne State University, 1990. See more Augsburg, Tanya. (2005), *Becoming Interdisciplinary: An Introduction to Interdisciplinary Studies* (Kendall/Hunt); Frodeman, R. and Mitcham, C. “New Directions in Interdisciplinarity: Broad, Deep, and Critical,” *Bulletin of Science, Technology, and Society*, Vol. 27 (Fall 2007) no. 6; 506–514; Frodeman, R., Klein, J.T., and Mitcham, C. *Oxford Handbook of Interdisciplinarity*. Oxford University Press, 2010.

that Greek historians and dramatists took elements from other realms of knowledge (such as medicine or philosophy) to further understand their own material. It is considered that interdisciplinary programs sometimes arise from a shared conviction that traditional disciplines are unable or unwilling to address important problems.<sup>154</sup>

The interdisciplinarity of IR and IL highlight particular opportunities between these disciplines.<sup>155</sup> Previously, developments between these two disciplines were regarded as a failure due to IR scholars' continued adherence to realist perspectives, which in turn played down the role of IL in state relations. However, international lawyers do not seek to impose a system of IL, akin to municipal law, on states. Instead, they seek to develop rules that provide a framework within which states are able to cooperate.<sup>156</sup>

In the context of human rights, the interdisciplinarity of IL and IR become increasingly evident. It may be argued that, at least, the three main IR approaches -- realism, liberalism and constructivism -- provide useful perspectives for international human rights law. As international human rights law primarily consists of treaty law, it is characteristic of modern IL. Consistent with realism, it points to the role of state consent as a reason for compliance, as well as to legal change as a formal process. Concurrently, international human rights law expresses core values of the international community. Human rights rest on the dignity of the individual and the protection of human rights serve as a system of stability. Arguably, democratic rights are also increasingly recognised by the international community. According to Armstrong, Farrell and Lambert, liberalism is less valuable in explaining state compliance with international human rights law. Self-interest is not a powerful motive for compliance as IL generally serves to restrain state freedom of action.<sup>157</sup>

However, the liberal notion of legal change as a policy process has considerable explanatory power, especially regarding the plurality of involved actors. The authoritative decision-making process in human rights substantially involves international organisations, courts and other quasi-legal bodies. NGOs, operating via transnational coalitions, lead campaigns to advance international human rights law. Such law is, then, elaborated on and implemented via transnational policy networks. The judicial interpretation is also an important method of change in international human rights law. The transnational traffic of judicial decisions carrying 'persuasive authority' is also

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154 Gunn, Giles. "Interdisciplinary Studies." Gibaldi, J., ed. *Introduction to Scholarship in Modern Language and Literatures*. New York: Modern Language Association, 1992, 239-240.

155 See for example Koivurova Timo, *Climate Governance in the Arctic: Introduction and Theoretical Framework*, in "Climate Governance in the Arctic", (editors T. Koivurova, C. Keskitalo and N. Bankes), pp. 1-26. Springer, 2009.

156 Barker 2000, 94-95.

157 Armstrong David, Farrell Theo and Lambert Hélène, *International Law and International Relations*. Cambridge University Press 2007, 172; see also Hathaway Oona A., 'The cost of commitment', *Stanford Law review* 55, 2003, 1821-1862.

visible.<sup>158</sup> In this regard, the worldwide ratification processes of the ILO Convention represents political procedures involving many actors. After the ratification, the legal and political process is continued through the comments of the Expert Committee (CEACR). Here, the interpretation of Convention No. 169 plays a crucial role.

Finally, the constructivist approach draws our attention to the role of international human rights law as a discourse – as constituting the relationship between states and citizens, and as providing a vocabulary and moral purpose for judging state action. Congruence and internalisation emerge as powerful and reinforcing reasons for compliance with international human rights law, thus, explaining significant national and regional variation. Change in international human rights law, particularly in regard to spreading influence, may be examined in terms of a social process that is centred on elite learning and state socialisation. Key actors – NGOs and progressive states – have also played the vital role of norm entrepreneurs in pushing forward the boundaries of international human rights law.<sup>159</sup>

A lot of interdisciplinary scholarship, with international lawyers drawing on IR scholarship to provide new means of examining IL and its relevance to IR, is originating in the legal world. However, Barker notes that such work would not have been possible without key developments in IR theory.<sup>160</sup> For present purposes it is sufficient to note that, prospects for interdisciplinary scholarship between IR and IL have recently greatly improved. However, despite its extremely challenging methodology, it is a rewarding and eminently interesting approach.

#### 1.1.4 The Relevance of the Thesis in the Finnish context

The dissertation also has a Finnish context, although other comparisons are made as well. Through the use of the comparative method, solutions are sought for the significant questions of our own society in regard to indigenous peoples' right to land and water. The purpose of this study is to provide a general understanding of the main difficulties faced in regard to questions related to land right issues in Finland, as well as in regard to the ratification process of ILO Convention No. 169. The aim is to produce knowledge and information that is relevant for decision-makers, academic scholars, as well as other stakeholders and to thereby fill existing knowledge gaps.

The indigenous people of Finland, Sweden, Norway and Russia are called the Saami people and are often described as the only indigenous people of the European Union. They have unique cultural characteristics and some still practice traditional livelihoods,

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158 Armstrong David, Farrell Theo and Lambert H el ene, *International Law and International Relations*. Cambridge University Press 2007, 172.

159 *ibid.*, 173.

160 *ibid.*

including reindeer herding, fishing and hunting. Various Saami languages are spoken in the area, although there are often difficulties in transferring the language from one generation to the next.<sup>161</sup>

As the evaluation of the subjects of ILO Convention No. 169, especially in regard to land rights, is a central issue of the thesis, I have, for the purpose of this study, taken a wider perspective on the general understanding of an indigenous person, as well as a Saami, at least in the case of Finland. In the context of the ILO, reference to a Saami means a person who fulfils the criteria of Article 1 of the ILO Convention, as well as the elements required in Article 14 (e.g. the current connection with the land/water). My presumption is that there are more existing Saami than merely the ones marked by Sweden, Norway, and, Finland's Saami Parliament's<sup>162</sup> electoral rolls. As noted earlier, a similar approach has been taken in a 1999 Swedish Committee report. When defining the subjects of the Convention's land right articles, crucial elements emerge. They include the descendancy of the original inhabitants of the area in question, as well as connection with the land and self-identification as indigenous.<sup>163</sup> Group acceptance, however, becomes problematic in the context of Finland. Three decisions, made by the Finnish Supreme Administrative Court, concerning a person's acceptance to the Saami Parliament's electoral roll will be introduced and further examined below.

It should be noted that, within this context, that the Nordic states pursued a consistent and harsh policy of assimilation towards the Saami population for many decades. The assimilation policy was strongest in Norway where *Norwegianization* gradually developed and became an official Norwegian policy around 1880. The aim of this policy was, in paraphrasing the title of Eugen Weber's study of the modernization of France (1976), to turn the "Saami into Norwegians". The Saami population was subject to formal, as well as informal, discrimination. *Norwegianization* led to a radical decline in the number of persons with a stated Saami self-identification, as well as a radical decline in actual use and command of the Saami languages. Additionally, the school system and the later rapidly expanding Nordic welfare states, significantly contributed to the integration of the Saami population into the broader institutional development of the Nordic states.<sup>164</sup> Contemporary statistics from Norway and Sweden only present estimations of the total Saami population within these countries. However, it is

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161 Different saami languages are divided into western and eastern languages: western Sami languages are Southern Sami, Ume Sami, Pite Sami, Lule Sami and Northern Sami. Eastern Sami languages are Inari Sami, Kemi Sami (extinct) Skolt Sami, Akkala Sami (extinct), Kildin Sami and Ter Sami. See more Sammallahti, Pekka. *The Saami Languages: an introduction*. Käräs'johka: Davvi Girji OS. 1998, 5-38

162 Saami Parliaments are the representative organs of the Saami in the three Nordic countries, Finland, Sweden and Norway. To be able to vote a candidate to be represented in the Parliament a person must be accepted to the electoral roll of the Saami Parliament. The practices in the acceptance of a person to the electoral roll varies in these countries.

163 See more: Article 1 and Article 14 of the ILO Convention No. 169

164 Selle, Per Anne Julie Semb and Kristin Strømsnes: Sami citizenship: Challenging identities. Paper presented at ECPR Joint Sessions of Workshops St. Gallen, Switzerland, 12-17 April 2011 Preliminary first draft. Quoting permission asked.

reasonable to highlight the statistics, which registered Saami in the Saami Parliament's electoral roll, as well as non-registered Saami in Sweden and Norway.<sup>165</sup> People may have different reasons for not entering into the electoral roll. However, it does not reduce their status as an indigenous right holder. The situation in Finland is different.

Issues related to the historical rights of Lapp and Saami descendants are more closely examined in Article No. 5, published in the Yearbook of Polar Law. Various figures presenting the Saami Parliament's electoral rolls in the three Nordic countries are evaluated in chapter 2.2 and compared to the estimates presented in different public sources.

The answers to our Finnish and Nordic questions are explored through the comparative method introduced in chapter 1.3.3. It was reasonable to examine the countries that have already ratified ILO Convention No. 169 in order to find similarities and differences in their approaches to such complex issues. It is obvious that a uniform approach cannot be directly applied to our own situations. It is, however, interesting to examine how many different variations there are in the approaches taken to these questions (subjectivity and land rights). It also appears that countries deal with these issues after the ratification in the context of the Committee of Experts (CEACR) reporting process. This may be interpreted in two ways: 1) there is a strong pressure for the country to resolve these issues; and 2) not everything must be resolved *prior* to ratification. It must be noted that a comparison is also made with countries who have *not* ratified ILO Convention No. 169, but have found different means of acknowledging indigenous peoples' rights to their traditionally occupied lands.

### 1.1.5 The Structure of the Thesis

The dissertation: "An interdisciplinary approach to ILO Convention No. 169 – in a Nordic Context with Comparative Analysis" consists of five separately published articles and the synthesis. Three (four) of the articles are refereed<sup>166</sup> articles: The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with

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<sup>165</sup> See more *ibid.* A Citizenship Survey conducted in Norway by Per Selle, Anne Julie Semb and Kristin Strømsnes "We asked the respondents both whether they fulfil the criteria for registering in the Sami electoral roster and whether they have actually chosen to register. 745 persons reported that they fulfil the criteria for registering, whereas 315 persons reported that they did not fulfil the criteria. 79 persons reported that they did not know whether they fulfilled the criteria, and 33 persons did not answer this question. Of those 745 persons who were eligible for registration in the electoral roster, a total of 549 persons reported that they have actually registered, whereas 173 persons reported that they have not registered. 20 persons answered that they did not know whether they were registered or not, and 3 persons did not answer this question. Those who answered "do not know" or who did not answer these questions were omitted from the analysis. The remaining 1037 respondents were categorized as 'registered Sami', 'unregistered Sami' and 'non-Sami' on the basis of their answers to these two questions.

<sup>166</sup> Scholarly peer review (also known as refereeing) is the process of subjecting an author's scholarly work, research, or ideas to the scrutiny of others who are experts in the same field, before a paper describing this work is published in a journal.

some comparison to Sweden and Norway *Nordic Journal of Human Rights Vol. 23 Nr. 3:2005*; International Norms and Domestic Practices in Regard to ILO Convention No. 169 – with special reference to Articles 1 and 13-19. *International Community Law Review, Volume 12, No.2, 2010*; and The Historical Basis of Saami Land Rights in Finland and the Application of the ILO Convention No. 169, published in the *Yearbook of Polar Law*, 2011. The fourth article: Sammenliknende synsvinkel på ILO-konvensjon nr. 169 – spesielt artiklene 1 og 13-19 *ARINA, Nordisk tidsskrift for kvensk forskning*, Rujia Forlag 2009-2010 is in line with the thesis and provides Nordic readers with information on this issue. This article has been accepted as a Norwegian referee journal .

The fifth article: Eräistä ILO:n alkuperäiskansasopimuksen No. 169 soveltamiskysymyksistä, in Kai T. Kokko (ed.) *Kysymyksiä saamelaisten oikeusasemasta. Lapin yliopiston oikeustieteellisiä julkaisuja, Sarja B nro 30*. Jyväskylä 2010 is chosen for the thesis as a more detailed example of the Finnish situation in relation to Article 1 of ILO Convention No. 169. It also provides elements of the study for Finnish readers. The articles are published in chronological order to illustrate the development of the writing process of the dissertation — the approach, focus, research questions and conclusions.

The synthesis is a summary of the five articles that includes the theoretical and methodological aspects of the study. It also presents a concluding chapter with recommendations for future development. The synthesis consists of three parts. The first part serves as an introduction, as well as a background study. It also defines the key concepts of this study. Additionally, the theoretical framework, in the context of international relations and international law, as well as the methodological aspects connected to the materials utilized in this study are introduced. The second part of the thesis explores ILO Convention No. 169, as well as issues related to indigenous peoples' land rights in comparison with the Nordic situations. Here, the subject-object dichotomy of ILO Convention No. 169 is examined as it constitutes the basis for the implementation of other rights as well. Part three acts as a concluding chapter where the above-mentioned themes are evaluated from the perspective of liberal human rights. Finally, some recommendations, particularly regarding Finnish issues related to this study, are outlined for policy-makers and other stakeholders. The five separately published articles are chronologically presented along with the references of the synthesis and several appendices.

## 1.2 Theoretical Framework - International Relations and International Law in the Context of Human Rights

### 1.2.1 States as Sovereign entities

State sovereignty has, for the past several hundred years, been a defining principle of interstate relations and a foundation of world order. The concept lies at the heart of both customary international law and the United Nations (UN) Charter. It also remains an essential component of the maintenance of international peace and security, as well as the defense of weak states against the strong. Simultaneously, the concept has never been as inviolable, in law or in practice, as a formal legal definition may imply.<sup>167</sup>

Empirically, sovereignty has routinely been violated by powerful states. In today's globalized world, it is generally recognized that cultural, environmental, and economic influences do not respect borders. The concept of state sovereignty is well entrenched in legal and political discourse. At the same time, territorial boundaries have come under stress and have significantly diminished as a result of contemporary international relations (IR). Not only have technology and communication caused borders to become permeable, but the political dimensions of internal disorder and suffering have also often resulted in greater international disorder. Consequently, perspectives on the range and role of state sovereignty have, particularly over the past decade, quickly and substantially evolved.<sup>168</sup> This chapter introduces a short review on the concept of the *state* and the origins of *sovereignty*. It will discuss the widely acknowledged limits and challenges of state sovereignty, particularly in the context of the human right regimes.

The logical introduction to the contemporary challenges of state sovereignty includes defining the concept of a state.<sup>169</sup> The basic criteria of statehood are to be found in Article 1 of the Montevideo Convention on the Rights and Duties of States 1933<sup>170</sup>, which require that: "The State, as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states."<sup>171</sup> This is generally accepted as the definition of statehood and has, despite existing criticism, evolved into a rule of customary international law (IL). Population and territorial requirements

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167 According to former Secretary-General, "The time of absolute sovereignty ... has passed; its theory was never matched by reality." Boutros Boutros-Ghali, *An Agenda for peace* (New York: United Nations, 1992), para.17.

168 State Sovereignty: International Development Research Centre at [http://www.idrc.ca/en/ev-28492-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html). Accessed 22.3.2008.

169 See more on States and the legal personality in international law at Warbick Colin, *States and recognition in international law*, in Malcolm D. Evans (ed.) *International law*, Oxford University Press, 2003, 206-231.

170 The Convention itself has been ratified by only a very small number of South American states.

171 Warbick, Colin, *States and Recognition in International Law* (The legal criteria of statehood) in Malcolm D. Evans (ed.) *International Law*. Oxford University Press, 2003, 221-231.

are relatively uncontroversial. Essentially, IL does not impose a lower limit on the size of a population and recognizes that a population may be nomadic. Accordingly, the question of territory does not require that a state have undisputed boundaries, but necessitates a 'sufficient consistency' instead.<sup>172</sup> There is also no specification for a particular type of government, such as a democracy, in order for it to constitute a state. According to Barker, of the criteria outlined above, the fourth - the capacity to enter into international relations with other states - is the most controversial. In this regard, there has been a debate as to whether this criterion requires that an entity be recognized by other states in order for it to exist. According to a majority of international lawyers, the recognition is merely declarative of the status of an entity as a state under IL. Recognition is, therefore, essentially a political act.<sup>173</sup>

The history of IR and the present foundation of IL, with regard to sovereignty, have often been traced back to the 1648 Peace of Westphalia<sup>174</sup>, where the modern state system was developed. Prior to this, the European medieval organization of political authority was based on a vaguely hierarchical religious order. Westphalia instituted the legal concept of sovereignty, which essentially meant that rulers, or legitimate sovereigns, had no internal equals within a defined territory and no external superiors, as the ultimate authority, within the territory's sovereign borders.<sup>175</sup> Despite its varied definitions over time, the Stanford Encyclopedia of Philosophy defines sovereignty as the 'supreme authority within a territory'.<sup>176</sup>

State sovereignty denotes the competence, independence, and legal equality of states. The concept is normally used to encompass all matters on which a state is permitted, by IL, to decide and act without the intrusion of other sovereign states. These matters include choices regarding political, economic, social and cultural systems, as well as the formulation of foreign policy. However, the scope of such state choices is limited and depends on developments in IL (including agreements made voluntarily) and IR.<sup>177</sup>

An important component of sovereignty has been an adequate display of state authority over its respective territory and the exclusion of such action to other states.

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172 See more on *Western Sahara Case* (1975) ICJ Rep. 12; Per German-polish Mixed Arbitral Tribunal in *Deutsche Continental Gas-Gesellschaft v Polish State* 5 A.D. 11 at P. 15 (1929); Barker 2000, 38-39.

173 Barker 2000, pp. 39-40. This does not mean, however, that recognition of an entity as a state is required before a state can enter into bilateral relations with that entity. On the other hand, an express act of recognition is not required and can be implied from the actual creation of bilateral relations.

174 The Peace of Westphalia was a series of peace treaties signed between May and October of 1648 in Osnabruck and Munster. These treaties ended the Thirty years' War (1618-1648) in the Holy Roman Empire, and the Eighty Years War (1568-1648) between Spain and the Dutch Republic. See also Stephen C Neff, *A short history of international law* in Malcolm D. Evans (ed.), *International Law*, Oxford University Press, 2003, 37-38.

175 Barker J. Craig, *International law and international relations*, York, 2000, 37.

176 Stanford Encyclopedia of Philosophy at <http://plato.stanford.edu/entries/sovereignty/>. Accessed 8.6.2010.

177 State Sovereignty: International Development Research Centre at [http://www.idrc.ca/en/ev-28492-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-28492-201-1-DO_TOPIC.html). Accessed 22.3.2008.



The post-1945 system of international order, enshrined in the UN Charter, inherited this basic model. Following decolonization, a restrictive and Eurocentric (that is, Western) order became global. There were no longer “insiders” and “outsiders” as virtually every individual inhabiting the globe lived within a sovereign state. Concurrently, the multiplication of the number of states did not diminish the controversial character of sovereignty.<sup>178</sup> However, it must be noted that dozens of colonial overseas territories still remain today. These are either recognised as non-self-governing territories by the UN or exist in disguise as a result of a one-sided integration/incorporation with a colonial power.

In accordance with article 2 (1) of the UN Charter, the organization of the world is based on the principle of the sovereign equality of all member states. While states are equal in relation to one another, their status of legal equality, as a mark of sovereignty, also serves as a basis for establishing intergovernmental organizations and endowing them with the capacity to act between and within states, to the extent that the framework of the organization permits it. As a hallmark of statehood, territorial sovereignty underlies the system of international order in relations among states. An act of aggression is unlawful, not only because it undermines the international order, but also because states have exercised their sovereignty to outlaw war. Additionally, the failure or weakening of state capacity, which produces a political vacuum within states, leads to human tragedies, as well as international and regional insecurity. Repressive, aggressive, or collapsed states may result in threats to international peace and security.<sup>179</sup>

The principle of non-interference in affairs within states’ domestic jurisdiction is the anchor to state sovereignty within the system of IR. Indigenous global politics regard the Westphalian system of sovereign independent nation states as a construct that privileges Euro-centric societies over all others in the international sphere. The transnational movement of indigenous rights seeks a reconfiguration of this norm toward a more pluralistic conception. According to Lightfoot, securing indigenous rights to land and self-determination through a less state-centric and multi-faceted view of sovereignty, thus, offers a new and particular challenge to the hegemonic, and increasingly pressured, Westphalian international system.<sup>180</sup>

To conclude, in order to be considered as a subject of IL, an entity must be capable of possessing rights and duties under IL and have the procedural capacity to enforce those rights and duties. Traditionally, only states fulfilled the necessary requirements. As will be examined later, IL has developed in manner that allows it to recognize further categories of subjects. However, it cannot be denied that states remain the

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178 *ibid.*

179 *ibid.*

180 Lightfoot Sheryl, *Emerging International Indigenous Rights Norms and ‘Over-Compliance’ in New Zealand and Canada.* Political Science, Vol. 62, No. 1, June 2010, pp. 84-104.

*primary* subjects of IL. According to Barker, there are four factors that point toward the primacy of states in IL. First, IL is primarily a system of law between states. It is made by states and is concerned with regulating the interactions of states. Secondly, the International Court of Justice, the principal judicial organ of the UN recognized by IL, is only open to states in its contentious jurisdiction. Thirdly, when an individual suffers harm abroad, under IL, that individual cannot directly bring a claim against the state in which he or she is harmed. Such a claim must be placed by his or her nation state. Finally, when a state pursues such a claim, it is not acting as an agent of the individual, but is pursuing its own claim.<sup>181</sup>

However, in a more recent development, considered to be ‘one of the more significant features of contemporary international law’, the number of recognized subjects in IL has expanded to include international organizations and, to a limited degree, *individuals*. Other putative subjects of IL could include insurgents and national liberation movements.<sup>182</sup> Nevertheless, here, consideration will only be given to international organizations, such as the International Labour Organisation (ILO), and individuals as members of indigenous peoples. Emphasis is placed on the status and subjectivity of indigenous peoples and their treatment within the system of contemporary IL. These issues will be further examined in chapter 2.2.

### 1.2.2 State Sovereignty Challenged by the Human Rights Regime and guided by the Liberal Political Theory

As noted above, the Westphalian system explicitly consists of states. However, according to Brown, there is a long-standing interpretive tradition, which argues that individuals are the *ultimate* members of international society, even if states are considered to be the immediate members. International action on behalf of individuals and distressed groups has been a common occurrence over the last few centuries. Concurrently, an individual’s international legal status has been different. Conventional IL often only recognized individuals in exceptional circumstances – famously, pirates were the unfortunate bearers of international recognition as state action against them, irrespective of their nationality, was considered to be a customary rule of IL. At the other end of the social scale, diplomats had personal immunity, which was similarly recognized as customary IL.<sup>183</sup> In (public) international law, individuals were represented via ‘their’ sovereign state, as their recognition as legal entities of their own right would undermine state sovereignty.

181 See the judgement of the ICJ in *Mavrommatis Palestine Concessions case* (Jurisdiction) 1924 ICJ, Ser. A, No. 2, p.12, where the court observed that: ‘Once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is sole claimant.’

182 Barker 2000, 45.

183 Brown Chris, *Sovereignty, Rights and Justice, International Political Theory Today*, 2002, 115.

This approach was changed after 1945. Today, there is an extensive international *human rights* regime that is primarily based on treaty law and regulates the manner in which states treat individuals that are under their control. This regime principally consists of treaties prohibiting genocide<sup>184</sup>, racial discrimination<sup>185</sup>, civil and political rights<sup>186</sup>, economic, social and cultural rights<sup>187</sup>, and discrimination against women<sup>188</sup>, torture<sup>189</sup> and the rights of children<sup>190</sup>. Additionally, there are various regional human rights treaties. States party to these treaties promise other signatories to protect the human rights of individuals under their control. These treaties also establish various mechanisms for monitoring and promoting compliance.<sup>191</sup> The modern multilateral human rights regime precisely rests on the notion that all individuals have rights by virtue of their humanity, and that they theoretically should be able to enforce these rights against their own government.<sup>192</sup> Individuals possess economic, social, political, as well as civil rights. However, the rights regime is not solely restricted to individuals – groups and ‘peoples’ are also considered to possess rights, which they may assert against the state.<sup>193</sup>

In the case of indigenous peoples, the traditional view on state sovereignty changes the composition. On the one hand, states are willing to promote human rights concerning indigenous peoples as ‘peoples’. On the other hand, they do not want to go ‘too far’ in recognizing these rights. According to Tully, indigenous peoples have turned to IL in order to gain the recognition and protection of their status as peoples with the right to self-determination. Extensive research and reasoning, which supports their

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184 International Convention for the Protection of All Persons from Enforced Disappearance. Adopted and opened for signature and ratification by General Assembly resolution 61/177 of 20 December 2006 Entry into force 23 December 2010.

185 International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969.

186 International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

187 International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976.

188 Convention on the Elimination of All Forms of Discrimination against Women. Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981.

189 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987.

190 Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

191 Brown, Chris 2002; 115-116; see also Goldsmith, Jack L. and Posner, Eric A. *The Limits of International Law*, Oxford University Press, 2005 at pp. 107-108; Steiner, H.J. and Alston, P. (eds.) *International Human Rights in Context: Law, Politics and Morals – Texts and Materials*, 2<sup>nd</sup> edn. Oxford. Clarendon Press, 2000.

192 *ibid*, 115-116.

193 See more Crawford, J (ed.), *The Rights of Peoples*. Oxford: Clarendon Press, 1988.

prior coexistent sovereignty also, and *eo ipso*<sup>194</sup>, recognizes indigenous populations as internally colonised peoples to whom the principle of self-determination applies.<sup>195</sup>

### ***The Approach of Liberal theory***

It is argued that finding an appropriate political expression for a just relationship toward colonised indigenous peoples is one of the most important issues confronting political theory today.<sup>196</sup> It is important to understand how Western and liberal political theory, in particular, are implicated in justifying colonialism. At the same time, determining whether this complex tradition of thought can provide a space for indigenous peoples' contemporary aspirations may be of even more significance. Typically, these aspirations have included claims for the return of traditional lands, the preservation of culture, as well as the right and means to exercise effective self-government. Western political thought is not necessarily the language of the world's indigenous peoples. Nonetheless, they have often been restricted to use it, despite sometimes overlapping with indigenous conceptions of what is right or just.<sup>197</sup> Chapter 1.2.3 will further evaluate this notion.

It can be argued that, indigenous peoples' claims to prior and continued sovereignty over their territories are challenging the source and legitimacy of state authority. Some states rely on the now discredited doctrine of *terra nullius*<sup>198</sup>, while others rely on treaty terms that are not observed at all times. Undoubtedly, most states owe their existence to some combination of force and fraud. However, the issue is not simply a matter of how a state came to be, but how it may become 'morally rehabilitated', despite its illegitimate establishment. Ivison, Patton, and Sanders question how the narratives of nationhood are to be told – the reconstitution of the founding moments and the reinterpretation of its fundamental documents. According to them, these issues have broad consequences for philosophical views regarding the relation of the individual to the state, as well as the nature of community and identity.<sup>199</sup>

An important issue that emerges at the outset is the problem of distinguishing

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194 "by that very fact" [http://en.wikipedia.org/wiki/Eo\\_ipso](http://en.wikipedia.org/wiki/Eo_ipso) Accessed 22.3.2011.

195 Tully, James, *The Struggles for Freedom* in Duncan Ivison, Paul Patton and Will Sanders (eds.) *Political Theory and the Rights of Indigenous Peoples*, 2007, 54.

196 Ivison Duncan, Patton Paul and Sanders Will, *Introduction in Political Theory and the Rights of Indigenous Peoples*. Cambridge University Press, 2007, 2.

197 *ibid.*

198 *Terra nullius* is a Latin expression deriving from Roman law meaning "land belonging to no one" (or "no man's land"), which is used in international law to describe territory which has never been subject to the sovereignty of any state, or over which any prior sovereign has expressly or implicitly relinquished sovereignty. Sovereignty over territory which is *terra nullius* may be acquired through occupation, though in some cases doing so would violate an international law or treaty. [http://en.wikipedia.org/wiki/Terra\\_nullius](http://en.wikipedia.org/wiki/Terra_nullius) Accessed 22.3.2011. See also, English Dictionary, Allwords.com.

199 Ivison Duncan, Patton Paul, and Sanders Will, *Political Theory and the Rights of Indigenous peoples*, Cambridge University Press, 2007, 3.

indigenous claims from the claims of other forms of cultural or ‘societal’ groups. In order to ‘do justice’ to indigenous claims, there must be a distinct understanding of the nature of the claims made. It is historically true that many liberal democracies have aimed to assimilate indigenous peoples, while denying them any form of group-specific recognition. However, Will Kymlicka points out that similar actions were taken in regard to many other minority groups.<sup>200</sup> Moreover, these ‘stateless nations’ have not only regarded themselves as a distinct people, similar to indigenous peoples, but as occupying territories that they regard as their ‘homeland’. An important question is, thus, raised by Kymlicka in regard to distinguishing between indigenous peoples and other minority groups, as well as among indigenous peoples themselves. How can it be done, and according to what criteria?<sup>201</sup> These questions are dominated by contemporary discussions in IR and IL and are particularly true in issues related to political and cultural identity and difference.

James Tully suggests that Western political theory has consistently failed to enter into a just dialogue – political traditions and understandings – with indigenous peoples. Concurrently, the demand for a just dialogue with indigenous peoples and non-indigenous peoples presents a series of difficult challenges. What are the necessary conditions for such dialogue? According to Tully, on the one hand, it is clearly a presupposition of dialogue that indigenous and western political theories are not utterly incommensurable. On the other hand, this does not mean that there cannot be profound differences between their conceptions of social relations, individual rights and obligations and that, as a result, we still face the problem of finding appropriate translations or reconciliations. Furthermore, Tully questions whether this implies that Western liberal political theory should renounce its claim to universality and present itself as based upon one possible set of values that are to be considered alongside others, including indigenous ones. Tully continues to question, whether we are, then, not in danger of assuming that cultures and traditions are more homogeneous and self-contained than they actually are. Do we not risk losing sight of shared values between cultures and traditions that are concerned with equality, freedom, autonomy, wellbeing and justice?<sup>202</sup>

Contemporary anthropologists and cultural theorists have shown that cultures that appear to be apparently ‘traditional’ may also be complex and fluid.<sup>203</sup> This seems to be particularly true in regard to the cultures of colonised indigenous peoples within contemporary liberal democracies. Since the sixteenth century, problematic assump-

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200 Kymlicka Will, *American Multiculturalism and the ‘Nations Within’* in Ivison, Patton and Sanders, 2007, 216-236.

201 *ibid.*

202 Tully 2007, 4.

203 See for example Clifford, James, *The predicament of culture*, Harvard University Press, 1988 and Michelle Moody-Adams, *Fieldwork in Familiar Places: Morality, Culture and Philosophy*, Harvard University Press, 1997.

tions about the inherent inferiority of indigenous peoples and practices, as well as the intrinsic superiority of European norms and institutions, have served as a standard feature of arguments in political theory. By invoking a mysterious ‘otherness’ or radical difference in referring to indigenous cultures, there is a danger of simply replaying existing prejudices. Deep cultural diversity is a key feature of many contemporary societies. Nevertheless, various cultures and peoples are not encased within static and clearly delineated cultural structures and boundaries. According to Ivison, Patton, and Sanders, claims of cultural difference must be balanced against the dynamic nature of cultural practices and traditions, as well as the manners in which cultures borrow and import practices and beliefs from outside.<sup>204</sup> Later, the concept of identity will be briefly examined in the context of subjectivity.

According to Ivison, Patton, and Sanders, recent years have witnessed genuine attempts by the liberal tradition to accommodate indigenous claims. These must be evaluated to the extent that earlier forms of complicity within the process of colonisation are examined. In this regard, the above mentioned scholars have addressed two questions: First, in what ways has western political theory contributed to the colonisation, subjugation and continued disadvantage faced by indigenous peoples in the past, as well as today? Second, what resources of political theory exist for thinking differently about these relations, as well as about the possibility of ‘decolonising’ relations between indigenous and non-indigenous peoples? The authors’<sup>205</sup> three main themes— *sovereignty, identity and democratic theory*— place an emphasis on the fundamental issue of justice for colonised indigenous peoples. I will also add a fourth theme, *subjectivity*, which is examined as an important issue related to identity and vice versa. Each theme represents a significant domain within Western political theory, and has been central in the encounter between indigenous and non-indigenous peoples. I will consider how indigenous claims have been understood and interpreted by contemporary political scholars, and what they consider to be the consequences of these claims. Here, liberal political philosophy looms large as the debate on the nature of indigenous claims from non-indigenous perspective has, philosophically, most developed among liberal political theorists.<sup>206</sup>

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204 Ivison, Patton and Sanders, 2007, 4-5. See also articles in the book by Ivison, Patton and Sanders, 2007: Barcham Manuhua, (De)Constructing the Politics of Indigeneity, 137-151; Simpson Audra, Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake, 113-136; Connolly William, The Liberal Image of Nation 183-198; and Webber Jeremy, Beyond regret: Mabo’s Implications for Australian Constitutionalism, 60-88.

205 Ivison, Patton and Sanders, 2007, 5.

206 *ibid.*

### ***Different Claims by the Indigenous Peoples***

In recent years, according to Ivison, Patton, and Sanders, three types of responses have emerged toward indigenous rights claims. The first notes that liberal political theory must not to be reshaped in light of indigenous demands, but should, instead, remain close to its individualist and non-interventionist credentials, while also ensuring that cherished rights and protection are effectively extended to indigenous peoples. The second argues that liberal political thought can be remoulded and reshaped to meet indigenous aspirations. However, this may be limited by the established liberal conception of equality and autonomy. The third response states that the poverty of both previous responses suggests that some reshaping of the conceptual framework of political theory is required in order to justify indigenous aspirations.<sup>207</sup>

The first response invokes a form of liberal neutrality and argues that the liberal state should not seek to recognise distinctive cultural or group rights, but should, instead, focus on providing effective individual civil rights, such as the freedom of expression, association, religion, movement, as well as others. In particular, liberal theorists should be wary of the social ontology of cultures and groups. According to Kukathas, groups are not homogenous but dynamic, heterogenous historical associations of individuals.<sup>208</sup> To treat them otherwise is to risk empowering groups' elites and creating problems for 'internal minorities'. Hence, it is argued that individuals should be empowered to move within and, if desired, outside of the 'associations' in which they have grown up or chosen to live. Individuals should be free to form associations with others based on the grounds of a shared societal culture or way of life. The state has no business interfering with their choice, but must ensure that individual' rights to express dissent from, or to exit, such associations are protected. This means the avoidance of entrenching group rights. Rights that are contingent and bi-directional are not to be exercised over individuals by a group or cultural membership. Cultural membership may contribute to individual wellbeing, but group rights may increase a state's communicative transaction costs by complicating the political process and slowing down effective decision-making. They can also place burdens – material and otherwise – on majority populations (that is, subsidising alternative legal systems; language programs; separate schools, etc.), which may, in turn, generate resentment and 'backlash', thus, undermining conditions for granting such rights in the first place. Individual and non-group rights must be secured. The rights to self-government, or self-determination, for indigenous peoples are satisfied *ipso facto* upon the provision of their individual rights.<sup>209</sup>

207 Ivison, Patton and Sanders, 2007, 6.

208 Kukathas, Chandran, Are There any Cultural Rights? *Political Theory* 20 (1) :105-139, 1992; Kukathas, Chandran, Survey Article: Multiculturalism as Fairness: Will Kymlicka's Multicultural Citizenship. *Journal of Political Philosophy* 5 (4):406–427, 1997.

209 Ivison, Patton and Sanders, 2007, 6.

Still, an alternative response from within the liberal tradition, has been to tie the recognition of more extensive rights of self-government and the protection (or return) of indigenous lands into an argument based on individual wellbeing. Will Kymlicka has developed this argument with considerable skill.<sup>210</sup> Kymlicka states that indigenous people, or traditional minorities, are owed self-government and title to their lands because, without such rights (in addition to traditional liberal rights mentioned above), they are in danger of losing access to a secure societal culture and hence, to the context in which individual freedom is rendered as meaningful. Thus, group rights, up to and including self-government, are justified on the grounds of preserving conditions for the flourishing of individual autonomy and freedom. The same grounds also justify the limiting condition that, 'liberals can only endorse minority rights insofar as they are consistent with respect for the freedom and autonomy of individuals.'<sup>211</sup> Justice involves compensation for arbitrary and unfair social disadvantages, as well as promoting and securing capacities for individuals to pursue and revise their own conception of the good. The value of cultural membership, including a particular relation to land, in this case, is fixed relative to a conception of justice in which the value of autonomy is central. To renounce the centrality of autonomy for the purpose of a liberal recognition of difference is to risk tolerating practices that are not simply illiberal, but potentially harmful.<sup>212</sup>

The tension between cultural differences and liberal values leads to a third response to indigenous claims, which necessitates the greater conceptual and practical reshaping of liberal democratic norms and institutions. A part of the reason for this scepticism of existing norms and institutions is that liberal arguments are said to be unable to comprehend what is distinctive about indigenous claims to land and self-government. What is it about the claims of indigenous peoples that is missed by liberal responses, and in what way are indigenous claims distinctive when compared to those of other minority peoples?<sup>213</sup>

Approaches to this issue have a tendency of either appealing to the 'inherent' sovereignty of indigenous peoples, to the history of their relations with settlers, or to their cultural differences with respect to Europeans. Some argue that indigenous peoples exercised historical sovereignty over their lands and communities and, therefore, possessed an 'inherent' sovereignty that was unjustly taken away and should be returned to them. Similarly, lands that were unfairly expropriated should be returned, or appropriate compensation should be negotiated where expropriation is impossible. This is also a common approach in the Nordic countries, while other views exist as well.

According to Anaya, there are two difficulties with respect to this argument. Firstly,

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210 1989, 1995; 1998a.

211 Kymlicka 1995, 75.

212 Ivison, Patton and Sanders, 2007, 7.

213 Ivison, Patton and Sanders, 2007, 9.



other stateless peoples also once exercised historic sovereignty over their lands and communities (e.g. the Scots and Catalans). In this regard, it is unclear in what way indigenous claims may be comparatively more distinctive. It may be argued that indigenous peoples have suffered more than other peoples and, thus, provide a remedial case for distinguishing their claims from others.<sup>214</sup> However according to Ivison, Patton and Sanders, linking rights to self-government to degrees of suffering is problematic. The case of remedial rights is dependent on a temporary measure intended to address specific disadvantages caused by historic injustices. Still, indigenous claims appeal to 'inherent', not temporary, sovereignty. The second problem with the approach to historical sovereignty, according to Ivison, Patton and Sanders, is that the meaning of 'sovereignty' is unclear in this context, and should, therefore, be recognised or 'returned' to indigenous peoples.<sup>215</sup>

The relevance of the history of relations between indigenous and non-indigenous peoples is something that contemporary theories of justice have been slow to recognise. Jeremy Waldron has argued that the recognition of Aboriginal claims to land or self-government rights should not focus on compensating for historical injustice, but should, instead, address contemporary discrimination and disadvantage.<sup>216</sup> If it were the historical nature entitlements that mattered most, then the connection between the restoration of lands or resources and distributive justice would be unclear, as parties may be just as well-off or may not be suffering from serious disadvantages. Naturally, in some parts of the world, indigenous peoples currently do not suffer from appalling social disadvantages.

The distinctiveness of indigenous claims, if purely seen as deriving from their attachment to land and historical relations to the colonial state, is lost or rendered opaque in discussions of distributive justice. Some would argue that this is unavoidable. Justice is about the impartial distribution of goods, and the distinctive identity or history of indigenous peoples is only relevant insofar as it affects the consideration of their fair share of 'primary goods' relative to other citizens. However, this means that there is a risk that the manner in which such lists of primary goods are gathered, as well as the construction of notions of fairness, will not only misunderstand the particular value of culture or land that is being appealed to, but also the nature of moral wrongs upon which claims are based – the historical legacy of colonialism. For example according to Ivison, Patton and Sanders, indigenous claims do not merely aim for rights to a fair share of Australian or Canadian resources, but to a particular share that must be understood against a background of the denial of indigenous peoples' equal sovereign status, the dispossession of their lands, and the destruction of their cultural practices.<sup>217</sup>

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214 See more Anaya, 1996.

215 Ivison, Patton and Sanders, 2007, 9.

216 Waldron, Jeremy, Superseding Historic Injustice. *Ethics* 103 (1):4-28, 1992.

217 Ivison, Patton and Sanders, 2007, 10.

The final means of distinguishing indigenous claims from those of other peoples includes an appeal to cultural differences. In this approach, indigenous peoples' claims are distinctive due to the nature of their culture and *especially their relation to the land*, which affects the particular history of their interactions with various settler states. The way we distinguish between indigenous peoples and other 'stateless' nations is that, in state-building processes, other peoples were able to converge with the majority of the nation on what Kymlicka regards as 'certain cultural self-conceptions, and [the sharing of] certain economic and social needs and influences.'<sup>218</sup>

To conclude, contemporary political theory has much to learn from its encounter with its colonial past. The demands of self-determination and justice from indigenous peoples present far-reaching challenges for dominant societies. In chapter 1.1.3, the traditional human rights regime is compared and examined in the context of ILO Convention No. 169, an international human rights treaty that is particularly dedicated to indigenous peoples.

### 1.2.3 The Principle of Self-determination and ILO Convention No. 169

This chapter shortly introduces the concept of self-determination and how it has been managed in the context of indigenous peoples and ILO Convention No. 169. It is beyond my competence to evaluate whether these peoples should or could have the full and extensive right to self-determination as peoples among peoples, but rather to describe the current attitude toward the issue in IL and within the international community. The purpose of this chapter is to examine the limitations of the concept of self-determination in the context of the ILO. Subsequently (in chapter 1.1.1), the process by which traditional state sovereignty is challenged through demands for greater self-determination and the recognition of ownership rights of traditionally occupied lands, as required in Article 14.1 of the Convention, is described.

The principle or right to self-determination of colonised peoples is one of the fundamental and universal principles of the United Nations (UN) and IL. In Article 1 (2) of the Charter and the Covenants of the UN, self-determination is regarded as equal in status to individual human rights.<sup>219</sup> Moreover, it is generally the principle that

218 Kymlicka in Ivison, Patton and Sanders 2007, 10-11.

219 See more extensive commentaries on the right to self-determination in Lâm Mai Vân Clech, *At the Edge of the State: Indigenous Peoples and Self-Determination*, Transnational Publishers, Inc. Ardsley, New York 2000; Daes, Erica-Irene A., *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 *Transnat'l L. & Contemp. Probs.* 1, 1993; Alfredsson, Gudmundur S., *Greenland and the Right to Self-Determination*, 51 *Nordisk Tidsskrift Int'l Ret* 39, 1982; Hurst, Hannum *Autonomy, sovereignty and self-determination, : the accommodation of conflicting rights*, University of Pennsylvania Press, 1990; Cassese Anthony *Self-Determination of Peoples: A Legal Reappraisal*, CUP Cambridge 1995; Alfredsson G. 'Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a Matter of International Law' in N. Ghanea and A. Xanthaki (eds.) *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry*, Martinus Nijhoff, Leiden 2005, 163-72.

has justified struggles of decolonisation since the Enlightenment, including those in Canada, the United States, Australia and New Zealand. Indigenous peoples have gained a modicum of support at the UN. In an advisory opinion of the International Court of Justice, *Western Sahara*<sup>220</sup>, the ICJ rejected the doctrine of discovery and asserted that the only way a foreign sovereign could acquire a right to enter into territory that is not *terra nullius*<sup>221</sup> is with the consent of the inhabitants by means of public agreement. The court further advised that the structure and form of government, as well as whether a people are said to be at a lower level of civilisation, are not valid criteria for determining whether inhabitants have rights, such as the right to self-determination. The relevant consideration is whether they maintain social and political organisations. According to Tully, this line of reasoning questions the doctrines that continue to serve as a denial to prior and continuing rights of indigenous peoples globally.<sup>222</sup>

A working group on indigenous populations (WGIP) was established in 1982 with strong efforts and help from indigenous lobbyists. The WGIP was a UN body, established by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and authorized by the Commission of Human Rights and ECOSOC. The WGIP was terminated and replaced with an expert mechanism. The working group provided a forum where indigenous peoples could present their views. After extensive (over twenty years) negotiations with both states and indigenous peoples, the Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>223</sup>, stating that indigenous peoples have a qualified right to self-determination, was issued.<sup>224</sup>

Despite the current wide variety international instruments targeted at indigenous peoples, many states are still reluctant to accept and live up to these internationally adopted standards. This is particularly the case with Finland and other Nordic States who have taken great pride in their human rights records and their emphasis on human rights in foreign policy, as frequently expressed in IGO forums and bilateral relations. Certainly, there are challenges, like the principle of self-determination, indigenous

220 International Court of Justice *Western Sahara*, General List No. 61, 1974-1975. See more Hodges Tony, *Western Sahara: The Roots of a Desert War*, Lawrence Hill Books, 1983.

221 *Terra nullius* is a Latin expression deriving from Roman law meaning “land belonging to no one” (or “no man’s land”), which is used in international law to describe territory which has never been subject to the sovereignty of any state, or over which any prior sovereign has expressly or implicitly relinquished sovereignty. English Dictionary, Allwords.com Accessed 23.2.2011. Sovereignty over territory which is *terra nullius* may be acquired through occupation, though in some cases doing so would violate an international law or treaty.

222 Tully James, *The Struggles of Indigenous Peoples for and of Freedom* in Ivison, Patton and Sanders (eds.) *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press 2007, 54.

223 See more Koivurova, Timo “From High Hopes to Disillusionment: Indigenous peoples’ Struggle to (Re)gain Their Right to Self-Determination” in *International Journal on Minority and Group Rights*, issue 15 (2008) pp. 1-26.

224 United Nations Declaration on the Rights of Indigenous People. Adopted by General Assembly Resolution 61/295 on 13 September 2007. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> Accessed 7.4.2011.

identities, lands, resources and self-governance rights.<sup>225</sup> According to Tully, this form of behaviour occurs because IL, the UN, and its Committees are established by existing nation states that will do everything in their power to deny the application of the principle of self-determination when it threatens their exclusive jurisdiction. Strelein notes that, collective rights, embodied in a claim to self-determination, are regarded as a threat to the sovereignty of the dominant state. This tension between indigenous self-determination and the state's assertion of [exclusive] sovereignty is a recurrent theme throughout this discussion at the UN as it serves as the basis for arguments against the recognition of a right of indigenous peoples to self-determination.<sup>226</sup>

In IL, the application of self-determination may be denied in four ways. They are analogous to and usually complement arguments used in incorporating and assimilating or accommodating indigenous peoples within the exclusive jurisdiction of existing nation states according to domestic law. In many cases, indigenous and non-indigenous scholars have critically examined these rationalisations, shown them to be dubious, and defended the application of the principle to indigenous peoples.<sup>227</sup>

The first argument is that indigenous peoples do not meet the criteria of 'peoples' but are 'populations' or 'minorities' within states. According to Tully, this strategy is not difficult to employ as there is no official agreement on the criteria and the general guidelines are vague. Despite this, studies by UN Special Rapporteurs have a tendency of substantiating existing independent research. For example, the indigenous peoples of the Americas may be clearly defined as peoples, as used in the Charter and the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>228</sup>. Thus, the principle of self-determination, enunciated in the Declaration, applies to them. It is to understand how peoples who have governed over their own territories for millennia, and have not surrendered under several centuries of colonisation, may be denied the status as peoples by the colonisers, without the introduction of a biased criterion, which has been deemed inadmissible by the ICJ.<sup>229</sup>

The second contention is the 'saltwater' thesis, which states that the right to self-determination only applies to colonised peoples on territories that are geographically separate from the imperial country. This notorious and arbitrary thesis in the General Assembly Declaration on the Granting of Independence to Colonial Countries and

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225 However, incipient practice in various UN human rights treaty monitoring bodies to invoke Article 1 towards well-established indigenous peoples in their concluding observations. See more Koivurova, Timo "From High Hopes to Disillusionment: Indigenous peoples' Struggle to (Re)gain Their Right to Self-Determination" in *International Journal on Minority and Group Rights*, issue 15 (2008) pp. 1-26.

226 Strelein, L.M. *Indigenous Self-determination Claims and the Common Law in Australia*. PhD Thesis, Australian National University, 1998, 55-56, in Tully, 2007, 55.

227 Tully, 2007, 55.

228 *ibid.*

229 *ibid.*

Peoples neatly legitimises the dismantling of external colonies in the twentieth century, while excluding internal colonies and, thereby, denying indigenous peoples the same right as other colonised peoples and, in turn, protecting the exclusive jurisdiction of the major drafters of the Declaration.<sup>230</sup>

A third and relatively important argument is that the right to self-determination of all colonised peoples is subordinate to the protection of the territorial integrity of existing nation states from disruption. According to Tully, there are two cogent responses to this argument. First, it presupposes what is in question: namely, the legitimacy of the present territorial integrity of existing nation states. The second, and more important response is that the recognition of the right of indigenous peoples to self-determination does not entail the disruption of the territorial integrity of existing nation states. This would only be the case if the exercise of the right to self-determination by indigenous peoples took the form of European and third-world decolonisation, as well as the establishment of sovereign nation states with exclusive jurisdiction over their territories.<sup>231</sup>

For indigenous peoples, the exercise of self-determination consists of decolonisation and the recognition of indigenous peoples as free, equal and self-governing peoples under IL with *shared* jurisdiction over lands and resources on the basis of mutual consent. This achieves, rather than disrupts, territorial integrity by amending an illegitimate and exclusive jurisdiction into a legitimate shared jurisdiction. This type of post-Westphalian jurisdiction, with multiple and overlapping governance, is regarded as the general tendency of global politics in many spheres. There is a discriminatory reason as to why it should be denied in this specific case - the tenacity by which existing states hold on to their exclusive jurisdiction, inherited from an earlier period in which state sovereignty ruled supreme.<sup>232</sup>

Finally, it is argued by Tully, that the principle only applies to colonised peoples, whereas indigenous peoples are already said to enjoy the right of self-determination within existing nation states. This occurs in two ways. The right to self-determination is satisfied when indigenous peoples are counted as part of the fictitious homogeneous sovereign people of a nation state and are able to exercise the same individual participatory rights as other citizens. According to Tully, the reduction of the rights of peoples to undifferentiated individual participatory rights is used to gloss over the existence of indigenous peoples and to legitimise their assimilation.<sup>233</sup> Critical liberal theorists have responded by stating that this approach undermines the individual liberties and goods that a liberal democracy is supposed to secure by destroying the appropriate institutions of self-rule in which they are cultivated and protected.

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230 *ibid.*

231 *ibid.*, 55-56.

232 Tully, 2007, 56.

233 *ibid.*

Another version of this argument notes that forms of accommodation, which recognise degrees of self-government and land rights within existing nation states, satisfy the criteria of *internal* self-determination.<sup>234</sup> According to Tully, the right of internal self-determination is the right of a people to govern themselves in a wide range of matters – including culture, religion, education, information, health, housing, welfare, economic activity, land and resource management, environmental practices and membership – within a larger state. Tully continues of arguing that if a people exercise such a right, they are not colonised but internally self-determining. Principally, a people may only exercise the right of *external* self-determination if the right to internal self-determination is thwarted by an encompassing society: that is, to free themselves from the dominant society and to establish their own nation state. As societies with systems of internal colonisation claim to be moving in a direction where they recognise the right to internal self-determination, the demand is being met, and these societies become legitimate under IL.<sup>235</sup> The approach to self-determination of ILO Convention No. 169 will be more closely examined below.

ILO Convention No. 169 does not explicitly recognise a right to self-determination, autonomy or self-government for indigenous peoples. In fact, the ILO declared itself incompetent at recognising the right to self-determination, which it felt should be left to a UN body with requisite authority.<sup>236</sup> Thus, while the Convention does use the term ‘peoples’, it also includes qualifying language stating that the use of that term ‘shall not be construed as having any implications as regards the rights which may attach to the term under international law’ (Article 1.3).

This principle should be referred to in connection with the specific provisions contained elsewhere in the Convention.

The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. (Article 7.1.)

The provision recognises that indigenous peoples have the right to some measure of self-government with regard to their institutions and in determining the direction and

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<sup>234</sup> See more Thornberry Patrick, *The Democratic or International Aspect of Self-determination with some Remarks on Federalism*. In C. Tomuschat (ed.) *Modern Law of Self-determination*, 101-138. Kluwer Academic Publishers. Printed in the Netherlands, 1993.

<sup>235</sup> Tully, 2007, 56-57.

<sup>236</sup> ILO, *a Manual* 2000, 9.

scope of their economic, social and cultural development.<sup>237</sup> The precise scope of that internal autonomy is to be determined by referencing, among others: participation provisions; the provisions on health services (Article 25.1 – ‘adequate health services . . . under their own responsibility and control’); education (Article 27.2. and 3. – ‘[t]he competent authority shall ensure the training of members . . . with a view to the progressive transfer of responsibility for [the] conduct of [educational programmes]’ and ‘the right of these peoples to establish their own educational institutions’); vocational training (Article 22.3 – ‘these peoples shall progressively assume responsibility for the organisation and operation of such special training programs’); and especially to those concerning lands and territories (Articles 13-19) and indigenous institutions (Articles 7.1, 8.2 and 9).

According to MacKay, the quality of the relationship between indigenous peoples and governments is also a determining factor in how the autonomy provisions of the Convention are applied in practice. A cooperative working relationship based upon mutual respect and understanding, can only enhance the quality and scope of the rights to autonomy to a certain extent. In this regard, according to Mackay, it is disappointing to note that the ILO chose a weak standard – ‘with the objective of achieving consent’ – as opposed to free and informed consent, or as it is used in the UN Declaration, as well as elsewhere in ILO Convention No. 169.<sup>238</sup>

The Convention does not recognise a right to establish autonomous indigenous legal systems. However, should an indigenous community establish its own autonomous legal system, it would appear that Articles 7(1) and 8(2) would require the state to justify any interference with its existence.<sup>239</sup> The Convention does recognise the right to maintain indigenous customs and institutions, provided that these are not incompatible with national law or recognised human rights standards. It also requires that states respect indigenous peoples’ customary methods for dealing with ‘offenses committed by their members’ and that indigenous customs concerning ‘penal matters’ are taken into consideration by the state’s law enforcement authorities (Article 9(1)(2)). According to Barsh, the requirement of conformity with national law is

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237 The issue of self-determination has been highly criticized among the indigenous peoples. Article 1(3) of ILO Convention No. 169 holds that indigenous peoples do not have the right of self-determination in international law. Technically, this only means that indigenous peoples cannot form their own independent countries. It is argued that it is only a presumption to express that indigenous peoples would seek a ceding from the nation-states. The argument has merely been used as an excuse by non-indigenous people to deny the right to self-determination. And further, in relation to the legal right, even if indigenous peoples who don’t want to form their own countries support the right of other indigenous peoples to do so if they wish. See more Venne Sharon, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, in *Without Prejudice*, Vol.2:2, 1990, 56; Iorns, Catherine, *Australian Ratification of International Labour Organisation Convention No. 169*, Murdoch University Electronic Journal of Law, Volume 1, Number 1, 1993, 2.

238 MacKay, Fergus, *A Guide to Indigenous Peoples’ Rights in the International Labour Organization* FPP Briefing Paper, Moreton-in-Mars, 2002, 15-16.

239 Barsh R.L., *An Advocates Guide to the Convention on Indigenous and Tribal Peoples*, 15 *Okl. City Univ. L.R.* 209 (1990), 223.

extremely disappointing as it may, according to him, severely hamper the effective development and operation of indigenous institutions. However, this may not be the case with every ratifying country as, for example, the Nordic countries provide quite an effective legislation in this regard. It is, thus, dependent on context.

According to the ILO Manual, the ILO's mandate are social and economic rights. The Manual states

It is outside its competence to interpret the political concept of self-determination. However, Convention No. 169 does not place any limitations on the right to self-determination. It is compatible with any future international instruments which may establish or define such a right.<sup>240</sup>

Convention No. 169 provides *self-management*, and the right of indigenous and tribal peoples to choose their own priorities.<sup>241</sup> The economic or resource dimension of self-determination, the right to freely dispose of one's own natural wealth and resources, is of crucial importance to indigenous peoples. The issue of land and resource rights is the most important question for the majority of the world's indigenous peoples. There are also other dimensions of the right to self-determination<sup>242</sup> in relation to land and natural resources. These include: the cultural dimension, the social and human security dimension, all of which are important in the context of indigenous peoples. Below are examples of self-management or forms of self-determination.

The Australian example provides many challenging questions and views. Henry Reynolds has suggested that self-determination be understood as a 'single Aboriginal nation'.<sup>243</sup> A limitation of this model is that the moral force of self-government of a people is diluted as the nation in question is composed of a [large] number of smaller groups with distinct languages, histories and cultural practices.<sup>244</sup>

In agreement, Michael Mansell's approach to indigenous self-government highlights the importance of local Aboriginal control over the government of the communities in Australia.<sup>245</sup> Delegates from those communities would come together under the umbrella of the Aboriginal nation.<sup>246</sup> According to Bern and Dodds, the formal recognition of indigenous entitlements to land contributes to at least two goals: first, the recognition of distinct indigenous interests in land (that is, interests based on prior oc-

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240 ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169), A Manual 2000, 9.

241 See more ILO Manual 2000, 10.

242 Internal right of self-determination.

243 Reynolds, Henry, *Aboriginal Sovereignty: reflections on race, state, and nation*. Allen & Unwin, 1996.

244 Bern and Dodds 2000, 163.

245 Mansell, Michael, 1994.

246 Bern and Dodds 2000, 164.



cupation and culturally specified rights and responsibilities) and second, the enhanced self-determination of indigenous groups. In arguing for particular indigenous peoples' rights to land or other resources, Bern and Dodds take the approach of contemporary political theorists, who utilize the concepts of group identity in picking out those who can claim these rights -- group-specific rights.<sup>247</sup>

Further, mechanisms for identifying the interests of groups that are to be protected or promoted via the recognition of indigenous rights to land must be articulated. For example, Bern and Dodds ask whether relevant groups are to be identified in terms of location – who lives, or has lived, on or near the land in question? Should they be identified in terms of their relation to each other and their collective, spiritual connection with the land? Should they be identified in terms of who uses the land for subsistence and/or farming? Lastly, should it be a combination?<sup>248</sup> These are also relevant and important questions in the Nordic context where many of the Saami have lost their connection to the land and live in big urban cities like Helsinki, Stockholm and Oslo.

According to Bern and Dodds, it should be noted that different ways of carving out the scope of the group, or the person, entitled to land claims will not always pick out the same set of people. It is interesting to notice that some Australian Aboriginal people who have been separated from their land for a long period of time may retain relations with a local family group, but may not necessarily retain the knowledge of spiritual or other connections with the land. The recognition of land rights may also promote, or protect, an array of interests in land. These may reflect a difference in interests held by various groups within particular Aboriginal communities. In other words, there are questions regarding the appropriate representation of indigenous identity and indigenous peoples' interests.<sup>249</sup>

Bern and Dodds illustrate that within a single Aboriginal/indigenous community there may be those:

- “who have special spiritual responsibilities with regard to the land and/or sites on the land;
- who wish to see the community gain greater control over their own use and control of the land in order to achieve greater economic independence;
- who wish to have their historic claim to the land and their subsequent unjust dispossession formally recognised; and
- who use the land to hunt and gather food in a traditional manner, and wish for continued access to the land for those purposes.”<sup>250</sup>

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247 *ibid.*

248 Bern and Dodds 2000, 164.

249 *ibid.*, 165.

250 *ibid.*

Political theorists, arguing for the greater recognition of indigenous interests, frequently focus on differences between indigenous and non-indigenous interests, downplaying or ignoring any differences between and among indigenous groups and interests. This apparent dichotomy between indigenous and non-indigenous interests may mask the diversity of indigenous peoples' interests, the silent debate among indigenous peoples, and/or support arguments against greater self-determination.<sup>251</sup> Downplaying and ignoring the demands of indigenous peoples has also often occurred in the Nordic context – the bypassing of Saami demands. These issues are closely related to reindeer herding or other traditional forms of land use. It is often argued that these traditional activities should not be protected as they cause a lot of harm to other types of land use, including forestry, mining and tourism-business. However, the opponents reason that no special rights are to be granted to traditional livelihoods as they are such a marginal activity in the area.

## 1.3 Research Materials and the Methodology used in the Thesis

### 1.3.1 Previous Research

The dissertation “ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach” is both a study of political science in the field of IR and IL. Particularly in the case of indigenous peoples, these two disciplines are unavoidably linked. The implementation of international conventions and treaties into states' domestic practises heavily involves both political and legal procedures. Consequently, this research is based on an extensive literature review of both disciplines where questions related to indigenous peoples rights become interlinked.

Several authors, who have played a central role in the compilation of this thesis, have generally analysed ILO Convention No. 169, describing it as the most important Convention directly dedicated to indigenous peoples. I have had the honour of being in personal contact with many of them. This has given me the opportunity to have fruitful conversations, as well as clarify certain issues.

The debate surrounding the rights of indigenous peoples is one of the most dynamic and controversial fields of contemporary politics. *Luis Rodriques-Pinero* has conducted one of the most extensive studies in the field of indigenous peoples' rights.<sup>252</sup> His book analyses the work of the International Labour Organisation (ILO) as a driving force in

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<sup>251</sup> *ibid.*

<sup>252</sup> Rodríguez-Piñero Luis, *Indigenous Peoples, Postcolonialism, and International Law. The ILO Regime (1919-1989)*. Oxford University Press, 2006.

developing the status of indigenous peoples in IL. Focusing on the development and implementation of two legally binding international instruments – Conventions No. 107 (1957) and 169 (1989) – Rodríguez-Pinero traces indigenous peoples' historical and political processes in the struggle for legal recognition. I highly appreciate his work and regard it as a significant source for my own research.

A valuable contribution from the IL perspective has come from Professor *S. James Anaya*, who is appointed as a Special Rapporteur by the UN Human Rights Council on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. In the context of ILO Convention No. 169, Professor Anaya's work has highlighted the importance of comparative research and different approaches in issues dealing with indigenous peoples rights. His expertise as a consultant for organizations and government agencies in numerous countries on matters of human rights and indigenous peoples is also interesting in providing tools for different perspectives. From a legal viewpoint, it is important to acknowledge that he has represented North and Central American indigenous groups in landmark cases before both courts and international organizations. He was also the lead counsel for indigenous parties in the *Awás Tingni v. Nicaragua*<sup>253</sup> case, in which the Inter-American Court of Human Rights, for the first time, upheld indigenous land rights as a matter of IL. Additionally, Anaya has published numerous articles and books concerning the rights of indigenous peoples in IL.<sup>254</sup>

The works of Professor *Gudmundur Alfredsson*<sup>255</sup> have significantly influenced the structure and content of this dissertation. He has, for example, provided valuable descriptions on the content of the concept of self-determination and its implementation in Greenland. It would be interesting to continue to evolve the conceptual approach within the context of the Nordic countries, especially in Finland. Although it is only referred to shortly in this text, it would likely require an additional study. Professor Alfredsson has worked at the UN Secretariat and the Centre for Human Rights in Geneva. He was also the Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, as well as a member of the UN Sub-Commission on the Promotion and Protection of Human Rights (2004-2006). He is, now, a Profes-

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253 About the *Awás Tingni vs. Nicaragua* see more: <http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/felix.cfm?page=advoc>

254 *Indigenous Peoples in International Law* (Oxford Univ. Press, 1996, 2d. ed. 2004; *International Human Rights: Problems of Law, Policy, and Practice* (4th ed. 2006) (co-authored with Richard B. Lillich, Hurst Hannun & Dinah L. Shelton; *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 Harv. Hum. Rts. J. 33 (2001) (co-author with Robert A. Williams, Jr.; *A Contemporary Definition of the International Norm of Self-Determination*, 3 Transnat'l L. & Contemp. Probs. 131, 1993

255 Professor at the University of Strasbourg and the Faculty of Social Sciences and Law at the University of Akureyri. He was a member of the Greenlandic-Danish Self-Governance Commission (2004-2008), appointed by Greenland's Home Rule Government. He is the Editor-in-Chief of the *International Journal on Minority and Group Rights*, the editor of several books and the author of over one hundred articles on a variety of human rights and international law issues.

sor at the University of Strasbourg and the Faculty of Social Sciences and Law at the University of Akureyri. He is a member of the Greenlandic-Danish Self-Governance Commission, appointed by Greenland's Home Rule Government.<sup>256</sup>

Emeritus professor of International Law, *Patrick Thornberry*<sup>257</sup>, has conducted numerous works in the field of minority rights; indigenous peoples rights and racial discrimination. His views concerning the criteria for indigenesness from an IL perspective and the "subjectivity-issue" have been utilized in this study.<sup>258</sup> Another Emeritus professor of IL, *Lauri Hannikainen*<sup>259</sup> provided copious publications in the field of minority and indigenous peoples rights. He has many years of experience on issues concerning the ratification process of ILO Convention No. 169 in Finland and has expertise in treaty interpretation within this context. His knowledge on Saami issues and IL has also provided important tools for this study.<sup>260</sup>

The question of land rights, from the Scandinavian point of view, has been examined by scholars including *Bertil Bengtsson*<sup>261</sup> and *Christina Allard*<sup>262</sup> in Sweden, *Kaisa*

256 *Justice Pending* (Raoul Wallenberg Institute Human Rights Library, 10.) Martinus Nijhoff Publishers, 2002; With Katarina Tomasevski (eds.) *A Thematic Guide to Documents on the Human Rights of Women: Global and Regional Standards Adopted by Intergovernmental Organizations, International Non-Governmental...* Wallenberg Institute Human Rights Guides) Martinus Nijhoff Publishers, 1995; With Katarina Tomasevski (eds.) *A Thematic Guide to Documents on Health and Human Rights: Global and Regional Standards Adopted by Intergovernmental Organizations, International Non-Governmental...* Institute Human Rights Guides, V. 2) Tilalle: Martinus Nijhoff Publishers, 1998; Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, *The Yearbook of Polar Law* by Gudmundur Alfredsson, T. Koivurova (Editor), D. K. Leary (Editor), Volume 1 published in 2009.

257 At Keele University, UK and a Fellow of Kellogg College, University of Oxford. He has been a member of CERD – UN Committee on the Elimination of Racial Discrimination - since 2001 and was rapporteur of that Committee from 2002 until Spring 2008. He currently chairs the Early Warning and Urgent Action Group in CERD, dealing with a range of pressing situations notably including land and resource questions involving indigenous peoples. He is a former Chairman of Minority Rights Group International and has acted as consultant and adviser to a range of international organizations.

258 *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991), *Indigenous Peoples and Human Rights* (Manchester UP, 2002) and (with M.A. Martin Estebanez) *Minority Rights in Europe* (Council of Europe Publishing 2004). A Festschrift in his honour, edited by Nazila Ghanea and Alexandra Xanthaki, *Minorities, Peoples and Self-Determination*, was published by Martinus Nijhoff in 2005. He is currently working on a commentary for Oxford UP on the International Convention on the Elimination of All Forms of Racial Discrimination, to be published in 2010.

259 At University of Turku, Finland.

260 *Cultural Autonomy – and Some Related Aspects of Territorial Autonomy*, teoksessa 'Managing Diversity – Protection of Minorities in International Law', eds. Thürer, D. & Kedzia, Z. Zürich: Schulthess, 2009, 193-205, *Monitoring against Discrimination and Xenophobia – The European Commission against Racism and Intolerance* (ECRI), in 'International Human Rights Monitoring Mechanisms', eds.. Alfredsson G. ym. Leiden: Martinus Nijhoff, 2009, 541-546; Hannikainen, L. & Koivurova, T.: Vuoden 1751 Lappekodisilli v. nykyajan kansainvälinen oikeus – Miten usean valtion alueella asuvan saamelaisen alkupeväiskansan oikeuksien perusta ja luonne on ymmärrettävä kansainvälisoikeudellisesti?, in 'Juhlajulkaisu Mikael Hiden 1939 – 7/12 / 2009'. Helsinki: Suomalainen Lakimiesyhdistys, 2009, 339-35.

261 Juridik och Politik i äganderättsfrågor, *Kungliga Skogs- och och Lantbruksakademiens Tidskrift*. 2005, 144, 6-10; Några samerättsliga frågor *Svensk Juristtidning*. 2000, 1, s. 36-46; Om jakt och fiske i fjällmarken, *Svensk Juristtidning*. 2010, 78-87; Samerätt, ett översikt, : Norstedts juridik. 131 s. (Institutet för rättsvetenskaplig forskning; 185). Stockholm, 2004.

262 Two Sides of the Coin: Rights and Duties *The Interface between Environmental Law and Saami Law Based on a Comparison with Aotearoa/New Zealand and Canada*. Luleå University of Technology Department of Business Administration and Social Sciences, Division of Social Science, 2006:32.

*Korpjääkko-Labba*<sup>263</sup> and *Juha Joonas*<sup>264</sup> in Finland, *Otto Jebens*<sup>265</sup>, *Kirsti Ström-Bull*<sup>266</sup> and *Oyvind Ravna*<sup>267</sup> in Norway. These authors have particularly examined the question of land rights through legal history, property and environmental law perspectives, and have also provided better knowledge in understanding the historical background of many issues that have a significant role in determining the conditions of how ILO Convention No. 169 should be implemented in the Nordic countries, especially in Finland.

The most recent and interesting dissertation by Dr. *Mattias Åhren* focuses on indigenous peoples' self-determination and ownership over their cultures.<sup>268</sup> Questions related to Saami self-determination are also examined by Laila Susanne Vars in her 2010 dissertation.<sup>269</sup> The various kinds of questions related to Saami issues have inspired many scholars, including *Malgosia Fitzmaurice*<sup>270</sup> and *Athanasios Yupsanis*, to write extensive articles on the issue.<sup>271</sup>

Political scientist *Lennard Sillanpää*<sup>272</sup> has studied political and administrative responses to Saami self-determination with short reference to land rights and the ILO Convention. *Dave Lewis* and the Arctic Centre of the University of Lapland have conducted an interesting study on indigenous rights claims in welfare capitalist society.<sup>273</sup> In this study, *Dave Lewis* provides an extensive overview of the Nordic states, which have all utilized various approaches in regard to Saami issues. He heavily refers to the political atmosphere, as well as the goals of different parties, which have

263 Saamelaisten oikeusasemasta Ruotsi-Suomessa: Oikeushistoriallinen tutkimus Länsi-Pohjan Lapin maankäyttöoloista ja oikeuksista ennen 1700-luvun puoliväliä. Lakimiesliiton kustannus, 1989.

264 Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista. *Juridica Lapponica* 32, Rovaniemi 2006; Poronhoito-oikeus maankäyttöoikeutena, Helsinki, 1993.

265 Om eiendomsretten til grunnen i Indre Finnmark. Oslo 1999.

266 Historisk fremstilling av retten til fiske i havet utenfor Finnmark, NOU 2008: 5; Finnmarksloven - Finnmarkseiendommen og kartlegging av rettigheter i Finnmark, Lov og Rett 2007 s. s. 545 flg.; Lappekodisillen og 1905: Forspillet til Karlstadforhandlingene, i *Grenseoverskridende reindrift før og etter 1905*, Senter for samiske studier skriftserie nr. 14, Tromsø 2007; Samisk forhistorie og samiske rettigheter i et juridisk perspektiv. I Samisk forhistorie, Rapport fra konferanse i Lakselv 5.-6. september 2002, Várjjat Sámi Musea Cállosat 2004, s. 40-49.

267 Rettsutgreiing og bruksordning i reindriftsområder en undersøkelse med henblikk på bruk av jordskiftelovgivningens virkemidler. Gyldendal Akademisk in Oslo, 2008. See also Arctic Review on Law and Politics <http://akademiskweb.com/index.asp?id=129002> Accessed 16.5.2011.

268 The Saami Traditional Dress & and Beauty Pageants: Indigenous Peoples' Rights of Ownership and Self-Determination over Their Cultures. University of Tromsø (2010).

269 The Sámi People's Right to Self-determination, University of Tromsø, 2010.

270 The New Developments Regarding the Saami Peoples of the North", 16 *International Journal on Minority and Group Rights* (2009) 67-156.

271 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview. 79 *Nordic Journal of International Law* (2010): 433-456.

272 Political and Administrative responses to Sami Self-determination. A comparative study of public administrations in Fennoscandia on the issue of Sami Land Title as an Aboriginal Right. *Societas Scientiarum Fennica* 48, Helsinki 1994.

273 Indigenous Rights Claims in Welfare Capitalist Society: Recognition and Implementation. The Case of the Sami People in Norway, Sweden and Finland. Arctic Centre Reports, 24, University of Lapland, Rovaniemi 1998.

a significant meaning when discussing and planning the future developments of the Saami. It appears to be relatively easier to discuss the strengthening of linguistic and cultural rights, while it is “harder” to deliberate on difficult issues related to land and water. However, other issues, including self-government, remain unresolved.

Several authors have studied Saami issues from political and sociological perspectives. The works of Dr. *Kristian Myntti*<sup>274</sup> have provided many inspiring thoughts and aided in the construction of the approach taken in this dissertation. He has excellently combining the methods of political science and IL in relation to questions of human rights, regarding minorities and indigenous peoples. These methods have also significantly influenced this study. *Jari Uimonen* has also written an interesting article in the context of ILO Convention No. 169.<sup>275</sup> Other approaches include works by *Elina Helander-Renva*<sup>276</sup>, *Trond Thuen*<sup>277</sup>, *Seija Tuulentie*<sup>278</sup>, *Veli-Pekka Lehtola*<sup>279</sup>, *Sanna Valkonen*<sup>280</sup> to mention few.

IR scholars, including *Thomas Risse*, *Stephen C. Ropp* and *Kathryn Sikkink* have made a valuable contribution to the theoretical framework of this study.<sup>281</sup> Their research on the internalization of international norms into daily domestic legal and political practices is also used to describe the process related to ILO Convention No. 169. The norms of ILO Convention No. 169 are internalized into domestic practices through the reporting dialogue that occurs between the ratified state and the Committee of Experts (CEACR). This will be discussed in more detail in article No. 3, which focuses on domestic practices.

Risse, Ropp and Sikkink find it interesting that many states’ motivations, in adapting human rights norms, vary significantly. This should also be recognized in the context of ILO Convention No. 169. In that context, national governments often

274 Suomen saamelaisten yhteiskunnallinen osallistuminen ja kulttuuri-itsehallinto. Raportti Oikeusministeriölle Osa I, Lainvalmisteluosaston julkaisu. Helsinki, 2/1997; Saamelaismääritelmä oikeudelliselta kannalta, Teoksessa Irja Seurujärvi-Kari, *Beaivvi Mánát, Saamelaisten juuret ja nykyaika*. Suomalaisen kirjallisuuden seura, Helsinki 2000; Minoritetters och Urfolks Politiska Rättigheter: En Studie av Rätten för små Minoriteter och Urfolk till Politiskt Deltagande och Självbestämmande. *Juridica Lapponica*, Rovaniemi 1998.

275 Jari Uimonen, *Alkuperäiskansojen oikeudet: pohjatonkaivo vai askel eteenpäin?* *Lakimies* 4/2011, 732-752.

276 *Globalization and Traditional Livelihoods*. In L. Heininen & C. Southcott (editors). *Globalization and the Circumpolar North*. Fairbanks: University of Alaska Press, 2010, 179-219; Animism, personhood and the nature of reality: Sami perspectives. In *Polar Record* 46 (236), 2010, 44-56; Ihmisen, poron ja luonnon vuorovaikutus - Perinnetiedon merkitys saamelaisessa poronhoidossa Utsjoella. *Arktisen keskuksen tiedotteita* 53. University of Lapland. Lapin yliopisto. Rovaniemi: Oy Sevenprint Ltd, 2009.

277 *Quest for equity, Norway and the Saami Challenge*. St. John's Canada, 1995.

278 *Meidän vähemmistömmä. Valtaväestön retoriikat saamelaisten oikeuksista käydyissä keskusteluissa*. Hakapaino, Helsinki 2001.

279 *Saamelaiset, Historia, yhteiskunta ja taide*, Gummerus, Jyväskylä 1997.

280 *Poliittinen saamelaisuus*, Vastapaino, Tampere, 2009.

281 Risse Thomas and Kathryn Sikkink, “The socialization of international human rights norms into domestic practices: introduction. The Power of Human Rights” in *International Norms and Domestic Change*, Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds. Cambridge University Press (1999).

change their human rights practices more easily when faced with the possibility of gaining access to the material benefits of foreign aid or in order to be able to remain in power in the face of strong domestic opposition (this holds true in many Latin American cases where states have ratified the Convention). In fact, a change in the human rights process is often initiated as a result of a state's instrumentally or strategically motivated adaptation to growing domestic and transnational pressure (this particularly holds true in the case of Finland).<sup>282</sup>

It is impossible to acknowledge all of the great scholars who have influenced and aided in the development of this study, as well as in the approaches taken. However, *Will Kymlicka*<sup>283</sup> provided both interesting and valuable knowledge in regard to his understanding of minorities, *Jeremy Webber*<sup>284</sup> offered both intellectual and theoretical perspectives on the rights of Australian aboriginals, and *John Bern*<sup>285</sup> and *Susan Dodds*<sup>286</sup> shared their knowledge on the Australian situation, while *Makau Mutua*<sup>287</sup>, *Martti Koskenniemi*<sup>288</sup>, *Anthony Angie*<sup>289</sup> and *Linda Tubiwai-Smith's*<sup>290</sup> different, non-western, or non-traditional, views on IL often highlighted indigenous peoples in the context of ILO Convention No. 169. Their scholarly work is highly appreciated.

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282 *ibid.*, 10-11.

283 Liberalism, Community, and Culture (Oxford: Oxford University Press, 1989/1991); Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Oxford University Press, 1995; *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998).

284 Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights Hamar Foster (Editor), Heather Raven (Editor), Jeremy Webber (Editor), UBC Press 2007; *Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights*. In Catherine Bell and David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts*. Vancouver: University of British Columbia Press. 2004, 149-157; Native Title as a Self-Government. University of New South Wales, L-J Forum 5-7, 1999.

285 John Bern and Susan Dodds, On the Plurality of Interests: Aboriginal self government and land rights, in D. Ivison, P. Patton, W. Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press: 2000, 163-79.

286 Susan Dodds, Justice and Indigenous Land Rights, *Inquiry* 41 (2); 1998, 1-19;

287 What is TWAIL? in *International Law in Ferment: a new vision for theory and practice: proceedings of the 94th Annual Meeting* (American Society of International Law, 2000, 31-39; *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (with Robert Howse) in *Human Rights in Development* (H. Stokke & A. Tostensen, editors) (Kluwer Law International, 2001) (51-82); *The Complexity of Universalism in Human Rights in Human Rights With Modesty: the problem of universalism* (A. Sajo, editor) (Martinus Nijhoff Publishers, 2004, 51-64.

288 *The Gentle Civilizer of Nations: The Rise and Fall of International law 1870-1960* Cambridge University Press (Hersch Lauterpacht Memorial Lectures), Cambridge 2001; *Sovereignty. Prolegomena to a Study of International Law as Discourse*, *Kansainoikeus/Jus Gentium*, 1987 71-106; *The Politics of International Law*, 1 *European Journal of International Law* (1990) 4-32.

289 *Imperialism, Sovereignty and the Making of International Law*, Cambridge Studies in International and Comparative Law (No. 37), 2005; *The History of International Law: an Introduction*, in *International Law for International Relations* (Basak Cali ed., Oxford Univ. Press 2009; *Rethinking Sovereignty in International Law*, 5 *Ann. Rev. L. & Soc. Sci.*, 291, 2009.

290 *Decolonizing Methodologies: Research and indigenous peoples*, Zed Books, London, 1999.

### 1.3.2 Research Materials

The research materials utilized are introduced from the perspectives of IL and political research. From the view of IL, the chosen method for this dissertation is the interpretation and systemisation of existing law and legal dogmatics.<sup>291</sup> Within the framework of this thesis, existing law consists both international and domestic law. When researching standards of IL concerning indigenous rights, Article 38 of the Statute of the International Court of Justice may well be regarded as a starting point.<sup>292</sup> Article 38 is widely accepted as expressing an authoritative enlistment of IL sources. These include: international conventions, international custom, general principles of law recognised by civilised nations, judicial decisions, and the teachings of the most highly qualified publicists of various nations. For the purpose of this study, international convention(s) are considered to be the most important source of IL. However, as mentioned in the text, it must be emphasized that other relevant instruments concerning the rights of indigenous peoples also exist. The UN Declaration on the Rights of Indigenous Peoples, which is non-binding in nature, but serves as an important development, is one of these instruments. Additionally, local attempts at codifying and harmonizing various indigenous rights; such as the Draft Nordic Saami Convention also exist.

Two conventions, ILO Convention No. 107 concerning the Protection and Integration of Indigenous and other Semi-Tribal Populations in Independent Countries and ILO Convention No. 169 concerning the Rights of Indigenous Peoples in Independent countries, specifically address the rights of indigenous peoples. Both contain land rights provisions, which are examined in separate articles of the thesis, as well as in the synthesis and in chapter 2.1., in a more detailed manner. However, despite the fact that Convention No. 107 is no longer open for new ratifications, it remains in force for those state parties who have not ratified the revised Convention.<sup>293</sup>

In regard to the interpretation of land rights provisions in ILO Convention No. 169, Lee Swepston writes:

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291 Legal dogmatics in Continental European law (*scientia iuris*, *Rechtswissenschaft*) consists of professional legal writings whose task is to systematize and interpret valid law. Legal dogmatics pursues knowledge of the existing law, yet in many cases it leads to a change of the law. Among general theories of legal dogmatics, one may mention the theories of negligence, intent, adequate causation and ownership. The theories produce principles and they also produce defeasible rules. By means of production of general and defeasible theories, legal dogmatics aims at obtaining a system of law that is both internally coherent and harmonized with its background in morality and (political) philosophy. Legal dogmatics is necessary in the context of constitutional constraints on the majority rule. Only if the courts act on the basis of Reason can they be a legitimate counterpart of the majority rule. And Reason cannot be exhausted by particular decision making. It also needs a more abstract deliberation, given by expert jurists. However, legal dogmatics has been a target of several kinds of criticism: empirical, morally-political, epistemological, logical, and ontological. Peczenik Aleksander, *Scientia iuris* : An unsolved philosophical. In *Ethical Theory and moral practice*, vol.3, no.3, 2000, Abstract.

292 The Statute of the International Court of Justice, signed 26<sup>th</sup> June 1945, came into force on 24<sup>th</sup> October 1945.

293 Ratified countries: Belgium, Cuba, Dominican Republic, El Salvador, Ghana, Haiti, India, Egypt, Syrian Arab Republic, Pakistan, Portugal, Tunisia, Brazil, Malawi, Panama, Bangladesh, Angola; Guinea-Bissay; Iraq.



[An i]nterpretation of this section is difficult, because of the way it was adopted. Discussions were so tense that at one point certain members of the Conference Committee went away with this whole section, and came back with a “take-it-or-leave-it” text. No records were kept of the discussion in that special working group. So the legislative history here is almost blank. We must rely on the words of the Convention itself.<sup>294</sup>

When analysing the land rights provisions of ILO Convention No. 169, available ILO material, including documents related to the partial revision of ILO Convention No. 107 have been used. This constitutes a form of *travaux préparatoires* or *legislative history* of ILO Convention No. 169.<sup>295</sup> Notable importance is also given to the three guides of ILO Convention No. 169<sup>296</sup>, as well as to the texts of authorities within this field, introduced in the chapter above. Swepston notes that, the interpretation of an international convention is always a challenge. As a result, general guidelines may be found in the 1969 Vienna Convention on the Law of Treaties.<sup>297</sup> Article 31 lays down the general rule of interpretation and states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. There are also other existing rules within the Vienna Convention.<sup>298</sup>

The *International Covenant on Civil and Political Rights* (hereafter the ICCPR or the Covenant) is the third most important convention in dealing with the rights of peoples and minorities. The UN Human Rights Committee (hereafter referred to as the HRC or the Committee)<sup>299</sup> has deduced that the Covenant’s Article 27, on the

294 Swepston, Lee 1998a 43, according to Niemi, Heli 2001.

295 International Labour Conference, 75th Session, 1988, Report VI (1) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1987; International Labour Conference, 75th Session, 1988, Report VI (2) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1988; International Labour Conference, 76th Session, 1989, Report IV (1) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1988; International Labour Conference, 76th Session, 1989, Report IV (2A) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1989; International Labour Conference, 76th Session, 1989, Report IV (2B) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1989.

296 Tomei Manuela and Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169. Policies for Development Branch, Equality and Human Rights Coordination Branch*. International Labour Office, Geneva, 1996; A Manual. ILO Convention on Indigenous and Tribal Peoples, 1989 (no.169).ILO, Geneva, 2000, MacKay Fergus, *A Guide to Indigenous Peoples’ Rights in the International Labour Organization*. Forest Peoples Programme, Stratford Road, 2002.

297 Vienna Convention on the Law of Treaties, done in Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331. Can be found at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) Accessed 22.2. 2011.

298 Article 32 and Article 33 of the Vienna Convention on the law of Treaties deals with the supplementary means of interpretation and the interpretation of treaties authenticated in two or more languages.

299 International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49.

cultural rights of minorities, may also be interpreted as offering protection to indigenous land rights. In regard to this understanding of Article 27, it has been noted that its *travaux préparatoires* do not offer much help in regarding the substantive content of the provision.<sup>300</sup> Additionally, according to Articles 31-32<sup>301</sup> of the *Vienna Convention on the Law of Treaties* (1969), the legislative history has a secondary place in treaty interpretation. According to Spiliopoulou, case law and the annual reports of the Human Rights Committee, in combination with the General Comment on Article 27, provide considerable guidance regarding the content and application of the ICCPR. They may, thus, be considered as the primary means of interpreting the Convention under Article 31 of the Vienna Convention.<sup>302</sup>

In the context of indigenous peoples, it is also notable to mention that the *United Nations Declaration on the Rights of Indigenous Peoples* belongs to the category of so called soft law,<sup>303</sup> which means that is not a legally binding Convention *per se*. Nevertheless, it already possesses great authority and may contribute to the development of customary law. Furthermore, according to Professor James Anaya, the UN Declaration “stands in

300 Article 27 of the ICCPR: 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.

301 *Article 31 General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;  
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;  
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended

*Article 32 Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

302 Spiliopoulou, Sia, Protection of Minorities under Article 27 of the International Covenant on Civil and political Rights and the Reporting System of the Hyman Rights Committee, *Juridica Lapponica* 8, NIEM/Univ. of Lapland, Rovaniemi, 1994. Human Rights Committee, General Comment No. 23: The rights of minorities (Art. 27) : 8.4.1994. CCPR/C/21/Rev.1/Add.5, General Comment No. 23 (General Comments). In point 7. in the case of indigenous peoples, the Committee states: “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, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”

303 In the field of human rights there exists extensive “soft law”, contained, *inter alia*, in such instruments as resolutions, declarations, recommendations, codes of conduct, standard minimum rules, guidelines, basic principles, and model treaties.

its own rights as an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles.”<sup>304</sup>

There are, of course, other Conventions that also play a significant role in the context of indigenous peoples, but cannot be examined in detail here. They will, thus, only be mentioned if relevant to the subject matter.

Both IR and IL methods are used in this thesis. From the IR perspective, the purpose is not to focus on the details and specific wording of the particular conventions, but to rather investigate how important obligations, rights and duties are internalized into daily domestic legal and political practices. The thesis aims to examine how various states, who have ratified ILO Convention No. 169, have implemented it. It also observes the challenges that they have faced, as well as the solutions that have been found. ILO materials were utilized in order to answer these questions. These primarily consist of reports that have been sent by ratified states to the *Committee of Experts of the Application of Conventions and Recommendations* (CEACR). These reports contain relevant information on the individual country’s legal and political situation.<sup>305</sup>

In conclusion, the primary sources include:

- 1) The statements given in Finland, Sweden and Norway after state committee-reports (NOU 1997, SOU 1999 and four reports in Finland),
- 2) The legislative history of ILO-Convention No. 169 (1989) and the record of proceedings,
- 3) The country reports submitted to the ILO by ratified states (22 total),
- 4) The cases investigated by the Governing Body of the ILO in the context of Convention No. 169 (11 of which 8 have been decided),
- 5) Interviews and personal discussions (e.g. with Members of the Finnish Parliament, Finnish Ministry of Justice, various officials responsible ministries, Saami representatives, local peoples of the three Nordic countries)

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304 Anaya 1996, 53, according to Niemi, Heli, Recognition and Protection of Indigenous Land and Resource Rights. A Comparison between Australia and Finland in Light of International Law. Avhandling pro gradu I folkrätt. Åbo Akademi, 2001, 9.

305 The ILO has a number of procedures to examine how its conventions are being applied. There is thus a process of dialogue between the country and the ILO supervisory bodies. Once a Convention has been ratified, Article 22 of the ILO Constitution requires that member States report regularly to the International Labour Office on the measures they have taken to give effect (implementation) to the Conventions to which they are party. These reports should include information on the situation in the relevant area, both in law and in actual practice. The reports sent by governments and by employers’ and workers’ organisations are reviewed by the *Committee of Experts on the Application of Convention and Recommendations* (CEACR). It is made up of 20 independent experts and convenes every year. The Committee’s response to the State reports include more general *Observations* and also *Direct Requests* for further information and clarification. These are also published on the ILO website.

### 1.3.3 A Note on Methodology

#### *Comparative Politics as a Tool for Analysis*

This chapter makes a distinction between comparative politics and comparative law. Although both methods are considered and the thesis reflects both politics and law, comparative law serves as the guiding tool for understanding the differences and similarities of states' political behaviour.<sup>306</sup> Simply, *comparative politics* is the study of politics in foreign countries<sup>307</sup>, while *comparative law* is the study of different legal systems and of our own legal system in the context of those alternatives.<sup>308</sup> When examining ILO Convention No. 169 and its implementation in different countries one must bear in mind that the present countries reflect a variety of different political and legal systems. Therefore, one must be selective, focus on general features and primary variants of law, as well as on dominant contemporary political systems.

Many textbooks, focusing on comparative politics, emphasize that it involves both a *method* of study and a *subject* of study.<sup>309</sup> As a method of study, comparative politics is, unsurprisingly, premised on comparison. As a subject of study, comparative politics focuses on understanding and explaining political phenomena that take place

306 Lim, Timothy C. *Doing Comparative Politics: An Introduction to approaches and Issues*. Lynne Rienner, Boulder Co. USA, 2006.

307 Zahariadis 1997. Also "Comparative politics involves the systematic study and comparison of the world's political systems. It seeks to explain differences between as well as similarities among countries. In contrast to journalistic reporting on a single country, comparative politics is particularly interested in exploring patterns, processes, and regularities among political systems" (Wiarda 2000, 7); "Comparative politics involves both a subject of study—foreign countries—and a method of study—comparison" (Wilson 1996, 4); "Comparative politics . . . involves no more and no less than a comparative study of politics—a search for similarities and differences between and among political phenomena, including political institutions (such as legislatures, political parties, or political interest groups), political behavior (such as voting, demonstrating, or reading political pamphlets), or political ideas (such as liberalism, conservatism, or Marxism). Everything that politics studies, comparative politics studies; the latter just undertakes the study with an explicit comparative methodology in mind" (Mahler 2000, 3).

308 Charles N.W. Keckler, George Mason University School of Law, Comparative Law. In the strict sense, it is the theoretical study of legal systems by comparison with each other, and has a tradition going back over a century Paul Norman, Comparative Law 2006, GlobaLex at [http://www.nyulawglobal.org/globalex/Comparative\\_Law.htm#\\_What\\_is\\_Comparative\\_Law?](http://www.nyulawglobal.org/globalex/Comparative_Law.htm#_What_is_Comparative_Law?)

309 Comparative politics is also described as a subfield of political science, characterized by an empirical approach based on the comparative method. Arend Lijphart argues that comparative politics does not have a *substantive* focus in itself, but rather a *methodological* one: it focuses on "the *how* but does not specify the *what* of the analysis." Lijphart, Arend (1971). "Comparative politics and the comparative method". *American Political Science Review* 65 (3): 682–693. In other words, comparative politics is not defined by the object of its study, but rather by the method it applies to study political phenomena. Peter Mair and Richard Rose advance a slightly different definition, arguing that comparative politics is defined by a combination of a *substantive* focus on the study of countries' political systems and a *method* of identifying and explaining similarities and differences between these countries using common concepts. Mair, Peter (1996). "Comparative politics: An introduction to comparative overview". In Goodin, Robert E.; Klingemann, Hans-Dieter. *A New Handbook of Political Science*. Oxford: Oxford University Press. 309–335. Rose states that, on his definition: "The focus is explicitly or implicitly upon more than one country, thus following familiar political science usage in excluding within-nation comparison. Methodologically, comparison is distinguished by its use of concepts that are applicable in more than one country." Rose, Richard, 1991, Comparing forms of comparative analysis. *Political Studies*, volume, 39, issue 3, 446–462.

within a state, society, country, or political system.<sup>310</sup> Comparative politics is primarily concerned with *internal* or domestic dynamics, which help distinguish comparative politics from international relations (IR)—a field of study largely, though not exclusively, concerned with “external” relations or the foreign policies of states. Secondly, it tells us that comparative politics is, appropriately enough, concerned with “political” phenomena. Third, and perhaps most importantly, it shows that the field is not only characterized, but *defined*, by a comparative method of analysis.

On the other hand, Timothy Lim argues whether comparative politics solely focuses on what happens *inside* countries. In other words, is it possible to understand the internal politics of a place without understanding and accounting for the impact of external or transnational/international forces?<sup>311</sup> Comparative politics is not the only field of political science that focuses on countries or states as primary units of analysis. As noted, IR scholars are also intimately concerned with countries or, more accurately, states. IR is typically more interested in relations between and among states—that is, with their interactions in an international system. However, Lim notes that comparative politics cannot be limited to looking at what happens inside a country or other large social unit. Additionally, it does not mean that we must completely abandon any distinctions among fields of study, especially between comparative politics and IR. Then again, the definition of comparative politics must be amended. Thus, rather than defining comparative politics as a subject of study based on an examination of political phenomena within or in countries, it may be said that it examines the interplay of domestic and external forces on the politics of a given country, state, or society.<sup>312</sup>

In the context of ILO Convention No. 169 it is reasonable to argue that the activities surrounding it – political and legal – interact with the domestic and international sphere. Therefore, the amended definition of comparative politics is used. The Convention is one of the treaties hosted by the ILO and is legally binding on its state parties. In many cases, once it has been ratified, it may be fully or partly internalized by domestic legislation via political and legal changes in the country. Often, prior to the ratification, especially in the case of Finland, there may be strong international pressure to ratify the Convention. In several instances, the country is notified of its obligations toward its indigenous peoples. In this sense the research interest is focused on the interplay of domestic and external forces in Finnish politics. The situation is, then, compared to other cases.

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310 Timothy C. Lim, *Doing Comparative Politics: An Introduction to approaches and Issues*. Lynne Rienner, Boulder Co. USA, 2006,

311 *ibid.*

312 Lim 2006, 11-15.

### **Why compare?**

Comparison, comparative methods, or comparative political research and analysis are used, implicitly and explicitly, across political science, in particular, and the social sciences, in general.<sup>313</sup> According to Lim, there are several reasons as to why this occurs: when making comparisons, researchers not only become aware of differences and similarities, per se, but also realize unexpected variation and surprising resemblance between, or among, “cases”. In this regard, comparisons help bring a sense of perspective to a familiar environment and discourage parochial responses to political issues, which, in turn, provide important opportunities for learning, explaining and understanding political phenomena. Such contrasts help us understand whether a particular political phenomenon is simply a local issue or a generalizable outcome, an objective for many political scientists. Such comparisons also help develop, test, and reform theory.<sup>314</sup>

What is the purpose of comparing, then? Giovanni Sartori notes that comparisons provide *control*.<sup>315</sup> By control, Sartori means — albeit loosely — that we use comparisons as a way of checking (verifying or falsifying) whether our claims or assertions about certain phenomena are valid by controlling for or holding certain variables constant. The focal point is that, different types of comparisons allow a researcher to treat a range of similarities or differences as if they are control variables. In doing so, the researcher can safely eliminate a whole range of potentially significant factors and, instead, concentrate on the variables that he/she deems to be most important.<sup>316</sup>

Secondly, for the researcher who is doing the comparison, an in-depth *understanding* is the aim of such comparative analysis. They are comparing to understand. Researchers use comparison to see what other cases can tell them about a specific case or country in which they are most interested. Thirdly, and instead, they advocate a more pragmatic approach that attempts at building a theoretical generalization—or explanation—through the accumulation of case-based knowledge (this is sometimes referred to as an *analytical induction*).<sup>317</sup>

The type of comparison, chosen for this thesis, is the cross-national comparison,

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313 See more Lijphart, Arend. 1971. “Comparative Politics and the Comparative Method.” *American Political Science Review* 65, 682-693; Lijphart, Arend. 1975. “The Comparable Cases Strategy in Comparative Research.” *Comparative Political Studies*, 8: 158-177; Przeworski, Adam and Henry Teune. 1970. *The Logic of Comparative Social Inquiry*. New York: Wiley. Chapters 1-3.

314 Lim 2006, 15.

315 Giovanni Sartori, 1994.

316 Lim 2006, 20-23.

317 *ibid.* See also Kuhn, Thomas S. *The Structure of Scientific Revolutions*. Chicago, IL: University of Chicago Press 1996.; Geddes, Barbara. *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics*. Ann Arbor, MI: University of Michigan Press, 2003.

which examines patterns of similarities and differences in states' political life. Research questions are analysed in terms of acceptance, implementation, conceptualization, and application in regard to ILO Convention No. 169 because these elements play different roles in each national context. It is obvious that the problems faced by indigenous peoples, today, are similar to each other. Concurrently, it is also interesting to examine the adoption of different approaches in solving analogous matters. It may be argued that indigenous peoples land rights are regarded as an ongoing process of different political interests, new legislation, interpretation and new information brought to an agenda. Therefore, combining the methods of international politics and IL is a fruitful approach.

### ***What is compared?***

In order to determine what is to be compared, it must be noted that, 'entities whose attributes are partly shared (similar) and partly unshared (and thus, we say, incomparable)' may be compared.<sup>318</sup>

For example according to Lim, it would appear to be reasonable to assert that countries, governments, societies, or similar entities are comparable. As they all occupy a territory defined by political boundaries, they also represent the interests of a political community and are recognized (albeit not always "officially", as in the case of Taiwan) by other countries or states. At the same time, they differ from each other in meaningful ways. Indeed, differences are crucially important in any form of comparative analysis. After all, if all countries were *exactly alike*, there would be little reason for comparison. In this respect, comparing apples to oranges would make more sense than comparing apples to apples.<sup>319</sup> Comparative analysis is based on a general "logic", as well as on particular strategies that guide, but do not necessarily determine, the comparative choices we make. Understanding the logic of comparative analysis is, in fact, essential to doing comparative politics.<sup>320</sup>

The comparative method is - together with the experimental method, the statistical method and the case study approach - one of four fundamental scientific methods that may be used to test the validity of general empirical propositions<sup>321</sup> - for example, the establishment of empirical relationships among two or more variables while holding

318 Sartori 1994, p. 17

319 *ibid.*

320 Lim 2006, 24-25. See also King, Gary, Robert O. Keohane, and Sidney Verba.. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton, NJ: Princeton University Press, 1994.; Collier, David, and Henry E. Brady, eds.. *Rethinking Social Inquiry: Diverse Tools, Shared Standards*. Lanham, MD: Rowman & Littlefield Publishers, Inc., 2004.

321 Lijphart, Arend (1971). "Comparative politics and the comparative method". *American Political Science Review* 65 (3): 682-693, 682.

all other variables constant.<sup>322</sup> In particular, the comparative method is generally used when neither the experimental nor the statistical method can be employed. On the one hand, experiments can only rarely be conducted in political science.<sup>323</sup> According to the definition above, the case study approach cannot be considered to be a scientific method. However, it may be useful in gaining knowledge about single cases, which may then be compared using the comparative method. A *case study* is a common research methodology in the social sciences. It is based on an in-depth investigation of a single individual, group, or event and may be descriptive or explanatory.<sup>324</sup>

Why utilize these cases in this study?

The answer is easy, as one of the primary reasons for the study was the examination of other countries in clarifying the Finnish situation regarding ILO Convention No. 169, while supplying decision-makers with tools that will allow them to further proceed with rights, particularly land and water rights, concerning the Saami. This may be accomplished by placing certain variables within the comparative approach. As Finland's main problem is related to land rights articles (13-19 of the Convention and especially Article 14) and Article 1, which deals with the subjects and objects of the Convention, it was reasonable to set these questions as the variables of this approach. Studying various situations in different countries provides diverse and similar approaches, which could perhaps be useful for Finland's situation. However, the basic assumption is that no uniform, but tools from many different cases and approaches, can be found.

Different cases include *ratifying*<sup>325</sup> and the *non-ratifying states*<sup>326</sup>. It must be noted that some of the countries that have ratified ILO Convention No. 169, such as the Netherlands, do not have indigenous peoples living within their territory. They have, instead, ratified the Convention in order to show solidarity with their former colonies. Therefore, the Netherlands has nothing to report to the Committee of Experts in regard to the Convention's application. Some of the countries only recently ratified the Convention and have, therefore, not yet sent their first report. Although the primary focus of this work is on countries that have ratified the Convention, other cases will also be introduced when appropriate to the context.

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322 *ibid.*, 683.

323 Hopkin, J. [2002 (1995)] "Comparative Methods", in Marsh, D. and G. Stoker (ed.) *Theory and Methods in Political Science*, Palgrave Macmillan, 249-250, 250.

324 Shepard, Jon; Robert W. Greene (2003). *Sociology and You*. Ohio: Glencoe McGraw-Hill. pp. A-22; Robert K. Yin. *Case Study Research: Design and Methods*. Fourth Edition. SAGE Publications. California, 2009.

325 Argentina, Bolivia, Brazil, Colombia, Chile, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Paraguay, Peru, Bolivarian republic of Venezuela, Nepal, Norway, Spain, Central African Republic, Nicaragua.

326 Especially Finland and Sweden.



## PART II Two Themes

The second part of this thesis is divided into two themes, where the *first* part examines the overview of the institutions and instruments of the ILO, especially in the context of ILO Convention No. 169. The *travaux préparatoires* or the legislative history of Convention No. 169 are examined in detail to provide a starting point for the analysis of the land rights articles. Then, procedures and requirements for filing complaints with the ILO's Governing Body are evaluated with a summary of the jurisprudence of the Committee. Finally, as most states that are party to ILO Convention No. 169 are Central and Latin American states, it concludes with a short section on the relationship between ILO instruments on indigenous peoples and the instruments and bodies of the Inter-American human rights system.

The *second* theme of the thesis is related to the subject-object dichotomy of ILO Convention No. 169. Although it is understood that states are the ultimate subjects of the Convention, the approach is a puzzle of different approaches – is argued that states, peoples and individuals are all “subjects” of this Convention. At the end of this chapter, conclusions on liberal theory and the rights of indigenous peoples are provided. These rights often challenge traditional state sovereignty from internal and external points of view. Within this context, it is also relevant to emphasize the relationship between indigenous peoples to/with the land and the challenges it reflects to the subjects of these land rights. Finally, some recommendations are expressed for future development in enabling Finland to proceed with this important question related to Saami land ownership.

### **2.1 ILO Convention No. 169: a State-Oriented Convention recognizing Indigenous Peoples' Rights of Ownership to Land**

#### **2.2.1 Some Words on the History of ILO Work with Indigenous Peoples**

For overall clarification, it is necessary to compare the status of minorities, on the one hand, and indigenous peoples, on the other. Variations in the emergence of minorities and indigenous peoples are complex and cannot be examined in detail here. These two actors are often compared on the international scene, so their different history must be kept in mind. The emergence of minorities was, and still is, generally described as the result of changing state borders, immigration, and forced migration. The emergence of indigenous peoples, from the late 15<sup>th</sup> century onward, is depicted as the result of

contacts between indigenous peoples and ‘non-indigenous’ peoples in other parts of the world in the context of European colonial expansion.<sup>327</sup>

The international protection of indigenous peoples in international documents began in 1957 with the adoption of Convention No. 107 by the International Labour Organization (ILO)<sup>328</sup>. Until the 1970s, the ILO was the only member of the UN system to have consistently expressed an interest in indigenous peoples’ rights. This was largely due to the widespread exploitation of indigenous labour, which presently still continues in certain countries. The ILO began to study the condition of indigenous workers as early as 1921; a Committee of Experts on Native Labour was established in 1926; a number of early Conventions addressed the situation of indigenous workers (Convention No. 29 in particular) and; in 1953, the ILO published a comprehensive reference work titled “Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries.”<sup>329</sup>

It is reasonable to mention an important provision, Article 11, of ILO Convention No. 107, which concerns land rights and provides that, ‘[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized.’ When interpreting this article in regard to a complaint involving Indian tribal peoples, the ILO Committee of Experts (CEACR), a body mandated with the oversight of state compliance with ILO Conventions, held that the rights attached to Article 11 also apply to lands presently occupied irrespective of immemorial possession or occupation. India had unsuccessfully argued that the phrase ‘traditionally occupy’ limits compensable land rights to groups, which can demonstrate immemorial possession. The CEACR stated that because the people have formed some form of relationship with the presently occupied land, if only for a short time, it was sufficient enough to form an interest and, consequently, rights to the land and attendant resources.<sup>330</sup> As with ILO Convention

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327 Martinez, A., *Discrimination Against Indigenous peoples, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, Third Progress Report, E/CN.4/Sub.2/1996/23, 15 August 1996, §§ 169, p. 172.

328 The ILO was founded in 1919 as a specialised agency of the League of Nations, the predecessor of the United Nations. It was the first international organisation devoted to the protection of human rights. Today, the ILO is a specialised agency of the United Nations with headquarters in Geneva and offices throughout the world. It is unique among international organisations in that its Constitution recognises the membership, with attendant voting privileges, of non-state actors – workers’ and employers’ delegations – in addition to states. The ILO’s tripartite membership structure accords workers’ organisations, or ‘industrial associations’ as they are called by the ILO, a substantial voice in the ILO’s decisionmaking process. In practice, however, the states’ and employers’ delegations often vote together lessening the impact of the workers’ delegations vote. Nonetheless, the workers’ delegations have exercised some influence in the ILO, in particular acting on behalf of indigenous peoples during the drafting of ILO 169. The ILO’s institutional structure is also tripartite. Its three organs are: the International Labour Office, the Governing Body and, the General Conference of representatives of member states, or the International Labour Conference as it is usually called. See more [www.ilo.org](http://www.ilo.org).

329 Mackay Fergus, 2002, 7.

330 *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), at 287, International Labour Conference, 75th Session, Geneva, 1988.

No. 169, indigenous and tribal peoples, living in countries that have ratified ILO Convention No. 107, may seek the enforcement of their rights by approaching the ILO's Governing Body. The same procedures that apply to ILO Convention No. 169, discussed in chapter 2.1.4, also apply to petitions submitted in relation to ILO Convention No. 107.

The assimilative approach of Convention No. 107 was explicitly abandoned in 1989, in a subsequent ILO Convention No. 169, concerning Indigenous and Tribal People in independent countries, while criticism exists towards that Convention as well. According to its Preamble,

“the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilative orientation of the earlier standards.”

An additional development of Convention No. 169 was that it called attention to the ‘distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and [...] international co-operation and understanding.’ Thus, a positive aspect of indigenous peoples was emphasised, and a positive motivation was provided for protecting them. However, it should be noted that ILO Convention No. 169 may be regarded as challenging in many ways and has also been severely criticised by many indigenous peoples<sup>331</sup>, particularly concerning its lack of self-determination language; weak provisions on lands, territories, resources and relocation; lack of a consent standard; and the absence of meaningful indigenous participation in the revision process. Convention No. 169 should also be regarded as an absolute minimum statement of indigenous rights; this is particularly apparent in comparison to the UN Declaration. Nonetheless, a number of indigenous peoples’

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331 *The Resolution of the Indigenous Peoples' Preparatory Meeting* – Geneva, (1989), severely criticised ILO Convention No 169. The resolution:

1. Calls upon indigenous peoples all over the World to seize every opportunity to condemn the ILO and the revision process.
2. Calls upon states not to ratify the revised Convention.
3. Calls upon indigenous peoples to monitor the ILO and governments in the implementation of the Convention.
4. Calls upon support groups of indigenous peoples to urge states not to ratify the Convention and to publish lists of governments who ratify the revised Convention.
5. Calls upon members of the Working Group and the Sub-commission on the Prevention of Discrimination and Protection of Minorities to condemn the racist revision.
6. Calls upon the Working Group to monitor the implementation of the revised Convention.
7. Calls upon governments and human rights experts involved in the process of drafting of the Declaration on the Rights of Indigenous Peoples not to repeat the mistake of the ILO.
8. Calls upon the Working Group, the Sub-commission and governments to disregard the terms of the revised Convention in the process of achieving a meaningful development on the draft Declaration on the Rights of Indigenous Peoples.

organisations are promoting the ratification of ILO Convention No. 169 in countries where indigenous peoples have expressed a desire to do so.<sup>332</sup> According to Fergus Mackay, there are a number of reasons for this<sup>333</sup>:

*“First, and most importantly, for indigenous peoples in certain states ratification of ILO Convention No. 169 will be a major step forward for the protection of their rights as national laws are presently sub-standard, unenforced or even hostile. At a minimum, ratification of the Convention provides international oversight and a measure of transparency to indigenous-state relations, consultations and negotiations that were previously entirely within the jurisdiction of the state and addresses a number of concerns in a relatively positive manner.”*

*“Second, and equally importantly, for those states which have not ratified ILO Convention No. 169, but have ratified ILO 107, the latter remains in force with its disrespect for indigenous culture and identity intact. For those peoples in states with national legislation of a higher standard than ILO Convention No. 169, ratification will in no way prejudice the enjoyment of those rights over and above ILO 169’s standards. This is explicitly stated in Article 35, which says that the application of the ILO Convention No. 169 ‘shall not adversely affect the rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties or national laws, awards, customs or agreements’.”*

*“Third, ratification of ILO Convention No. 169 provides access to the ILO’s reporting and monitoring procedures, which are among the best available. States-parties to the Convention must report on a regular basis to the ILO Committee of Experts on the Application of Conventions and Recommendations, on steps taken to implement and maintain compliance with its terms. In fact, even member-states of the ILO that have not ratified the Convention must report on the reasons for not doing so.<sup>334</sup> Additionally, complaints may be submitted to the ILO by interested*

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332 According to Fergus MacKay (2002) the following international indigenous organizations are actively promoting the ratification of ILO 169: the Inuit Circumpolar Council, the National Indian Youth Council, the Saami Council and the World Council of Indigenous Peoples. Additionally, many national indigenous organizations are promoting ratification in their respective states: Guyana, Suriname, the Philippines and India, for instance.

333 Mackay 2002, 10-11.

334 ILO CONST. Article 19.5.

parties, in certain cases including indigenous peoples, informing the ILO of perceived violations.”

*“Finally,* the language of ILO Convention No. 169 is relatively imprecise, permitting flexible interpretations of its provisions. Therefore, ILO 169 can be either interpreted expansively, increasing the scope of its provisions, or restrictively, having the opposite effect. Consequently, it is important for indigenous peoples to participate in any process that involves the interpretation of the convention, particularly in the Committee of Experts to ensure the most favourable interpretation of the standards contained therein.”

According to McKay, and as stated in the revision process, the primary purpose of ILO Convention No. 169 is to ‘recognize the principle of respect for the identity and wishes of the [indigenous peoples] concerned and to provide for the increased consultation with, and participation by, these populations in decisions affecting them.’<sup>335</sup> Thus, there is an emphasis on the participation of, and consultation with, indigenous peoples, particularly concerning development-related activities. However, McKay notes that the consent of the indigenous people(s) concerned is not required. Instead, the consultation goal is simply attempting to achieve a good faith agreement between the parties.<sup>336</sup>

ILO Convention No. 169 is one of the ILO’s procedural conventions. Therefore, the Convention primarily recognises procedural rights, as opposed to substantive rights. In other words, the Convention sets forth procedures that the state is required to follow and comply with in relation to indigenous peoples. Consequently, according to McKay, the Committee of Experts is more interested in whether the state has followed the correct procedures (i.e. consultation, participation, environmental impact assessments) than the result of its actions. Exceptions to this include Article 14, which requires that the state recognises and respects the rights of indigenous peoples to own and to traditionally use and occupy their lands. This is a substantive right that requires that the state produce a concrete results.<sup>337</sup>

ILO Convention No. 169 includes rights to participate in the formulation of legislation; certain rights to internal autonomy, including economic, social and cultural development; respect for certain aspects of indigenous customs or customary laws; rights to lands and territories, including use rights, traditional economic activities

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335 See for example ILO, a Manual 2000, 15-18.

336 MacKay 2002, 12.

337 *ibid.*

and the use of natural resources; protection from relocation and; broad based cultural rights – religious, linguistic and educational.<sup>338</sup>

### 2.1.2 The Scope of the Land Rights, Articles 13-19

The provisions of the ILO Convention No. 169 on lands, territories and resources have justifiably been criticised by indigenous peoples as inadequate. Nevertheless, these provisions do contain a number of important protections over and above those presently found in some domestic legal systems. These provisions are framed by Article 13(1), which requires that governments recognise and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories and especially ‘the collective aspects of this relationship.’<sup>339</sup>

This chapter introduces the land rights provisions of ILO Convention No. 169 with a special focus on Article 14. An important emphasis has been placed on the *travaux préparatoires*<sup>340</sup> or *legislative history* of the Convention when Convention No. 107 was revised. Special attention has been directed at the wording of the Convention and its different interpretations of the land rights articles. According to Fergus MacKay, two points should be made with regard to the interpretation of the Convention. First, the *travaux préparatoires* and the Reports of the Committee of Experts are indispensable guides to the background and the content of various provisions of the Convention.<sup>341</sup> These reports can, and should, be used to clarify the language of the Convention’s provisions. Second, many of the Convention’s articles overlap and inform the content and scope of other articles. Therefore according to MacKay, when reading a particular provision of the Convention, constant reference should be made to the general principles of participation, consultation, and respect for indigenous culture and institutions, as well as any other related articles.<sup>342</sup>

During the revision process of ILO Convention No. 107, it became evident that the loss of traditional lands and the lack of control over development projects carried out on these lands are the most important problems confronting indigenous and tribal peoples in the world today. Their lands and territorial base are increasingly under threat as large-scale government or privately sponsored development programmes, such as hydro-

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338 *ibid.*

339 Mackay 2002, 16.

340 The term ‘*travaux préparatoires*’ refers to the all background documents that were used in the negotiation and drafting of an international instrument. The *travaux préparatoires* for ILO Convention No. 169 are contained in, among others, *Reports of the Committee on Convention No. 107* for the years 1988 and 1989 (Provisional Record 32, International Labour Conference, 75th Session (1988) and, Provisional Record 25, International Labour Conference, 76th Session (1989).

341 See, for example, *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, International Labour Conference, 82nd Session, 1995, Report III (Part 4A) (International Labour Office, 1995), 398-99 for ILO 169 and 288-91 for ILO 107.

342 Mackay 2002, 12-13.

electric schemes, oil exploration and pipeline construction, settlement and colonisation programmes, logging and ranching enterprises, agricultural modernisation, and growth in capital intensive commercial farming in the areas occupied by indigenous and tribal peoples are implemented. Indigenous and tribal rural peoples in the Indian subcontinent, the inhabitants of the Andean plateau and Latin American forests, the nomads of Africa, as well as circumpolar peoples are all losing the territories necessary for their survival.<sup>343</sup>

The issue of land rights is bound to prove particularly complex when attempting to define international standards. First, there are great differences in land ownership and tenure, the ownership and control of natural and environmental resources, under and around the land, in national systems. Second, it must be remembered that there is a fundamental difference between the relationship that many indigenous peoples have with the land and the attitude of other sectors of national populations who regard land as an alienable and productive commodity. As the UN Special Rapporteur on indigenous populations has written, '[t]he whole range of emotional, cultural, spiritual and religious considerations is present where the relationship with the land is concerned... The land forms part of their existence.'<sup>344</sup>

The Meeting of Experts emphasized the same point on several occasions when ILO Convention No. 107 began its revision process in September 1986.<sup>345</sup> In describing the special relationship of indigenous and tribal peoples with the lands that they occupy, the expert of the World Council of Indigenous Peoples stated that reference should be made to "traditional territories" as opposed to simply referencing land. This concept includes all matters pertaining to the lands, including water, sub-oil, air space, all occupants, plant and animal life, as well as all the resources. Another expert also stressed the importance of including coastal waters and sea-ice. Moreover, it was noted that many indigenous peoples do not equate ownership with the power to transmit all rights over territories to other persons; instead, they consider themselves as *trustees* of the territories that they occupy and perceive a continuity that runs from their ancestors, through themselves, and to future generations, all of whom possess rights to these territories.<sup>346</sup>

“The special relationship that indigenous peoples often have with their land and environment must be taken into account. However, the nature

343 International Labour Conference, 75th Session 1988. Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 44.

344 United Nations: Study of the problem of discrimination against indigenous populations, by Mr. Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Geneva; doc. E/CN.4/Sub.2/1983/21/Add.4), Ch.XVII, para. 51. In International Labour Conference, 75th Session 1988. Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 44.

345 A Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), September 1986.

346 Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 44.

of this special relationship is likely to render standard setting particularly difficult in the light of different approaches to land and natural resources. On the one hand, given the particular characteristics of indigenous cultures and lifestyles, States may be faced with the need to recognise systems of ownership and tenancy which differ from those prevailing for the remainder of the national population. On the other hand, where development and conservation programmes are concerned, States will have to balance the interests of society at large with the particular needs of the more vulnerable indigenous and tribal groups.<sup>347</sup>

According to MacKay, in the three decades since the adoption of Convention No. 107, the conflict between the needs of indigenous and tribal peoples and government development policies and programmes has often been regarded as a serious problem.<sup>348</sup> As it becomes increasingly clear from reports submitted by Governments to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), and from the comments received by the International Labour Office, the removal of indigenous and tribal peoples, whose traditional lands have been selected as the site for hydroelectric or mineral extraction projects, have been both physically removed, as well as been threatened with removal. For the most part, available information indicates that there has been little or no meaningful prior consultation with the indigenous and tribal peoples concerned. Often, no attempt has been made to soften the impact of these projects on vulnerable groups.<sup>349</sup>

However it should be noted that the picture is not only negative. There are several positive examples of how states have begun to examine whether they can reconcile the interests of national economic development with the fundamental rights and needs of indigenous peoples. In other cases, indigenous peoples have taken action to challenge development strategies and demand the protection of their traditional lands through national courts. In other instances, agreements to share profits from mining activities on their traditional lands have been reached. In many areas of the world, organisations and indigenous peoples' representatives make stronger demands for a fairer share in, and greater control over, the exploitation of underground wealth, as well as other resources that pertain to traditionally occupied lands.<sup>350</sup>

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347 *ibid.*, 45.

348 When Convention No. 107 was drafted in the mid-1950s there had already been encouraging signs that for the first time many States were taking measures to recognise, and in certain cases safeguard, traditional forms of indigenous and tribal ownership of land. In a number of countries the alienation or seizure of their lands had been forbidden, title deeds

349 MacKay 2002, 14.

350 Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 45.



### 2.1.3 Ownership and/or Control

In helping to understand the provisions of ILO Convention No. 169, it is also reasonable to examine Convention No. 107 and the *legislative history* or *travaux préparatoires* when the first Convention was revised in the late 1980s. The reports submitted to the Committee of Experts on the Application of Conventions and Recommendations (CEACR) by ratified states is also used to describe trends in legislative and administrative measures, as well as to recognise particular forms of ownership and control by indigenous and tribal forest-dwellers of traditional Latin American territories. This is a particularly useful comparison as it demonstrates that Nordic states are not the not the only states managing the complexity of issues involving indigenous peoples' ownership to land. It also describes a large variety of approaches where similar denominators may be found. These approaches could serve as building blocs in the Nordic countries, at least in Finland.<sup>351</sup>

The Meeting of Experts in September 1986 particular considered two aspects – *ownership* and the *control* of land and resources. First, the meeting recognised the need to ensure the effectiveness of the rights of possession, use or ownership of these lands; in other words, that these persons were able to exercise these rights in practice. It was noted that, in many countries, the extent of lands to which such groups had rights had not been defined. Second, the Meeting of Experts discussed restrictions on indigenous and tribal ownership of lands, particularly whether or not these lands should be inalienable. Nevertheless, while strong feelings were expressed in favour of including the principle of inalienability in a revised instrument, other experts felt that the inclusion of this principle would require certain states to alter fundamental provisions of domestic law. One government expert drew a distinction between separate aspects of inalienability. One is the restraint upon the right of indigenous or tribal owners of land to dispose of or mortgage their land, coupled with the notion that national governments do not have the right to impose economic development without the full and free consent of indigenous and tribal landholders. A second is that national governments do not relinquish their capacity for final decisions on matters of national interest or on the utilisation of natural resources.<sup>352</sup>

Much national legislation on indigenous land ownership not only provides that indigenous lands are to be inalienable, but also places additional restrictions on their use and transfer. In some cases, lands are not subject to attachment, seizure or transfer. Some legislation includes provisions that lands should be commonly held and may not

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351 See more on the situation in Finland from an article within this study: The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with some comparison to Sweden and Norway *Nordic Journal of Human Rights* Vol. 23 Nr. 3:2005.

352 Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 45.

be broken up among individual families of the concerned community. Convention No. 107 expresses no specific preference for the communal or individual ownership of land. However, in the Meeting of Experts, a number of experts felt that a future instrument should express preference for collective, rather than individual forms of ownership.<sup>353</sup>

In the article “*International Norms and Domestic Practices in regard to ILO Convention No. 169 – with Special Reference to Articles 1 and 13-19*”<sup>354</sup> the situation of the countries that have already ratified ILO Convention No. 169, primarily Latin American countries, are examined in more depth. Here, the concept of ownership, in law and practice, is examined in regard to Latin American countries that have indigenous and tribal peoples within their national frontiers. In five Latin American countries (Bolivia, Ecuador, Guatemala, Mexico and Peru), indigenous peoples either form a majority or a substantial percentage of the national population. They have been significantly incorporated in the national economy since Spain’s colonial era. Although certain indigenous groups of these countries have communal titles, and are protected by legislation against alienation or other encumbrance of their customary lands, many others either have private ownership titles to their lands, are tenant farmers, or landless agricultural labourers. There may be little or no difference, in regard to system ownership or land use, between their situation and that of the non-indigenous peasantry and rural labour force. In countries where a smaller percentage of the national population is defined as indigenous (for example Argentina, Chile, Colombia, Costa Rica, Nicaragua and Panama), the ownership and tenure of indigenous lands has, at times, been regulated by special protective legislation, which usually includes provisions against the alienation and seizure of such land. There are also a number of Latin American countries, often bordering the Amazon Basin, where forest-dwelling groups have, until recently, had little contact with the remainder of national society, and where special legislation has been enacted to safeguard against the dispossession of their traditional lands. In the Andean countries of South America there are a substantial number of both settled highland-dwelling indigenous peoples and nomadic forest-dwellers within the same country.<sup>355</sup>

One of the most difficult decisions facing Latin American states, with a settled indigenous population, is whether they should legislate for separate systems of indigenous ownership of lands. Often, these lands have already been largely fragmented, but indigenous organisations are now demanding a partial restructuring of agrarian property systems in order to take account of traditional forms of ownership, which

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353 *ibid.*

354 *International Community Law Review*, Vol 12, no.2. 2010.

355 Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 47.

are deeply and historically rooted. In order to understand the complexities involved, historical background information is also provided in footnotes<sup>356</sup>: Mexico<sup>357</sup>, Peru<sup>358</sup>, Bolivia<sup>359</sup>, Colombia<sup>360</sup>, Chile<sup>361</sup>, Argentina<sup>362</sup>. After changes in Mexican constitutional

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356 "In Latin America during the period of Spanish colonial domination there were legal restrictions against the transfer of indigenous property. Many indigenous communities received title to their lands from the Spanish Crown; at one stage, special courts were created to prevent the alienation of indigenous property. Post independence legislation, however, tended to recognise only private forms of property ownership; this resulted in a heavy loss of lands by indigenous communities, which still continues. While the indigenous *comunidades* were generally broken up by law, many of them survived in practice, in particular in remote Andean regions where there was less pressure on their traditional lands. But the end of the nineteenth century certain countries were already witnessing reactions against the adverse effects of liberal concepts of land ownership on the security of indigenous lands." Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 47.

357 "Constitutional and social legislation enacted in the aftermath of the 1910-17 revolution in *Mexico* was to have a profound impact on the concept of indigenous land rights throughout Latin America. It reversed the trend towards privatisation, reaffirmed the legal basis of communal land ownership, called for the restitution of alienated land to the original indigenous occupants, and recognised the social function of property. The Constitution provided for the restitution, in the form of *ejidos*, of the communal lands of which indigenous and other communities had been unlawfully dispossessed during the previous decades; it also required that land be granted to population centres which lacked ejidos, and to which ejidos could not be restored due to lack of titles or impossibility of identification, or because they had been legally transferred. Furthermore, a new Agrarian Code provided regulations on the ownership and use of ejido. It stipulated that the collective agrarian property rights acquired by the ejidos could not in any form be alienated, ceded, transmitted, rented or mortgaged wholly or in part." Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 48.

358 In the 1960s and 1970s agrarian reform laws were enacted in many Latin American countries, leading to significant changes in systems of land tenure and ownership.

359 As in Mexico previously, a major land reform programme undertaken in *Bolivia* in the 1950s was also based to large extent on the preservation or restitution of customary indigenous forms of land ownership. An agrarian reform law of 1953 provided that the lands usurped from indigenous communities after 1900 should be restored to them when these communities could prove right of ownership, and that the lands of indigenous communities should be inalienable except in certain cases to be established in a special regulation. Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 48.

360 "In Colombia an agrarian reform law enacted in 1961 called for the Colombian Agrarian Reform Institute (INCORA) to allocate more lands to indigenous peoples with insufficient land for their subsistence needs, and to establish new resguardos for indigenous peoples without land. But the same law also granted INCORA the authority to divide resguardos where necessary, apparently subordinating customary land rights to the requirements of efficient production." In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 49.

361 "In Chile legislation enacted in the 1970s and 1980s has reversed earlier legislative prohibitions against the alienation of indigenous lands. Act No. 17729 was enacted in 1972 with the aim of preventing the further division of indigenous lands. It prohibited the sale and alienation of these lands, and also prevented their use and usufruct by non-indigenous persons. In March 1979 Legislative Decree No. 2568 established procedures under which members of indigenous communities could petition for individual ownership. As the Government of Chile informed the United Nations Committee for the Elimination of Racial Discrimination, one aim of the Decree was to provide machinery for obtaining individual titles of ownership, free of charge and on a voluntary basis, for the persons concerned. This legislation and its effects have been criticised widely by Mapuché organisations and other non-governmental organisations, who have asserted that the division of Mapuché lands has been proceeding rapidly since it was adopted." In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 49.

362 "In Argentina the question of indigenous land rights was left to provincial rather than federal legislation. In September 1985 federal Act No. 23302 concerning indigenous policy and support for aboriginal communities was adopted. It stipulates that indigenous communities should receive sufficient land for their agricultural, forestry, mineral, industrial or artisanal needs in accordance with the character of each community. In principle, the lands adjudicated are to be unseizable. The only exceptions, designed to help beneficiaries to obtain credit from official state bodies are to be provided for in the accompanying regulations, which has not yet been adopted." In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 49.

and social legislation, between 1910-17, the legislation was also enacted elsewhere in Latin America, thus, reaffirming the lawful existence of indigenous *comunidades*. The Peruvian Constitution of 1920 and the Bolivian Constitution of 1938 both recognise this status explicitly.<sup>363</sup> In the 1960s and 1970s, agrarian reform laws were enacted in many Latin American countries, leading to significant changes in systems of land tenure and ownership. While indigenous peoples may have benefited from these redistributive measures, the reforms did not necessarily account for their customary systems of ownership and control.<sup>364</sup> In Central America, which has seen the fragmentation of a lot of indigenous lands over the past century, several states have both taken and contemplated measures to provide separate forms of indigenous land ownership.<sup>365</sup> A number of general trends may be detected from Latin American examples of law and practice with regard to securing ownership and the control of lands and resources for indigenous peoples who are more settled. Firstly, while their problems should not be underestimated, a number of states have recently adopted or given consideration to measures that will guarantee systems of ownership that are markedly different from those developed for non-indigenous peasant farmers. In this way, there has been an evident departure from an integrationist philosophy toward one of autonomy and self-management with adequate consultative procedures. Secondly, despite some exceptions, it is generally accepted that restrictions may be placed upon the alienation of, or transfer of, the lands concerned. Thirdly, there is a new awareness that is simply insufficient in recognising indigenous ownership and control over communal lands, which remain in the possession of indigenous peoples – more lands must be made available, either through the adjudication of state lands or through agrarian reform programmes.<sup>366</sup>

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363 Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 48.

364 “In Peru, for example, over 10 million hectare of land were expropriated following the enactment in 1968 of an important agrarian reform law; the majority of beneficiaries were indigenous peoples from non-forest areas had formerly enjoyed legal recognition and separate tenure systems as “Indigenous Communities”, legislation adopted under the agrarian reform programme transformed them into “Rural Communities” and no longer recognised the more settled agricultural indigenous groups in these regions as having the special status of indigenous peoples. The Government of Peru has since stated in its report on the application of Convention No. 107 that it cannot distinguish between the treatment afforded these populations and others in the same regions.” In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 48.

365 “In *Costa Rica* lands inhabited by indigenous populations were declared to be inalienable in 1945. Further legislation enacted in the 1970s provided that indigenous reserves registered in the name of the Land and Settlements Institute (ITCO) were inalienable and reserved exclusively for indigenous settlement. Whereas the lands were not transferable except to other Indians, ITCO could grant leases on these reserves for a limited period of time. In 1976 and 1977 new laws were enacted creating additional reserves for indigenous peoples, and stipulating that any property on the reserve lands currently owned by non-Indians was to be confiscated and turned over to Indians.” In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 50.

366 In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 50.

Finally, when observing situations in Latin America, it may be noted that, in several quarters, there is a renewed awareness of the need to safeguard indigenous forms of land ownership in order to tackle social conflicts that have their origin in the inequitable distribution of land and other resources. This point was also frequently raised during the 12<sup>th</sup> Conference of American States Members of ILO in Montreal 1986. At this meeting, a number of delegates cited the link between the exploitation of indigenous populations, political conflicts and violent confrontations. It was pointed out that violence had led to the scattering and impoverishment of indigenous peoples owing to the loss of their lands and the ensuing loss of their cultural heritage.<sup>367</sup>

Similarly, in the Nordic countries, questions of land ownership have led to difficult circumstances among local stakeholders. Despite no use of violence, various forms of confrontation and mental conflicts have arisen. This situation is highly unfortunate as the events that have led to the current situation occurred a significant amount of time ago.

According to the legislative history, *travaux préparatoires* of ILO Convention No.169, the distinction between forest-dwelling indigenous and tribal peoples in Latin America, and more settled or acculturated peoples is, by no means, always clear one. In some cases, for the purpose of legislative measures and protection,

“a more useful distinction might be drawn between groups whose claims are based on historically derived land rights, and who have a clear awareness of their legal rights and their ability to enter into negotiations with national governments, and groups who are more physically and culturally isolated from the remainder of national society, and thus are more vulnerable.”<sup>368</sup>

In some parts of the world, the situation of forest-dwellers has, since the adoption of the 1957 instrument, changed in a number of ways. Regional and even national organisations of forest-dwelling indigenous and tribal peoples have now been established in several countries, particularly in the Amazon Basin. Their representatives have gained familiarity with national laws and legal procedures, and have, at times, sought legal redress in order to resist encroachment on and the exploitation of their traditional lands by outsiders. Still, there are many other forest-dwelling groups that are still dependent on state, missionary or private bodies for protection against dispossession from their lands. There are also problems of removal and control over mineral and other natural resources, which will be examined later.

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<sup>367</sup> *ibid.*, 51.

<sup>368</sup> *ibid.*

According to the legislative history, all issues concerning the protection of indigenous and tribal lands are closely related to the right of ownership. Where there are firm provisions concerning the effective ownership and control of lands and resources by these peoples, there is less danger that ownership rights may be curtailed due to conflicting national priorities. It has been noted that the relevant Articles of Convention No. 107, while recognising the rights of these peoples to *own* the land that they occupy, do not provide any administrative measures to render that right of ownership effective. Furthermore, Article 11, while recognising the right of ownership over lands, makes no mention of other resources which pertain to these territories and the control of which may be necessary for the continuation of these peoples' traditional lifestyle, or alternatively, for their economic development under conditions that will not destroy their cultures. A further criticism of this part of the Convention, both at the meeting of Experts and elsewhere is that Articles 12 and 13 place too many limitations on the effective exercise of ownership, thereby facilitating the appropriation of indigenous and tribal lands or the removal of these peoples from their traditional lands, without providing for adequate safeguards and procedures when conflicts of interest arise.<sup>369</sup>

In the legislative history of Convention No. 169, it is, thus, suggested that some amendments are made to Articles 11 to 14 of Convention No. 107 in light of national developments and problems noted in the application of the Convention. The amendments suggested in the *travaux préparatoires* had two basic purposes (in addition to revising the Convention's integrationist approach). The first reason for reviewing these articles was modifying or strengthening them to account for the needs of these peoples in light of developments since 1957. The second reason was perhaps even more important than any other modification as it concerned substantive land rights. These suggestions provide for procedures reflecting the basic approach of promoting consultations with representatives of the peoples affected and their participation in making the decisions that affect them.<sup>370</sup>

Land right Article 11 of the ILO No. 107 states:

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

While views were expressed in the Meeting of Experts to the effect that indigenous peoples have generally expressed a preference for collective forms of ownership, in-

<sup>369</sup> In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 71.

<sup>370</sup> *ibid.*

dividual forms of ownership are also widespread, particularly among certain tribal peoples covered by Convention No. 107. So the legislative history suggests that the present wording of this Article should, therefore, be retained. However, a new paragraph may be added, providing that governments take steps to determine the lands that the peoples concerned traditionally occupy and to guarantee the effective protection of the right of ownership, where this has not already been done.

It has been noted that, in Paragraph 4 of the accompanying Recommendation No. 104<sup>371</sup> of Convention No. 107, members of the populations concerned should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preferential rights in the development of such wealth. During the Meeting of Experts it was noted that, in many countries, those who hold the title to land do not have rights to sub oil and other resources. Even though indigenous and tribal peoples have special needs and claims in regard to such resources, a stronger provision that simply extends the ownership of these resources to these peoples would prove to be incompatible with the legal systems of a number of countries.<sup>372</sup>

It is clear from the legislative history and the reports submitted by ratified states that these peoples are particularly vulnerable when others exploit resources on the lands that they occupy. Such exploitation often results in their effective dispossession from lands that have been rendered unsuitable for traditional lifestyles. Additionally, it has been suggested that these peoples should have 'as much control as possible' over the processes as it affects them. It was also clearly noted in a revised Convention that some rights would require radical changes in national legal systems, if the Convention were ratified. The adopted provision adopted on this subject should, therefore, establish the general principle that these peoples should have certain rights, while also providing special measures for their protection where there may be difficulty in the immediate recognition of these rights.<sup>373</sup>

The legislative history therefore suggests that a new provision may provide that the right of ownership over lands, given in Article 11 of Convention No. 107, should be extended to also cover natural resources, including flora and fauna, waters, ice, and mineral, as well as other sub oil resources pertaining to the lands traditionally occupied by the peoples concerned. Taking account of objections that are likely to be raised, a second paragraph may provide that, in places where land and ownership do not include the ownership of mineral and other sub oil resources in the national legal

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371 Recommendation concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Recommendation: R104, Place: Geneva, Session of the Conference:40, Date of adoption, 26.6, 1957.

372 In Report VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Office, Geneva, 72.

373 *ibid.*

system, special measures should be taken to protect the peoples concerned from the exploitation of such resources. It would, of course, be understood that, in accordance with other suggestions made in this context, the adoption of such special measures would follow consultations with these peoples' representatives.<sup>374</sup>

The first report of the ILO on the partial revision of the Convention No. 107<sup>375</sup> was concluded with a questionnaire that was communicated to the governments of the member states of the ILO. These states were, in turn, invited to send their replies to the Office by the end of September 1987. By the time the subsequent report had been drawn up<sup>376</sup>, the Office had received replies from the governments of 53 member States.<sup>377</sup> The Governing Body also noted that they should consult the most representative organisations of employers and workers before finalizing their replies. Governments were also asked to indicate which organisations had been consulted.<sup>378</sup> In preparing their replies for the questionnaire, it was also suggested that governments consult their respective representatives of indigenous and tribal populations, but noted that there was no requirement to do so.<sup>379</sup>

The following chapters present the substance of the general observations and replies made by governments to the questionnaire. In a general comment, the Government of Canada stated:

“Provisions regarding land in a revised Convention should give greater recognition to means other than ‘ownership’ for the effective control of

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<sup>374</sup> *ibid.*

<sup>375</sup> ILO: VI(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988.

<sup>376</sup> ILO: VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988.

<sup>377</sup> Algeria, Argentina, Australia, Austria, Bahrain, Barbados, Benin, Bolivia, Brazil, Bulgaria, Burundi, Canada, Central African republic, Chile, Colombia, Cote d'Ivoire, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, Gabon, German Democratic Republic, Federal Republic of Germany, Guatemala, Guinea-Bissau, Honduras, Hungary, India, Ireland, Madagascar, Mexico, Mozambique, New Zealand, Nicaragua, Nigeria, Norway, Peru, Portugal, Saudi Arabia, Sierra Leone, Suriname, Sweden, Switzerland, Trinidad and Tobago, Uganda, Ukrainian SSR, Union of Soviet Socialist Republics, United Kingdom, United States, Yugoslavia, Zambia. In ILO: VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 1.

<sup>378</sup> The governments of 17 member States, Australia, Benin, Bulgaria, Canada, Colombia, Cuba, Czechoslovakia, Denmark, Finland, India, Ireland, Japan, Madagascar, Norway, Portugal, Sweden, United Kingdom stated that their replies had been drawn up after consultations with the most representative organisations of employers and workers, or made known in their replies in the opinions expressed on certain points by these organisations. In VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 2.

<sup>379</sup> The governments of four countries (Australia, Canada, Finland and Sweden) indicated in their replies that they had carried out such consultations; the Government of Peru stated that because of time pressures it had been impossible to hold formal consultations but that the views expressed by these peoples in previous consultations had been taken into account. The Government of Canada included the comments of the indigenous representatives separately in its report. In ILO: VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 2.



lands by indigenous and tribal populations; historical developments and agreements; the need for governments to recognise currently occupied lands of indigenous and tribal populations while also providing for a process respecting their traditional lands which they no longer occupy.”<sup>380</sup>

The International Working Group (IWG) concluded:

“The flourishing of indigenous peoples, the strengthening and development – let alone the very survival – of their societies, economies, cultures and lifestyles depend upon adequate land and resource bases. Traditional lands designated as ‘indigenous’ lands must be adequate to provide for the economic self-reliance and self-determination of indigenous peoples, and the sharing of lands must only take place with the informed consent of those indigenous peoples directly involved.”<sup>381</sup>

The Government of New Zealand noted:

“Articles 11-14 should be excluded from the revised text.”<sup>382</sup>

The Government of Norway stated:

“The question in Part IV deal with land rights on the basis of the provisions of the Convention No. 107, to which Norway is not a party, and which was drafted without regard for the traditions of the Sami in Norway or for legal developments with regard to property law in Norway including regions inhabited by the Sami. The questions do not therefore in all respects have direct relevance to the situation of the Sami. In Norway, title to land and the right of use land in the area inhabited by the Sami are in principle governed by the same legislation which applies elsewhere in the kingdom. Right of ownership has generally been recognised with regard to land which has been intensively used for economic purposes, whereas less intensive economic activities have formed the basis for right to use only. Sami rights of land use enjoy measures of legal protection.

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380 The Government of Canada in VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 46.

381 The IWG in VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 46.

382 The Government of New Zealand in VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 46.

They are entitled to compensation if they suffer losses, for example, in connection with hydroelectric development. However, they have no legal claim to compensation in the form of land, an arrangement which would in practice be difficult to implement. It is therefore declared public policy that areas necessary for Sami reindeer husbandry shall as far as possible be kept intact. The question of Sami land rights is now being considered in the Commission on Sami Legal Matters. The Commission is charged with describing the current legal situation with regard to land rights. At the present time, Norwegian authorities are precluded from prejudging the final outcome of this process. The basic aim is to safeguard the legal status of the Sami population in order to enable these people to maintain and develop their culture. The absence of definite replies to questions 33-46 should be considered in this light.”<sup>383</sup>

Questions no. 33, 34, 35 and 35 dealt with land rights issues of Convention No. 107. Question no. 33 read: “Subject to question 34 below, do you consider that Article 11 should remain unchanged?”

The clear majority of replies to this question were affirmative (21). However, a number of complex issues have been raised, both in response to this specific question and in more general observations concerning land rights. These issues include, among other things, whether the notion of ‘lands’ should be extended to “territory” for the purposes of Article 11; whether this Article should cover the notions of ‘possession’ and ‘use’ of land; as well as the notion of ‘ownership’ itself; whether the use of the term ‘traditionally’ might be deleted; whether the rights of land ownership should accrue to peoples as a group, rather than to group members; whether a preference may be expressed for collective, rather than individual forms of land ownership; and whether specific reference may be made to the concept of ‘inalienable’ land ownership.<sup>384</sup>

Legislative history concludes that both the term ‘lands’ and ‘territories’ are used in Convention No. 107. While the term used in Article 11 is “lands”, Article 12 refers to ‘habitual territories’. Where the question of ownership is concerned, it would appear to be preferable to retain the term ‘lands’ as in Article 11 because – despite indigenous representatives’ preference at the Meeting of Experts – not all concerned peoples can occupy or possess ‘territories’ in a manner that is similar to the term’s general use in IL. For several centuries, many of the concerned groups have farmed small land areas and plots, either individually or in communal holdings and communities, whereas others have enjoyed the possession and occupation of contiguous and undivided land

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383 The Norwegian Government in VI(2) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (107). International Labour Conference, 75<sup>th</sup> Session, Geneva, 1988, 46.

384 *ibid.* 48.

areas, which are more easily referred to as 'territories'. Thus, the use of the term 'territories', for the purpose of Article 11, may raise complex issues with regard to the peoples covered by this instrument.<sup>385</sup>

Both government replies and participants at the Meeting of Experts raised the importance of the concepts of possession and use. In light of the fact that certain concerned peoples may, indeed, attach more importance to these concepts than to the legal notion of ownership, it would appear to be appropriate to refer to possession and use in this provision. The legislative history noted that the Committee of Experts, in supervising the implementation of Convention No. 107, recognised the importance of these concepts.<sup>386</sup>

In their replies, two governments suggested that consideration would be given to deleting the term 'traditionally' from Article 11. In the legislative history, it is stated that this term cannot be taken to realistically imply that these peoples should have recognised ownership rights over all lands traditionally occupied by them at all previous stages of their history (although procedures may be established to deal with land claims made on the basis of immemorial possession). The Committee of Experts has taken the view that the use of the term 'traditionally' *refers to the manner of, and criteria for, land occupation*, rather than giving rise to a detailed inquiry into past history, though it is also consistent with claims for restitution. In light of this, it would be preferable to retain the term 'traditionally' in a revised instrument.<sup>387</sup>

With regard to the forms of land ownership, it would appear that one purpose of the Article 11 is to recognise that the peoples concerned have a right of land ownership, possession and use, in accordance with their own customs and traditions, even though these may be different from those prevailing for other members of national society. The Government of Colombia suggested that Article 11 would be complemented by a phrase indicating that the property rights of indigenous and tribal peoples should be recognised and respected in the same manner as those of other citizens. This would, however, appear to require that these peoples adapt to the prevailing national system, as opposed to the national system recognising their right to the ownership and possession of these lands, which is what the present instrument requires and appears to reflect in the prevailing opinion.<sup>388</sup>

One respondent suggested that a provision for inalienability be made for this Article. In this regard, the legislative history noted that indigenous and tribal representatives, who were present at the Meeting of Experts, unanimously concluded that these lands should be inalienable, which is consistent with other available information on these

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385 *ibid.*

386 *ibid.*

387 *ibid.*

388 *ibid.*, 49.

peoples' wishes. However, as this issue concerns the transmission of rights of ownership, it would be dealt with more appropriately under Article 13. In view of the opinions expressed, and of the doubts raised as to the use of the word 'ownership', the Proposed Conclusions add a reference to possession. If this amendment were to be accepted (as it was later on), there would appear to be no need to retain the words 'collective' or 'individual' in the first paragraph of a revised Article 11. No preference would be expressed, and *it could be left to the peoples concerned to determine their own preferential form of land holding and ownership*.<sup>389</sup>

Question no. 34 asks: "Do you consider that a paragraph should be added to Article 11 providing that governments should take steps, where this has not already been done, to determine the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their right of ownership?"<sup>390</sup>

The great majority of responses to this question were affirmative (26). Some suggestions for partial rewording were made. These included, for example: to use 'identify' rather than 'determine'; to provide that the steps should be taken in collaboration with the peoples concerned; to include reference to treaty rights; and to include reference to ground rent, possession and tenurial arrangements, as well as ownership. The Proposed Conclusions incorporate the word 'identify'. The legislative history highlights that, while collaboration is important, this principle is already proposed above in provisions on general policy, and may not be necessary to repeat the requirements for consent, collaboration or consultation throughout the instrument.<sup>391</sup>

The International Labour Office prepared a report<sup>392</sup> in regard to lands/territories on the basis of the replies to the above-mentioned questionnaire. It is stated that, a working-party discussion was held on this issue and that two basic positions became apparent. First, indigenous and tribal representatives, supported by workers' members and some governments, felt that the word 'lands' are too restrictive and do not express the relationship between these peoples and the territories that they occupy. On a purely practical level, the word 'lands' also does not cover elements such as the sea ice of the northern peoples, which are a part of the territory, but are not land. It also does not reflect other elements that are inherent in the concept of a territory, such as the flora and fauna, water and the environment as a whole. On the other hand, a number of governments and the Employers' members pointed out that some internal legal systems are based on the concept of lands as opposed to territories. This is, at least, the case where the acquisition of enforceable rights is concerned. Furthermore, the word 'territories' is used in many

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389 *ibid.*

390 *ibid.*

391 *ibid.*, 50.

392 International Labour Conference, 76<sup>th</sup> Session 1989, Report IV(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). ILO, Geneva 1988.

national legal texts, but only refers to the national territory as a whole. In this context, the use of the term may raise problems in connection with national sovereignty.<sup>393</sup>

The International Labour Office points to the fact that both terms – ‘lands’ and ‘territories’ – were already used in the second part of Convention No. 107 and that no problems have arisen in interpreting them since 1957. It appears as though the issues raised during the Conference discussion could be resolved if the word ‘lands’ were used in connection with the establishment of legal rights, while ‘territories’ were utilized when describing a physical space, when discussing the environment as a whole, or when discussing the relationship of these peoples to the territories that they occupy.<sup>394</sup> Later, in the subsequent report by the Office,<sup>395</sup> the wide divergence in views is noted. The Office has, however, retained both terms according to the context, as is the case in Convention No. 107. It is also highlighted that some of the rights provided for in this part specifically relate to the land itself, as is the case with the ownership and transmission of land rights. Other provisions relate to matters such as waters and other natural resources, or to the question of the removal of these peoples from the areas that they occupy. Moreover, in certain provisions, the terms ‘lands and territories’ are used together. The Government of Australia stated that the term ‘territories’ does not appear to be appropriate for areas with which indigenous peoples may retain a traditional association, but to which they do not hold any form of legal title. However, the term ‘territory’ would not appear to carry the implication of a legal title, but only of a geographical area subject to a particular jurisdiction.<sup>396</sup>

Certain respondents, particularly from non-governmental and workers’ organisations, have proposed a significant restructuring of this Part of the Convention. At this late stage of the revision process, the Office considers a major restructuring, which would necessarily involve the replacement of several Articles while the inclusion of new ones would be inadvisable. However, the substantive submitted proposals have largely been taken into account. Several respondents have also similarly proposed the inclusion of a new Article at the beginning of this part. As this proposal also received considerable support during the first discussion, such a provision (Article 13 in the new text) has been included, thus, providing a useful introductory basis for considering the complex issue of land rights in the subsequent Articles of this part. Furthermore, this may help establish the principle that, in certain matters, because of the special relationship between their lands and cultures, the peoples concerned should, indeed,

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393 International Labour Conference, 76<sup>th</sup> Session 1989, Report IV(1) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). ILO, Geneva 1988, 4.

394 *ibid.*

395 International Labour Conference, 76<sup>th</sup> Session 1989, Report IV(2 A) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). ILO, Geneva 1988.

396 International Labour Conference, 76<sup>th</sup> Session 1989, Report IV(2 A) Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). ILO, Geneva 1988, 32-33.

be accorded different treatment, in comparison to other sectors of the national population. A small number of respondents have expressed concern that such distinct or preferential treatment might constitute discrimination against other sectors of society.<sup>397</sup>

In Report IV (2A) by the International Labour Office, land rights Article 14 was suggested as follows:

1. Governments shall take steps to identify, in co-operation with the peoples concerned, and where necessary to demarcate, the lands and territories of the peoples concerned and to guarantee the effective protection of their rights.
2. The peoples concerned shall be accorded exclusive rights of ownership, possession and control to the largest practicable portion of their traditional territories.
3. The peoples concerned shall be accorded the greatest practicable rights of non-exclusive possession and use to those portions of their traditional territories which have been occupied or are used by other persons. The nature and legal form of the rights recognised shall be determined in co-operation with the peoples concerned. On no account may the peoples concerned be deprived of their forms of subsistence.
4. Conflicting rights or claims to any portions of the traditional territories of the peoples concerned shall be resolved equitably in accordance with criteria and procedures established in co-operation with the peoples concerned.

The Office has made a commentary on the basis of respondents by governments. According to the Office, when it concerns the use of the terms 'ownership', 'possession' and 'use', the Governments of Canada and Norway have made identical proposals based on a suggestion submitted during the first discussion. In light of other received observations, the Office considers that, to assimilate the term 'use' to ownership and possession would weaken the revised Convention in comparison to Convention No. 107, which recognises the right of ownership; it has therefore dealt with this question separately. The Government of India considers that the concept of possession is unacceptable, and proposes its deletion. This wording would, however, correspond to cases in which the rights that indigenous or tribal peoples have acquired through occupation should be recognised, but are not appropriate to be recognised via ownership. Several respondents and the Meeting of Experts convened on this question in 1986. They put forward effective arguments in favour of including the concept. Indigenous and tribal peoples' representatives have also indicated that they often attach more importance to possession than to ownership.<sup>398</sup>

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<sup>397</sup> *ibid.*, 33.

<sup>398</sup> *ibid.*, 36.

The concern expressed by the Government of the United States over the meaning of ‘traditionally occupy’ was already addressed in earlier reports. The Office considers that this term would not grant rights to any occupied territory. In any case, *it would be subject to the land-claims mechanisms* referred to below. Different views were expressed concerning users’ rights. The Food and Agriculture Organisation of the United Nations also previously raised such concerns with special reference to nomadic peoples. Recommendation No. 104, which supplements Convention No. 107, contains provisions dealing with land-use rights for nomads and shifting cultivators. An additional paragraph was, thus, inserted in order *to distinguish between the right to use and the rights of ownership and possession*. The term ‘preferential use’ has not been retained, as the concept would, in this context, be contrary to the sought objective.<sup>399</sup>

Some respondents have suggested that the present Article should refer to Article 19 concerning the resolution of land claims. The Office has proposed to incorporate the Article in the present one (Article 14 in the new text) in recognition of the close links between the identification of relevant lands and the resolution of claims. The retention of the existing wording appeared appropriate in maintaining maximum flexibility. Far-reaching proposals by Australia (ACTU) and Canada (IPWG) have been taken into account in preparing the proposed text. However, if accepted in their entirety, they would considerably go beyond what other participants appear to accept. The Government of Chile’s proposal to promote ‘family ownership’ has not been retained, as it advocates giving priority to a single model of land rights in preference to many existing ones.<sup>400</sup>

### 2.1.4 On the Complaint Procedures of ILO Convention No. 169 with a Focus on Representations

State compliance with obligations assumed under various ILO Conventions is monitored by two bodies: the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts, CEACR) and the Conference Committee on the Application of Conventions and Recommendations (Conference Committee). As noted earlier, the Committee of Experts, which usually meets in Geneva, is composed of 20 independent experts that represent global regions, as well as economic and political systems. The Conference Committee’s membership is composed of delegations from ILO’s three groupings and annually meets in Geneva during the session of the International Labour Conference.<sup>401</sup>

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399 *ibid.*

400 *ibid.*

401 About the supervisory mechanism of the ILO Conventions, see ILO A Manual 2000, 74-77.

As mentioned, one of the benefits of ratifying ILO Convention No. 169 is access to the ILO's reporting and monitoring procedure, which is regarded as one of the best available. The ILO regularly and systematically monitors the implementation of its ratified Conventions. This is done in a number of ways. Firstly, by requiring states to report on steps taken to implement ratified Conventions (every 2–4 years). These reports are annually reviewed by the Committee of Experts and require states to report on reasons for not ratifying Conventions if they have not done so within one year of their adoption by the ILO. Secondly, by receiving reports from workers and employers' organisations, operating in states that have ratified Conventions, as a supplement to information received from states. Thirdly, and importantly, there is a complaints procedure, which can be used to raise and address perceived violations of ratified ILO Conventions.<sup>402</sup>

The work conducted by the *Committee of Experts* is extensively explained in article No. 2 of this study. Different cases related to the reporting process of the ratified state and the Committee of Experts are introduced in various articles and chapters of this study. These cases bring up important knowledge on political and legal changes in domestic practices while cases of *representation* and *complaints*, introduced in this chapter, present the compliance mechanism of the ILO structure. It is however, important to emphasise that all procedures are an integral part of the ratification process. We must also be aware of the possible consequences of ratification, as well as the mechanisms provided for the disposal of possible problems.

Another ILO method used to encourage and facilitate compliance with the obligations assumed under its treaties is 'Direct Contacts'. According to MacKay these direct contacts 'essentially entail the provision of technical support from the International Labour Office or individual experts to governments to aid in the implementation of and respect for ILO Conventions.'<sup>403</sup> The aim of this technical cooperation is to develop recommendations and find solutions for problems related to implementing or respecting rights defined in a ratified Convention. For instance, if a state is remiss in implementing or respecting the protection of indigenous lands and territories, defined in ILO Convention No. 169, the ILO may, for example, aid in designing legal reforms, strengthening indigenous land management institutions, or a combination of both. An advantage for states in agreeing to, requesting and complying with Direct Contacts is that they are able to avoid public criticism.<sup>404</sup>

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402 *ibid.*

403 MacKay 2002, 21-22.

404 MacKay 2002, 22. According to ILO the technical assistance activities for indigenous and tribal peoples are specifically designed to meet the following criteria: 1) to respond to local conditions; 2) to be formulated and implemented with the participation of the peoples concerned; and to be culturally appropriate. See more about the technical cooperation, ILO A Manual 2000, 81-82.



There are four main complaint procedures that may be utilized in the ILO system: Representations (*ILO Constitution, Article 24*); Complaints (*ILO Constitution, Article 26*); Freedom of Association complaints; and Special Surveys on Discrimination in Employment.<sup>405</sup> These procedures are subject to relatively few procedural requirements, thereby providing easy access and reducing the need for technical support. While all of these procedures may be of some use, Article 24, *Representations*, and to a much lesser extent Article 26, *Complaints*, are most useful for indigenous peoples in states that have ratified ILO Conventions No. 107 and 169. Consequently, I will only discuss those procedures.<sup>406</sup>

Under Article 24, any ‘industrial association’ can submit representations to the ILO. The definition of an industrial association is flexible and includes trades-unions, as well as local, national or international associations. Indigenous peoples’ organisations, campesinos’ unions and cooperative associations, which represent farmers, fishers, artisanal workers or other indigenous workers, may also be included in this category. Article 26 – Complaints – may be instituted by a delegate to the International Labour Conference. This would most likely be a representative of a Workers’ delegation, who may also be an indigenous person. Therefore, it is important to highlight that indigenous peoples may have direct access to the ILO to raise issues concerning violations of the rights defined in ILO Convention No. 169. In the Nordic context, it is also relevant to understand that, for example, indigenous reindeer herders could be subjects in filing a complaint under Article 26 of the ILO Constitution. This means that difficult issues can, not only, be raised prior to ratification, but also after the ratification has taken place. Furthermore, the organisation submitting the representation does not have a factual connection to the situation. Thus, relatively few procedural obstacles and the possibility of direct access or coordination with Workers’ organisations, which have been helpful for indigenous peoples in the past, provide an opportunity for the examination of grievances in an international forum.<sup>407</sup>

Representation under Article 24 of the ILO Constitution may be filed against any ILO member state that has ratified an ILO Convention and is perceived to have failed to meet its obligations as defined under that Convention. If the state concerned is not an ILO member state, the fact that it is bound by a Convention is sufficient. Any industrial workers or employers’ association may submit the representation. The *Governing Body*, the executive body of the ILO whose Office is the secretariat of the Organization, then investigates the representation. The Governing Body meets three times a year, takes decisions on ILO policy, decides on the agenda of the International

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<sup>405</sup> About the complaints procedure at the ILO see more Complaints at <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm> Accessed 23.11.2011.

<sup>406</sup> *ibid.*

<sup>407</sup> *ibid.*, 23-24.

Labour Conference, adopts the draft Programme and Budget of the Organization for submission to the conference, and elects the Director-General.<sup>408</sup> The procedure governing the receipt and examination of Article 24 is set out in the Standing Orders of the Governing Body concerning the examination procedure of representations under Articles 24 and 25 of the ILO Constitution. These Standing Orders are repeated in Appendix 2 of this study.<sup>409</sup>

After a Representation has been found to be legally admissible, the Governing Body appoints a special committee, among its members, to examine the allegations. The special committee will, at this point, request a response from the concerned state and may demand further information from the submitting organisation, if necessary. The special committee then forms an opinion, as well as any recommendations, and communicates them to the Governing Body. Based on the opinions of the special committee and the information received from the parties, the Governing Body will reach a decision on whether a violation has or has not occurred. If the Governing Body finds that the state has not violated the terms of the Convention, the proceeding is terminated. If it finds that the state has, indeed, violated the terms of the Convention, it may publish the Representation, along with its opinion and other supporting documents. It may also decide to establish a Commission of Inquiry to examine the Representation under the Compliant procedure of Article 26 (see below).<sup>410</sup>

The Committee of Experts and the Conference Committee, which oversee state compliance with the decision, follow up on the findings of the Governing Body. This may include the use of Direct Contacts, Observations, as well as Direct Requests. As noted earlier, many states comply with recommendations developed by the ILO's supervisory machinery.

The requirements for filing a complaint under Article 26 of the ILO Constitution are the same as those for submitting a representation. It is important to notice that, in this respect, the only difference is who is competent in instituting the proceeding. Complaints must either be filed by a delegate to the International Labour Confer-

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408 See more about the function of the Governing Body at <http://www.ilo.org/gb/about-governing-body/lang--en/index.htm> Accessed 23.11.2011.

409 The ILO has very loose admissibility requirements. To be declared admissible a Representation must include the following (*Article 2, Standing Orders*). It must:

- 1 be in writing and in a widely used language;
- 2 be submitted by an industrial or employers' association – some description of the organisation should be included as evidence of its status;
- 3 concern a member-state of the ILO or a state bound by an ILO Convention (if not a member);
- 4 make specific reference to Article 24 of the ILO's Constitution;
- 5 concern an ILO Convention ratified by the state in question and the Convention must be in force for that state; 24 and,
- 6 allege that the state has failed to respect the rights defined in a ratified ILO Convention; this should include, although not required, information and documentation to substantiate the claim. MacKay 2002, 23.

410 See more: Introduction to the Governing Body at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_098160.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_098160.pdf)

ence, by a member-state of the ILO, or by the Governing Body. Complaints are also examined by the Governing Body.<sup>411</sup>

After the complaint is declared as admissible, the Governing Body begins its investigation. As with representations, the state is requested to submit information responding to the allegations contained in the complaint. At this point, a quasi-judicial Commission of Inquiry is usually established in order to pursue the matter.<sup>412</sup> The Commission requests that the parties (the state and those submitting the complaint) submit written presentations concerning the allegations, which are then exchanged by the parties so as to formulate a response and submit additional information if necessary. The Commission may also solicit information from other states and NGOs to aid in the investigation. This stage is normally followed by hearings involving the parties or their representatives, as well as any relevant witnesses. Occasionally, at the discretion of the Commission, on-site fact finding missions are also organised.<sup>413</sup>

According to MacKay and the official web pages of the ILO, the Commission's decision includes a determination of compliance or non-compliance, as well as detailed recommendations on how to remedy the situation that gave rise to the complaint. Decisions and recommendations are published in the Official Bulletin of the ILO. The former are implemented in the same manner as resolutions reached under the representations procedure. However, two additional enforcement options exist with regard to complaints, neither of which has been used to date. First, the Governing Body can recommend appropriate actions, taken to enforce the Commission's decision (Article 33, ILO Constitution), to the International Labour Conference. Secondly, an ILO member-state may request that another Commission of Inquiry be established in order to determine if the state found in violation has complied with the original decision (Article 34, ILO Constitution). MacKay emphasises that these options have not been previously used due to a lack of political will on the part of the ILO and because states usually comply with recommendations of the ILO's supervisory machinery, thereby forgoing the unknown need to resort to them.<sup>414</sup>

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411 It must:

1 be in written form, in a language that is widely used;

2 be filed by either an ILO member-state, the Governing Body or a delegate to the International Labour Conference;

3 concern a member-state of the ILO or one bound by an ILO Convention;

4 concern a Convention ratified by, and in force for the state in question and;

5 allege the failure of the state in question to secure the effective enjoyment of a right or rights defined in the relevant Convention, including, although not required, as much supporting evidence as possible.

412 See more about the Complaints at <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/complaints/lang--en/index.htm> Accessed 23.11.2011.

413 Ibid.

414 Mackay 2002, 25.

To conclude, it is obvious that the reporting and complaints procedures of the ILO offer an opportunity for indigenous peoples to raise their human rights concerns in an international forum. As emphasised in the discussion of ILO Convention No. 169, the imprecise nature of the Convention's language permits the flexible interpretation of its provisions. Therefore, it is important for indigenous peoples to actively participate in any ILO procedure that may have some bearing on the elaboration of the rights of ILO Convention No. 169. To date, 11 cases have been filed in connection with ILO Convention No. 169: eight have been decided (two on Mexico, two on Colombia and one each for Peru, Ecuador, Denmark and Bolivia) and three are pending before the Committee of Experts, all which are against Mexico. In my opinion, the low number of cases speaks to the effectiveness of these processes. Of course, there may also be other reasons, such as the lack of knowledge, training and education of right holders and the lawyers representing them.

Some of the cases, all of which were filed as representations in accordance with Article 24 of the ILO Constitution, are discussed in the following section. Only cases relevant to this study and provide relevant examples, as well as raise problems have been chosen. The case materials are presented on the official web pages of the ILO under 'Representations under Article 24 of the ILO Constitution.'<sup>415</sup> The chosen cases are only summarized (due to a lack of space) and rely on an excellent summary provided by Fergus MacKay in his 'Guide to Indigenous Peoples' Rights in the International Labour Organization.'<sup>416</sup> The report particularly provides guidance on how to file a complaint with the ILO's Governing Body, which also has relevant information for countries considering ratification.

### **Peru**<sup>417</sup>

In its communication, dating back to July 17<sup>th</sup> 1997, the General Confederation of Workers of Peru (CGTP) made a representation, under Article 24 of the ILO Constitution, alleging that the government of Peru had failed to secure the effective enjoyment of rights under ILO Convention No. 169. The representation concerned the application of a law to coastal indigenous communities, which converted communally held land into individual titles, allowed individuals to sell communal land and set up a special arbitration system to resolve land disputes. The ILO Governing Body appointed a Committee of Experts to examine the representation.

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415 Representations under Article 24 of the ILO Constitution at <http://www.ilo.org/ilolex/english/repframeE.htm> Accessed 23.11.2011.

416 A Guide to Indigenous Peoples' Rights in the International Labour Organization at <http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/iloguideiprightsjul02eng.pdf> Accessed 23.11.2011.

417 Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP). Doc. GB 270/16/4; GB 270/14/4 (1998).

As background information for the case, it must be noted that, on July 9<sup>th</sup> 1997, the Peruvian Congress approved Act No. 26845, which regulated the establishment of individual land titles for indigenous communities in the coastal plain. This Act, according to the Peruvian government, simply recognised the existing form of land tenure (individually held and farmed plots) employed by the communities and was intended to promote more efficient and productive agriculture. The CGTP (General Confederation of Workers of Peru) alleged that this Act was: discriminatory in that it treated coastal indigenous communities on a different basis than indigenous communities in the mountain and forest regions; that it compromised ownership rights, cultural traditions and survival, social organisation and institutions of the affected communities by dividing and allowing individuals to sell communal lands to outsiders; that the community would not receive compensation for lands disposed of by individuals; and that the arbitration system established by the Act was discriminatory and denied the communities access to judicial and other remedies.

In its conclusions, the Committee made explicit reference to Article 13 of ILO Convention No. 169, which refers to, among other concerns, the need for special attention to the collective aspects of indigenous peoples' relationship with their lands and territories. It also made reference to Article 17(2), which requires that indigenous peoples be consulted whenever consideration is being given to alienating their land outside of their community, noting that no consultation had taken place. It stated:

‘The ILO’s experience with indigenous and tribal peoples has shown that when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of their rights by indigenous communities tends to be weakened and generally end up losing all or most of the lands, resulting in a general reduction of the resources that are available to indigenous peoples when they keep their lands in common.’<sup>418</sup>

In regard to the allegation that the arbitration system, imposed by the Act, was discriminatory and denied the communities access to judicial remedies, the Committee noted that Article 2(2) required that measures be taken to ensure that indigenous peoples equally benefit from the rights that national laws grant to other members of society. It then requested that Peru consider amending the section of the Act that established the exclusive jurisdiction of the arbitration system and requested information about whether the communities could access judicial remedies once the arbitration system had made a final decision. The Committee stated that it was not proper for it to determine whether individual or collective titles were the most appropriate form of land tenure

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418 Mackay 2002, 26.

for indigenous peoples in any given situation. However, it then recalled Article 13 and stated that ‘the loss of communal land often damages the cohesion and viability of the people concerned.’<sup>419</sup> According to MacKay, this is why, in the legislative history of the ILO Convention No. 169, many delegates have taken the position that lands owned by indigenous persons, especially communal lands, should be inalienable.<sup>420</sup> In a closed session, the Conference Committee decided that Article 17 should continue the line of reasoning pursued in other parts of the Convention, according to which indigenous and tribal peoples shall decide their own priorities for the process of development (Article 7) and should be consulted via their representative institutions whenever consideration is being given to legislative or administrative measures that may affect them directly.<sup>421</sup> In this case, the Committee stated that the government’s decision, without the consultation or participation of the affected communities, had violated the Convention. The Committee recommended that Peru take the following steps to correct the violation to the Governing Body:

- Submit detailed information on what it had done to implement and give effect to the provisions of ILO Convention No. 169, so that the Committee of Experts could follow up on the case;
- Pay special attention to Article 13;
- Take legislative or administrative decisions that could affect ‘the landownership’ of indigenous peoples in full consultation with their representative institutions, as provided for by Article 6;
- Consult indigenous peoples when considering their capacity to alienate their lands, under Article 17(2). Peru must also inform the Committee of Experts of the measures taken to ensure respect for this right;
- In consideration of Article 2(2), Peru should contemplate amending Section 16 of the Act that established the exclusive jurisdiction of the arbitration panel and inform the Committee of Experts on whether access to judicial remedies was possible after arbitration had been exhausted.

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419 Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP). Doc. GB 270/16/4; GB 270/14/4 (1998). Also MacKay 2002, 25.

420 *ibid.* 26.

421 *ibid.*, 30.

**Mexico**<sup>422</sup>

As in the previous case, the Mexico case, examined by a Committee appointed by the Governing Body, was substantially based on perceived violations of ILO Convention No. 169's land rights provisions (Articles 13 and 14, especially). The case, decided in 1998, was filed on July 9<sup>th</sup>, 1996, by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education on behalf of the Union of Huichol Indigenous Communities of Jalisco (UHICJ). The UHICJ sought the return of the land title to a part of their ancestral lands, which had been granted to non-indigenous communities. They also sought the reunification of these lands with the rest of their land. The case provides an example of the ILO's approach to issues of domestic remedy.<sup>423</sup>

In providing contextual information, it must be noted that, in 1993, the Huichol community of San Andres Cohamiata petitioned the Mexican government for the return of 22,000 hectares of land and the unification of their community. In the same year, they took legal action in the Agrarian Tribunal of the State of Nayarit for the return of a part of this area, which is presently held by the Tierra Blanca community (1255 hectares). They claimed that, in the 1960s, the Mexican government had illegally given this land to a number of non-indigenous communities, separating about 2,000 Huichol from San Andres. They cited titles issued to them by the Spanish crown in 1725, a demarcation of their territory in 1809, as well as documents issued by the Mexican government, which admitted that they were the owners of the land in question. The Huichol, who lived in non-indigenous communities, were not recognised by the land census and, therefore, had no rights to their land under the law and were dependent on the permission of non-indigenous landowners to farm and graze their livestock. This resulted in, among others, a serious violation of their cultural rights. These lands, upon which the Huichol depend for their economic subsistence and which are integral to their religious and social organisation, have been overtaken by non-indigenous livestock breeders.<sup>424</sup>

In 1996, the Agrarian Tribunal ruled against the community, stating that they had failed to prove their case and that it would be inappropriate to recognise the property rights of the community as this would affect the rights of third parties. However, at this time, the community managed to get the Agrarian Attorney General to open an

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422 Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education. Doc. GB 270/16/3; GB 272/7/2 (1998).

423 *ibid.*

424 *ibid.*

investigation of the situation, its relationship to ILO 169, and the possibility of returning the community's lands. The community appealed the decision of the Agrarian Tribunal to the Third Collegial Court of the Twelfth Circuit for protection of their constitutional rights. It also filed a case through the SNTE with the Committee of Experts, under Article 24 of the ILO Convention, which asserted that Mexico had violated their rights under Articles 13 and 14 of ILO Convention No. 169. The complaint alleged that 2,000 Huichol persons had illegally been integrated into non-indigenous communities, thereby, losing rights to their ancestral lands and demonstrating that the Mexican government was unwilling to address the situation. It further alleged that, due to the non-recognition of their land rights, the Huichol of San Andres were forced to live in conditions that 'violate the most elementary individual and collective rights . . .' <sup>425</sup>The government countered by citing the decision of the Agrarian Tribunal and stated that the case should not be examined by the Committee as the Third Collegial Court had not yet made a decision on the case. It also noted that the Secretariat for Labour and Social Welfare had requested information on the study of the Agrarian Attorney General. <sup>426</sup>

In its conclusions, the Committee addressed "the domestic remedies aspects of the case, finding that its Standing Orders do not require that a decision must be reached in a national procedure before the Governing Body may examine the case or the aspect of the case which is still pending before the national jurisdiction and, in fact, the examination of a representation by the Governing Body sometimes becomes a relevant circumstance in a decision being handed down in a national legal procedure on a specific aspect of the application of a ratified Convention."<sup>427</sup>

Concerning land rights issues, the Committee stated that, while it does not issue opinions on individual land disputes, under ILO Convention No. 169, 'its essential task is rather to ensure that the appropriate means of resolving these disputes have been applied and that the principles of the Convention have been taken into account . . .' <sup>428</sup> Therefore, according to the Committee, Articles 13 and 14 of ILO Convention No. 169 must be read in conjunction with Articles 2(1) and 6, which respectively require that the state, in participation with the affected indigenous peoples, develop coordinated and systematic action to respect their rights and guarantee their integrity. Indigenous peoples are also to be consulted and should participate in decisions that affect them. Applying Article 14, the Committee found that, although the lands of some of the

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<sup>425</sup> *ibid.*

<sup>426</sup> *ibid.*

<sup>427</sup> Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Trade Union Delegation, D-III-57, section XI of the National Trade Union of Education Workers (SNTE), Radio Education. Doc. GB 270/16/3; GB 272/7/2 (1998), 31.

<sup>428</sup> *Ibid.*, 32.



Huichol had been given to others, ‘they continued to share [the] occupancy of the lands at issue’ and, according to Article 14(1), ‘the Government would be obliged to take measures, in appropriate cases, to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, and that this appears to be the situation in this case.’<sup>429</sup>

Concerning Article 14(2), it found that, with the exception of the 1,255 hectares of land held by Tierra Blanca, presently under consideration by the courts, Mexico should ‘take the necessary measures to guarantee effective protection of the rights of ownership and possession of the Huicholes, and in particular to protect them from possible intrusion by third parties.’<sup>430</sup> The Committee noted the allegation that the community is forced to live under conditions that violated basic individual and collective rights and requested that Mexico examine the measures that could be taken to remedy this situation by possibly including the ‘adoption of special measures to safeguard the existence of these peoples as such and their way of life to the extent that they wish to safeguard it, which is one of the primordial objectives of this Convention.’<sup>431</sup> Finally, in this case, it requested that Mexico re-evaluate the application of its agrarian laws in light of Articles 19, 4 and 6 (consultation and participation), noting that Article 4 requires that ‘special measure shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.’ Consistent with its conclusions, the Committee recommended to the Governing Body that Mexico take the following steps to address the issues raised by the case:

- Take appropriate measures, in accordance with Article 14, to guarantee the use rights of the Huichol on lands not exclusively occupied by them;
- The Government should inform the Governing body of the decision of the Third Collegial Court; the measures taken to remedy violations of the Huichol’s individual and collective rights caused by non-recognition of their land rights, including any special measures adopted; the measures taken to remedy the situation underlying the representation, ‘taking account of the possibility of assigning additional land to the Huichol people when they do not have the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers, as provided in Article 19.’<sup>432</sup>

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429 *Ibid.*, 40

430 *ibid.*

431 *ibid.*

432 *ibid.*, 42.

**Bolivia**<sup>433</sup>

This case was filed by the Bolivian Central of Workers on behalf of the Confederation of Indigenous Peoples of Bolivia (CIDOB) and its affiliates, the Coordinating Body of Ethnic Peoples of Santa Cruz (CPESC), the Central of Indigenous Peoples of Beni (CPIB) and the Indigenous Central of the Amazon Region of Bolivia (CIRABO) in 1998. It alleged the violation of Articles 6 and 14 of ILO Convention No. 169, in connection with a series of logging concessions, some of which overlapped traditional indigenous territories in the Bolivian Amazon.

To provide the context, it must be noted that Bolivia's new Forestry Act came into force in 1996 and permitted holders of long term forestry contracts to convert their contracts to forestry concessions that would remain valid for 40 years and be renewable for an additional 40 years. As a result and despite objections by indigenous peoples, in August 1997, 86 new concessions were issued, 27 of which overlapped indigenous territories. This occurred through the contravention of a law that granted indigenous territories provisional titles and did not require the granting of new concessions until the formal title was issued. At the time, the concessions that had been granted a formal title had yet to be conveyed. The complaint filed with the Committee of Experts alleged that this conversion of forest exploitation contracts was in direct contradiction to indigenous territorial claims that were, at the time, being processed in order to obtain a land title. It states that the area of the logging concessions, which overlaps with indigenous territories, amounts to a total of 712,313 hectares. This, for example, accounts for 33 per cent of Yaminahua- Machineri territory, 22 per cent of Guarayo territory, and 13 per cent of Monte Verde territory. Moreover, the COB points out that the territories in question will be subjected to a process of title clearing, which is likely to result in considerable in the allotment of these areas to third parties. These territories will be further reduced by expropriations and concessions for mining and petroleum exploitation.<sup>434</sup>

It is also alleged that, in connection with the decision to issue logging concessions, there was no genuine consultation with the participation of the affected indigenous peoples. Their attempts at having the concessions revoked were rejected by the agency responsible for forestry issues. An administrative appeal against this decision had been filed, but was undecided at the time that the complaint was filed with the Committee of Experts. Finally, the complaint further alleged that the logging concessions constituted 'a direct threat to the viability of indigenous territories, since the existence of forestry

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433 Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB). Doc. GB.272/8/1; GB.274/16/7.

434 *ibid.*, 12.

concessions in these territories will have a considerable social and economic impact, affecting the natural resources that need to be protected for future generations.<sup>435</sup>

The Committee began by noting that this case principally refers ‘to the adoption of administrative decisions by the National Forestry Superintendency, establishing 27 forestry concessions that overlap with six traditional indigenous territories, without prior consultation.’<sup>436</sup> Referring to Article 15 of the Convention (to be read in conjunction with Articles 6 and 7), which had not been invoked by petitioners, it then stated that concessions for logging, mining and petroleum exploitation may directly affect indigenous peoples’ viability and interests. Thus, by ratifying the Convention, governments ensure that the indigenous communities concerned are promptly and adequately consulted on the extent and implications of exploration activities – mining, petroleum or forestry activities.<sup>437</sup>

In these circumstances, the Committee considers it appropriate to recommend that – in each particular case, especially in the case of large-scale exploitations such as those affecting large tracts of land – the Governing Body request the government to consider the possibility of establishing, environmental, cultural, social and spiritual impact studies. These would be jointly conducted with the peoples concerned, prior to authorizing the exploration and exploitation of natural resources in areas that have traditionally been occupied by indigenous peoples. In addition, the Committee suggests that the Governing Body request the government to inform the Committee of Experts on the Application of Conventions and Recommendations on the process of title clearing that is now taking place in the community lands of origin and on whether appropriate consultation procedures, which must take place prior to undertaking any exploration or exploitation of natural resources, have been established or maintained, as provided by the Convention.<sup>438</sup>

With regard to the required consultations under the provisions of Articles 6 and 15, the Committee emphasised that the principle recognized in Article 6(2) of the Convention, according to which consultations are to be carried out during the application of the Convention, is to be undertaken in good faith and in a form that is clear and appropriate to the circumstances. This is particularly the case when contracts, as referred to in this case, are of a considerable duration and cover an extensive area. While the Committee understands that the lands, with which forestry concessions overlap, have not yet been titled as community lands of origin, it has not received any evidence indicating that such consultations, whether under Article 6(1)(a) or under Article 15(2) of the Convention, have been carried out or whether provisions has

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435 *ibid.*, 17.

436 *ibid.*

437 *ibid.*, 38.

438 *ibid.*, 39.

been made for the peoples concerned to participate wherever possible. Accordingly, the Committee suggests that the Governing Body request the government to inform the Committee of Experts on the achieved progress relating to consultations with the peoples concerned. It also requests information regarding their participation, wherever possible, in benefiting the concessions and their receipt of fair compensation for sustained damages as a result of this exploitation. An additional point is the omission of any reference to the requirement of Article 6(2), which states that consultations, 'shall be undertaken . . . with the objective of achieving agreement or consent to the proposed measures.'<sup>439</sup> This omission is disturbing, as this language substantially strengthens the primary consultation provisions of ILO Convention No. 169, including those found in Article 15(2), and because it is apparent that they have been reached by the Committee in other decisions.

In conclusion, in this case, the Committee's recommendations were as follows:

- That the government provide detailed information on the measures taken to give effect to Articles 6, 14 and 15 of ILO Convention No. 169 in its reports required under Article 22 of the ILO Constitution to the Committee;
- That the government fully apply 'the provisions of Article 15 of the Convention and to consider engaging in consultations in each particular case, especially when large tracts of land such as those referred to in this representation are affected, as well as environmental, cultural, social and spiritual impact studies, jointly with the peoples concerned, before authorizing the exploration and exploitation of natural resources in areas traditionally occupied by indigenous peoples';<sup>440</sup>
- That the government provide information 'on the establishment or maintenance of the appropriate consultation procedures that must be carried out before undertaking any programme for the exploration or exploitation of natural resources, as provided by the Convention'<sup>441</sup>; and
- That the government provide information on 'the progress made in practice with regard to consultations with the peoples concerned, their participation wherever possible in the benefits of the concessions and their receipt of fair compensation for any damages which they may sustain as a result of this exploitation.'<sup>442</sup>

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<sup>439</sup> Article 6 of the ILO Convention No. 169.

<sup>440</sup> Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB). Doc. GB.272/8/1; GB.274/16/7.

<sup>441</sup> *ibid.*

<sup>442</sup> *ibid.*

**Denmark**<sup>443</sup>

This case was submitted in November 1999 by a Danish trade union (SIK) on behalf of the members of the former settlement of Uummanaq (Thule District), a geographic location in north-western Greenland whose inhabitants are the Thule peoples. The representation alleged a violation of Article 14(2) of ILO Convention No. 169, which requires that '[g]overnments 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.'<sup>444</sup>

As with the previous case concerning Mexico, this case also relates to the consequences of forced relocation. In May 1953, the entire population of Uummanaq, an indigenous settlement of the Thule peoples, was relocated to permit the expansion of a United States' military base. This took place without the affected peoples' consultation and consent. According to the representation, the new site for the settlement lacked many of the subsistence resources found at the previous site. It was only the presence of a large number of whales that prevented the starvation of the relocated persons. In 1954 and 1959, the Thule sought compensation from Danish authorities, but were denied any payment. In December 1996, they filed a case with the High Court in Copenhagen from which they sought compensation for and the recognition of their land rights in the area from which they were relocated. The Court ruled in their favour and ordered that compensation be paid. However, it failed to address the land rights issue. The latter was appealed to the Danish Supreme Court and was pending at the time that the Thule brought their case to the Committee of Experts. In response, Denmark argued that:

- The relocation took place in 1953, 44 years prior to its ratification of ILO 169 and, therefore, the representation is inadmissible as it cannot be held responsible for acts that took place prior to ratification and its entry into force;
- The dispute was pending before the Supreme Court of Denmark and, therefore, the Thule could not assert a failure of Denmark to guarantee their rights under ILO Convention No. 169 until the Court had issued its ruling;
- The Thule did not constitute a 'people' for the purposes of ILO Convention No. 169 but were a part of the larger Inuit population of Greenland, who made no distinction among themselves. It also noted that the Inuit 'never recognized the existence of areas reserved for particular population groups.' In support of

<sup>443</sup> Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiuteqartut Kattuffiat (SIK, Greenlandic trade Union). Doc. GB.277/18/3; GB.280/18/5.

<sup>444</sup> Article 14 of the ILO Convention No.169.

this position it referred to its declaration, made at the time of the ratification of ILO Convention No. 169, which provided that, among other things, ‘it has not at any time been possible, for either natural or legal persons, to acquire rights of ownership to lands in Greenland.’<sup>445</sup>

The Committee began by dismissing Denmark’s declaration, which was filed when it ratified ILO Convention No. 169, by stating that ‘no reservations to the ratification of ILO Conventions are admissible and that, consequently, the Government’s Declaration has no binding force.’<sup>446</sup> It also dismissed the state’s argument that the Committee could not examine the case as it was presently under consideration by the Danish Supreme Court – ‘with regard to the litigation pending before the Danish Supreme Court, the Committee notes that neither article 24 of the ILO Constitution or the Standing Orders require that a complainant exhaust national remedies available before the Governing Body may examine a representation involving the same or similar issues.’<sup>447</sup> It then addressed Denmark’s contention that it could not be held responsible under ILO Convention No. 169 for events (the 1953 relocation) that occurred prior to its ratification and entry into force.

Consistent with its decision in the Mexico case, the Committee stated that the relocation of the population of the Uummannaq settlement, which forms the basis of this representation, took place in 1953. It also took note of the fact that, for Denmark, the Convention only came into force on 22 February 1997. The Committee considers that the provisions of the Convention cannot be applied retroactively, particularly with regard to procedural matters, such as whether the appropriate consultations were held with the peoples concerned in 1953. However, the effects of the 1953 relocation still continue today – relocated persons cannot return to the Uummannaq settlement and legal claims to those lands remain outstanding. Accordingly, the Committee considers that the consequences of the relocation, which persist after Convention No. 169 entered into force, must be considered with regard to Articles 14(2) and (3), 16(3) and (4) and 17 of the Convention. These provisions of the Convention are almost invariably invoked concerning displacements of indigenous and tribal peoples, which predated the ratification of the Convention by a member state.<sup>448</sup>

The Committee also discussed Denmark’s position that, for the purpose of ILO Convention No. 169, the Thule cannot be considered a people, separate and distinct from all Inuit in Greenland. It observed that the parties to this case do not dispute

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445 Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiatteqartut Kattuffiat (SIK, Greenlandic trade Union). Doc. GB.277/18/3; GB.280/18/5.

446 *ibid.*, 50.

447 *ibid.*

448 *ibid.*, 29.

that the Inuit, residing in Uummannaq at the time of the relocation, are of the same origin as the Inuit in other areas of Greenland, speak the same language (Greenlandic), engage in similar traditional hunting, trapping and fishing activities as other Greenlandic inhabitants and identify themselves as Greenlanders (Kalaalit). The Committee notes that, prior to 1953, the residents of the Uummannaq community were, at times, isolated from other Greenlandic settlements due to their remote location. However, resulting from the development of modern communication systems and transportation technology, the Thule District is no longer cut off from other settlements in Greenland. The Committee notes that these persons share the same social, economic, cultural, and political conditions as other inhabitants of Greenland (see Article 1(1) of the Convention). These conditions do not distinguish the people of the Uummannaq community from other Greenlanders, but do distinguish Greenlanders, as a group, from the inhabitants of Denmark and the Faroe Islands. *As concerns Article 1(2) of the Convention, while self-identification is a fundamental criterion for defining the groups to which the Convention is applicable, this specifically relates to self-identification – as indigenous or tribal – and, not necessarily, to a feeling that those concerned are a ‘people’ different from other members of the country’s indigenous or tribal population, which may form a people together.* The Committee considers there to be no basis for considering the inhabitants of the Uummannaq community to be a ‘people’ separate and apart from other Greenlanders. *“This is not necessarily relevant to the determination of this representation as no part of the Convention indicates that only distinct peoples – a differentiation between various indigenous groups or tribal peoples – may make land claims.”*<sup>449</sup> (emphasis added).

In this case, the Committee’s treatment of the land rights once again illustrates the procedural nature of ILO Convention No. 169.<sup>450</sup> In this regard, the Committee stated that, with regard to the pending claims for compensation for lost hunting and trapping rights, as well as other consequential damages incurred by the residents of the Uummannaq community, resulting from the 1953 relocation, the Committee points out that the ILO cannot resolve individual land disputes under the Convention, including issues of the valuation of compensation. *The Committee considers that, “in such cases, its essential task is to not offer an alternative venue for parties dissatisfied with the outcome of a claim for compensation before the national administrative or judicial bodies, but to rather ensure that the appropriate procedures for resolving land disputes have been applied and that the principles of the Convention have been taken into account in dealing with the issues affecting indigenous and tribal peoples.”*<sup>451</sup> (emphasis added)

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449 *ibid.*

450 Compare the treatment of the same case by the European Court of Human Rights, see Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, in *International Journal on Minority and Group Rights* 18 (2011) pp. 1–37.

451 MacKay 2002, 35.

According to Mackay, the Committee's reasoning on the land rights provisions, at issue in this case is instructive on ILO Convention No. 169 land rights provisions in general. Referring to Articles 14 and 17, and Denmark's compliance with its obligations under those articles, it observed that Article 14(2) of the Convention provides that, '[g]overnments 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.'<sup>452</sup> The Committee points out that Article 14, paragraph 2, on which the complainant organization bases its allegations, must be interpreted in light of the general policy set forth in Article 2(1) of the Convention, which requires governments to develop, with the participation of the peoples concerned and to coordinate 'systematic action to protect the rights of these peoples and to guarantee respect for their integrity.' The Committee considers that the land, traditionally occupied by the Inuit people, has been identified and consists of the entire territory of Greenland. Section 8(1) of the Home Rule Act of 1978 establishes that 'the resident population of Greenland has fundamental rights to the natural resources of Greenland.'<sup>453</sup> Noting that Greenlanders have the collective right to use the territory of Greenland and continue to have access to the land for their subsistence and traditional hunting and fishing activities, the Committee considers that the Greenlandic situation is not inconsistent with the principles established in Article 14 of the Convention.<sup>454</sup>

The Committee observes that Article 14, paragraph 3, requires governments to establish adequate procedures within the national legal system in order to resolve the land claims of indigenous and tribal peoples. The Committee observes that there are procedures in place to resolve land disputes and that these procedures have, in fact, been invoked by the peoples concerned and that competent national authorities have been, and continue to, examine the land claims in depth. It therefore concludes that, in this regard, the Government of Denmark has complied with Article 14(3). The Committee is aware of the difficulties entailed in resolving conflicting land claims, particularly where there are different and opposing views with respect to the relations that various communities have to land. It is also aware of their cultural and spiritual attachment to traditionally occupied lands, as well as activities traditionally carried out on the land, such as hunting, trapping and fishing. The Committee is aware that the former residents of the Ummannaq community were forcibly relocated, under difficult circumstances and with little or no prior consultation in 1953. They have also been unable to return to their settlement. However, the Committee also notes

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<sup>452</sup> Article 14 of the ILO Convention No. 169.

<sup>453</sup> Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Sulinermik Inuussutissarsiuqartut Kattuffiat (SIK, Greenlandic trade Union). Doc. GB.277/18/3; GB.280/18/5.

<sup>454</sup> See more MacKay 2002, 35.



that former residents of the Uummanaq community have been awarded compensation for lost hunting and trapping rights, as well as for damages incurred as a result of relocation. It also notes that, almost 50 years later, the persons and children concerned have now resettled in other sections of Greenland or in Denmark. Under the particular circumstances of this case, the Committee considers that a call for the demarcation of lands within Greenland, for the benefit of a specific group of Greenlanders, would run counter to the well-established system of collective land rights based on Greenlandic tradition and maintained by the Greenland Home Rule Authorities. This conclusion should be viewed in light of the Convention's Article 17(1), which provides that 'procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected', noting that individual land rights were traditionally not recognized among Greenlanders.<sup>455</sup>

The Committee also found that, since 1997, Denmark's actions were consistent with the Convention with regard to Article 16, which deals with relocation. It did, however, urge the Thule and Denmark to continue to discuss the necessary measures to arrive at a mutually satisfactory solution to the dispute. It concluded its consideration of the case by recommending that Denmark provide information in its Article 22 reports on the results of the case before the Supreme Court, as well as any additional measures taken to compensate the Thule, any consultations held about future use of the land around the military base claimed by the Thule, and the measures taken 'to ensure that no Greenlanders are relocated in the future without their free and informed consent or, if this is not possible, only after following appropriate procedures in accordance with Article 16 of the Convention.'<sup>456</sup>

The above-mentioned cases play a significant role when evaluating the implementation of ILO Convention No. 169. It is evident that the implementation is not only happening through the reporting process to the Committee of Experts. Violations against the Convention may also be raised. Even though representations and complaints are only used in a few cases, they show an important procedure related to ILO Conventions. It is also important to note that, in Latin America, there is considerable experience in the application of Convention No. 169 and that some countries have even developed important jurisprudence through a significant number of judgments.<sup>457</sup>

As it is impossible to examine each case in detail, the overall aim is to briefly examine the approaches used by Latin American domestic courts in respect to ILO Convention No. 169. At 14, the greatest number of ratifications of ILO Convention No. 169, has taken place in Latin America and the Caribbean. This is not an accident. Many coun-

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455 *ibid.*, 35-40.

456 *ibid.*, 44.

457 Courtis, Christian, Notes on the implementation by Latin American courts of the ILO Convention No. 169 on indigenous peoples. *International Journal on Human Rights*, Year 6, no: 10, 2009, 53-80.

tries in the region are multilingual and multicultural, and in some cases, indigenous people constitute a majority or a significant portion of the population. In addition to ratifying Convention No. 169, along with a series of constitutional reforms that took place at the end of the 1980s, many of these countries have incorporated provisions relating to the rights of indigenous peoples and communities into their constitutions.<sup>458</sup>

Thus, it is no wonder according to Courtis, that many of these constitutional and legal changes have impacted the jurisprudence of many countries. Some common factors – applicable to different degrees in each country, but nevertheless representing a regional tendency – may help us understand this landscape. It is evident that Convention No. 169 has had significant regional success, especially in comparison to other global regions. A part of the Convention's influence is reflected in the aspirational character of constitutional and legal reforms related to indigenous peoples in the region – in the sense that many of the concepts articulated therein, such as 'indigenous peoples and communities,' 'self-identification,' 'traditional territories,' 'autonomy,' 'consultation,' and 'uses and customs,' among others – are incorporated in one way or another in the constitutions and legal norms of various countries in the region.<sup>459</sup>

The influence of Convention No. 169 is not limited to the role of 'model legislation' that is to be followed by local political powers. Convention No. 169 has been employed and invoked by indigenous peoples and communities. Other actors – both public institutions and civil society – have also used this Convention in defending these communities' rights and interests. Additionally, this international instrument has been employed in litigation before local courts and, when necessary, before the bodies of the regional human rights system. It should be clarified that the degree to which the application of Convention No. 169 has been developed varies significantly among the region's local courts. In some countries, there are few cases where the application of Convention No. 169, by local courts, is in its early phase. In other cases, including Colombia and Costa Rica, the richness and variety of cases are enormous.<sup>460</sup>

Both various countries' local courts, as well as the bodies the regional human rights systems, namely the Inter-American Court and Commission for Human Rights, have applied ILO Convention No. 169. In the former case – with some exceptions, such as in Belize – Convention No. 169 is a legal norm incorporated into the domestic law of the countries in question. In contrast, in the latter case, it is important to note that Inter-American bodies do not have jurisdiction in resolving controversies based on violations of Convention No. 169, as their jurisdiction is based on regional human rights instruments. However, regional human rights bodies have used ILO Conven-

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458 *ibid.* 54.

459 *ibid.*, 55.

460 In Colombia, for example, the Constitutional Court has decided more than forty cases in which the Convention is invoked 169. See, for example, Botero Marino (2003, 45-87).

tion No. 169 as an interpretive norm in specifying states' obligations, based on other international agreements (such as the American Convention on Human Rights and the American Declaration of the Rights and Obligations of Man), to indigenous peoples or communities and their members. Thus, regional human rights bodies have, for example, interpreted the right to property ownership or the right of due process, as applied to the rights of indigenous peoples and communities in light of those rights established by Convention No. 169.<sup>461</sup>

A related question regards the incorporation of the treaty into domestic law, as well as its normative hierarchy in cases with the direct incorporation of IL. The dominant Latin American tradition is monist. That is to say that an international treaty is automatically part of domestic law once it has been ratified. However, it is important to remember that some countries in this region have a *common law* tradition in which dualism predominates. In some countries, international human rights treaties and ILO Convention No. 169 have been assigned to a category that is similar to the constitution. These countries include Bolivia and Colombia, which have assimilated Convention No. 169 into their constitution by employing the notion of a 'constitutional block.' According to this idea, the integration of international human rights treaties into domestic law requires an interpretation that blends the fundamental rights of the constitution with the human rights of international treaties.<sup>462</sup>

Other countries of the region have considered the normative hierarchy of human rights treaties to be higher than the law, but lower than the Constitution (Art. 7). The Constitutional Tribunal of the Supreme Court has interpreted international human rights treaties as being at the same level of importance as the constitution, or of even greater importance. This is particularly the case where treaties guard domestic law and were there has been a tendency to assign them to a level that is lower than that of the Constitution, but higher than that of ordinary legislation. This is the case in Ecuador (Art. 425) and in Guatemala (Art. 46).<sup>463</sup>

If the variety of the types of lawsuits is large, the thematic diversity of these cases is even greater. The areas in which Convention No. 169 is relevant, and has been used as an interpretive tool, are manifold. However, it must be noted that a significant percentage of the cases decided by regional courts deal with disputes related to land and the exploitation of natural resources situated therein, and that several of these cases relate to the *consultation* and *participation* of the community in decisions related to this theme.

Finally, according to Courtis, there are also cases that cover a variety of other as-

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461 Courtis 2009, 57.

462 *ibid.*, 58.

463 *ibid.*, 59.

pects – the right to education and health care for indigenous communities, respect for political autonomy and the manner in which authorities are elected, respect for cultural identity and cultural symbols, and the formation of state bodies to accomplish obligations relating to indigenous peoples and communities laid out in the constitution and in ILO Convention No. 169. Unsurprisingly, one of the most important claims made by indigenous peoples and communities, concerns the recognition of the title to their ancestral lands. Land constitutes an identity trait for indigenous peoples, defining their way of life and world view. The land has, for indigenous peoples and communities, a religious significance, and is also the foundation of their economy, which generally fluctuates with the seasons. One unique characteristic of indigenous claims on land is the claim of collective ownership, in the name of the people or with the community acting as the owners, and not in terms of individual property of the members of the community. In Latin America, the ancestral land of indigenous communities and peoples has frequently been the object of pillage and plunder by the state and by third parties. Courtis continues to argue that the close relationship of indigenous peoples and communities to land has led to the recognition that their collective property ownership constitutes a condition for the survival of those peoples and communities.<sup>464</sup>

According to MacKay, given the importance of the issue, the jurisprudence of the region has not been blind to these claims, in which the invocation of ILO's Convention No.169 has played a relevant role. The Inter-American Court for Human Rights, for example, has employed Convention No. 169 as the interpretive standard for property law in cases where a claim about the ancestral territory of indigenous peoples and communities is at stake. In the case of *Yakye Axa*<sup>465</sup>, the Inter American Court of Human Rights confronted a claim for the land title of an ancestral territory of a hunter-gatherer indigenous community, living in a situation of extreme poverty, from the Chaco forest in Paraguay. Third parties held the community's ancestral lands as private property. In this case, it was argued that the Paraguayan government's lack of effective action to recognize the legal character of the indigenous community and grant it the title to its ancestral lands, led the community to wait for a response to pending claims in an inhospitable environment in extremely precarious conditions. The lack of access to health care and a means of survival caused the death of many members of the community. Given the conditions of the settlement, the children of the community were deprived of food, health care, clothing, and adequate education. The state was charged with a violation of the right to life, to private property, due process and legal protection. The Inter-American Court considered that, in cases where issues

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<sup>464</sup> *ibid.*, 62-64.

<sup>465</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the *Yakye Axa* Indigenous Community v. Paraguay. Decision. June 17, 2005.

of the right to property – and the right to life, due process, and legal protection – are applied to indigenous communities, the Court must refer to Convention 169. In this sense, the court notes that, ‘the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.’<sup>466</sup> In particular, the Court states that *[t]he above relates to the provision set forth in Article 13 of ILO Convention No. 169, under which states must respect ‘the special importance of cultures and spiritual values of the peoples with respect to their relationship with lands or territories or both, as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.’*<sup>467</sup> (emphasis added) In this case, the Court decides that the time that has elapsed since the community first made its claims, without the state granting effective title to their ancestral lands, constitutes a violation of the community’s right to property. The Inter-American Court has repeated this doctrine in the *Sawhoyamaxa* and *Saramaka* cases.<sup>468</sup>

The historical land rights of the Saami, in relation to ILO Convention No. 169 and in comparison to Sweden and Norway, are examined in detail in article No. 5 of this study. Within that context, the most important case concerning Saami land ownership, the Swedish *Taxed Mountain case* (1981) is introduced. It is important to understand the reporting and complaint procedure involving ILO Convention No. 169. When deciding on ratification, the state becomes bound to the continuing process where the rights of indigenous peoples are implemented and improved in national legal and political practices. The above mentioned cases only provide some guidance for states within this reporting process, but form valuable information for indigenous peoples when, for example, seeking better protection and prerequisites for their livelihoods.

## 2.2 Subjectivity - Formulating Indigenousness and the Right Holders of the Convention No. 169

### *Introduction*

According to international law the states that have ratified ILO Convention No. 169, are the *subjects* of the Convention. As is known, the Convention concerns the rights of indigenous peoples’. Thus, these peoples may be regarded as the *objects* of

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<sup>466</sup> *ibid.*

<sup>467</sup> *ibid.*

<sup>468</sup> See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Sawhoyamaxa Indian Community v. Paraguay*. Decision of March 29, 2006, par. 117- 119 and 150-151; and See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Saramaka People v. Suriname*. Decision. 28 Nov. 2007, par. 93-94 and 131.

the Convention. However, the approach is ambiguous. This thesis chapter attempts to explain the subject-object dichotomy and the challenges in respect to Convention No. 169. Three different levels of this approach are presented: 1) individuals as the subjects of the Convention, 2) peoples as the subjects of the Convention and 3) states as the subjects of the Convention. Additionally, the following question is raised: Why it is so important to know the subjects of the Convention?

At an international level it is considered to be relatively obvious who the world's indigenous peoples are (despite some existing disagreement).<sup>469</sup> On the other hand, it is often complex and difficult to define who belongs to a certain group on a personal level. In the context of ILO Convention No. 169 it is, however, necessary to know who is regarded as an indigenous person. It is necessary to know to whom the Convention is applicable, and who its beneficiaries are, so that these peoples are aware of their special rights. This is a question of human rights and is highlighted in the direct request by the Committee of Experts of the ILO concerning Bolivia in 1995 and also in Manual 2000: “. . . The Committee would be grateful if the Government would indicate the manner in which recognition is given to indigenous communities and individuals so that they can benefit from the legislation which applies to them.”<sup>470</sup>

In the case of Honduras, the Committee of Experts believes that, according to the statement of the Government of Honduras, the ILO Convention covers those persons who are members of indigenous and tribal peoples and particularly those belonging to the CONPAH, an organisation of indigenous persons. The Committee does, however, raise the question as to *whether and in what manner the Convention applies to those indigenous and tribal peoples who are not affiliated with this organisation.*<sup>471</sup>

This raises an interesting question in regard to the Nordic states: Does a person have to be registered in order to be regarded as ‘indigenous’ and to be able to be the subject of this human rights instrument? This question evaluated in the later text and, in more detail, in article no. 5 of this study.

According to Meijknecht, based on international instruments focusing on the protection of minorities, there are different techniques for defining minorities in legal terms. Minorities may be approached as groups of individuals or as beneficiaries of positive state obligations. Aspects of their culture, such as their language, may also be regarded as a protective object. However, a collective approach of minorities ‘as such’ is almost completely absent in this overview of approaches. It could even be imagined that these different stances toward minorities ‘as such’ is not feasible. Although not

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469 See above different definitions on indigenous peoples.

470 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

471 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras Ratification: 1995, Submitted: 2000.

in direct relation to minorities, several international legal instruments do apply a collective legal approach toward groups. Although some authors consider this to be 'doctrinally impure', a collective approach and an individual approach exist side by side in some instruments.<sup>472</sup>

The most comprehensive and binding international document in which several approaches are used alongside one another is ILO Convention No. 169 'Concerning the Protection of Indigenous and Tribal Peoples in Independent Countries.' This Convention, concluded in 1989, is a revised version of ILO Convention No. 107 'Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent countries' of 1957. The latter Convention has severely been criticised for aiming, at the 'progressive integration [of indigenous and other tribal and semi-tribal populations into their respective national communities.]' Convention No. 107 was framed in terms of indigenous populations' members and their rights as equals within the larger society. Indigenous peoples or groups were only secondary beneficiaries (if even) of rights of protection. ILO Convention No. 169 is one of the rare examples of a convention in which special attention is paid to peoples, living as a group within independent states. However, this attention is neither self-evident nor undisputed, or as James Anaya notes in *Indigenous Peoples in International Law*:

"Convention No. 169 can be seen as a manifestation of the movement toward responsiveness to indigenous peoples' demands through international law and, at the same time, the tension inherent in that movement. Indigenous peoples have demanded recognition of rights that are of a collective character, rights among whose beneficiaries are historically grounded communities rather than simply individuals or (inchoate) States. The conceptualization and articulation of such rights collide with the individual/State perceptual dichotomy that has lingered in dominant conceptions of human society and persisted in the shaping of international standards. The asserted collective rights, furthermore, challenge notions of State sovereignty, which are especially jealous of matters of social and political organization within the presumed sphere of State authority."<sup>473</sup>

In fact, according to Meijknecht it can be considered that the ILO Convention No. 169 is a puzzle of different approaches that refer to different entities as bearers of rights or duties. Below, analysis is made in this respect with special focus in the Nordic countries.

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472 Meijknecht, 2001, 148; Thornberry 1994, 11-12.

473 Anaya, 1996, p.48.

## 2.2.1 States are the Subjects of ILO Convention No. 169

As previously mentioned, many of the provisions in ILO Convention No. 169 are clearly targeted at state governments and oblige them to take specific measures related to indigenous or tribal peoples. For example:

Article 7.4,

Governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 25 states

Governments shall ensure that adequate health services are made available to the peoples concerned.

Article 30

Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

Article 2

Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Article 6

In applying the provisions of this Convention, governments shall: consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly...

Article 13

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territo-



ries, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

#### Article 14.2

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.

#### Article 15.2

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view...

#### Article 20

Governments shall, within the framework of national laws and regulations, and in cooperation with the peoples concerned, adopt special measures to ensure effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

#### Article 23.1

... Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

#### Article 25

Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

Lastly, according to Meijknecht, there is a category of provisions that are formulated in general terms without clearly specifying the subject of the beneficiary.<sup>474</sup> These provisions are vaguely aimed at state governments and place a weak obligation on governments:

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<sup>474</sup> Meijknecht 2001, 148-151.

In applying the provisions of this part of the Convention, governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.<sup>475</sup>

This general obligation, concerning the relationship with land, is further examined in Article 14 which notes that, '[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.'

Meijknecht states that, the manner in which rights for 'the relationship with their land' were formulated is similar to the manner in which the protection of 'language' in the Languages Charter of the Council of Europe<sup>476</sup> was conceived. Neither individuals nor groups are right bearers in regard to language or land, which are constituted as crucial aspects of their respective cultures. Instead, these cultural aspects are, in themselves, protective objects of the state.<sup>477</sup>

## 2.2.2 Indigenous Peoples are the Subjects of ILO Convention No. 169

In other provisions of the ILO Convention, indigenous and tribal peoples are referred to as groups as a whole. One must also emphasise that a number of the Convention's provisions are clearly aimed at state governments and contain obligations to take specific measures relating to indigenous or tribal peoples.<sup>478</sup>

As stated in Article 1, this Convention applies to:

Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; as well as to: Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

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475 Article 13.1

476 European Charter for Regional or Minority Languages, Strasbourg, 5.XI.1992. <http://conventions.coe.int/treaty/en/Treaties/Html/148.htm> Accessed 16.5.2011

477 Meijknecht 2001, 152.

478 *ibid.*

In the context of this Convention, the term ‘peoples’ has been extensively discussed during the revision and negotiation process of Convention No. 107. State governments, in particular, maintained that the term ‘peoples’ invokes an association with self-determination as laid down in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICECR). This controversy was settled by adding that, ‘the use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.’<sup>479</sup> Examples of provisions in which a collective approach has been applied include:

#### Article 2

Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

#### Article 3

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

#### Article 7.1

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development...

#### Article 8.2

These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

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<sup>479</sup> See Article 1.3 ILO Convention No. 169. See also Anaya 1999, p. 49.

#### Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights...

#### Article 14

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

#### Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

#### Article 16

Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

#### Article 17.1

Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

According to Meijknecht, it appears as though the indigenous and tribal group is the subject of these rights, and that many states and scholars actually interpret these rights as collective rights. However, the use of 'shall' in all provisions may also be interpreted as implying that a slight measure of discretion concerning the implementation is left to state governments. Such wording is, generally, considered as a strong formulation, especially when compared with 'should', as well as others.<sup>480</sup>

### 2.2.3 Individuals are the Subjects of ILO Convention No. 169

Perhaps the primary indication that individuals are among the subjects of ILO Convention No. 169 is the inclusion in the instrument of provisions, which relate to the individual members of the tribe or group.

Article 10.1 states :

In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

and Article 11 provides:

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

As it is left to indigenous peoples to decide on their preferred form of ownership, it can be argued that the articles on land rights (arts 13-19) include the individual dimension of 'indigenous' as well.

Article 14

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

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<sup>480</sup> Meijknecht 2001, 151. Peoples concerned shall have the right' clearly indicates the 'Peoples' as the bearers of the right in question. Further, also the nature of the rights mentioned in Article 7 does not leave much room for interference by the State. Meijknecht 2001, 151.

### Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible

### Article 17.1 and 17.3.

Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

### Article 16.5

Persons thus relocated shall be fully compensated for any resulting loss or injury.

### Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

### Article 22.1

Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

### Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

## Article 28

Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong.

On the international agenda, it is relatively obvious who are considered to be the world's indigenous peoples, although dissent also exists. However, there are many reasons as to why the question is often complicated on an individual and group level. Thus, questioning the existing number of the world's indigenous peoples is often contentious. Even where peoples are concerned, identified and 'quantified', they may be denied the use of the term 'indigenous'; as such a description may introduce notes of priority and privilege, or 'a sort of snobbery', into inter-communal or community-state relations. However, disputes regarding figures are often politics, as opposed to analytics. They are normative, not cognitive, and impose an outside will upon peoples and contest how they identify themselves. The contentious issue of description and definition – later examined in detail – has become important in the context of current legal politics. The growing respect for the principle of *self-identification*<sup>481</sup>, as an essential aspect of individual and group freedom, complicates figures.<sup>482</sup> It should be noted that, even though self-identification is generally used to refer to peoples, the term also includes an individual's feeling. Without individuals there are no groups. Logically, the definition of a group and the definition of an individual cannot be fully separated.

According to Thornberry, individuals exercise their preferences and choose to identify with a group or not. In this respect, some legal systems are relatively freewheeling. In the field of minority rights, Hungarian legislation allows individual choice whether it means belonging to a minority – or more than one minority.<sup>483</sup> Discrimination against a group may, thus, influence public declarations of group affiliation as individuals change their minds. Groups may exist as cultural formations with a history, or represent creations of state laws. Statistics abound but are not consistent.<sup>484</sup>

For example, the 2006 Australian census, showed that 455,028 people identified themselves as being of Aboriginal and/ or Torres Strait Islander origin, thus, comprising 2.3% of the total population.<sup>485</sup>

481 The principle is contained in Article 1.2 of ILO Convention No. 169: "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".

482 Thornberry, Patrick, *Indigenous peoples and human rights*, Manchester University Press, 2002, 15.

483 Report submitted by Hungary under the Council of Europe framework Convention for the Protection of National Minorities, ACFC/SR (99) 10, 33, according to Thornberry 2002, 15.

484 Thornberry 2002, 15-16.

485 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006*, ABS cat no 4713.0, 2008, 12.

There were approximately 409,729 persons of Aboriginal origin (90% of the total) and 29,239 of Torres Strait Islander origin (6%). A further 19,552 people (4%) identified themselves as being of both Aboriginal and Torres Strait Islander origin.<sup>486</sup>

Aboriginal people were first counted as citizens in the 1971 Census. Since then, censuses have shown a significant increase in the number of people identifying themselves as Aboriginal and/or Torres Strait Islanders:

- Between the 1991 and 1996 Census, there was a 33% increase in the numbers of recorded Indigenous peoples.
- Between the 1996 and 2001 Census, there was a 16% increase.
- Between the 2001 and 2006 Census, there was an 11% increase.<sup>487</sup>

Increases in the indigenous population cannot be accounted for by birth rate alone. The Australian Bureau of Statistics (ABS) attributes the increase to a growing propensity of people to identify themselves as Aboriginal and/or Torres Strait Islander, and to greater efforts of recording indigenous status in the census. As the number of indigenous peoples recorded increases, the ABS has warned that comparisons made between two censuses must be made with caution. They recommend comparing percentages from two censuses, as opposed to directly comparing counts or numbers.<sup>488</sup>

Despite increases in the number of people identifying themselves as indigenous in censuses, significant underestimates are still thought to occur. In the 2006 Census, indigenous status was unknown for 1,133,466 people, comprising 5.7% of the total number of people surveyed. As some of these people are indigenous, the ABS calculates 'experimental estimates' of the true number of Indigenous peoples. However, it is important to distinguish actual counts from experimental estimates when considering the size of the Indigenous population.<sup>489</sup>

As noted above, due to the undercount of the Census, the ABS estimated that, in 2006, the indigenous population numbered 517,174, or approximately 2.5% of the total Australian population.<sup>490</sup>

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486 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006*, ABS cat no 4713.0, 2008, 19, table 2.2.

487 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006*, ABS cat no 4713.0 (2008), 12.

488 Australian Bureau of Statistics and Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003*, ABS cat no 4704.0 (2003), 245.

489 Australian Bureau of Statistics *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006*, ABS cat no 4713.0 (2008), 15.

490 Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006*, ABS cat no 4713.0 (2008), 9.



The world's total indigenous population varies from 200 million to 370 million.<sup>491</sup> Indigenous peoples live in every region of the world. However, 70% of indigenous peoples live in Asia, while Latin America holds 50 million, which make up 11% of the region's population. It is claimed that there are 100,000 Inuit, 80,000 Saami, and 1.5 million indigenous people in North America. There are 13 million indigenous peoples in Mexico and Central America, 14 million nomads in Africa and 350,000 Maoris in New Zealand. In 2001, approximately 90% of Australia's indigenous population was identified as being of Aboriginal origin; 6% were identified as being of Torres Strait Islander origin and 4% were identified as being of both Aboriginal and Torres Strait Islander origin. In Bolivia and Guatemala, indigenous peoples make up more than half of the population; the Adivasi, or tribal peoples of India, constitute only 8% of the total population of the country, but 40% of them are internally displaced.<sup>492</sup>

Many governments allegedly undercount their indigenous population. 'Statistical ethnocide' is always a possibility. According to Thornberry, in the context of the Adivasi population of Bangladesh, a study noted that,

“[m]any observers feel that undercounting has been done deliberately to emphasize the marginality of the Adivasi population. Lower numbers mean that their legitimate demands can be more easily dismissed or ignored by governments and thus excluded from relief aid or development programmes.”<sup>493</sup>

The estimated Nordic Saami population varies from 75,000 up to 100,000.<sup>494</sup> There are several reasons for this, which will be listed, in short, below. However, the issue will be further examined in more detail in articles No.2 and No.4 of this dissertation. Firstly, the number of persons belonging to ethnic minorities is rarely “listed” as a result of the occurrences of the Second World War. Secondly, definitions of who may be regarded as Saami varies in the three Nordic countries. For example, in Sweden, the spouse of a Saami may also be “accepted” as Saami. Thirdly, each states' Saami parliaments has its own list of voters, the electoral roll. In Finland, for example, this list serves as the basis for the official number of Saami, 9200 persons.<sup>495</sup> In Sweden,

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491 IWGIA International Work Group for Indigenous Affairs <http://www.iwgia.org/sw641.asp> Visited 9.2.2011. , World Bank according to Rural Poverty portal <http://www.ruralpovertyportal.org/web/guest/topic/statistics/tags/indigenous%20peoples> Visited 9.2.2011.

492 See for example: Rural Poverty portal <http://www.ruralpovertyportal.org/web/guest/topic/statistics/tags/indigenous%20peoples> Visited 9.2.2011.

493 Thornberry 2002, 16-17.

494 See for example: The free library at <http://www.thefreelibrary.com/Number+of+Sami+People+in+Northern+Europe-a01073958137> ; Nordic Way <http://www.nordicway.com/search/Sami.htm>; The Saami Parliaments in Finland [www.samediggi.fi](http://www.samediggi.fi) , Sweden [www.samediggi.se](http://www.samediggi.se) and Norway [www.samediggi.no](http://www.samediggi.no) .

495 In 2009. [www.samediggi.se](http://www.samediggi.se)

7809<sup>496</sup> persons are registered in the electoral roll, while approximately 13 89 are registered in Norway's. However, the assumption that there are more than the estimated number of Saami in Norway (estimation of 75 000-100 000) is officially presented.

In regard to ILO Convention No. 169, the definition of an indigenous person raises the question of subjectivity. Similar to the situation in Honduras, it is reasonable to ask: how do we ensure *whether, and in what manner, the Convention is applied to those indigenous and tribal peoples who are not affiliated with this organisation?* Still, if the register serves as the basis for determining peoples' rights, how can we ensure that every person is registered? This is a particularly important issue as the registration is strongly connected to how a person identifies themselves.<sup>497</sup> In Norway and Sweden, it appears as though a person may identify themselves as Saami, despite not being in the electoral roll. This identification process is particularly important for individuals who are descendents of the original inhabitants and still practice reindeer husbandry. However, this issues has not yet been discussed in Finland, despite the fact that it appears as though the current definition of Saami does not conform to Article 1 of ILO Convention No. 169.

How can it be ensured that the persons not "listed" on the electoral rolls of the Saami parliaments are also regarded as the subjects of the Convention? At the same time, if such recognition serves as a prerequisite for indigenous rights, is it possible to ensure that all persons are "listed"?

## 2.3 Concluding Perspectives on Liberalism and the Rights of Indigenous Persons

### 2.3.1 Liberalism and the Human Rights Context

Usually, a wide range of knowledge is necessary for understanding liberalism. Often, it is regarded as a disputatious family of doctrines with some core principles. In the West, these may hardly be considered to be new. Still, they constitute a radically different way of understanding and organizing the best scheme for human association from many other understandings produced in the course of human history, in Western and other civilizations. While liberal doctrines and practices are presently well

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<sup>496</sup> In 2009. [www.samediggi.no](http://www.samediggi.no)

<sup>497</sup> According to Gudmundur Alfredsson, the subjective element, or self-identification, is now acknowledged as part of the minority definition. This is the case for ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in Article 1, paragraph 2, and UN Special Rapporteur Francesco Capotorti also recommended adherence to this element. It presumably comes in two layers: an individual decides whether he/she is a member of a minority; and the group must accept the individual concerned on the basis of the characteristics, do so in a non-arbitrary fashion, and it must be possible to subject the group's decision to independent review. Article by Alfredsson, "Institutional Trends – Minority Rights", at: <http://www.wcl.american.edu/humright/hracademy/documents/Class2-Reading3MinorityRightsNormsand-Institutions.pdf?rd=1> Accessed 22.2. 201.

established in the West, it should not be forgotten that they were recently threatened with extinction in their heartland.<sup>498</sup>

When discussing the liberal project, from a broad historical perspective, liberalism differs from its predecessors and subsequent rivals as it is a fairly new and has a radically different conception of social and political order. Still, the most significant idea of liberalism, as a project for a new world order, refers to the application of liberal ideas and practices to the organization of IR, principally through human rights documents and instruments produced by, or under, the patronage of the UN after the Second World War. The attempt at promoting the general acceptance of these declarations and covenants on human rights constitutes a project for a new order – both for the internal organization of many of the world's states, as well as the manner in which these states relate to one another internationally.<sup>499</sup>

In order to understand the idea of human rights as the expression of liberal principles, in these documents, the meaning of liberalism must first be grasped. Liberalism in both theory and practice is concerned with promoting social outcomes that are, as far as possible, the result of free individual choices. However, one person's choice to not respect the equal freedom and rights of others is invalid. Thus, economic liberalism upholds the rights of individuals to make necessary decisions for their labour and the use of their wealth and income, as long as they respect liberty, property and contractual rights of others. In general, social liberalism extends this idea to all aspects of life, except for the political, and requires freedom of thought and expression, of religion, of movement and association, of sexual orientation and ways of life, which are all subject to the condition that the exercise of any particular freedom is to be respected only insofar as it does not violate the equal freedom of others.<sup>500</sup>

Of course, equal freedom could refer to everyone's unrestricted freedom to do as he or she pleases, including the 'right' to kill or injure another. However, this would result in a freedom that is constantly open to the invasion of others. Everyone's freedom may then be increased by the mutual acceptance of equal limits on what a person is entitled to do. The basic content of these limitations is the exclusion of force and fraud so that interactions among human beings may take place with the free consent of each party. Coercion is only justified against someone who violates those limits.<sup>501</sup>

Political liberalism cannot be understood in a similar manner, as decisions in the political sphere must, *ex hypothesi*, be collective and binding on all members of the

498 John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*, Cambridge University Press, 2008.

499 *ibid.*

500 *ibid.* See also Holder, Cindy L. and Cornthassel, Jeff J., 'Indigenous peoples and multicultural citizenship: Bridging Collective and Individual Rights', *Human Rights Quarterly* 24, 2002.

501 John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*, Cambridge University Press, 2008, 1.

polity. However, its foundations, based on the respect of individual liberty, remain the same. Political liberalism affirms the rights of individuals to choose their governors through exercise of individual and equal votes in periodic elections, the right to stand for election, and to associate politically in order to promote the policies and parties of their choice. Political liberalism also includes the designing of institutions that provide some guarantee of government accountability to the people and limits the government's power to attack or erode individual liberty. Standard mechanisms are institutions of representative government, as well as the separation of the legislative, executive and judicial powers.<sup>502</sup>

Liberalism, then, consists in the structuring of individual social interactions on the basis of a set of rights that require human beings to respect one another's liberty and equality. These rights must not be expressed as natural or human rights. There are liberal theories that defend the adoption of such rights on the grounds that societies that are organized in such a manner achieve a greater sum of utility or happiness than any alternate social scheme. In the 18th and 19th centuries, British thinkers, such as Jeremy Bentham and John Stuart Mill were influential liberal theorists in the utilitarian tradition. Another source of major theoretical support for the liberal organization of society has been the belief in natural rights as developed by 17th innovative theorists, such as Hugo Grotius in the Netherlands, Samuel Pufendorf in Germany, and Thomas Hobbes and John Locke in England. In this view, human beings have a fundamental natural right to liberty provided that they do not violate the equal liberty of others unless their own preservation is threatened. This tradition may have been transformed and rationalized by the immensely influential liberal theory of Immanuel Kant at the end of the 18th and the beginning of the 19th centuries.<sup>503</sup>

Similar to natural rights, these are believed to be the inherent rights of human beings. This means that individuals are entitled to enjoy such rights by the virtue of their nature and dignity as human beings. Thus, Article 1 of the 1948 United Nations Universal Declaration of Human Rights, which has acquired iconic status in the contemporary Human Rights movement, affirms that, '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood.'<sup>504</sup> In this sense, human beings possess rights, regardless of whether they are recognized by the politico-legal system of which they are a member of and to which they are a subject to. A politico-legal system that does not respect such rights is in violation of fundamental ethical requirements.<sup>505</sup>

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502 *ibid.*, 2.

503 *ibid.*, 3.

504 The UN Declaration of Human Rights.

505 John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*, Cambridge University Press, 2008, 4.

According to Charvet and Kaczynska-Nay the principle of equal liberty promotes social outcomes that are, as far as possible, the result of individual choice under circumstances where all individuals respect one another as equals. This principle is unclear without noting the belief that every adult has the ability to make life decisions without becoming subject to the coercive authority of others. This notion is compatible with the acknowledgement that some people are relatively more intelligent, in comparison to others, and may make decisions that are better informed. Still, to claim that such inequalities are irrelevant to the fundamental equality enjoyed by all is false. Thus, individuals must, to a sufficient degree, possess the capacity for self-direction, as coercing them into living contrary to their wishes would be wrong.<sup>506</sup>

Liberalism is a theory and set of practices that considers a just social and political order. It is concerned with the right to coerce persons to act in accordance with the requirements of a just order. Mainstream liberalism is under the belief that this right is possessed by the state. A crucial function of the just state is the ability to guarantee citizens that, if they comply with the just state's rules, they will not expose themselves to exploitation by the unjust. The liberal anarchist believes that the right to coerce the unjust is possessed by each individual and that, in order to transfer that right to the state, one must foolishly place oneself into the hands of a potential tyrant. Most liberals, however, believe that they have found a method of taming the tyrant and making it serve the liberal idea.<sup>507</sup>

The distinctiveness and originality of liberalism can, then, be understood as an attempt to restrict the area of human life that is subject to justified state coercion. This is expressed in the liberal idea of maximal equal liberty. It allows individuals to decide, alone or in a voluntary association with others, how they will compatibly live with others while still enjoying equal rights. Liberals and various anti-liberals oppose one another in the sphere of freedom of religion, thought, and expression. Liberalism holds that the belief in and practice of one religion is perfectly compatible with others' freedom as long as it does not require its adherents to forcibly convert, subordinate or kill followers of other religions. Such requirements clearly violate the principle of equal freedom and are not permitted within a liberal scheme.<sup>508</sup>

Two pressing issues for critics of existing human rights mechanisms are the lack of progress in promoting universal recognition of group rights and the continued exclusion of indigenous groups from political, economic, and social participation in many areas of the world. For many, the problem lies in the individualistic nature of existing human rights discourse. The concern is that existing instruments emphasize individual needs and

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506 *ibid.*, 5.

507 *ibid.*, 7.

508 *ibid.*, 8.

entitlements in a manner that inadequately compares the collective nature of groups with non-Western world-views and priorities. Charvet and Kaczynska-Nay argues that in this regard the preference of many human rights documents for the language of ‘populations’ and ‘persons who are members’ over the language of ‘peoples’ is one important example of an atomistic bias that does not adequately protect those for whom communal life is vital.<sup>509</sup>

Debating the limits of existing rights discourse is often pursued within a framework of liberal-individualism versus corporatism. For example, Peter Jones distinguishes two different ways in which a group’s claim may be incorporated into human rights discourse: 1) the claim of a collectivity that is ultimately reducible to individual members; or 2) the claim of a corporate body of which the reduction of constituent members is impossible. Jones, among others, has argued that groups should not be recognized as subjects of human rights, which can conflict with, and potentially override, the claims of individual members.<sup>510</sup>

However, for many representatives of minority claims, protecting the ability of groups to determine the terms on which members interact with outsiders and with one another is an essential part of protecting their right to self-determination. It represents a goal toward which any fight for group recognition must aim.<sup>511</sup> If reducing group claims to individual claims is incompatible with treating group autonomy as important, then liberal-individualist accounts of human rights are incompatible with corporatism and the political demands of most groups claiming rights globally. Local and international rights claims of indigenous peoples often appear as test cases in theoretical discussions surrounding this issue. Indigenous groups tend to practice a political and cultural philosophy in which the connections between individual and group identity are given as much weight as the boundaries. Consequently, their practice appears to offer a beneficial testing group for the theoretical works of both liberal-individualists and corporatists, who claim to model their work after indigenous philosophies.<sup>512</sup>

However, after close examination, the ways in which indigenous groups conceive of how groups relate to individual dignity are not only more complex than the liberal-individualist or corporatist approaches, but offer a more sophisticated understanding than either theoretical approach. Many indigenous groups emphasize the interdependence of individual and collective claims and gravitate toward solutions such as dual standing group rights (rights which are predicated of a group but can be claimed by

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509 *ibid.* 9. Some examples of human rights treaties stressing the individualistic nature of rights claimants include the International Covenant on Economic, Social, and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), and the Convention on the Elimination of All Forms of Discrimination Against Women (1979).

510 Peter Jones, *Human Rights, Group Rights and Peoples’ Rights*, 21 *HUM. RTS. Q.* 87–88, 1999.

511 See, Rosemarie Kuptana, *Speaking Notes for the North American Indigenous Nations UN Satellite Meeting* (1 Apr. 1993), cited in Wendy Moss, *Inuit Perspectives on Treaty Rights and Governance*, in *ABORIGINAL SELF-GOVERNMENT: LEGAL AND CONSTITUTIONAL ISSUES*, ROYAL COMMISSION ON ABORIGINAL PEOPLES, 1995.

512 Holder, Cindy L. and Cornassel, Jeff J., *Indigenous peoples and multicultural citizenship: Bridging Collective and Individual Rights*, *Human Rights Quarterly* 24, 2002, 129.

particular members as well as collectivities). Indigenous peoples generally recognize that collective and individual rights are mutually interactive, as opposed to being in competition. Duties of citizenship are grounded in interactions at multiple levels (the host state, indigenous group, and individual members), as are individual claims made of governing institutions, as well other individuals.<sup>513</sup>

Theoretically, the individual-collective debate is interesting to evaluate, while there appears to be no certainty regarding whether groups, such as indigenous peoples, have the “right holder” status in IL. Perhaps they do, to some extent. However, the most interesting aspect of this study is individual membership within these groups. This is particularly emphasized in a question of the CEACR to Honduras: the Committee of Experts is under the opinion that, according to the statement of the Government of Honduras, the ILO Convention covers persons who are members of indigenous and tribal peoples, particularly those belonging to the CONPAH, an association of indigenous persons. However, the Committee raises the question as to *whether, and in what manner, the Convention is applied to those indigenous and tribal peoples who are not affiliated with this organisation*.<sup>514</sup>

If you are recognized as an indigenous *person*, you are the right holder of ILO Convention No. 169. Does this recognition require a “membership” in an indigenous organization? What if your rights as an indigenous person are based on membership? What if you do not want to be a member of any organisation? Can you identify yourself as an indigenous person if you are not a member?

These are difficult questions that will be further examined in the following chapter.

### 2.3.2 The Importance of Subjectivity in the Context of Land and Liberalism

As it is explained above, in the previous chapter, human rights are generally understood as the fundamental rights of the individual. However, in the case of indigenous peoples, this approach is relatively unclear. Anaya and Williams have argued that one of the most notable features of the contemporary international human rights regime has been the recognition of indigenous peoples as groups as special subjects of concern. According to them, a discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing.<sup>515</sup>

513 *ibid*, 129-130.

514 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras Ratification: 1995, Submitted: 2000.

515 See S. James Anaya, *Indigenous Peoples in International Law* (1996); Siegfried Wiessner, *The Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Hum. Rts. J.* 57 (1999); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 *Duke L.J.* 660; W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 *Am. J. Int'l L.* 350 (1995).

In 1948, the General Assembly of the Organization of American States took initial steps toward the recognition of indigenous peoples as special subjects of international concern in Article 39 of the Inter-American Charter of Social Guarantees. It required states in the Inter-American system to take 'necessary measures' to protect indigenous peoples' lives and property, 'defending them from extermination, sheltering them from oppression and exploitation.'<sup>516</sup> This regional recognition was followed by the adoption of the first multilateral treaty specifically devoted to recognizing and protecting indigenous peoples' human rights, International Labour Organization Convention No.107 of 1957.

Subjectivity is most crucial in regard to the land right articles of ILO Convention No. 169. In Finland, the discussion around the historical Saami land rights is, currently, connected to membership in the Saami Parliament's electoral roll. This discussion began at the end of the 1990s and proves that the 'subject' issue has been taken for granted in Finland (e.g. only in referring to persons in the register). However, in Finland, it is impossible to further proceed with the issue if this is not thoroughly examined. A few examples illustrating the complexities involved in the subject-issue are presented below:<sup>517</sup>

1. A family from Inari-area states: *We are two brothers and one sister. My brother and my sister have been accepted to the Saami Parliament's electoral roll. However, when I applied to be accepted into the electoral roll with my children, in 2007, we received a negative answer. Consequently, we are asking: How is this possible?*

2. A family from Eastern Lapland articulates: *I am not a Lapp, but I am married to one. We have two children. My husband has a document showing his descendancy from the original inhabitants of this area, the area where we still reside. Like our forefathers, we are also reindeer herders. Over the years, not many outsiders have moved into this village. There are approximately 120 people living in the village. In our knowledge, approximately 11 of the 120 inhabitants are not of Lapp origin. However, these 11 persons are married to Lapps, so their children are Lapps. We know our ancestral roots far into the past and understand what an indigenous person is. What should we call ourselves? We have lost the old Lappish language due to the strong efforts of the state and the Lutheran church. When speaking the Lapp language, my mother in law was laughed at and teased at school. As a result, they burned their clothes so that they would not be teased. The Saami have always been a friendly and peaceable nation. I think that this is the reason why we have not publicly raised ourselves up against the conquerors. However, we have always known the locations of our traditional land and water. We know the hunting places, meadows, and*

<sup>516</sup> The Inter-American Charter of Social Guarantees, Article 39.

<sup>517</sup> I have collected data through personal contacts from people living in different parts of Lapland, from North of Finland from the so called Saami area, from Eastern Lapland, from the most southern part of the historical Lapland (Kuusamo) and from Western Lapland. Some of the people would have performed with their own names for the purposes of the thesis, but some didn't. This made me to choose anonymity for all of these persons. The names are not so important anyway, the stories are.



*grazing grounds for reindeers, birthplaces for calves, as well as places where we can gather firewood. We also know that we have never given these lands away. I understand that the lifestyle and culture of the indigenous peoples is changing. However, this development should happen in a manner that is accepted by the peoples concerned. I believe that the culture is alive through traditional livelihoods.*

3. A person from Kuusamo, the southern part of historical Lapland recalls: *I am the descendant of ---. I know all of my forefathers who lived between him and myself beginning from the 17<sup>th</sup> century onward. We have been reindeer herders in the area and we are the original inhabitants of this area. I am not in the Saami parliament's electoral roll.*

4. A family from Northern Lapland articulates: *We are reindeer herders and the descendants of the original inhabitants of the area. Our forefathers hunted deers (wild reindeer), were fishermen and bartered with small animal skins. They were referred to as the Forest Lapps and I consider myself to be a Forest Lapp. At the end of the 1990s, I applied to the Saami Parliament's electoral roll. I have the document as a proof of my descendancy, but was not accepted. The Supreme Administrative Court declined my complaint. A similar rejection letter was sent to hundreds of other persons. Aside from our social security number, all letters were identical. My children are proud of their roots, they wear the Lappish dress during festivities, and participate in reindeer herding activities. Still, they were never taught about Saami culture and language in school.*

5. A person from Northern Lapland states: *At the end of the 1990s I applied to the Finnish Saami Parliament's electoral roll. I fulfilled all criteria in the legislation. However, I was not accepted. I think the system is unfair. It appears as though some family members are accepted while others are not. I consider it to be the electoral roll of the SP, but not a list of indigenous persons. I also consider that we are all born as indigenous persons. Still, the electoral roll does not include persons under the age of 18 years. My cousins, as well as my daughter's husband, are on the roll. If only those persons on the register have the rights of indigenous persons, then I consider the system to be unfair. For me, land, forests and lakes are the foundation of my identity. They are what I am.*

The subject-object dichotomy in IL reflects the level of individuals. It is important to highlight the meaning of this approach to peoples' daily lives. The internalization of human rights norms into states' political and legal practices is extremely challenging. Still, the recognition of peoples as the beneficiaries of such rights is, in itself, a human right. In reflecting upon this on a research basis, the international development of indigenous peoples rights as collective rights may, perhaps, lead to diminished individual rights. It has become increasingly evident that indigenous peoples are the subjects of IL and politics. However, there is still an uncertainty as to who these people are exactly. We begin by discussing the rights of the group. My aim is to restore the discussion of the liberal theorists' original thought process – where the rights of the individual are also discussed – and to place it within the Finnish context.

In the Finnish context, the issue is problematic for two reasons: the electoral roll of the Saami Parliament plays a central role in determining the “Saami-subject”, as well as the “Saami-right holder”. This means that people have many difficulties in identifying themselves as Saami if they are not in the “register”. Thus, only registered Saami maintain rights under national and international law. This leads to an interesting dichotomy: as Finnish Saaminess is based on the register, it also defines a persons’ identity. Consequently, if you are not accepted, you are a Finn, not a Saami. For many persons, this is the second rejection. They faced the assimilation and integration policy of the state and church in the 1960s. As they no longer speak the language<sup>518</sup> due to these policies, they are once again rejected. As a result, they do not know what to call themselves.

It might be easy to concur with a decision by the Supreme Administrative Court of Finland<sup>519</sup>, where it states that it is the indigenous peoples themselves who should decide on their members without questioning the consequences of this approach. However, this approach do have consequences. An electoral board, consisting of five persons, makes a decision on membership with the only possibility of an appeal being to the governmental body of the Saami Parliament and later to the Supreme Court. In Sweden, the appeal can be made to the Administrative Board of the County where the Saami Parliament is situated.<sup>520</sup> In 1999, the possibility to appeal to the Supreme Administrative Court of Finland was tested by 657 persons, of which only a few were accepted into the register. The decision was proactive and makes it difficult to, once again, raise the issue. However, in 2003 a new case was brought to the Supreme Administrative Court<sup>521</sup>: It was stated by the electoral board of the Saami Parliament that a mistake was occurred during the process of 1999 and for that reason person B was marked to the register, even though should not have been. Later on according to the decision of the Supreme Court, person A, *descendant* to person B was marked to the register. The Court also stated that person B is to be accounted as Saami for the purposes of the electoral roll.<sup>522</sup>

In 2011 again five persons appealed to the Supreme Administrative Court on the

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518 Of course, nowadays it is possible to learn the language in the schools, but it is not the same thing when language is transmitted in a family to the next generations with stories and traditions involved with the language. In this respect, language can be one element of “indigenoussness”, but can it be the only one?

519 The Decision by the Supreme Administrative Court of Finland (KHO:n päätös) 1999:55.

520 Överklagandet skall ha kommit in till länsstyrelsen i det län där Sametinget har sitt säte (Norrbottens län) senast den 15 december året före valåret. Överklagandet av beslutet om den preliminära sameröstlängden prövas vid offentligt sammanträde hos länsstyrelsen den 15 februari valåret, eller om denna dag är en lördag eller söndag, närmast följande måndag. <http://www.samediggi.se/1060> Accessed 16.5.2011.

521 The Decision by the High Administrative Court of Finland (KHO:n päätös) 2003:61.

522 See more on the issue Joona, Juha Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa-ja vesioikeuksista. *Juridica Lapponica*, Rovaniemi 2006, 367-393.

decision of the Saami Parliament.<sup>523</sup> When looking into the decision(s), it seems that the Court has slightly changed its view in the issue since the reasoning of its decision is emphasizing the self-identification of these persons and also other cultural characteristics. These people themselves do not speak the Saami language, but they could show that their forefathers have done so. Their forefathers have also been marked as Lapps to Land and Taxation register of 1825. Similar cases can be addressed in every four years when the electoral board of the Saami Parliament is working actively before the new elections. However, in practise it will take at least 8 years for a person to be eligible to stand as a candidate for the next elections, if/when she/he is marked to the register. Further on, it is almost extremely sad, that persons identity is ruled by the Supreme Administrative Court.

To conclude, I would like to return to the the *Universal Declaration of Human Rights*, as mentioned at the beginning of the thesis. *Freedom of association* is the individual right to come together with other individuals and collectively express, promote, pursue and defend common interests.<sup>524</sup> The right to freedom of association has been included in a number of national constitutions and human rights instruments, including the European Convention on Human Rights and the Canadian Charter of Rights and Freedoms.<sup>525</sup> Freedom of association in the sense of workers' rights to organize is also recognized in the Universal Declaration of Human Rights and International Labour Organization Conventions. The latter also protects collective bargaining in the conventions on freedom of association. The right to freedom of association is sometimes interchangeably used with the freedom of assembly. More specifically, the freedom of assembly is understood in a political context, which is dependent on the source (e.g. constitution, human rights instrument, etc.). The right to freedom of association may, thus, be understood as including the right to freedom of assembly.<sup>526</sup>

Freedom of association is a popular term in libertarian literature. It is used in describing the concept of absolute freedom to live in a community or to participate in an organization whose values or culture are closely related to one's preferences; or, on a more basic level, to associate with any chosen individual. The libertarian concept of freedom of association is often rebuked from a moral/ethical context. In such a system, operating under laws would allow business owners to refuse service to anyone for any reason. Opponents argue that such practices are regressive and would lead to greater prejudice within society. Libertarians also argue that freedom of association, in a political context, is merely the extension of the right to determine with whom

523 The Decision by the High Administrative Court of Finland (KHO:n päätös) 2011: 81.

524 Article 20 ( UDHR) (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.

525 Jeremy McBride, *Freedom of Association, The Essentials of Human Rights*, Hodder Arnold, London, 2005, 18.

526 *ibid.*

to associate in one's personal life. For example, a person who values good manners or etiquette may not relish in associating with a person who is not decent or uncouth. Thus, a person voluntarily decides with whom to associate, based on his/her own volition. Libertarians believe that freedom of association, in the political sphere, is not a fanciful or unrealistic notion, as individual human beings already choose with whom they would like to associate based on a variety of reasons.

The electoral roll of the Saami Parliament was developed as a means for an individual to participate as a candidate or/and a voter in the elections of the Saami Parliament. The Parliament serves as the representative body of the Saami and decides on matters relevant to the cultural and linguistic rights of the Saami.<sup>527</sup>

The Finnish Act on the Saami Parliament<sup>528</sup> states: Section 3 — *Definition of a Saami*

For the purpose of this Act, a Sámi means a person who considers himself a Saami, provided:

- (1) That he himself or at least one of his parents or grandparents has learnt Saami as his first language;
- (2) That he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or
- (3) That at least one of his parents has or could have been registered as an elector for an election to the Saami Delegation or the Saami Parliament.

In its official web-pages the Norwegian Saami Parliament introduces the requirements to be eligible to vote for Saami parliamentary elections. "A separate electoral roll has been established for the purposes. To register in the electoral roll, an individual must file a declaration stating that:

- he/she considers him-/herself a Saami, and
- the Saami language is his/her home language, or that at least one of his/her parents, grandparents or great grandparents have or have had Sámi as their home language, or
- he/she is the child of someone who is or has been registered in the electoral roll.<sup>529</sup>"

Also in the web pages of the Swedish Saami Parliament similar approach has been taken:

"Inför varje val upprättas en samisk röstlängd. Rätten att bli upptagen i röstlängden och därmed ha rösträtt har du som uppfattar dig som same och har eller har

527 The Finnish Saami Parliament [www.samediggi.fi](http://www.samediggi.fi)

528 974/1995; amendments up to 1026/2003 included

529 The Norwegian Saami Parliament <http://www.samediggi.no/artikkel.aspx?MId1=3485&AId=3677&back=1> Accessed 21.11.2011.

haft samiska som språk hemma. Det går också bra om dina föräldrar, far- eller morföräldrar har eller har haft samiska som språk i hemmet eller om du har en förälder som är upptagen i röstlängden. Du ska ha fyllt eller fylla 18 år på valdagen och vara svensk medborgare. Bestämmelser om rösträtt och den samiska röstlängden finns i Sametingslagen (1992:1433).<sup>530</sup>”

It should be noticed that when talking about of cultural, linguistic, welfare etc. rights the issue of “membership” is probably not so problematic. These are rights that are quite well provided to all Saami citizens in the Nordic countries, although improving is always needed. However, in the context of property rights, land rights or usage rights, things are more complicated. There are usually also economical interests related to land rights as well to other financial support provided by the national states in able the minorities to develop their functions. In the context of the Saami, the financial support is usually targeted to the national Saami Parliaments, a representative bodies of the Saami. Therefore, very understandable, the membership to the electoral roll of the Saami Parliament becomes desirable. Naturally, it is relevant to ask, whether the membership is a requirement to be a subject of the ILO Convention No. 169 and therefore the beneficiary of the rights. The connection between these two is at some extend unclear.

As explained in article No. 5 of this dissertation the national legal systems in Nordic countries rely on the concept of immemorial prescription/usage (*urminnes hävd* in Swedish) when determining ownership to an area that has been used for long time. This approach in the context of ILO Convention No. 169 becomes interlinked. How do we take into account the immemorial rights to land and the other rights provided by the ILO Convention No. 169 in general?

In Norway, according to Pettersen, in 2009 the Saami electoral register was comprised of 13 890 persons aged 18 and older. It had, thereby, increased by approximately 150 per cent since its establishment in 1989. In her study Pettersen states that, on the other hand, we are unable to know how large this population could have been if all persons with a known or unknown Saami background considered themselves to be Saami and decided to join the electoral register.<sup>531</sup>

Pettersen continues, that the main reason why this remains unknown is because Saami affiliation had not been registered in the Norwegian censuses until 1930. Combined with previously prevailing negative attitudes towards being a Saami, this could have caused many to become unaware of their Saami heritage or, to make those who were aware, reluctant to acknowledge it. At the same time, some Saami, who are unaware of their heritage, may prefer to know. Others may, however, regard a quest for

<sup>530</sup> The Swedish Saami Parliament <http://www.sametinget.se/1061> Accessed 21.11.2011.

<sup>531</sup> Pettersen Torunn, *The electoral register of the Sámediggi in Norway 1989—2009: Basis, growth and geographical shifts*, 2011, 23. *Paper prepared for presentation at* European Consortium for Political Research (ECPR), Joint Sessions of Workshops, University of St Gallen, Switzerland 12-17 April 2011. A permission for quotation has been asked.

their potential Saami heritage as irrelevant and/or meaningless. Still, it is likely that a majority of the persons concerned acknowledge, as well as proclaim, their fulfilment of at least one of the objective criteria for inclusion in the Saami electoral register.<sup>532</sup>

Some may regard the Saami element of their ancestry as unproblematic. However, in light of their total family history, these persons may also regard it as an unimportant element in their daily lives and identities. There may also be persons whose life path has led them to leave their Saami identity behind. They were once Saami, but have ceased to be.<sup>533</sup>

In this respect, Pettersen continues to reflect on the Norwegian Saami situation. Still, there are an unknown number of persons, in Norway, with a clearly defined and unproblematic Saami identity. These persons may consider themselves to be fully Saami, a little Saami, sufficiently Saami and/or Saami a combination of Saami and another ethnic identity. On the other hand, an unproblematic Saami identity is not the same as joining the electoral register of the Sámediggi. So far, no wide-ranging or systematic studies have been undertaken in order to investigate the choices made by persons who qualify for inclusion. However, there is a widespread notion that relatively many of those who fulfil the criteria for inclusion choose not to join the electoral register a reason for abstaining could either be a lack of political interest, in general, and/or Saami policy, in particular. An additional reason could be a disagreement with the existence and/or the activities of the Sámediggi. Some may regard the Sámediggi as an appropriate and important institution, but as irrelevant to their own lives. Furthermore, it may occur that some refuse to be accountable to a particular aspect of the Sámediggi's overall activities. Last but not least, a reluctance to join may also be caused by opposition to a registration of ethnicity in a public registry, in general, and/or reluctance to declaring one's own Saami identity publicly, in particular.<sup>534</sup>

What differs between Finland and Norway? As noted, in Norway it has clearly been acknowledged that persons have different reasons for *not* registering in the Saami Parliament's electoral roll. For instance, it may not play a significant role in their personal lives. As a result, two concepts exist: "registered Saami" and "non-registered Saami". Only approximately 14 000 persons are registered, while the estimated total Saami population of Norway varies between 75 000 to 100 000. In Finland, Saami identity is closely connected to and is dependent on whether a person is registered or not. It is, thus, also directly connected to legal subjectivity. The Finnish situation is at odds with the Norwegian situation, where Saami identity is manifested irrespective of whether a person is registered or not.

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532 See *ibid.* 23-24.

533 *ibid.*

534 *ibid.* 24-25.

### 2.3.3 Concluding Words

The ratification of ILO Convention No. 169 has been under discussion in Finland for almost two decades. This dissertation has sought solutions for the most difficult questions related to the problems of the ratification. Two main themes have arisen within this context: the ownership question in regard to the land rights and subjects of these rights. As is the case in many other countries, the primary obstacles for Finland's ratification have been the Convention's land right articles, as well as the recognition of ownership and possession of the peoples concerned with their traditionally occupied lands. So far, it has been impossible to find a legislative solution with an adequate political endorsement. The question regarding Saami land rights has, until recently, been approached from two different and separate directions. On the one hand, there has been a demand for discussions on historical land rights, determined in national legislation according to property law, and their promulgation. On the other hand, relief has been sought from international treaties, which would improve Saami land rights and rights related to traditional livelihoods. In this respect, land rights provisions of the ILO Convention are essential. Although links between rights determined in national legislation and rights in IL are not required as, the ILO Convention maintains a special status. The Convention manages rights, as well as their historical dimension, concerning indigenous peoples. A concrete requirement regarding this historical dimension is already expressed in the Convention's first article. Article 1 states that, the Convention applies to indigenous peoples who are regarded as indigenous on account of their descent from populations that inhabited the country at the time of the establishment of the present state boundaries. In the area of present-day Finland, this would refer to the 17<sup>th</sup> and 18<sup>th</sup> centuries.

In this respect, Article 34 of the Convention is crucial as it states that, in regard to the characteristics of each country, the nature and scope of the measures that are to be taken in order to give effect to this Convention shall be determined in a flexible manner. Thus far, in the models presented on land rights issues in Finland the starting points have not been the special characteristics of Northern Finland, but are rather an administrative model in which the Saami Parliament would have a stronger and more decisive role on questions regarding land use, as well as stronger usufructuary rights. However, actual ownership remains with the state. The northern lands would be administrated by a council with both local and Saami members. Norway has established a Commission to investigate issues of ownership. It has also developed a special Tribunal for resolving land claims. This has, however, not yet been discussed in Finland. It may be argued that the illustrated administrative model does not, in any way, account for the area's legal-historical characteristics. This relates to the Convention's planned area of application, the persons to be affected, as well as the existing information from the area's property law history.

To date, the presented administrative models have taken a starting point where the Convention would only be applicable to Lapland County's three northernmost municipalities and one reindeer herding district. However, the area occupied by indigenous peoples in the 17<sup>th</sup> and 18<sup>th</sup> centuries is a lot larger and also consists of the middle and eastern parts of today's Lapland County.

In this respect, the best comparison can be made to Sweden, with whom Finland shares a joint property law history. In the context of Sweden's ratification of ILO Convention No. 169, the Convention would apply to the area where all Lapp villages were situated in the 17<sup>th</sup> and 18<sup>th</sup> centuries. In its entirety, this area is, in fact, larger as it consists of the current reindeer herding area, which, at some points, extends south of Lapland's borders. Sweden has attempted to clarify the ratification of ILO Convention No. 169 for as long as Finland. Under no circumstances has it been claimed in Sweden that the Convention would only apply to a specific small and limited area north of Lapland's border.

An additional question relates to the subjects of the Convention. To date, the state has suggested the establishment of an administrative body to govern the Northern lands, where the ownership would still remain in a states' possession.<sup>535</sup> In the context of the presented administrative models, the Convention would apply to persons registered in the Saami Parliament's electoral register, as well as to other local peoples regardless of whether they are descendants of an area's original inhabitants or practice traditional Saami livelihoods. In this respect, it is notable that the Convention focuses on indigenous peoples and explicitly applies to them. An essential approach of the Convention is the safeguarding of the possibility of practicing traditional livelihoods. In this respect, a comparison to Sweden, where the Convention applies to Saami reindeer herders, may be made. According to Swedish reindeer herding legislation, the right to practice reindeer herding belongs to all persons of Saami descent, but may only be practiced via a Saami village. Consequently, membership in a particular village is mandatory.<sup>536</sup> Therefore, thoughts presented in the Swedish situation are in line with what is normally understood to be a Saami (an indigenous person). In the Finnish context, the subjects would not necessarily only be reindeer herders, as the Forest Lapps who live in the Northern parts of Finland maintain their subsistence through reindeer herding, fishing, and hunting. In light of this information, it would be reasonable to defend an arrangement where the Convention would apply to peoples descending from the area's original inhabitants and who maintain a considerable amount of their subsistence via traditional livelihoods.

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<sup>535</sup> See more detailed on the issue in an article of this study, Jooa, Tanja, 'The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with some comparison to Sweden and Norway' *Nordic Journal of Human Rights* Vol. 23 Nr. 3:2005.

<sup>536</sup> Reindeer Husbandry Act, 1 and 11.



In clarifying the question of right holders of ILO Convention No. 169 in Finland, a possible solution may be found in a census that is to be carried out in, at least, the areas of historical land rights. The census is a recommended expedient of the Committee of Experts of the ILO (CEACR) when states have difficulties determining the right holders of ILO Convention No. 169. For example, in the case of Ecuador, the Committee notes that the peoples covered by the Convention are, in accordance with Article 83 of the Constitution, the indigenous peoples with nationalities of ancestral origin – black and Afro-Ecuadorian peoples. The Committee would be grateful if the government indicated Ecuador’s total number, as well as the number of each region’s, indigenous persons based on the latest census. The Committee also requests an indication of whether a person’s self-identification as indigenous was taken into account in determining their ethnic origin. On several other occasions, the Committee has requested that the census be undertaken in order to determine the Convention’s right holders. The 2003 case of Argentina serves as an example.<sup>537</sup>

It appears as though censuses have already been conducted in Bolivia, with the assistance of the United Nations Development Programme<sup>538</sup>, and Colombia.<sup>539</sup> In the case of Norway<sup>540</sup>, the Committee notes that there are no plans for further censuses targeting a specific indigenous criterion. The Norwegian Government uses the figures of the Saami Parliament’s electoral lists to determine the Saami population, although higher numbers are sometimes presented. In regard to Article 1 of ILO Convention No. 169, the Committee highlights four different aspects: 1) A census is an official way for a state to determine the number of its indigenous people(s), 2) a census should include a specific “indigenous component” 3) a census should be based on the self-identification of a person; and 4) the indigenous persons concerned should be consulted in the formulation of questions, which would provide guidance for the indigenous census.<sup>541</sup> However, it is clear that, according to the views expressed by the Committee, the identification of indigenous peoples is a crucial aspect in regard to these persons’ human rights situation. The implementation of Article 1 may be regarded as a challenging task for states, while also serving as the origin for the realization of other rights.

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537 CEACR: Individual Direct Request for Argentina, Submitted 2003.

538 CEACR: Individual Direct Request for Bolivia, Submitted 1995.

539 CEACR: Individual Direct Request for Colombia, Submitted in 1996.

540 CEACR: Individual Direct Request for Norway, Submitted in 1995.

541 These views are expressed repeatedly in the cases of Argentina, Ecuador, Bolivia and Colombia. Almost all of the ratified countries face problems with the implementation of Article 1. This is especially difficult in countries with a large indigenous population and in countries with many different peoples. For example, in Peru, there are 24 million inhabitants, of which 9 million are indigenous, and there are 42 different ethno-linguistic groups. The Committee has often referred to the difficulties that have arisen from the various definitions and terms used to identify the populations covered by the provisions of the Convention. CEACR: Individual Direct Request for Peru, Submitted 2006.

Finally, in reference to Article 14.1 of the Convention, which implies that indigenous peoples' rights of ownership and possession are to be recognized. As stated above, until the mid-18<sup>th</sup> century, the area's indigenous peoples, the Lapps<sup>542</sup>, were considered to be the landowners. It would be possible to fulfil the obligations of the Convention's land rights provisions by considering this information despite the fact that, later on, national law did not consider the Lapps as the area's landowners. If this perspective is taken, ratification could be justified on the basis of repairing the injustice confronting the Saami, at that time. Additionally, one may assume that, politically, it would be easier to enforce an arrangement in which Saami people's possessions would be returned in areas where they have previously held ownership. This may be tested through land claims procedures, based on national property law, or the establishing procedures of a Commission that is similar to the Finnmark Act, which investigates and reports on existing ownership, as well as other rights.

As a last comment, the extremely challenging situation related to indigenous peoples' land rights, and the ratification of ILO Convention No. 169, not only in Finland but also in other countries, must be highlighted. Often in times, questions are related to important resources that are located within these territories and are an important source of state revenue. State sovereignty may be challenged by the ratification of the Convention when the territories are returned to their traditional owners. One may argue that the ratification of ILO Convention No. 169 is easy, but that its implementation is difficult. The internalization of the Convention into a state's political and legal practices is a process guided by the ILO Committee of Experts. Comparative aspects of the study show that it is relatively difficult to estimate the substantial effects of the ratification of the Convention. However, certain guidelines may be found. In the Finnish context, the question of ownership should be evaluated based on historical conditions, while considering the context of the potential ratification – a context that may change in the future.

When this research began, approximately ten years ago, only 14 countries had ratified ILO Convention No. 169. Now, 22 ratifications have taken place. The increase number certainly conveys the relevance of this Convention as the only legally binding treaty dedicated to the protection of the rights of indigenous peoples. In Finland, its ratification should, thus, fundamentally be regarded as important for as long as the conditions for the fulfilment of its provisions are met in accordance with national conditions and equity.

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<sup>542</sup> The Saami were previously called Lapps. Lapp is used as an exonym, a name given by the others. However, the distinction is not so clear, some people still use also the word Lapp.

### 2.3.4 Recommendations for Future Development – *de lege ferenda*

On the basis of the presented research, the final part of this dissertation provides recommendations and suggestions on how Finland could further proceed with issues related to Saami peoples' rights to their traditionally occupied lands and water, as well as the possibility of ratifying ILO Convention No. 169. Some fundamental questions, which are to be examined, include issues related to land rights, the identification of land, ownership, questions related to land, and the subjects of these rights.

This study reflects many of the issues that have been under discussion in Finland, Sweden, and Norway, for many years. It has been extremely important to realize that many of the issues, debated today, are rooted far into the history of these areas. The following recommendations contain similar suggestions to those presented by Sven Heurgren in a 1999 Swedish Committee report.<sup>543</sup> However, the suggestions consider Finland's national characteristics as required by ILO Convention No. 169.

- Firstly, the subjects or right holders of the Convention should be identified based on the phrasing of Article 1 of the Convention and in the context of Article 14. A census may be completed on behalf of a state, at least, within areas belonging to historical Lapland. This is usually recommended by the Committee of Experts in situations when determining the beneficiaries of ILO Convention No. 169 is unclear.
- The land to which the Saami hold rights, under the Convention (Article 14.1.), must be identified. This applies to both land that the Saami traditionally occupy and to land that the Saami occupy with others, as well. So far, historical information on land areas occupied by the Saami has not been taken into account in state preparations.
- Measures are to be taken so as to ensure that the Saami have sufficient land to enable them to continue reindeer herding.
- Other Saami livelihoods connected to land, like fishing and hunting should be equally protected.
- It should be possible to receive state compensation for legal costs incurred in connection with important cases involving Saami land rights. No case should be left without investigation due to lack of money.
- Special consideration should be given to the situation of the Saami who have, due to colonisation and integration, lost their language, but who still practice traditional livelihoods in the area and have maintained their culture in many forms. The strengthening of their identity and transmission to future genera-

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543 SOU 1999:25.

tions is of vital importance. This may occur via, for example, compensation, as well as protection and cultural development aid.

- ILO Convention No. 169 does not explicitly recognise indigenous peoples' rights to self-determination, autonomy, or self-government. It provides *self-management*, and the right of indigenous and tribal peoples to choose their own priorities. Basically, this provides indigenous peoples with the right to some measure of self-government in regard to their institutions and in determining the direction and scope of their economic, social and cultural development. According to some scholars, this would mean 'internal autonomy' that would give Saami the right to maintain their indigenous customs and institutions, provided that they are compatible with national law or recognised human rights standards. However, it must be highlighted that, especially in regard to land rights, states are responsible for establishing adequate procedures to resolve the land claims of the peoples concerned within the national legal system (Article 14.3.).

## **PART III The Articles**

## THE POLITICAL RECOGNITION AND RATIFICATION OF ILO CONVENTION NO. 169 IN FINLAND, WITH SOME COMPARISON TO SWEDEN AND NORWAY

By TANJA JOONA\*

**Abstract:** *The demands of indigenous peoples for self-determination over their traditionally occupied lands have caused new challenges for State sovereignty. Outside pressure from the international community has led States to reconsider their relationship with the indigenous peoples living within their borders and to recognize their historical rights. This article surveys the recent responses in Finland, Sweden and Norway to Sámi demands for protection of land rights pursuant to ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries. While Norway has ratified the treaty, Sweden and Finland have not done so. They are however, aware of the potential impact of the law of the Convention and trying to remove the obstacles before the ratification. The article analyses the interpretation and implementation of the Convention, which has caused disagreement and conflict between the different stakeholders, and where legal concepts have been mixed in different ways and used for political purposes.*

**Keywords:** *Sámi land rights, ILO-Convention No. 169*

### A. INTRODUCTION

This article surveys recent responses in Finland, Sweden and Norway to Sámi demands for protection of land rights pursuant to ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter ILO Convention No. 169, or the Convention). While Norway has ratified the treaty, Sweden and Finland have not done so. As will be shown, however, all three countries, regardless of the ratification question, are acutely aware of the potential impact of the law of the Convention.

Indigenous ownership rights usually have long historical roots. On the land in question, population is mixed, borders poorly defined, and proving ownership rights is intensely problematic. Claims from the Sámi people with regard to land may collide with the equality rights of other members of the States in question, where generous social, cultural and political rights are enjoyed all citizens regardless of status.<sup>1</sup>

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<sup>1</sup> Margret Carstens: "From Native Title to Self-Determination? Indigenous Rights in Australia and Canada – A Comparison" (2001) 11 *Law and Anthropology: International Yearbook for Legal Anthropology*, 248–281.

In the three Nordic countries under discussion the interpretation and implementation of the Convention has caused disagreement and conflict between the different stakeholders. The legal concepts used have been mixed in different ways and used for political purposes; actors look to their own political interests when interpreting texts. This article analyses this situation. It relies heavily on official reports from the three countries in recent years, and also draws on the significantly important guidelines to the treaty emanating from the ILO.<sup>2</sup>

## B. AN OVERVIEW OF ILO CONVENTION NO. 169 IN THE NORDIC CONTEXT

### 1. SOME WORDS ON PROCEDURE

A fundamental principle of ILO Convention No 169 is that the persons protected by it shall enjoy the full measure of human rights without discrimination.<sup>3</sup> Importantly here, it specifies that indigenous peoples have certain rights to the natural resources of their territories. They have the right to participate in the use, management, protection and conservation of these resources and the right to be consulted before natural resources are explored. Land forms a basis of their existence as such and of all their beliefs, customs, traditions and culture. But the right to land is also in potential conflict with sovereign interests, not just with regard to the allocation of natural resources, their exploration and exploitation, but also with the problems caused by, for example, overgrazing and environmental protection. Article 34 therefore unsurprisingly states that “the nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.” The Convention’s flexibility and the enduring problems of interpretation will be examined later.

The ILO Committee of Experts, which supervises State compliance with the treaty, encourages ratifying states to develop appropriate mechanisms to improve the participation of indigenous peoples in the application of the Convention.<sup>4</sup> Ratification of the treaty marks a start for dialogue and future consultations, where indigenous peoples are given an active role. Indigenous peoples can also use the Convention as a useful tool for negotiating policies or projects affecting them.

Indigenous peoples as such have no formal position within the ILO structure. But they can participate in ILO meetings and other activities as representatives of governments, or of workers’ and employers’ organizations or other non-governmental organizations. ILO’s

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<sup>2</sup> Particularly Manuela Tomei, and Lee Swepston: *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169* (Geneva: ILO 1996) (hereinafter ‘the 1996 Guide’); and *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169). A Manual* (Geneva: ILO 2000) (hereinafter ‘the 2000 Manual’).

<sup>3</sup> Patrick Thornberry: “Indigenous Peoples: An Introduction”, in Patrick Thornberry (ed.): *International Law and the Rights of Minorities* (Oxford: Oxford University Press 1991) 332-382; and Lee Swepston: “A New step in the International Law on indigenous and Tribal Peoples: ILO Convention No. 169 of 1989”, *ibid.* 329-377.

<sup>4</sup> 2000 Manual 80.

supervisory system does not provide for the filing of complaints by individuals or general NGOs, including indigenous organizations. But it permits complaints from employers' or workers' organizations on behalf of or concerning indigenous organizations, communities or individuals.<sup>5</sup>

## 2. THE ISSUE OF DEFINING THE CONVENTION'S RIGHTS-HOLDERS

### NO CLEAR DEFINITION

ILO Convention No. 169 does not fully define who indigenous and tribal peoples are. Article 1(1) defines indigenous peoples as people who are descendants from the populations which inhabited the country at the time when the present State boundaries were established and who have wholly or partially retained their own social, economic, cultural and political institutions. The full wording of the provision is as follows:

Article(1) This Convention applies to:

- a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations;
- b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions

This definition correlates with the definition used for the purposes of what may be said to amount to general international law in this area. The Convention adopts an approach based on objective and subjective criteria, whereby the objective criterion means that a specific indigenous or tribal group or people meets the requirements of Article 1(1) and recognizes and accepts a person as belonging to their group or people. The subjective criterion implies that the person in question identifies himself or herself as belonging to this group or people; or the group considers itself to be indigenous or tribal under the Convention. The treaty seems to focus on the present situation, though historical continuity is important too. The challenge is how to improve the living and working conditions of indigenous and tribal peoples so they can continue to exist as distinct peoples, if they wish to do so.<sup>6</sup>

### NORDIC DEFINITIONS OF INDIGENOUS SÁMI

It is commonly agreed that the Sámi people are a "people" for the purpose of Article 1(1). But that is not to say there is universal acceptance of what makes a person a Sámi for the purpose of domestic or international law. In spite of the fact that the Sámi, at least for the purpose of political speech making, consider themselves one nation in four States (Sámi people also

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<sup>5</sup> 2000 Manual 74–78.

<sup>6</sup> 2000 Manual 7-8.



inhabit parts of Russia), there is a lack of a joint or common definition. This is one of the basic problems in regard to land rights from a property law perspective and the recognition and implementation in these countries of the international Convention.

In Finland, Sweden and Norway the Sámi elect representative bodies, Sámi Parliaments, which have advisory functions *vis-à-vis* the national governments. According to the laws regulating the right to vote in these parliamentary elections people are Sámi if they regard themselves as such and have learnt Sámi as their first language, or have at least one grandparent (in Norway even a great-grandparent) who has learnt the language. In Sweden, spouses of Sámi meeting these criteria are entitled to Sámi status. In Finland's Sámi Parliament Act, the term Sámi also refers to a person who is a descendant of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp (an old term for the Sámi).

#### THE SÁMI POPULATION

It is estimated that approximately 100 000 Sámi persons live in Northern Fennoscandinavia and on the Kola Peninsula; areas that cover parts of Finland, Norway and Sweden. The figures presented in table 1 below are based on information presented by the Sámi parliaments.

	FINLAND	SWEDEN	NORWAY
Sámi Parliament Election register	5121 (1999) <sup>7</sup>	5900 (1997) <sup>8</sup>	5497 (1989) <sup>9</sup> 9923 (2001)
Estimation of the total Sámi population <sup>10</sup>	7500	15 000–17 000 even 20 000–25 000	50 000
Estimated Sámi area in each country	Sámi Homeland in Northernmost Finland	51 Sámi village from Karesuando (north) to Idre (south)	County of Finnmark in Northern Norway to Røros (south)

### 3. IMPORTANT PROVISIONS IN THE CONVENTION

#### LAND RIGHT ARTICLES

In the following this article introduces the central land right provisions of ILO Convention No. 169. They are of special importance in Norway, Sweden and Finland (but also in many other countries). The provisions caused significant problems to countries in a process of ratification or implementing an already ratified Convention.

<sup>7</sup> <http://www.samediggi.fi/suomi/toimieli/tilasto2htm> (visited 28 November 2003).

<sup>8</sup> [http://www.sapmi.se/ssr/same\\_sverige.html](http://www.sapmi.se/ssr/same_sverige.html) (visited 28 November 2003).

<sup>9</sup> <http://www.samediggi.no.default.asp?selNodeID=110&lang=no> (visited 28 November 2003).

<sup>10</sup> These estimations are based on official documents, literature, Internet etc. There is no, however, any information detailing where these figures were obtained or on what they are based, who these people are, where they live etc.

Two parts of the treaty deal with land rights. They include Articles 13 through 19, of which Articles 14 and 15 contain the most concrete obligations for the ratifying States. According to Lee Swepston, the Convention was framed in such a way to provide for the possibility of a separate land rights regime within the context of the national legal system. Indigenous peoples have land rights even when they are different from those recognized by the national legal system. At the same time, the national legal system is the framework within which land rights must be realized.<sup>11</sup>

#### ARTICLE 14

Article 14 is the most important provision on land rights in the treaty. It states:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to use lands which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. 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.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

The provision requires State parties to recognize the rights of ownership and possession of the peoples concerned over lands they traditionally occupy. In addition, governments shall take measures to safeguard the rights of the peoples concerned to use lands not exclusively occupied by them, but to which they traditionally had access for their subsistence and traditional activities.

In order to recognize and protect indigenous and tribal peoples' rights to the lands they traditionally occupy, it is necessary to know which these are. The identification of indigenous and tribal peoples' lands is therefore crucial. This is an ongoing process in Finland and in Sweden.<sup>12</sup>

When drafting the Convention, the International Labour Conference concluded that in some circumstances the right to possession and use of the land would satisfy the provision's conditions as long as there was a firm assurance that these rights would continue. This may be the case, for instance, in situations where isolated indigenous and tribal peoples live on reserves or where there is shared use of certain lands.<sup>13</sup> The Convention also requires States to esta-

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<sup>11</sup> Lee Swepston: "A New Step in the International law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989", *supra* note 3, 348.

<sup>12</sup> In Finland the Ministry of Justice has appointed a historical-legal research group to investigate among other things the identification of historical land right areas. See <http://www.om.fi/16860.htm> (visited 12 January 2004).

<sup>13</sup> 1996 Guide 31–32.

blish adequate procedures within the national legal system to resolve land claims by the peoples concerned. In some situations, problems may arise out of these land claims. These can be with other indigenous communities, or with outside settlers or other stakeholders.<sup>14</sup>

#### ARTICLE 13

Article 13(1) states that governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. The Convention recognizes both individual and collective aspects of the concept of land. It thus encompasses land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g. for home or dwelling. Land can also be shared among different communities or even different peoples. This means that a community or people lives in a certain area and also has access to, or is allowed to use, another. This is especially the case with grazing lands, hunting and gathering areas and forests.<sup>15</sup>

#### ARTICLE 15

Article 15 concerns the rights of these peoples to the resources pertaining to their lands. This has been considered to be an especially difficult provision to interpret. It is drafted in terms which are far from specific because it is intended to apply to many different national situations. There are many cases in which the State constitution provides that the State alone owns mineral and other resources. In such cases, Article 15(2) provides that, when a government retains the ownership of mineral or subsurface resources, it has to consult these peoples in order to determine whether and to what degree their interests would be prejudiced, before it allows any programmes for the exploration or exploitation of the resources to be undertaken. The consultation has to be undertaken before allowing these acts.<sup>16</sup>

#### OTHER PROVISIONS

It is widely recognized that traditional economies in many countries constitute the basis of indigenous and tribal peoples' economical survival. In regard to traditional livelihoods and land use of indigenous peoples, Articles 16–19 and 23 of the Convention are also of relevance.<sup>17</sup> These traditional livelihoods are based on detailed knowledge of the environment, and

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<sup>14</sup> Article 14(3). See, e.g., the Swedish Taxed Mountain Case, Supreme Court Judgement 1981. In Finland such claims have never been taken to court.

<sup>15</sup> 2000 Manual 30. See also C. K. Roy: *Land Rights of the Indigenous Peoples of the Chittagong Hill Tracts, Bangladesh* (Jumma Peoples Network in Europe [JUPNET]), 1996, 26–28.

<sup>16</sup> See also 2000 Manual 34–41.

<sup>17</sup> Indigenous and tribal peoples should not be removed from their lands (Article 16). Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them (Article 17). Article 18 provides that adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned. National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population (Article 19).

originate from generations of experience of caring for and using their traditional lands. In Norway, Sweden and Finland Sámi reindeer herding (as well as fishing and hunting) forms a traditional livelihood which is treated very differently in the national legislations.

But the traditional economies are not attractive to the young generations. In Finland, for example, about 1,000 Sámi are reindeer herders (of total 7,500 Sámi). This development can be a result of many different factors. The Convention, however, highlights the need to recognize indigenous and tribal peoples' specific knowledge, skills and traditional technologies as basic factors in traditional economies and the need to strengthen and promote these economies with the participation of indigenous and tribal peoples. The Convention also requires States to provide enough land for the peoples concerned for their means of subsistence and to provide them with the necessary financial and technical assistance to enable them to maintain and develop their traditional economies in a sustainable way. According to the 2000 Manual, emphasizing the importance of traditional activities does not mean that indigenous and tribal peoples cannot seek work outside their communities, or take on new economic opportunities. It means that traditional activities are recognised as a very important part of indigenous and tribal peoples' economies and cultures, and the Convention stresses the need for their protection.<sup>18</sup>

#### FLEXIBILITY AND ITS PROBLEMS

Many of the provisions in the Convention are qualified by terms such as “as appropriate”, “as necessary”, “wherever practicable” or “to the extent possible”. These terms provide flexibility to the Convention, although critics say that they may have the effect of limiting or obscuring the obligations of ratifying Governments.

The flexibility has led to difficult questions of interpretation. In the Nordic countries there are conflicts of interest in many areas that touch upon difficult issues of treaty interpretation. The Sámi right to use land for reindeer herding, hunting and fishing in certain areas is poorly defined or not defined at all. In many cases these rights apply to land owned and used by other people. In Sweden, for example, ownership rights to parts of the mountain areas are a controversial issue. Sámi ownership rights to parts of this reindeer breeding area have only been examined by the courts in a few cases.

The conflicts that have arisen between the Sámi and landowners are a result of a series of circumstances for which neither party can be blamed. In Sweden, Finland and Norway the State has – from the mid 18<sup>th</sup> century and late 20<sup>th</sup> century – actively encouraged settlers and others to cultivate areas used exclusively by the Sámi for reindeer herding, fishing and hunting. The politicization of the Sámi question from the 1960s onwards has also led to stronger demands towards the nation states such as the demand to have their rights investigated and recognized, and not to be treated as a despised minority. The following chapters will shortly introduce the solutions realized and planned in Norway, Sweden and Finland in regard to ILO Convention No. 169.

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<sup>18</sup> 2000 Manual 51.

## C. THE FINNISH PLAN<sup>19</sup>

### 1. A SLOW PROCESS

Rights of the Sámi people as an indigenous people and minority are limited in Finland. The law does not currently recognize any special rights to traditional livelihoods: reindeer herding, fishing and hunting, and they say little regarding their use of traditional lands and waters. About 90 per cent of the land in the Sámi homeland of northernmost Finland, where Sámi cultural autonomy is secured by law, is presently owned by the State; private owners own the rest. In the late 1980s new information was retrieved affecting the historical land right question. Kaisa Korpijaakko argued that the Lapps may have had an ownership to the land and water areas in northern part of Sweden-Finland in the 17<sup>th</sup> and early part of the 18<sup>th</sup> century.<sup>20</sup> The Constitution Committee of the Finnish Parliament mentioned the same possibility in 1990. To clarify the situation, a State committee recommended in 1990 resolving unsettled questions by amending the law – unsuccessfully as it turned out. In 1993, the task of clarifying Sámi rights was given to the Sámi Delegation (the predecessor of the Sámi Parliament), and later passed on to the present Sámi Parliament.

A process to clarify the position was, however, initiated in the late 1990s. Progress has been slow and controversial. The State's intention was to solve the question by political consensus through establishing bureaucratic organs to administrate the northern lands, which would remain in State hands. As consultations got under way, however, very few stakeholders had anything positive to say about it. After several reports and committee deliberations, the Ministry of Justice in 2003 appointed an academic research group to investigate the historical and current legal position of those State lands.

### 2. THE VIHERVUORI REPORT

In order for Finland to proceed towards ratifying the Convention, the Ministry of Justice decided in 1999 to invite Dr Pekka Vihervuori to prepare a report clarifying issues of land, waters, natural resources and traditional livelihoods in the Sámi homeland. The purpose of the report was not, however, to deal with the issue of land ownership. It report pays special attention to the obligations of the Convention and examines also the provisions of the national legislation in force. Finally, the report proposes modifications of the legislation concerning land use, but, as such, it does not advise on whether Finland should ratify the Convention.<sup>21</sup>

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<sup>19</sup> See also Tanja Joonas: "Finland and the Process of Ratifying ILO Convention No. 169" (2003) 27 *Indigenous Affairs* 40–45.

<sup>20</sup> Kaisa Korpijaakko: *Saamelaisten oikeusasemasta Ruotsi-Suomessa* (Helsinki: Lakimiesliiton kustannus 1989).

<sup>21</sup> Pekka Vihervuori: *Maahan, veteen ja luonnonvaroihin sekä peinteisiin elinkeinoihin kohdisuvat oikeudet saamelaisten kotiseutualueella* (Helsinki: Oikeusministeriön yleisen osaston julkaisuja 3/1999).

The report proposed, however, the founding of a Land Rights Council of the Sámi Homeland in connection with the Sámi Parliament. Four of the members of the Council would be nominated by the Sámi Parliament and four by the four municipalities of the homeland. In practice, the Sámi would have a leading role in the Land Rights Council. The Council would supervise the respect of the rights and interests of the Sámi and of the other local population relating to the use of the lands and waters in the homeland. The Council would have the right to speak and appeal in matters concerning the application of the laws on the use of the land and waters.

The report also proposed that a Land Rights Fund should be established and overseen by the Land Rights Council. A part of the income earned by the National Board of Forestry, the Forest Research Institute and the State's Real Estate Office for their activities in the homeland would be given to the Fund. The resources of the Fund could be used for the development of the traditional livelihoods, for repairing damages caused by the use of the lands, and for the promotion of the interests of the Sámi. Between at least third and a half of annual revenues would be forwarded to the Sámi Parliament and at least a third to the municipalities in the homeland.

Introducing different kinds of provisions on new rights and limitations would modify the legislation on the use of the land and natural resources. The Reindeer Husbandry Area would be divided into two parts. In the part located in the Sámi Homeland, only what is termed 'minor harm' to reindeer husbandry interests would be tolerated, less, that is, than in the other part. In areas managed by reindeer-grazing associations, where at least half of the reindeer owners are Sámi, the right to graze reindeers would be granted only to the Sámi and other reindeer owners living in the area. The report could be criticized for not elaborating the meaning of 'minor harm'.

### 3. OTHER REPORTS

The Ministry of Justice requested opinions on the Vihervuori report from 57 different instances. The response covers a wide variety of viewpoints. There were also many proposals on how to proceed further. As a comment to the requested opinions the Ministry of Justice decided there was a need for more work before Finland could ratify the Convention. In that light, the Ministry in 2000 commissioned another legal expert, Dr Juhani Wirilander, to prepare a legal assessment from the perspective of real estate law on analyses so far made on the land ownership issues in the Sámi homeland.<sup>22</sup> The Ministry also appointed a Sámi Commission with the task to assess whether it would be advisable to realize the proposals of the Vihervuori report, or whether they should be modified. The Sámi Commission's proposals were to meet the minimum criteria of the Convention. The Governor of the Province of Lapland, Ms. Hannele Pokka, was appointed chairperson of the Commission.<sup>23</sup>

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<sup>22</sup> Juhani Wirilander: *Lausunto maanomistusoloista ja niiden kehityksestä saamelaisten kotiseutualueella* (Helsinki: oikeusministeriö 8. elokuuta 2001).

<sup>23</sup> With members from the Ministries of Justice, Agriculture, Forestry and Finance, the National Board of Forestry, the four municipalities of the Sámi Homeland, the Sámi Parliament, the Skolt Sámi and the reindeer-grazer associations in the Sámi Homeland.

Wirilander's study found no clear evidence of Lapp villages having owned the areas used by them in the mid-18<sup>th</sup> century. The report does say, however, that single families evidently had ownership over the special areas as fishing and hunting sites and herding areas in the mid-18<sup>th</sup> century. The Sámi Commission recommended continued State ownership of the land, but that an eleven-strong Directorate of Sámi Homeland should be established. The chairperson of this Directorate would be elected by the Government, five members each by the Sámi Parliament and the municipalities. Decision making would be made by a simple majority. This Directorate would have competence to decide on general guidelines on the use of State-owned land in the Sámi Homeland.

These proposals were not unanimous, and several dissenting opinions were submitted, including a joint dissenting opinion. The Sámi members of the Commission did not want to see the proposals implemented. The Ministry of Justice, however, proceeded to draft a Government Bill in 2002 to set up the Sámi Homeland Consultative Committee. Two alternative committee structures were suggested: One that was similar to the that of the Commission, and another where an extra member would be nominated by the reindeer-herding associations of the Sámi Homeland and where a two-third majority would make decisions.

Most comments on the proposals were critical, including those from the Sámi Parliament. Calls were made for thorough historical and legal research to clarify the unclear legal and historical situation. Given this response, the Ministry 'buried' its draft.

#### 4. THE HISTORICAL AND LEGAL RESEARCH PROJECT

The Ministry of Justice then decided in early 2003 to commission a research project to study from a historical and legal perspective the settlement patterns, population history, land use and land ownership in the area of historical Lapland which at present is part of Finland. The research would concentrate on the period 1750–1923 and study 1) the legal situation of land use rights and land ownership in Finnish Lapland, 2) historical developments after Finnish settlers' arrival to Lapland and 3) historical developments concerning the position of mountain and forest Sámi.

Source materials include legislation, court verdicts, and tax material, administrative materials (decisions of Governors, tax authorities, etc.); correspondence of authorities, and decisions made in connection of the establishment farms by the settlers. The research group consists of experts from the Universities of Oulu (history) and Lapland (law) and the work is estimated to be finished in the fall of 2005. The question of ratification of the Convention will be reconsidered after the project has submitted its findings.

### D. RATIFICATION OF NORWAY IN 1990

#### 1. AN EARLY PROPONENT FOR RATIFICATION

The Sámi rights process in Norway dates from the controversy of the Alta river power plant of the 1970s. A Sámi Rights Commission has been operative since 1980 with a task of clarifying and creating a basis for consolidation of the legal position of the Sámi in Norway. The Com-

mission's report of 1984 included an extensive assessment of relevant international law, and led to the establishment of Sámi Parliament, elected for the first time in 1989, and the inclusion in the Constitution of Article 110a on the rights of the Sámi in 1988.<sup>24</sup> Norway was the first country to ratify the Convention, and did so in 1990. When ratifying the Convention, there was an examination to make sure that there was no contradiction with Norwegian law. At the same time, ILO was informed that matters of Sámi land rights remained partly disputed and unsettled, and were under consideration by the Commission, with a view to possible changes in legislation.<sup>25</sup>

## 2. ISSUES OF DISCUSSION

At the time of ratification, the Ministry of Justice did not question that there were areas in Norway that were "traditionally occupied" by the Sámi, and where their rights of "ownership and possession" should be recognised. However, contrary to the demands of Article 14(2), the Ministry did not identify the areas. Moreover, it interpreted the phrase "ownership and possession" narrowly, and concluded that a "protected right to use" was also covered by the phrase. As a result of this, the view in Norway in 1990 was that current regulations on the rights to land and natural resources fulfilled the requirements of the Convention. Norway's understanding of the Convention has not been criticized by the ILO. In a comment on Norway, the ILO Committee of Experts has stated that

[it] does not consider that the Convention requires title to be recognised in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership by these peoples over the lands they occupy would always be consistent with the Convention.<sup>26</sup>

The ILO organisation has shown an active interest in Norway's process and asked to be kept informed of its progress. Thus, ILO has not given the Norwegian Government reason to doubt its interpretation of the land right articles of the Convention; it is rather their own Sámi rights process that has brought forward arguments and different points of view regarding the understanding of the Convention compared to alternative proposed changes in land administration and rights, especially in the county of Finnmark.<sup>27</sup>

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<sup>24</sup> NOU 1984:18 *Om samenes rettsstilling*.

<sup>25</sup> Unpublished seminar paper by State Secretary Anne Lise Ryel, Ministry of Justice, Norway. Rovaniemi, Finland, 5 May 2001.

<sup>26</sup> Committee of Experts, Observation 1995, §17.

<sup>27</sup> Unpublished seminar paper by State Secretary Anne Lise Ryel, Ministry of Justice, Norway. Rovaniemi, Finland, 5 May 2001; Unpublished seminar paper by Legal Advisor Jon Gauslaa, Ministry of Justice, Norway. Rovaniemi, Finland, 5. May 2001.



### 3. RECENT DEVELOPMENTS

The legal opinion of Norway's ratification has been questioned, not only by the Sámi Parliament, but also by a number of legal experts,<sup>28</sup> as well as the Sámi Rights Commission, which released two reports in January 1997. The first was compiled by the Commission itself.<sup>29</sup> The second was a review by sub-committee of the Commission.<sup>30</sup> This latter report points out that even if Article 14(1) does not require Sámi to be given title to the land they traditionally have occupied, they have to be given at least most of the powers enjoyed by an "ordinary" land owner. The sub-committee estimates that at least the Sámi heartland of Inner Finnmark (the Karasjok, Kautokeino and Upper Tana areas) was "traditionally" occupied by the Sámi, and perhaps also other areas where there were Sámi settlements and Sámi dominance of natural resources and their exploitation.

The Sámi Rights Commission recommended 1) transferring the land and non-renewable resources from the State to a newly established governmental council, *Finnmark grunnforvaltning* (Finnmark Land Management), with equal representation from the county council and the Sámi Parliament (four from each of them); 2) transferring most of the renewable resources from the State to the municipalities; and 3) giving the Sámi Parliament a delaying veto when Sámi interests are at stake.<sup>31</sup> According to the sub-committee, it is not clear that even these proposals go far enough in recognising Sámi rights of "ownership and possession".

Consultation on the proposals set out in NOU 1997:4 continued to the end of 1999. Finnmark county assembly and the Sámi Parliament both pursued vigorous and thorough review. After a legal analysis and political discussions, legislative action was recommended. A bill was therefore prepared setting out the rights to and management of land and natural resources in Finnmark county. The bill was published in April 2003, and the Act passed 24 May, 2005.<sup>32</sup>

The purpose of the Finnmark Act is to facilitate the management of land and natural resources in a balanced and ecologically sustainable manner in the best interests of the Sámi people, their culture, reindeer husbandry, economic and community interests, and of people in the country in general. The Act establishes the Finnmark Land Management Commission, an independent body stationed in Finnmark to oversee management of land and natural resources. The Commission will be governed by a Board of seven. Finnmark County Council and the Samediggi (Sámi Parliament) shall each elect three persons and their alternates. These members and their alternates must be resident in Finnmark. Among the members elected by the Samediggi, at least one (or his or her alternate) shall be a representative of the reindeer-herding industry. The seventh member and his or her alternate shall be appointed by the King in Council. Many criticized the bill. For example, the Sámi Parliament rejected it out

<sup>28</sup> E.g., Otto Jebens: *Om eiendomsretten til grunnen i Indre Finnmark* (Oslo, 1999.)

<sup>29</sup> NOU 1997:4, *Naturgrunnlaget for samisk kultur*.

<sup>30</sup> NOU 1997:5 *Urfolks landrettigheter etter folkeretten og utenlandsk rett*.

<sup>31</sup> H. Minde: "Sami Land Rights in Norway: A Test Case for Indigenous Peoples" (2001) 8 *Journal of Minority and Group Rights* page no missing; and NOU 1997:4 *Naturgrunnlaget for samisk kultur*.

<sup>32</sup> Forslag til Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Finnmarksloven) Published in 4.4.2003. See more in English at <http://www.samediggi.no/default.asp?selNodeID=313&lang=no>. (visited 11 November 2003).

right, claiming it violated Norwegian legal precedent and national and international law on the rights of indigenous peoples.<sup>33</sup>

In the summer of 2003 the Norwegian Parliament commissioned Professors Hans Petter Graver and Geir Ulfstein of the University of Oslo to prepare a legal opinion on human rights and the proposed Finnmark Act. The proposed Finnmark Act, they say in their report,<sup>34</sup> does not meet human rights legislation and commitments. Representatives of the Labour Party and the coalition in the Storting Justice Committee agreed however Monday 9 on May on a compromise for the wording of the Finnmark Act. A 25-year-long battle over the right to land and water in Norway's biggest county may have come to an end when the Act was discussed and approved in the Odelsting on 24 May 2005. This means that 96 percent of Finnmark's land area, an area the size of Denmark, will be transferred from the State to the citizens of the county.

## E. INVESTIGATIONS IN SWEDEN

### I. THE HEURGREN REPORT

In Sweden the Convention has been under consideration in the National Assembly (the Riksdag) for more than ten years. In 1997, the Government decided to appoint a one-man Commission with the task of examining whether Sweden should ratify ILO Convention No. 169 and the measures necessary for Sweden to be able to live up to its provisions. The Heurgren Report of 1999 – entitled “The Sámi – an indigenous people in Sweden”<sup>35</sup> – concluded that Sweden fulfilled the treaty requirements in most respects, but that the land right articles might be problematic. The report also pointed out that, despite the fact that the Convention uses the expression “rights of ownership and possession”, this does not necessarily involve a formal title to the land. However, the Convention assumes that these land rights satisfy certain minimum requirements. In the Heurgren Report's estimation, this minimum level corresponds to a right of use and possession of the land with strong protection under the law.<sup>36</sup>

The report also states that the rights to land enjoyed by the Sámi today do not meet these minimum requirements, since the Sámi are forced to tolerate serious infringements of their reindeer husbandry rights. For Sweden to fulfil these minimum requirements, the Sámi must enjoy the same protection against such infringements as applies to other land use rights. The report concluded that Sweden may ratify the ILO Convention No. 169, but that this should not occur before a number of measures relating to Sámi land rights were implemented:

First, the land to which the Sámi have rights under the Convention must be identified. This applies partly to land which, under the terms of the Convention, has traditionally been occupied

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<sup>33</sup> Some the comments are found in English at <http://www.samediggi.no/default.asp?selN-odeID=313&lang=no>. See, for example, Counsellor Sara's speech to the UN, a statement by the Sámi Council, and a press release about the Finnmark Act (visited 11 November 2003).

<sup>34</sup> Folkerettslig vurdering av Forslaget til ny Finnmarkslov.

<sup>35</sup> SOU 1999:25, Samerna – ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169, Stockholm, 31 March 1999.

<sup>36</sup> SOU 1999:25, P. 25-26.

by the Sámi, and partly land to which they have traditionally enjoyed right of usage jointly with others. A boundary commission should therefore be appointed to solve these issues. Second, a survey should decide the scope of Sámi hunting and fishing rights on land traditionally occupied by them. Third, the Sámi should be protected against infringements of their reindeer husbandry rights. On land traditionally occupied by the Sámi, they should be granted the right to transmit their hunting and fishing rights to others in exchange for payment. On land traditionally used by them together with others, greater protection against limitations on the right to reindeer husbandry is necessary. The Heurgren Report also suggested measures to ensure that the Sámi have enough land to sustain reindeer husbandry and that a mechanism be put in place that ensures compensation from the State for legal expenses in important cases of principle with respect to Sámi land claims. As an additional initiative, the report proposed a national information campaign on the Sámi as an indigenous people and on Sámi culture. Information specifying the effects of Swedish ratification on the parties involved was also needed.<sup>37</sup>

## 2. DISPUTED ISSUES

After the Commission's report, statements from 60 different bodies were submitted. While they accepted the majority of the assessments and interpretations, many were critical of the Commission's proposal to protect reindeer husbandry rights, which they considered too extensive and possibly, moreover, in contravention of the Swedish Constitution. It was maintained the proposed amendment would affect landowners unreasonably severely and impair or completely inhibit their ability to manage their forestry interests. Many also pointed out the lack of clarity in the interpretation of the Convention and that this would lead to uncertainty about the effects of implementing the Convention in Sweden.<sup>38</sup>

Regarding the establishment of a boundary commission to define the geographical boundaries of land rights and a commission to survey the extent of hunting and fishing rights, most opinions were positive. There was agreement on the necessity of a definition of the legal position on these issues. Those who were critical of Swedish ratification believed it would have serious consequences for the majority of the population because there would be more intensive protection of Sámi land rights and the Sámi would have proportionately greater influence over hunting and fishing than other groups. Stronger protection of Sámi reindeer husbandry rights and increased influence over hunting and fishing would lead to serious long-term difficulties for the forestry and agriculture sectors and reduce the opportunities for hunting and fishing for the majority of the population. Reindeer-owning Sámi would be favoured at the cost of the rest of the population. It was feared that such a development would create conflicts between reindeer-owning Sámi and others. It was also felt that a more detailed analysis should be made on how ratification would affect tourism and opportunities for mineral extraction. Even Sámi groupings requested more extensive impact analyses, particularly on the impact on non-reindeer owning Sámi.<sup>39</sup>

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<sup>37</sup> SOU 1999:25, p. 25-31.

<sup>38</sup> Unpublished seminar paper by Göran Ternbo, Department Secretary in the Swedish Ministry of Agriculture, Rovaniemi, Finland 5 May 2001.

<sup>39</sup> *Ibid.*

Arguments against ratification were informed primarily by the ongoing controversies surrounding the use of land in parts of the reindeer husbandry area. For the Convention to be ratified, it was thought necessary to define at least the outer reindeer husbandry boundaries more clearly than they are at present. If these boundaries were not clearly defined, it would be difficult to establish exactly where the Convention's provisions for protection of land rights should apply. One must also emphasize that boundary identification by a boundary commission will not preclude a person's right to bring the dispute before a court of law. Against this background the Swedish Government appointed a boundary commission consisting of a group of experts specialised in law (property law), land surveying and legal history. It is estimated that this commission will be able to complete its assignment within a three-year period. After this survey the Government will return to the issue of ratification of ILO Convention No. 169.<sup>40</sup>

In a recently published book, Bertil Bengtsson summarizes the situation in Sweden at the moment.<sup>41</sup> He goes through the historical issues of land ownership, the meaning of reindeer herding and the immemorial rights in the area. He also examines the environmental questions related to reindeer herding and finally gives comments of ILO Convention.

## F. CONCLUSION

The Governments of Finland, Norway and Sweden have progressed in their investigations into Sámi rights in recent years. While this is perhaps the result of national and international pressure from the indigenous peoples themselves, it also a result of improved and wider knowledge of the issues. It is reasonable to ask whether these solutions, planned or implemented so far in these countries, actually fulfil the requirements set down in the Convention. The legal status of the Convention's core provisions is still unclear on the matter of special indigenous land and self-determination rights and a system for their management.

It seems that countries have taken steps to establish new political bodies with representation from the indigenous communities and other local interests before the basic legal questions have been solved and the rights recognized. Shouldn't it be vice versa? Solutions thus far adopted have an ethno-political purpose and perspective. They would not necessarily entail protection for the traditional livelihoods practiced in the area. Members of land right councils may have very disparate interests. Ratification of an international treaty such as ILO Convention No. 169 should, it could be argued, not be an absolute value but a benchmark for rights that have already been fulfilled.

In the Nordic countries governmental and Sámi representatives have firmly supported ratification of the ILO Convention No. 169, seeing it as an important step towards international standards of indigenous rights, although there is disagreement between them on the interpretation of land rights. There was little cooperation between the Nordic countries when preparing ratification of the ILO Convention. The States in question have wanted to find their

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<sup>40</sup> SOU 1999:25; and unpublished Seminar paper by Göran Ternbo, Department Secretary in the Swedish Ministry of Agriculture, Rovaniemi, Finland 5 May 2001.

<sup>41</sup> Bertil Bengtsson: *Samerätt. En översikt* (Stockholm: Norstedts Juridik 2004).

own ways to solve the issues, although each country has closely followed proceedings in the others. The main problem remains the same in every country: how to solve the question of land rights? Taking advantage of the flexibility of the Convention, each country has taken different approach to ratification. The questions are difficult, they concern many people, they generating strong feelings and political views.

Critics of ILO Convention No. 169 are concerned with how the Convention was drawn up: Indigenous peoples were not officially represented at the negotiations so they had no rights to speak or voting rights on the rules being drawn up. They were also denied the right to self-determination under international law (Art. 1.3). However, according to the ILO Manual, the Convention No. 169 does not place any limitations on the right to self-determination. It is compatible with any future international instruments which may establish or define such a right. Indigenous peoples also argue that, under Article 8, indigenous customs and institutions can be too easily overridden by the government in the name of other laws of the country. And finally, it is interpreted that the land right articles only recognise rights over land currently used and occupied by indigenous peoples ; they don't recognise rights over land which they used to occupy and but were taken from them through colonisation. The primary argument in favour of ratification is that, while the Convention may not be the best solution, it is better than anything else available. This is because it actually identifies indigenous peoples' rights which are not specified anywhere else in international law, nor indeed in many countries' domestic laws, either. Ratification by a country could therefore give the indigenous peoples in that country more rights than they have at present.

## International Norms and Domestic Practices in Regard to ILO Convention No. 169 – with Special Reference to Articles 1 and 13–19

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### Abstract

International organizations are considered to be central actors on the stage of world politics. They are not simply passive collections of rules or structures through which others act. Rather, they are considered to be active agents of global change. International organizations are often the actors to whom we defer when it comes to defining meanings, norms of good behaviour, the nature of social actors, and categories of legitimate social action in the world. The article has an interdisciplinary approach to the International Labour Organisation (ILO) and its Convention No. 169 concerning Indigenous and Tribal Peoples in Independent countries. The approaches of international relations and international law helps explain the power the ILO exercises in national and world politics. These insights are illustrated by exploring why state agents comply with norms promoted by the regime of ILO Convention No. 169. The article briefly introduces the historical approach of the ILO to indigenous issues and the complexity related to the concept of indigenesness; the highly relevant debate when states are considering the ratification of the Convention and even when implementing it. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) in the ILO structure is the most central body guiding the States to normative and political changes in their domestic practices. It is argued that the Committee is using its authority and power through the normative regime and its supervisory mechanisms, and therefore is also interpreting the Convention. The system as a whole has effects on traditional state sovereignty and the demands of indigenous peoples' right to self-determination. The research questions focuses also on the compliance, implementation and effectiveness of international Conventions. The article has a Nordic approach with comparison to different approaches related to Article 1 dealing with the subjects/objects of the Convention and also different land right situations (Articles 13–19) especially in Latin America.

### Keywords

ILO Convention No. 169; indigenous peoples; subject; object; land rights

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<sup>1)</sup> The author is preparing an interdisciplinary dissertation on ILO Convention No. 169, in Nordic context in comparison to Latin America and Australia. At present she is also working as a coordinator for an international project funded by the Nordic Council of Ministers. The project: "Recognition of Indigenous Property Systems within Arctic States" examines comparatively the property rights and conditions of indigenous peoples especially in regard to the Draft Nordic Saami Convention and ILO Convention No. 169.

*T. Joona / International Community Law Review 12 (2010) 213–260*

## 1. Introduction

*When I think of self-determination, I think of hunting, fishing and trapping. I think of the land, of the water. I think of the land we have lost.<sup>2</sup>*

The article belongs to a more extensive entity where the ratification of ILO Convention No. 169 concerning Indigenous and Tribal Peoples has been analysed from several points of view.<sup>3</sup> As a whole the article refers to the approach and documents of the Parliaments Constitutive Committee and the newest historical-legal research in Finland<sup>4</sup> where the state ownership to so-called “State land” has been challenged. This area covers approximately one third of the total surface of Finland. However, Finland has not ratified the ILO Convention No. 169, but is considering it with another Nordic state, Sweden. So far the Convention has acted as a guideline for the Finnish state when improving the legislation concerning indigenous peoples’ rights. According to the Minister of Justice in Finland, Tuija Brax, the ratification of ILO Convention No. 169 is not at the moment, however, high on the agenda of the Ministry.<sup>5</sup> A new ministerial group was established by the Ministry in Fall 2009 to examine the conditions for ratification of the Convention.<sup>6</sup> The contemporary discussions around indigenous peoples’ rights, especially those discussions concerning the land and water rights are very much focused on conflictual debates and issues that are mixed in many ways. The problems arose from confrontations whose essential backgrounds are not even known in many cases. This has been a challenge to the recent research in this field. As Ted Moses describes it in his reflection above, basically it is a question of quite simple things. However, the fundamental basis of these issues has been forgotten on the way to politicize the issues that actually concerns peoples’ basic rights. This article tries to go to these fundamental roots and describes

<sup>2</sup> Ted Moses, The right of indigenous peoples to self-determination. Presented in the Midnight Sun Workshop in Inari, Finland in 1999.

<sup>3</sup> Also see *supra* n 1.

<sup>4</sup> Kaisa Korpijaakko argued in her doctoral thesis that Lapps have had an ownership to the land and water areas in northern part of Sweden-Finland in the 17th and early part of 18th century. Kaisa Korpijaakko, *Saamelaisten oikeusasemasta Suomessa, Oikeushistoriallinen tutkimus Länsi-Pohjan Lapin maankäyttöoloista ja –oikeuksista ennen 1700-luvun puoliväliä*. Helsinki, 1989. The Constitution Committee of the Finnish Parliament has referred to the same possibility in 1990 and several times later. In his report, Juhani Wirilander (*Lausunto maanomistusoloista ja niiden kehityksestä saamelaisten kotiseutualueella*, Oikeusministeriö (2001)) and in his book, Juha Joona (*Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista*, Juridica Lapponica, 2006, 32, Rovaniemi) have both referred to the same possibility.

<sup>5</sup> Minister of Justice, Tuija Brax, Interview, 11 November 2008. According to the Minister, more emphasis should be paid to the cultural and linguistic rights of the Saami (In here: meaning the members of the Saami Parliament election register). Only after then ILO Convention No. 169 and the land right issues are to be considered.

<sup>6</sup> Minister of Justice, Tuija Brax, Interview, 11 November 2008; Lappish Radio Station (Lapin Radio) 24.2.2009.

*T. Joona / International Community Law Review 12 (2010) 213–260*

and compares how Article 1 (subjects/objects of the Convention) and Articles 13–19 (land rights) have been implemented into every day practices.<sup>7</sup>

In the field of international relations and international law the international human rights norms and their effect to domestic practices have had quite a little of attention in the research field.<sup>8</sup> Since 1950s' a global human rights regime has emerged consisting of numerous international conventions, specific international organizations to monitor compliance, and regional human rights arrangements. These human right instruments express the main purposes of these rights; to protect and empower vulnerable individuals and groups.<sup>9</sup> Thus far only very few international standards have been established to protect the rights of indigenous peoples.<sup>10</sup> Their protection is to be found in general human rights treaties and other international instruments.<sup>11</sup> However, at the moment political and legal issues concerning indigenous peoples in modern nation states are receiving increasing attention on national and international levels. Indigenous peoples worldwide are fighting for land and self-determination rights. Their aim is to regulate their affairs in their own way in order to survive as culturally different peoples, mostly within nation states. Fundamental questions arise concerning the limits of state sovereignty and the contents of highly and emotionally discussed indigenous right to self-determination.<sup>12</sup> According to Risse and Ropp it is however, one thing to argue that there is a global human rights polity composed of international regimes, organizations, and supportive advocacy coalitions. It is quite

<sup>7</sup> More on the situations in the Nordic countries see Tanja Joona, 'The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with some comparison to Sweden and Norway', 23 (3) *Nordic Journal of Human Rights* (2005) 305–320; Lennart Lundmark, (2006) *Samernas skatteländ*. Institutet för Rättshistorisk Forskning, Stockholm; Sven Heurgren, *Samerna – ett ursprungsfolk i Sverige, Frågan om Sveriges anslutning till ILO:s konvention Nr 169*. SOU 1999:25. Betänkande av Utredningen om ILO:s konvention nr 169, Stockholm (1999); Malgosia Fitzmaurice, 'The New Developments Regarding the Saami Peoples of the North', 16 *International Journal on Minority and Group Rights* (2009) 67–156.

<sup>8</sup> The history of human rights states back on 10 December 1948, when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR). It was stated at the time, that the Declaration was not a binding treaty, but rather a statement of principles.

<sup>9</sup> T. Risse and S.C. Ropp, 'The socialization of international human rights norms into domestic practices: introduction', in T. Risse, S.C. Ropp and K. Sikkink (eds.), *The Power of Human Rights, International Norms and Domestic Change*. Cambridge University Press, Cambridge, 1999, pp. 234–235.

<sup>10</sup> Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (1992), Indigenous and Tribal Peoples Convention No. 169 (1989), European Charter for Regional or Minority Languages (1998), Framework Convention for the Protection of National Minorities (1997), The UN Draft Declaration on Indigenous Peoples Rights (2008), The Nordic Saami Convention (2006).

<sup>11</sup> Risse and Sikkink, 1999, p. 1. See also, Elaine Ward, *Indigenous Peoples between Human Rights and Environmental Protection. Based on an Empirical Study of Greenland*. Danish Centre for Human Rights; No. 47, Denmark, 1994.

<sup>12</sup> Also see D. Ivison, P. Patton and W. Sanders, *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, Cambridge, 2000, pp. 1–24.



*T. Joona / International Community Law Review 12 (2010) 213–260*

another to claim that these global norms have made a real difference in the daily practices of national governments toward their citizens.<sup>13</sup>

This article introduces the International Labour Organization's (ILO) Convention No.169 which is an international legal instrument safeguarding the rights of indigenous peoples. It has been ratified by 20 countries, including two Nordic countries; Norway and Denmark.<sup>14</sup> The article analyses the interpretation, implementation and the domestic impacts of the Convention from the Nordic perspective. The questions related to land and water rights have caused disagreement and conflict between the different stakeholders and it seems that legal concepts have been mixed in different ways and used for political purposes. The purpose of this article is to examine the conditions under which international human rights norms are internalized into domestic practices and under what conditions international norms in general influence the actions of states. This article puts emphasis on the issues that have caused the main problems when countries are considering the ratification of the Convention and even when they have ratified it.

Article 1 refers to the subjects/objects of the Convention and Articles 13–19 are dealing with indigenous peoples' right to their traditionally occupied lands. The internalization of these Articles into domestic legal and political practices is examined through the supervisory mechanism of the Convention. The Convention gives certain guidelines to this internalization process: According to Article 34: "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country." Article 33 is also wording that the application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to for example national laws. In the Finnish context Article 33 and 34 has a special relevance, because there has been very little of discussion about the subjects/objects of this Convention. The beneficiaries of the Convention have been taken more or less for granted, i.e. persons who belong to the Saami Parliaments election register. However, the historical information provides that the indigenous peoples living in the territories of Northern Finland until mid 1700s<sup>15</sup> were considered as land owners by the Swedish-Finnish jurisdiction. In the ILO context it is reasonable to ask whether the descendants of these indigenous land owners should be understood as the

<sup>13</sup> Risse and Ropp, *The socialization of international human rights norms into domestic practices: introduction*, p. 235.

<sup>14</sup> Others: Argentina 2000, Bolivia 1991, Brazil 2002, Colombia 1991, Chile 2008, Costa Rica 1993, Dominica 2002, Ecuador 1998, Fiji 1998, Guatemala 1996, Honduras 1995, Mexico 1990, Netherlands 1998, Paraguay 1993, Peru 1994, Bolivarian republic of Venezuela 2002, Nepal 2007 and Spain 2007.

<sup>15</sup> In the legal praxis the Lapps were considered as land owners and their rights were strong in this respect. In 1743 situation changes in a special case concerning a legal case called Haukiniemi in Kemi Lapland in a Lapp village which was located to an area of Maanselkä, at present known as the Kuusamo area.

*T. Joona / International Community Law Review 12 (2010) 213–260*

right holders of the Article 14 of the Convention. In continuation, it is also relevant to consider what should be the relation of these peoples towards the Article 1? This approach would at least be targeted to those persons who still live in the area and has continued their traditional indigenous livelihoods, reindeer herding, fishing and hunting.

### 1.1. *Outline*

This article consists of four parts. Part 1 examines the theoretical approach of internalizing the legal norms into states domestic practices. To date, scholars of international relations are increasingly interested in studying norms and ideas, but few have yet demonstrated the actual impact that international norms can have on domestic politics. This theoretical approach is interesting for the reason that international norms may challenge state rule over society and national sovereignty.<sup>16</sup> Especially human right norms<sup>17</sup> are usually well institutionalized in international regimes and organizations, and they are contested and compete with other principled ideas.<sup>18</sup> The article refers to international relations doctrine of social constructivism which describes the International organizations as socially constructed bureaucracies and authorities.<sup>19</sup> These insights are illustrated by exploring why state agents comply with land right norms promoted by the regime of ILO Convention No. 169 and what has been so far the domestic impact of international norms in those countries that have chosen to ratify the ILO Convention No. 169?<sup>20</sup> The theory is explained in the ILO context and through the supervisory mechanism of the ILO structure. This part has continuation in parts three and four where empirical case studies of ratified countries are presented.

The second part explores the historical overview of the ILO to indigenous issues. It starts from the organization's early activities in the field of 'native labour' in the early 1920s and ends up to the adoption of the Convention No. 169. The

<sup>16</sup> Reilly argues that in Australia's case the focus on the formal recognition of Indigenous rights through the courts has meant that 'sovereignty' and self-determination are the terms most commonly used to describe Indigenous community aspirations for legal and political recognition. In his opinion Indigenous sovereignty has both a legal and a political dimension. It challenges the legal basis of the British assertion of sovereignty in Australia in 1788, and it expresses an allegiance to an alternative source of law. Also see Alexander Reilly, 'A Constitutional Framework for Indigenous Governance', 28 *Sydney Law Review* (2006) 403.

<sup>17</sup> "collective expectations about proper behaviour for a given identity", Also see Risse and Sikink 1999, 7; also Ian Hurd 'Legitimacy and Authority in International politics', 53(2) *International Organization* (1999) 379–408.

<sup>18</sup> "beliefs about right and wrong held by individuals", See Risse and Sikink 1999, 4–7.

<sup>19</sup> IOs use their power to define different meanings, norms and good behaviour, the nature of social actors and categories of legitimate social action in the world. Usually power is exercised through certain normative regime and its supervisory mechanisms (ILO Conv. No. 169).

<sup>20</sup> More in R.L. Jepperson, A. Wendt and P.J. Katzenstein, 'Norms, identity, and culture in national security'. In P.J. Katzenstein (ed.), *Culture and National Security*, Columbia University Press, New York, 1996, p. 54.

*T. Joona / International Community Law Review 12 (2010) 213–260*

second parts concentrates on the evolvement of the definition of ‘indigenous’, since it has had such a strong influence in the ILO’s work towards the indigenous populations in general. The development of the term reflects the organisations approach to indigenous issues from the colonial times to the contemporary world. The definition of ‘indigenous’ is seen highly relevant also in discussion in regard to land and resource rights as it is more detailed shown in part four. Part three focuses on the theoretical framework discussing how international norms become part of the states domestic practices and legislation. This is illustrated through explaining the role of the Committee of Experts and the supervisory mechanism that it is executing.

Part four introduces the important question about the objects/subjects of the Convention and the dichotomy between these. Empirical case studies are shown on the implementation of Article 1 dealing with the subjects/objects of this Convention. In relation to part four dealing with the land rights of indigenous peoples the subject-issue has a high relevance. It is the most fundamental question to know to whom the Convention is applying.

### *1.2. A Note on the Sources and Methodology*

Finally, it is necessary to include a note about the sources. The article draws extensively on a number of primary sources found on the ILO’s website.<sup>21</sup> These documents are related to the supervisory mechanism of the ILO and are primarily documents and reports sent by individual ratified country to the Committee of the Experts on the Application of the Conventions and Recommendations (CEACR). The Committees response to the state reports include more general *Observations* and *Direct Requests* for further information and clarification. These are also published in the ILO website. In this article, due to lack of space, only some part of this material is used in the empirical part of the paper.

It is obvious that the problems which indigenous peoples worldwide are facing today are similar to each other, but it is interesting to see how different approaches have been adopted in these matters.

The ILO Convention itself has gained very little critics in the Nordic approaches and few have yet demonstrated the actual impact that these international norms can have on domestic politics. Complete opposite approaches from the world are interesting examples for comparison. It could be argued that indigenous peoples land rights are seen as an ongoing process of different political interests, new legislation, interpretation and new information brought to agenda. Therefore combining also the methods of international politics and international law is a fruitful approach.

Comparison to different land right situations in the world is seen especially interesting because the political and economic environments in which indige-

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<sup>21)</sup> The International Labour Organizations web pages at: [www.ilo.org/ilolex](http://www.ilo.org/ilolex).

*T. Joona / International Community Law Review 12 (2010) 213–260*

nous peoples find themselves throughout the world offer different spaces for action. In some places, legal titles to land have to a large extent been secured and the major challenge now is the defence and management of these territories. In other places, legal recognition of territories or other forms of protection is still far from being a reality. However, the objectives remain the same and recognition of indigenous peoples' rights to their land and resources is considered a fundamental global responsibility in terms of safeguarding cultural diversity and the right and possibility of all peoples to determine their own future.

## 2. International Labour Organization and Indigenous Issues

### 2.1. *The "Legislative History" for the Definition of 'Indigenous' – Helping Understand the Present*

Any contemporary reflection on the rights of indigenous peoples requires perforce reference to the ILO's historical work on 'indigenous' issues, and its most refined outcome, Convention No. 169. Adopted in 1989, Convention No. 169 is a revision of an earlier instrument, the 1957 Convention No. 107. To date, the two ILO conventions are the only international treaties dealing with specifically with indigenous peoples. Convention No. 169 has gained such a central position in the contemporary defence of indigenous peoples' rights at the international and domestic levels that nobody seems to be concerned any longer with the Convention's controversial origins, when the ILO's involvement with the subject of indigenous and tribal populations [was] questioned at every stage of the process. More importantly, ILO involvement in the protection of indigenous rights tends to be regarded as a natural fact requiring no further explanation. However, the existence of an instrument like Convention No. 169 within a body such as the ILO poses a number of obvious questions. Why did the ILO, a highly bureaucratic and very technical organization, concerned with labour issues, end up drafting international legal standards concerning indigenous peoples? What does an organization such as the ILO have to do with indigenous issues? And what does it mean by 'indigenous' in the first place?<sup>22</sup> These questions will be examined in the article.

<sup>22</sup> Luis Rodríguez-Pinero, *Indigenous Peoples, Postcolonialism, and International Law, The ILO Regime (1919–1989)*. Oxford University Press, 2005, pp. 3–4. See also L. Swepston, 'A New Step in the International Law of Indigenous and Tribal Peoples', 15(3) *OCU LR* (1990) 677, 680. S. Venne, 'The New language of Assimilation: A Brief Analysis of ILO Convention', 169 53(2) *Without Prejudice* (1990) 60. Also see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, 2005; Ricardo Delgado, 'The Ethereal Scholar: Does Critical Legal Studies have What Minorities Want?', 22 *Harvard Civil Rights – Civil Liberties Law Review* (1987) 301; Seth Gordon, 'Theoretical Approaches to International Indigenous Rights. Indigenous Rights in Modern International Law from a Critical Third World Perspective', 31 *American Indian Law Review*. (2007) 401; Mutua Makau, 'What is TWAIL?', 94 *Am.Soc'y Intl'l L. Proc.* (2000) 31.

*T. Joona / International Community Law Review 12 (2010) 213–260*

Since its creation in 1919, the ILO has been concerned with the situation of indigenous and tribal populations. It undertook studies as early as 1921 on the situation of indigenous workers, and in 1926 the Governing Body established a Committee of Experts on Native Labour to formulate international standards for the protection of indigenous workers. The work of this Committee served as the basis for the adoption of a number of Conventions, including the Forced Labour Convention, 1930, No. 29, as well other Conventions more directly concerned with indigenous workers.

In the period of 1930–55 the ILO drafted a Colonial Code composed of a number of standards specifically aimed at regulating the working and living conditions of ‘indigenous workers’. But to whom the Colonial code referred? Shortly: the classic international legal notion of ‘indigenous’ referred to a ‘stage’ in the scale of human, lineal evolution towards ‘civilisation’: indigenous meant ‘primitive’. After the adoption of Convention 107 and its article 1 including the definition of “indigenous populations”, the international legal notion of ‘indigenous’ underwent a shift from a *classic* to a *colonial* to a *modern* concept of indigeness. Our contemporary understanding of ‘indigenous’ diverges from the classic definition. Notwithstanding the existence of a protracted theoretical debate concerning its precise definition, the modern concept of ‘indigenous’ refers to *culturally distinct groups living within the borders of independent states that are the descendants of the peoples that inhabited the region prior to colonization and the subsequent establishment of postcolonial states*.<sup>23</sup>

According to Rodriguez-Pinero the word ‘indigenous’ was not a common word at the inception of the ILO’s colonial policy – at least in the English language. Before the word was first used in the Colonial Code, the organization resorted to various terms, in particular ‘coloured’ and ‘backward races’ – the politically correct terms of the time. It was only when the organization’s interest in these issues became a distinct policy item that the ILO’s public discourse adopted a fixed, more strictly legal terminology: the English ‘native’ and the French ‘*indigène*’ – the terms normally used by metropolitan states in their respective colonial policies, in the late 1920s. The first definition of “indigenous” in the ILO context – and in international law as a whole – was that of “indigenous worker” in article 2 of the 1936 Recruitment of Indigenous Workers Convention.<sup>24</sup>

Why ‘indigenous’ and not ‘native’? The use of term ‘indigenous’ in the ILO context is a conscious borrowing of the French ‘*indigène*’, the common term used by the organization’s Colonial Code in correspondence with ‘native’. This borrowing might be explained according to Rodriguez-Pinero, first of all, as way to avoid the strong negative connotations attached to the term ‘native’ at this

<sup>23</sup> Rodriguez-Pinero, 2005, pp. 39–40.

<sup>24</sup> *Ibid.*, 41–43.

*T. Joonas / International Community Law Review 12 (2010) 213–260*

stage.<sup>25</sup> From this perspective, the entry of the word ‘indigenous’ into international legal nomenclature derived from the attempt to create a new, technical term relatively independent from the associations surrounding the concepts already in use. The definition of ‘indigenous worker’ enshrined in the 1936 Recruitment of Indigenous Workers Convention is as follows:

For the purposes of this Convention  
 ...the term indigenous workers includes workers belonging to or assimilated to the indigenous populations of the dependent territories of Members of the Organisation and workers belonging to or assimilated to the dependent indigenous populations of the home territories of the Members of the Organisation.

Read from the contemporary perspective, this definition might be understood to include indigenous populations living in independent countries – the modern definition of ‘indigenous’. However, this wording was aimed precisely at excluding these populations from the scope of application of the standards on recruitment. The key to understanding is the term ‘dependent’.<sup>26</sup>

Why the subject of indigenous peoples – in the modern sense – did then enter into the realm of positive international law? As this article seeks to explain, indigenous peoples entered into modern international law as a result of a distinct normative movement seeking solution to the ‘indigenous problem’, using the means of ‘development’.

According to Rodriguez-Pinero at the end of the 1940s, the use of the term ‘indigenous’ in the ILO’s institutional literature was somewhat schizophrenic. On the one hand, the term was used in a precise legal colonial sense, such as in the definition of ‘indigenous worker’ included in Convention No. 50 and other texts within the organization’s Colonial Code, by direct influence of the French colonial practice. On the other hand, ‘indigenous’ was also a widely used term in the organization’s American regional policy, influenced by Latin American legal and administrative practice, on the same footing as terms such as “Indian” and “Aborigine”. The coexistence of two distinct usages within the same organization was possible due to a historical-intellectual milieu in which the classic notion of ‘indigenous’ – describing a ‘cultural stage’ of these populations – was still fully operative. This conceptual continuity worked actively to legitimize the organization’s activities related to indigenous issues – in both the colonial and modern senses – that remained unquestioned until the drafting of the 1957 instruments on indigenous populations. Meanwhile, the limited regional framing of

<sup>25</sup> Moreover, the preference for a new word such as ‘indigenous’ may also reflect the conscious effort to overcome the ambiguities related to the term ‘native’ – after all, the English language commonly refers to Gallicisms when it lacks a precise term.

<sup>26</sup> Rodriguez-Pinero, 2005, p. 46.

*T. Joona / International Community Law Review 12 (2010) 213–260*

the organization's American Indian policy prevented conflict between the two alternative conceptual uses of the term.<sup>27</sup>

The shift from a personal to a territorial scope of definition in the various ILO colonial instruments adopted after 1944 – applying to 'dependent' or 'non-metropolitan territories' – allowed for a reappropriation of the term 'indigenous' as a distinct category within the organization's Indigenist policy. The reappropriation of the term paved the way for the consolidation of a general understanding of the term grounded on the notion of independent statehood, leading to the gradual erosion of the colonial concept of 'indigenous' and its eventual substitution by the modern notion still operative nowadays.<sup>28</sup>

An obvious consequence of broadening the geographical scope of the ILO's indigenous policy was the perceived need to define 'indigenous' with universal applicability. The research and operational activities undertaken by the organization in the framework of the Indigenous Labour Programme furthered the need to define the human groups at which these activities were specifically targeted. However, the inability to articulate a universally valid definition of 'indigenous' for all the contexts into which the ILO was planning to expand its activities of the Labour Programme was not perceived as vitally necessary. The first session of the Committee of Experts on Indigenous Labour in 1950 declared that 'it would be appropriate to lay aside the problem of an *a priori* definition of 'indigenous', and to concentrate attention on an analysis of the conditions of work of the groups commonly described as indigenous, insofar as these conditions raise special problems requiring special treatment.' The strategy resembles that adopted by the UN Working Group on Indigenous Populations thirty years later.<sup>29</sup>

Just before the adoption of the first Convention dedicated to indigenous peoples, the Convention No. 107, the 'description' of 'indigenous peoples' was incorporated in the introductory sections of the Office's 1953 book, *Indigenous Peoples*, which included a discussion on attempts to define indigenous populations in anthropological science and state comparative practice. The 'description', reads as follows:

... indigenous groups are descendants of the aboriginal population living in a given country at the time of settlement or conquest by some of the ancestors of the non-indigenous groups in whose hands political and economic power at present lies. In general these descendants tend to live more in conformity with social, economic and cultural institutions which existed before colonisation or conquest than with the culture owing to barriers of language, customs, creed, prejudice, and often

<sup>27</sup> *Ibid.*, p. 146.

<sup>28</sup> The articulation of the modern concept of 'indigenous' in the ILO institutional context is inseparable from the gradual universalization of the organization's policy beyond the original American framework. While the idea that the ILO's indigenous policy should aspire to a universal scope had long been active in the organisation, the first activity to formally surpass the American focus was the Committee of Experts on Indigenous Labour, given the responsibility of studying the 'social problems' of 'indigenous populations *of the world*'. Rodríguez-Pinero, 2005, p. 146.

<sup>29</sup> Rodríguez-Pinero, 2005, pp. 150–152.

*T. Joona / International Community Law Review 12 (2010) 213–260*

to an out-of-date unjust system of worker-employer relationship and other social and political factors. When their full participation in national life is not hindered by one of the obstacles mentioned above, it is restricted by historical influences producing in them an attitude of overriding loyalty to their position as members of a given tribe, in case of marginal indigenous persons or groups, the problem arises from the fact that they are not accepted into, or cannot or will not participate in, the organised life of either the nation or the indigenous society.<sup>30</sup>

The definition of indigenous peoples evolved until the first Convention No. 107<sup>31</sup> and Article 1 of the Convention described ‘indigenous, tribal and semi-tribal populations’ as follows:

This Convention applies to:

- a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from populations which inhabited the country, or geographical region to which the country belongs, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.<sup>32</sup>

In regard to the first legal definition of ‘indigenous’ Rodriguez-Pinero reflects the integrationist approach of the Convention No. 107 and the overall attitude towards indigenous peoples in the 1950s. He analyses the description of change in human societies as a linear, one-dimensional evolution which implies a diachronic dimension, whereby the *other* represents our past, and therefore we represent their *best* future. Deeply rooted in the same ethnocentric, evolutionist approach that dominated anthropological science from its inception, the first international legal definition on ‘indigenous’ portrayed these peoples as remnants of a distant past in a tide of modernity. Their distinct cultural traits were only relevant as factors in the process of induced, systematic socio-cultural change for which ILO standards called. According to Rodriguez-Pinero, international law first defined indigenous peoples to see them disappear.<sup>33</sup>

By knowing the ILO history on indigenous issues and especially issues related to the concept of ‘indigeneness’ helps more to understand the contemporary approach of the article 1 of the Convention No. 169 and the ongoing discussion around the matter in general level of international law. Knowing the development of this concept also enables us to leave doors open for further development

<sup>30</sup> ILO, *Indigenous peoples: Living and Working Conditions of Aboriginal Populations*, 1953, pp. 10–22.

<sup>31</sup> In 1957 the ILO adopted a Convention on Indigenous and Tribal Populations (No. 107), which was the first international treaty ever to be adopted on this subject. It was ratified by 27 countries, and remains at force still for 18 countries, but, it is no longer open for new ratifications.

<sup>32</sup> Convention No. 107.

<sup>33</sup> Rodriguez-Pinero, 2005, p. 172.



*T. Joona / International Community Law Review 12 (2010) 213–260*

and deepening of the concept. The scope of the Convention No. 169 will be examined more detailed in part four where the subject/object dichotomy is discussed in the light of international law and ILO, and also in the light of the experiences derived from the empirical case studies.

## 2.2. *ILO Convention No. 169*

As years went by and public opinion evolved, certain weaknesses in Convention No.107 began to attract attention, in particular its assumptions that integration into the larger society was the only possible future for indigenous and tribal peoples, and that all decisions regarding development were concern of the State rather than of the people most affected. The Governing Body of ILO responded by putting the revision of Convention No. 107 on the agenda of the International Labour Conference (ILC) in 1988 and 1989. In June 1989 the Indigenous and Tribal Peoples Convention (No. 169) was adopted to include the fundamental concept that the ways of life of indigenous and tribal peoples should and will survive. Another fundamental change is the premise that these peoples and their traditional organizations should be closely involved in the planning and implementation of development projects that affect them, and indeed in all the measures taken to apply the Convention.<sup>34</sup>

The basic philosophy of Convention No. 169 is the main thing that distinguishes it from Convention No. 107. Whereas Convention No. 107 assumed the gradual disappearance of indigenous and tribal populations as they were integrated into the countries in which they lived, Convention No. 169 is regard to adopt general attitude of respect for the cultures and ways of life of indigenous and tribal peoples, placing emphasis on their right to a continued existence and to development according to their own priorities.<sup>35</sup>

Critics have also been raised towards the new ILO Convention No. 169 especially among the indigenous peoples.<sup>36</sup> The fundamental issue, that indigenous and tribal peoples as such do not have a formal position within the ILO tripartite structure, is causing problems. They have not been drafting the Convention concerning them and because States are the subjects of International legal instruments according to international law, indigenous peoples can only be seen as objects of this Convention. However, indigenous and tribal peoples can partici-

<sup>34</sup> The ILO web-site: <http://www.ilo.org/public/english/indigenous/background/index.htm> (Visited 7.11.2006)

<sup>35</sup> Today, ILO work in the field of indigenous and tribal peoples falls into two categories: 1.) The supervision of Conventions No. 107 and 169 and 2.) Assistance to indigenous and tribal peoples and to governments. The assistance to indigenous and tribal peoples and to governments includes several specialized programmes governed by ILO. More detailed information on these projects can be found on ILO web-site: [www.ilo.org](http://www.ilo.org). The supervision concerning especially Convention No. 169 will be analysed later in the text.

<sup>36</sup> See for example, Venne 1990, pp. 53–67.

*T. Joona / International Community Law Review 12 (2010) 213–260*

pate in ILO meetings and other activities in the following manner: 1.) As representatives of governments, or of workers' and employers' organizations, or 2.) as representatives of a non-governmental organization (NGO) on the ILO Special List of NON-Governmental International Organizations.<sup>37</sup> Indigenous and tribal peoples can also send information directly to the ILO. This can be done through any workers' or employers' organization – including those made up of indigenous and tribal peoples or they can send information themselves.<sup>38</sup>

Ratification of an international convention is a sovereign and voluntary act of a State. By signing an international legal document the government agrees to be bound by the contents of the treaty. When looking at the ratifications of ILO Convention No. 169 one has to bear in mind that different states have different interests in ratifying human right Conventions. Some countries may change their practices only to gain access to the material benefits of foreign aid or to be able to stay in power in the face of strong domestic opposition.<sup>39</sup> According to Minister of Justice in Finland, Finland is encountering pressure from inside and outside the country to ratify the Convention and Finland has also the reputation in the world as a country providing good human rights for all of its' citizens. These are the reasons pressuring Finland for ratification.<sup>40</sup>

Ratification of an ILO Convention is also the beginning of a process of dialogue and co-operation between the government and the ILO. *The purpose is to work together to make sure national legislation and practice agree with the provisions of the Convention.* ILO Conventions, unlike other international treaties, cannot be ratified with reservations. They have to be accepted in their entirety. Therefore, it is important that governments, workers, and employers, as well as indigenous and tribal peoples, learn about the provisions of the Convention.<sup>41</sup> The

<sup>37</sup> The ILO's Special List is a list of NGOs whose aims and activities are in harmony with the spirit, aims and principles of the ILO. NGOs should work internationally and cover a number of countries in their work. NGOs wishing to be on the list can send a request to the Director-General of the ILO. The Four Directions Council, Indigenous World Association and the Saami Council are among the NGOs on the Special List, as well as several other NGOs which take an active interest in questions affecting indigenous and tribal peoples, for example Amnesty International and the International Work Group for Indigenous Affairs (IWGIA). ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169) *A Manual*, International Labour Organization, France (2000) p. 78.

<sup>38</sup> The Committee of Experts and the Conference Committee have emphasized the value of such comments for their work if the comments contain verifiable information such as laws, regulations or other official documents such as land titles and judicial decisions. There is also a suggestion that governments consult with indigenous and tribal peoples' traditional organizations in preparing their reports on Convention No. 169.

<sup>39</sup> Also see Risse and Sikkink, 1999, p. 10. In fact, the process of human rights change almost always begins with some instrumentally or strategically motivated adaptation by national governments to growing domestic and transnational pressures. Risse and Sikkink 1999, p. 10.

<sup>40</sup> Minister of Justice, Tuija Brax. Interview 11 November 2009, Helsinki, Finland.

<sup>41</sup> Before ratifying Convention No. 169, it is desirable that there be a dialogue among the traditional ILO partners, as well as with the indigenous and tribal peoples concerned. By involving these principal actors, their participation in the implementation of the Convention is better guaranteed. *A Manual*, 2000, p. 70.

*T. Joona / International Community Law Review 12 (2010) 213–260*

situation of indigenous and tribal peoples varies in different countries. Therefore, according to ILO, a uniform approach cannot be applied.<sup>42</sup> Sometimes, national laws and policies affecting indigenous and tribal peoples have to be amended or revised, or new laws adopted in order to bring national laws and policies into line with the Convention.<sup>43</sup> When government considers the ratification of Convention No. 169 it discusses it with the relevant bodies. The legislature may have to adopt an international treaty to make it part of the national law. Therefore, the approval of the parliament or other legislative body may have to be sought. Once this is obtained, then the executive authority of the country – the government – also has to approve the instrument.<sup>44</sup>

At the moment, Convention No. 169 is a comprehensive instrument covering a range of issues pertaining to indigenous and tribal peoples, including land rights, access to natural resources, health, education, vocational training, conditions of employment and contacts across borders. This updated instrument has been ratified by ILO member States<sup>45</sup> and forms a basis for national debates and policies concerning these peoples in a number of countries. It sets the *minimum* international standards, while holding the door open for higher standards in countries that can go further. It seeks to bring all those concerned – governments, organizations of indigenous and tribal peoples, and other non-governmental organisations – into the same dialogue. This Convention also makes important linkages with other aspects of the ILOs work. It is not only Convention No. 169 that is of relevance to indigenous and tribal peoples. A number of other ILO instruments are of direct relevance to indigenous and tribal peoples as well.<sup>46</sup>

The ratification and implementation of ILO Convention No. 169 has caused number of disagreements in those countries that are considering the ratification and also in those countries that have already ratified it. This debate can be

<sup>42</sup> Article 34 of the Convention stipulates that: “*The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.*”

<sup>43</sup> For example, after ratifying Convention No. 169, both Bolivia and Mexico revised their constitutions to recognize the existence of indigenous peoples and the multi-ethnic and pluri-cultural nature of the State.

<sup>44</sup> However, even if a country has not ratified the Convention, it can still use its provisions as guidelines. For example, Germany has not ratified Convention No. 169 but its development policy for cooperation with indigenous and tribal peoples in Latin America is based on the Convention. Again, according to ILO, while Finland has not yet ratified Convention No. 169, it has tried to meet many of the provisions of the Convention in the Saami Act of 1995. The Convention can also be useful tool for indigenous and tribal peoples to negotiate policies or projects affecting them. So far, this approach can be argued to be the mostly used dimension of the ILO Convention.

<sup>45</sup> See *supra* n. 14 at p. 216. Also see Russell Lawrence Barsh, ‘An Advocates Guide to the Convention on Indigenous and Tribal Peoples’, *Oklahoma City University Law Review* (1990) 209.

<sup>46</sup> The Forced Labour Convention, 1930 (No.29), The Discrimination (Employment and Occupation) Convention, 1958 (No.111), The Convention on the Elimination of the Worst Forms of Child Labour, 1999 (No. 182), The ILO Declaration on Fundamental Principles and Rights at work. <http://www.ilo.org/public/english/indigenous/standard/index.htm>, (Visited 7.11.2006).

*T. Joona / International Community Law Review 12 (2010) 213–260*

discovered simply as a consequence of conflict of interests. The ILO Convention No. 169 concerns areas from the top to the bottom, starting from state sovereignty and ending with individual's identity and relationship to/with land. All issues between these are handled in the political debates and mixed in many ways. One of the purposes of this article is to clarify the situation in relation to the ratification, supervision and implementation of the ILO Convention No. 169. Analysing the reports submitted by the Governments to the ILO Committee of Experts is showing some evidence what the ratification of ILO Convention No. 169 would mean in practice.

After the government has decided to ratify the ILO Convention No. 169 it sends a letter to the ILO informing it of its decision to ratify and be bound by the Convention. Once it receives this letter, the ILO registers the ratification and informs other member states. One year after the ILO receives notice of ratification and the Convention comes into force in the country – i.e., it comes binding. One year after the registration, the government has to send its first report on the implementation of the Convention to the ILO. The one year interim period is to give the government time to make sure national law and practice are in agreement with the Convention. A second report is due two years later. After this, the normal reporting period for Convention No. 169 is every five years. However, if the situation is serious and needs to be followed closely, more frequent reports are requested.<sup>47</sup>

### **3. International Human Right Norms and Domestic Practices – Theoretical Framework**

The promotion of human rights norms<sup>48</sup> throughout the world by the acceptance of declarations, treaties, trade agreements and world opinion is very important for holding nations accountable in the global community. However, such instruments do not guarantee that a nation will institute the legal protections necessary to secure human rights laws. The spread of human rights around the world entails more than simply extending the number of states that sign treaties or incorporate human rights protections into their legal systems. Although these agreements are significant because they allow for a nation state to formally accept human rights as the norm, and for the citizenry to socialize the norm, the true globalization of human rights is proliferation of the idea that human rights exist, that governments must infringe upon the rights of their citizens, and that governments must protect these rights from other members of society. When society accepts these norms, human rights penetrate beyond the society's legal code and

<sup>47</sup> *A Manual*, 2000, pp. 70–71.

<sup>48</sup> Thomas Risse and Stephen Ropp define international norms as “collective expectations about proper behaviour for a given identity”. Risse and Ropp, 1999, pp. 234, 236.

T. Joona / *International Community Law Review* 12 (2010) 213–260

embed themselves into its culture. It is our contention that this is the only way human rights will ever be truly guaranteed.<sup>49</sup>

By the late 1990s, constructivism has become the “third debate” among realist and liberal interpretations of international behaviour inside the international relations theoretical field. Jeffrey Checkel, Professor of Political Science at the University of Oslo argues that “recent constructivist work on socialization by international institutions and norms marks a considerable advance” in the study of international relations and that this body of research has moved well beyond the neorealist and neoliberal debate over power and interests. Further, “constructivism argues and empirically documents that effects of socialization reach deeper” than simply agents’ strategies, penetrating down to “underlying identities and interests.”<sup>50</sup>

One of the most influential and groundbreaking works to emerge in this area of literature in the past few years is Risse *et al*’s work, entitled *The Power of Human Rights: International Norms and Domestic Change*. In the introductory chapter, Risse and Sikkink lay out a theoretical framework for norms socialization, a process whereby human rights norms become internalized, “so that external pressure is no longer needed to ensure compliance.” The three phases of socialization include (1) “adaptation and strategic bargaining;” (2) moral consciousness-raising, argumentation, and persuasion, and (3) “institutionalization and habitualization.” This framework operates through a five-phase “spiral model” of human rights change. (1) repression and activation of international-transnational networks, (2) denial by the oppressing state; (3) tactical concessions by the oppressor; (4) prescriptive status, including the signing of treaties; and finally (5) rule-consistent behaviour.<sup>51</sup>

In the ILO context much has been written and said about the wrongful character of the objectives in the Conventions No. 107 and No. 169, but considerably less is known about how those goals have actually been applied. Within the anarchical international order the effectiveness of international norms depends primarily on their diffusion, execution and enforcement at the domestic level. In addition, a second measure of application of international law is the activities of international agencies and bodies responsible for verification and or/support of states’ compliance with their international obligations.

An analysis of the application of international labour standards can take a two-fold approach. Along with the organization’s developmentalist ethos, the standards in international conventions and recommendations may be applied through

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<sup>49</sup>) Also see Christopher Marsh and Daniel P. Payne, ‘The Globalization of Human Rights and the Socialization of Human Rights Norms’, *Brigham Young University Law review* (8/16/2007) 665–666.

<sup>50</sup>) Christopher Marsh and Daniel P. Payne (2007), p. 667 quoting Jeffrey T. Checkel, *International Institutions and Socialization* 1 8ARENA Working paper Series, paper No. 99/5 1998, available at [http://www.arena.uio.no/publications/wp99\\_5.htm](http://www.arena.uio.no/publications/wp99_5.htm).

<sup>51</sup>) Marsh and Payne, 2007, pp. 667–668.

*T. Joona / International Community Law Review 12 (2010) 213–260*

‘technical’ co-operation, ‘development’ activities, or through the activities of the International Labour organisation’s system of standards supervision, in which the Committee of Experts on the Application of Conventions and Recommendations (CEACR) plays a principle role. This article introduces only the approach enforced by the CEACR even though technical co-operation is considered to be an important approach too.<sup>52</sup>

### 3.1. *Supervisory Mechanisms*

Since its creation in 1919, the mandate of International Labour Organization has included adopting international labour standards and promoting their ratification and application in its member States as fundamental means of achieving its objectives. In order to monitor the progress of its member States in the application of international labour standards, the ILO has developed supervisory mechanisms which are described as being unique at the international level.<sup>53</sup> The ILO has a number of procedures to examine how its conventions are being applied. There is thus a process of dialogue between the country and the ILO supervisory bodies. Once a Convention has been ratified, Article 22 of the ILO Constitution requires that member States report regularly to the International Labour Office on the measures they have taken to give effect (implementation) to Conventions to which they are party. These reports should include information on the situation in the relevant area, both in law and in actual practice. The reports must be sent to the most representatives employers’ and workers’ organizations in the country for their comments. So far, Norway has been the only country to include indigenous peoples’ organizations, the Saami Parliament, in this reporting process. It is not required in the Convention, but very much encouraged by the ILO.<sup>54</sup>

The reports sent by governments and employers’ and workers’ organizations are reviewed by the *Committee of Experts on the Application of Convention and Recommendations* (CEACR). It is made up of 20 independent experts and meets every year. The role of CEACR is examined more detailed shortly below. The Committee sends governments written comments based upon the Committee’s findings. These comments may take the form of *direct requests* or *observations*. As

<sup>52</sup> Rodriguez-Pinero, 2005, p. 216. Rodriguez-Pinero has analysed both technical co-operation and the supervisory mechanism of the CEACR in the context of Convention No. 107 in his book from 2005.

<sup>53</sup> The ILO supervisory mechanisms have been described as ‘the most comprehensive international system for examining the implementation of international human right standards.’ Patrick Thornberry, *Indigenous Peoples and Human Rights*. Manchester University Press, 2002, pp. 323–324; also see Lee Swepston, ‘Human Rights complaint procedures of the International Labour Organization’, in H. Hannum (ed.), *Guide to International Human Rights Practice*. Philadelphia, University of Pennsylvania Press, 2nd ed, 1992, pp. 99–116 at p. 115.

<sup>54</sup> <http://www.ilo.org/public/english/indigenous/standard/super.htm>; Manual 2000, 74–75, 80; Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Office, Geneva. Report III (Part 1 A), 2006, p. 1.

*T. Joona / International Community Law Review 12 (2010) 213–260*

the name implies, direct requests are primarily requests for information on specified points, which are sent directly to the government concerned and are not published. Observations may also contain requests for information, but are primarily used to set forth the Committee's findings and recommendations as well as the substance of comments made by employers' and workers' organizations.<sup>55</sup>

### *3.2. Role of the Committee of Experts on the Application of Conventions and Recommendations (CEACR)*

The Committee of Experts is composed of 20 members, who are outstanding legal experts at national and international level. Members of the Committee are appointed by the Governing Body upon the proposal of the Director-General. Appointments are made in a personal capacity among completely impartial persons of technical competence and independent standing drawn from all regions of the world,<sup>56</sup> in order to enable the Committee to have at its disposal firsthand experience of different legal, economic and social systems. The appointments are made for renewable periods of three years.<sup>57</sup>

The Comments of the Committee of Experts on the fulfilment by member States of their standards-related obligations take the form of either observations or direct request as explained earlier. There are some fundamental principles in the work of the Committee of Experts which should be remembered when estimating its work. The Committee of Experts has reaffirmed on many occasions that *its work can have value only if it remains true to its tradition of independence, objectivity and impartiality* in assessing and reporting on the extent to which the position of each member State appears to be in conformity with the terms of the ratified Conventions and the obligations that the State has undertaken by virtue of the ILO Constitution. In its 1987 report, the Committee states that in its

<sup>55</sup> The Committee's observations on the application of ratified Conventions are published in its annual report, which is then considered during the annual International Labour Conference by the tripartite Committee on the Application of Standards. A Manual 2000, 74; Also see IOLEX database at [www.ilo.org](http://www.ilo.org).

<sup>56</sup> Argentina, Kuwait, Belize, United States, South Africa, United Kingdom, Mexico, Sierra Leone, Australia, France, Russian Federation, Brazil, Germany, India, Spain, Senegal, Croatia, Japan.

<sup>57</sup> The Committee of Experts meets annually in November–December. According to the mandate given by the Governing Body, the Committee is called upon to examine the following:

- the annual reports under article 22 of the ILO Constitution on the measures taken by member States to give effect to the provisions of the Conventions to which they are parties;
- the information and reports concerning Conventions and Recommendations communicated by member States in accordance with article 19 of the Constitution;

information and reports on the measures taken by member States in accordance with article 35 of the Constitution Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A), International Labour Office, Geneva, Switzerland, 2006. Also available on: <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1a.pdf>.

*T. Joona / International Community Law Review 12 (2010) 213–260*

evaluation of national law and practice in relation to the requirements of international labour Conventions:

...its function is to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given country. Subject only to any derogations, which are expressly permitted by the Convention itself, these requirements remain constant and uniform for all countries. In carrying out this work, the Committee is guided by the standards laid down in the Convention alone, mindful, however, of the fact that the modes of their implementation may be different in different States.<sup>58</sup>

The Committee has also observed on many occasions that its terms of reference do not require it to give definitive interpretations of Conventions, competence to do so being vested solely in the International Court of Justice by virtue of article 37 of the Constitution. At the same time, the Committee has also noted that, in order to carry out its function of evaluating the implementation of Conventions, it has to consider and express its views on the meaning of certain provisions of the Conventions.<sup>59</sup> This comment of the Committee of Experts strengthens the argument of its interpretative role.

The following sections will analyse the role of the Committee of Experts, the political processes related to domestic practices in prior to the ILO Convention No. 169 especially concerning Articles 1 and 13–19 of the Convention, and the interpretation of these articles. I have chosen to examine these articles especially because they form the fundamental basis for other articles (Article 1). They are also the most controversial articles (Articles 13–19). Article 1 refers to the subjects/objects of this Convention and Articles 13–19 concern the land rights of indigenous peoples.

### 3.3. *Domestic Changes and Interpretation*

A few words are also relevant to pronounce on the interpretation of the Convention. This is related to the work of CEACR and therefore also on how the provisions of the Convention are understood in domestic levels. It means that governments that are in doubt as to the meaning of particular provisions of an ILO Convention or Recommendation may request the Office to communicate its opinion. Under the ILO Constitution, the Office has no special authority to interpret Conventions and Recommendations. The International Court of Justice is, by virtue of article 37, paragraph 1 of the Constitution, considered to be the only body competent to give interpretations of ILO Conventions and Recommendations. However, it has not been asked to do so for many years and never in the context of ILO Convention No. 169. The International Labour Office

<sup>58</sup>) Report of the Committee of Experts on the Application of Conventions and Recommendations. International Labour Office, Geneva, Switzerland. Report III (Part I A), 2006, p. 2.

<sup>59</sup>) *Ibid.*



*T. Joona / International Community Law Review 12 (2010) 213–260*

may, however, provide its opinion. Where a request from a government is for a formal or official opinion, a Memorandum by the International Labour Office is published in the Official Bulletin. The Office's response to the Government of Switzerland in 2001, on questions concerning the Convention's coverage, is published in the Office's Official Bulletin, Vol. LXXXIV, 2001. This is the only published response of this nature. Where a formal or official opinion is not specifically requested, a letter of reply will be sent to the Government concerned. These are not published.<sup>60</sup>

The fact that International Court of Justice has hardly ever been asked to provide its interpretation on ILO Conventions provisions in my opinion, says something about the effectiveness of the supervisory mechanisms of ILO itself. There has clearly not been a *need* to question the comments and opinions submitted by the ILO Committee of Experts (CEACR). In my analytical part of the article I have examined all 20 countries that have ratified the ILO Convention No. 169. I have analysed all the *observations* and *direct requests* submitted by the Committee of Experts concerning the implementation of Convention No. 169 in individual countries.<sup>61</sup> I am not so much interested in the actual interpretation of the provisions that the Committee of Experts is obviously doing, but rather in the political processes that lead to a change in national legislation and policies in regard to indigenous peoples in these countries. The wide effect that Convention No. 169 as an international human rights instrument has to the domestic practices of individual countries is evident, and should be examined rather carefully. According to Risse and Sikkink, when using case studies that explore the linkages between international human right norms and changing practices in this field, we develop and present a theory of the stages and mechanisms through which international norms can lead to changes in behaviour.<sup>62</sup>

In my empirical section of this article I have taken into account some fundamental principles concerning the methods of international law and international relations.<sup>63</sup> Even though the actual interpretation is not in my special concern as explained above, but rather a side effect of the political processes, it is, however, interesting to see how the CEACR has interpreted certain provisions of ILO Convention No. 169 even if mandated not to do so.<sup>64</sup> The following sections intro-

<sup>60</sup> <http://www.ilo.org/public/english/indigenous/standard/super.htm>; International Labour Office, Governing Body, GB.280/18, 280th Session, Report of the Director-General, Geneva, March 2001.

<sup>61</sup> All together over 400 pages of materials.

<sup>62</sup> Risse and Sikkink 1999, p. 2.

<sup>63</sup> The doctrine of sources of law is considered to be a guiding element in this part of the work. It means that certain official documents are given a priority and supporting position in regard to the interpretation of the Convention.

<sup>64</sup> Especially those articles that have caused the main problems when States are considering the ratification or implementation of the Convention. The basis for the interpretation is formed in the Convention text and its wordings itself. In this case the former Convention No. 107 has also relevance, so has the preparatory works of the Convention No. 169. General rules for treaty interpretation is provided in The Vienna Convention on the Law of Treaties. In article 31 of the Vienna Convention it is stipulated that:

*T. Joona / International Community Law Review 12 (2010) 213–260*

duce the position of the Committee of Experts as using the power and authority of international organization to put international norms as part of national practices. As a consequence related to the reporting processes and political and legislative changes in the State, the CEACR is also interpreting the ILO Convention No. 169.

The Risse and Sikink model of norms socialization presented in the beginning of the section can be argued to be very linear, even teleological: it has an ultimate destination and there are no points along the way marking possible detours or obstacles to derail movement in the planned direction. While we may be able to place all countries into one of the presented phases, the fact is that most of the states in phase five did not get there by progressing through the earlier stages. Many countries have reached phase five through human rights movements from primarily domestic sources, which evolved over centuries. Regardless of this shortcoming, the model's theoretical mechanism makes sense and generally stands up to the empirical record for industrializing states and transitioning societies in the age of globalization. Put simply, the Risse and Sikink model anticipates that governments will adjust their behaviour in order to win favour with the international community without necessarily believing in the validity of the norms. Through the process of moral consciousness-raising, argumentation, and persuasion, it is expected that these regimes will eventually come around to accepting the value and veracity of human rights concepts. The unique contribution of Risse and Sikink is their recognition that the spread of human rights occurs not simply through compelling regimes to sign treaties and adjust their legal codes, but at the domestic level as well, where transnational actors and

- 
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of object and purpose.
  2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: a) any agreement relating to the treaty which was made between all the parties in connexion with the treaty; b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. There shall be taken into account together with the context: a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; c) any relevant rules of international law applicable in relations between the parties.

A special meaning shall be given to a term if it's established that the parties so intended.

As mentioned earlier, the International Court of Justice is the highest authority to actually give interpretations on ILO Conventions, but in the case of ILO Convention No. 169 it has never been asked to do so. There are also other instruments presented in the context of interpretation, like the Governing Body of ILO. Also other written materials provided by the ILO, like the "Guide to..." and "A Manual" can be regarded as useful tools when examining the ILO Convention No. 169, but their role as interpretations of the Convention is minor, if following the doctrine of sources of law. The individual opinions, comments of experts as well as mine flow into same category. This article should be read in light of this approach.

*T. Joona / International Community Law Review 12 (2010) 213–260*

advocacy networks spread human right norms and eventually establish these norms as part of a society's culture.<sup>65</sup>

#### 4. Implementation and Interpretation of Article 1

##### 4.1. Subject/Object Dichotomy

In the beginning of this section, it is important shortly to describe the interesting dichotomy between the concepts of *subject* and *object* referred already many times in this article. In the ILO context this is worth examination, since the Conventions real subjects are states, but it is targeted to indigenous peoples. According to Verzijl, 'international law has originated as a body of law regulating the relations between 'political entities' which later transformed and grouped together into "States".<sup>66</sup> The positivistic doctrine during the eighteenth and nineteenth centuries claimed that only sovereign states could be the subjects of international law, therefore the individual human being is the 'object' and not the 'subject' of international law.<sup>67</sup>

According to the object theory, the attribution of rights and benefits to other entities than States can only take place in an indirect way. According to the positivist school, Lauterpacht has explained, "in cases in which individuals derive benefits under international law, such benefits are enjoyed not by virtue of a right which international law gives to the individual but by reason of a rights appertaining to the State of which the individual is a national. The right is a right of the State; the individual is only the object of that right."<sup>68</sup>

In the second half of the 20th century, views with regard to the subject-object dichotomy changed. Manner criticised the 'object' theory and listed several reasons for the rejection of this theory. In the first place, the theory can be called illogical because an individual can be neither subject nor object of a law that deals exclusively with states. Later on, Higgins suggested a different view on international law: International law should not be perceived and discussed in terms of subjects and objects, but in terms of participants.<sup>69</sup> What about then in the case of minorities and indigenous peoples? Can they ever achieve the status of an 'international person' and, if so, to what extent and in what form?

<sup>65</sup> Marsh and Payne 2007, pp. 668–669.

<sup>66</sup> J.H.W. Verzijl, *International Law in Historical Perspective, Part II*, A.W. Sythoff, Leiden, 1969, pp. 4, 12.

<sup>67</sup> P. Heilborn, *Das System der Völkerrechts*, Julius Springer, 1896, pp. 58–211, 372, 374. See also Anna Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, School of Human rights Research Series, Vol. 10, 2001, pp. 46–47. Also see G. Manner, 'The object theory of the individual in international law', *American Journal of International Law* (1952), 428–449.

<sup>68</sup> H. Lauterpacht, *International Law and Human Rights*, 1st ed., (1950). Archon Books, Cambridge 1968, p. 8.

<sup>69</sup> R. Higgins, *Problems and Process*, Clarendon Press, Oxford, 1995, p. 49.

*T. Joona / International Community Law Review 12 (2010) 213–260*

Framed by recognition of indigenous peoples as ‘peoples’, Convention No. 169 takes a decisive stand on the collective nature of indigenous rights, transforming what the earlier convention defined as an object of applied anthropological concern into a collective subjects of rights. The very subject of these rights, with its flexible formulation of ‘indigenous and tribal people were not even questioned. In this way, the ILO bridged the bitter controversy in modern political theory and human rights law on individual versus collective rights by simply affirming a set of collective rights on an equal footing with the individual rights of indigenous persons.<sup>70</sup>

However, the Convention is a mosaic of different approaches which refer to different entities as bearers of rights or duties. In the first place, there are provisions which relate to the individual members of the tribe or group. For instance, Article 28 reads: “Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language...” or Article 26. “Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels...”<sup>71</sup>

Most of the enforceable rights affirmed in the Convention are affirmed collectively to indigenous peoples as such: articles 8 and 9 (indigenous peoples’ rights to their own institutions, legal systems and jurisdiction), articles 13–19 (land and resource rights). The collective aspect of indigenous rights is underscored in some instances by reference to indigenous representative institutions. Moreover, the collective nature of indigenous rights is expressly affirmed in relation to the crucial issue of land and resource rights, (article 13). The affirmation of collective rights in the convention does not by any means prejudice the enjoyment of individual rights by the members of the peoples concerned, which are also expressly affirmed in the instrument. (Article 3(1) ‘The Provisions of the Convention shall be applied without discrimination to male and female *members* of these peoples’) or (article 4(1) ‘Special measures shall be adopted as appropriate for safeguarding the person... of the peoples concerned’) or (article 8(3) ‘stating that the application of indigenous law shall not prevent members of these peoples from exercising the rights granted to all citizens’).<sup>72</sup>

It seems as if the indigenous and tribal group as such is the subject of these rights, and many States and scholars actually interpret these rights as collective rights. However, the fact that in all provisions the word ‘shall’ is used, can also be interpreted as implying that a slight measure of discretion concerning the implementation is left to the State’s governments. It needs to be emphasised that a great deal of the provisions in this Convention is clearly aimed at the governments of States and contain obligations to take specific measures relating to indigenous and tribal peoples.<sup>73</sup>

<sup>70</sup> Rodriguez-Pinero, 2005, pp. 321–322.

<sup>71</sup> Meijknecht, 2001, pp. 149–150.

<sup>72</sup> *Ibid.*, pp. 149–152.

<sup>73</sup> *Also see* Meijknecht, 2001, pp. 150–152.

*T. Joona / International Community Law Review 12 (2010) 213–260*

It can be concluded that the partial revision of the Convention No.107 marked a change in the ILO's approach to indigenous peoples, but also in approach from 'policy' to a 'rights' approach. This transition was considered a problematic and to certain extent, incomplete process. Convention No. 169 stands out as a multifaceted text, placed at a normative crossroads.

#### *4.2. Article 1 and its Implementation*

One of the central issues that have been many times mixed and wrongly stipulated in different political situations is Article 1 of ILO Convention No. 169. In this respect the ILO takes a practical approach and it means that it does not define who indigenous and tribal peoples are.<sup>74</sup> It only describes the peoples it aims to protect:

Article 1 is worded as follows:

1. This Convention applies to:
  - a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
  - b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
1. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
2. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

At an international level it is quite obvious that who are considered to be indigenous peoples of the world, but many times in local levels it is more complex issue to define who in personal level belongs to a certain group. In the context of ILO Convention No. 169 it is however necessary to know who are regarded as indigenous persons. It is necessary to know to whom the Convention is applicable, and who its beneficiaries are, so that these peoples would be aware of their special rights. This is a question of human right and it is for example highlighted in a CEACR direct request concerning Bolivia in 1995 and also in Manual 2000: "... The Committee would be grateful if the Government would indicate the manner in which recognition is given to indigenous communities and individuals so that they can benefit from the legislation which applies to them."<sup>75</sup>

<sup>74</sup> Also see Patrick Thornberry, 'Who is indigenous? Concept, definition, process' In *Indigenous Peoples and Human Rights*, 2002, pp. 33–60; also Patrick Thornberry, 'Who is indigenous?' In Frank Horn (ed.), *Economic, Social and Cultural Rights of the Sami*, Juridica Lapponica vol. 19, 1998, Institute for Nordic Law, University of Lapland, pp. 1–40.

<sup>75</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

*T. Joona / International Community Law Review 12 (2010) 213–260*

This comment of the Committee of Experts highlights the approach that, even though ILO Convention No. 169 is a Convention dedicated to indigenous peoples, as peoples, the Committee of Experts is through the supervisory mechanism interpreting the Article 1 of this Convention such way, that it is important to know also in a personal level, who is indigenous person. The task to clarify this issue is left to the Government and it is emphasized in several *observations* and *direct requests* of the Committee of Experts.<sup>76</sup>

In this article it is not possible to look deeper into the question of the definition of “indigenous peoples” in general international law level, but rather investigate the issue of “indigenous person” and the political processes where Article 1 of the ILO Convention No. 169 has been implemented into domestic practices.

Situations in each country are examined below, giving some examples of problems related to Article 1 and its implementation.

### 4.3. *Implementation*

#### 4.3.1. *Argentina*

In 2003, in a direct request the Committee of Experts notes that legislation in Argentina concerning the self-identification of indigenous peoples was not in compliance with Article 1 of the Convention. It especially requested the Government to undertake an indigenous census and recommends that the peoples concerned participate in its preparation.<sup>77</sup>

Later, in 2005, in an Observation, the Committee of Experts notes that the recognition of indigenous peoples was still encountering numerous problems, especially regarding legal personality. Since then, the Government of Argentina has not communicated with the Committee of Experts.<sup>78</sup>

In some cases the problems are recognized, but there is very little progress. The example of Argentina shows however, that even though it ratified the Convention, it is not sure who its beneficiaries are. The Committee of Experts is therefore repeatedly asking the Government to make sure its legislation is in compliance with the Convention.

<sup>76</sup> The ILO Convention No. 169 is regarded to be the first international instrument which recognizes self-identification of indigenous and tribal peoples as a fundamental criterion. The Convention adopts an approach based on both objective and subjective criteria. The Objective criteria mean that a specific indigenous or tribal group or people meets the requirements of Article 1.1, and recognizes and accepts a person as belonging to their group or people. Subjective criterion means that this person identifies himself or herself as belonging to this group or people; or the group considers itself to be indigenous or tribal under the Convention.

<sup>77</sup> CEAR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 Argentina Ratification: 2000, Submitted: 2003.

<sup>78</sup> CEAR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Argentina Ratification: 2000, Published: 2005.

*T. Joona / International Community Law Review 12 (2010) 213–260*

#### 4.3.2. *Bolivia*

In 1994, in a direct request the Committee of Experts raises a question for the Government, as to whether entry in the National Register as indigenous is distinct from being registered as a *campesino* (rural worker), and what criteria are applied in this respect. These questions show that the CEACR concludes that there is some controversy in regard to the Convention (Art.) and that the Government should do something about it.<sup>79</sup>

One year later 1995, in a direct request, it shows that the Government has responded to the questions raised by the CEACR and replies that the entry of indigenous persons into the Single National Register is no different from the entry of other rural workers. In its request the Committee also clearly speaks not only about communities but individuals as beneficiaries of the Convention. *It is important to know the individuals so that they can benefit from the legislation which applies to them.* The Committee also requests further information of the results of the census to be undertaken, which means that further developments in legislation and practice is needed.<sup>80</sup>

It is also important to note that in some cases it is possible to receive assistance, for example from the United Nations Development Programme to undertake a census within the indigenous community/ies.

#### 4.3.3. *Colombia*

In 1994, the direct request concerning Columbia shows that the Government is presenting exact figures of indigenous peoples living its territory. In 1994 it is estimated that there are 575,000 indigenous persons in Columbia. The Committee however requested further information on what grounds these figures are based, and also how the fundamental criterion of identification is manifested in practice.<sup>81</sup>

In 1996, the direct request shows that some progress has occurred regarding indigenous census. The 1993 census includes a specific indigenous component, an Amerindian ascendancy, and the feeling of belonging to an indigenous community as criteria for recognition as being indigenous. The Committee is still asking from the Government for more information in regard to the 1993 census with its next report.<sup>82</sup>

In 1999, in a direct request, exact figures are presented on the amount of indigenous population, which is estimated at 603,000 in 1999. The Committee

<sup>79)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1994.

<sup>80)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

<sup>81)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1994.

<sup>82)</sup> CEACR: Individual Direct Request concerning Convention no. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1996.

*T. Joona / International Community Law Review 12 (2010) 213–260*

is no longer asking for more information in regard to this issue. It seems that Columbia complies with the requirements of Article 1 of the Convention, but very exact figures of the number of indigenous persons is required.<sup>83</sup> In 2001, in a direct request it also shows that according to the Government, the Convention applies to 82 different peoples in its territory, which would be about 621,186 inhabitants.<sup>84</sup>

#### 4.3.4. *Costa Rica*

In 1997 and 1999, in the direct requests the Committee notes that according to the Costa Rican Indigenous Act “persons are indigenous who constitute ethnic groups descended directly from pre-Colombian civilizations and who conserve their own identity.” The Committee notes however, that this definition does not include self-identification as indigenous or tribal as one of the criteria for the definition of the peoples to which the Act applies. The Committee requests the Government to state how effect is given to this requirement of the Convention, which means that the national legislation in Costa Rica is not in conformity with the ILO Convention No. 169, Article 1.<sup>85</sup>

In 2000, in a direct request it shows that the Government of Costa Rica is however indicating that its’ legislation is in conformity with the Convention. The Committee notes in this respect also a judgement handed down by the Constitutional Court which stipulates that “it is the indigenous communities themselves which determine who are their members, applying their own criteria and not those followed by statute law” (Judgement No. 1786–93) The Committee notes that the definition of the concept of “indigenous” in section 1 of Act No. 6172 lays down that persons are indigenous who constitute the ethnic groups descended directly from pre-Colombian civilizations and who conserve their own identity.<sup>86</sup>

In 2001, in a direct request the Committee notes that Costa Rican law provides that each indigenous people will define autonomously who they recognize as indigenous. The Committee is requesting additional information on the practical application of this provision. The Committee is also asking the Government whether it plans to harmonize section 1 of the Indigenous Act so that it would come into conformity with Article 1(2) of the Convention.<sup>87</sup>

<sup>83</sup>) CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1999.

<sup>84</sup>) CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 2001.

<sup>85</sup>) CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 1999.

<sup>86</sup>) CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 2000.

<sup>87</sup>) CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 2001.



*T. Joona / International Community Law Review 12 (2010) 213–260*

In 2004, in a direct request it shows that the Government of Costa Rica has not replied on the Committees request in 2001. Therefore the Committee repeats its request and *trusts* that the Government will consider bringing its legislation into conformity with this provision of the Convention. The case of Costa Rica shows quite clearly the political process which have led to at least some changes in the national legislation of this country. The Committee of Experts is noting some inconsistency with the Convention and is therefore requesting the Government to do changes in this field. They seem to be long processes with minor steps and some issues still remain open and unclear, which means that the dialogue must and will continue.”<sup>88</sup>

#### 4.3.5. Honduras

In 2000, in a direct request interesting question is raised by the Committee of Experts. According to the statement of the Government of Honduras, the ILO Convention covers those persons that are members of indigenous and tribal peoples and particularly those belonging to the CONPAH, an association of indigenous persons. The Committee is however raising a question *whether and in what manner the Convention is applied to those indigenous and tribal peoples that are not affiliated with this association*. This statement can be interpreted such way that being a member of some association is not the basis for any rights. The rights must exist from different grounds, not whether the person belongs to an association or not. The Committee is also requesting the Government to supply copies of any judicial decrees or legislation relevant to the application of the Article 1 of the Convention.<sup>89</sup>

In 2004, in a direct request it shows that some progress has taken place in regard to those issues requested from the Government in 2000 and 2003. The Government of Honduras has provided the numbers of the indigenous population in the country and the procedures for indigenous peoples to obtain legal status. The Committee is still asking further information on the numbers of applications for the recognition of the legal status by indigenous peoples which have been processed under the Act governing this issue. It seems that the implementation of the Article 1 of the Convention is not still in conformity with the Convention.<sup>90</sup>

<sup>88</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 2004.

<sup>89</sup> According to the UN Universal Declaration of Human Rights, Article 20 (1) everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras Ratification: 1995, Submitted: 2000.

<sup>90</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras Ratification: 1995, Submitted: 2004.

*T. Joona / International Community Law Review 12 (2010) 213–260*

#### 4.3.6. *Mexico*

So far, the Committee of Experts has provided the largest amount of direct requests and observations in the case of Mexico. The Government of Mexico has also showed activeness in responding the requests and therefore committed to progress in this field.

In 1993, in a direct request the Committee of Experts is also raising an interesting question. It notes that use of an indigenous language is the primary basis for deciding on whether an individual is counted as indigenous. The Committee is requesting further information on how the requirement that self-identification can be regarded as a fundamental criterion is implemented, in particular in a situation of conflict over whether an individual is to be included in an indigenous community. This issue has also raised problems and questions in the Nordic countries and at least these observations can be made:

- \* Some people may have lost their “indigenous” language in some point of their ancestral chain.
- \* Language cannot be the only decisive factor about ethnicity, because language can be learnt in any time by anybody.
- \* ILO Convention applies to peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.<sup>91</sup>
- \* Language can be one element of “indigenesness”, but according to the Committee of Experts, it cannot be the only one.<sup>92</sup>

In 1995 in a direct request the Committee notes the Government’s statement that for the 1990 census of the population and housing the criterion of indigenous identity was not used to register the indigenous population, and that the only criterion adopted was the use of Penal Procedure, which has been in force since 1991, defendants often state that they belong to a particular indigenous community, and sometimes support their statement by an anthropological certificate issued by the National Indian Institute (INI).<sup>93</sup>

<sup>91)</sup> Also see on this issue Juha Joona, *Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista*, Juridica Lapponica 2006, Rovaniemi, p. 32.

<sup>92)</sup> CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Mexico Ratification: 1990, Submitted: 1993.

<sup>93)</sup> CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Mexico Ratification: 1990, Submitted: 1995, February.

*T. Joona / International Community Law Review 12 (2010) 213–260*

In 1996, in a direct request the Committee repeats its statement of 1995.<sup>94</sup> In 2002, in an observation the Committee examined constitutional reforms in a more detailed way in a request sent directly to the Government. The amendment to the Mexican Constitution, that is the most striking examples of a ‘legal transplant’ in relation to Convention No. 169, defines indigenous people in the following terms:

The Nation has a pluricultural composition based originally in its indigenous peoples that are those that descend from the populations that inhabited the current territory of the country at the time of colonization, and which retain their own social, economic, cultural and political institutions, or part thereof. Consciousness of indigenous identity should be a fundamental criterion in order to determine to whom the provisions on indigenous peoples apply.<sup>95</sup>

#### 4.3.7. *Norway*

In 1993, in a direct request the Committee notes that there has been a census in 1970 in Norway to determine the size of Sami population. In 1993 the Government estimates that there are approximately 40,000 Sami living its territory. The Committee is asking if there are any plans for future census which would include a specific indigenous component.<sup>96</sup>

In February 1995, in a direct request the Government of Norway gives an answer where it states that there are no plans for further census including specific indigenous criteria. However, the Government explains that high level of participation in the elections to the Sami Parliament has been achieved and that those who are entitled to vote in the elections to the Parliament can be identified.<sup>97</sup> It seems that Saami identification in Norway is based on the right to vote

<sup>94</sup> CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Mexico Ratification: 1990, Submitted: 1996.

<sup>95</sup> *Ibid.*

<sup>96</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Submitted: 1993.

<sup>97</sup> According to the official web-pages of Norwegian Saami Parliament, in 1989 5497 Saami were registered in the Saami Parliament Election Register in Norway and in 2001, 9923 persons were listed in the register. <http://www.samediggi.noddefault.asp?selNodellID=110&lang=no> (visited 28 November 2003) In 2005 Saami Parliament Elections 12 538 was listed on the register ( samemanntallet) <http://www.samediggi.no/Artikkel.asp?MIId1=3&MIId2=300&AIId=236&cback=1> (Visited 20 November 2006). Estimation of the total Saami population varies from 50 000 to 75 000. Also see Joona Juha 2006, pp. 307–309. The Ministry for Foreign Affairs in Norway gives this explanation for the variation of the amount of Saami population: “The size of the Sami population has been reckoned at 75,000, but estimates vary in accordance with criteria used (genetic heritage, mother tongue, personal wishes, etc.). Official censuses have not given reliable counts. Because of the assimilation process, not all Sami have wished to acknowledge or declare their ethnic identity. For this reason, the Sami parliaments in the Nordic countries have worked out their own criteria for defining Sami from a combination of subjective and objective factors.” <http://odin.dep.no/odin/engelsk/norway/history/032005-990463/index-dok000-b-n-a.html> (Visited 20 November 2006).

*T. Joona / International Community Law Review 12 (2010) 213–260*

in the Saami Parliament Elections. Similar issue was handled above in the case of Honduras.<sup>98</sup>

In 2004 in a direct request, the Committee refers to four different categories of people living in the traditional Saami areas in the Northernmost Norway, in Finnmark County: 1) Saami, 2) Mixed-Saami, 3) non-Saami, 4) Norwegians. The Committee is satisfied noting that issues are difficult with regard to rights that the Saami and other Norwegians should enjoy in the county of Finnmark. The request reflects the difficult situation in the area which is inhabited by indigenous and non-indigenous persons.

Compliance with the Convention. The Committee recognizes the very difficult issues raised by mixed Sami and non-Sami occupation of Finnmark County, and the uncertainty over the rights that Sami and other Norwegians should enjoy there. It has been the subject of long and difficult negotiations until recently.<sup>99</sup>

#### 4.3.8. *Peru*

In 1999, in a direct request the Committee requests the Government of Peru to provide more detailed information on the actual number of persons considered to be indigenous in the 1993 census, because it would not appear that distinction is made between indigenous persons and rural workers. The Committee also notes that the number of persons belonging to rural and native communities is fairly low in relation to the total amount of inhabitants. The Committee suggests that the Government of Peru would harmonize the criteria for the populations which may be covered by the Convention. Issues like indigenous origin and the criterion of “self-identification” should be taken into consideration to determine the groups covered by the Convention.<sup>100</sup>

In 2006, in a direct request it shows that only little progress has been achieved in the matter concerning the holders of rights in the Convention. The Committee sees as problematic the issue that the Government has not managed to develop a common criteria for all the indigenous groups in Peru. This means that not all persons who could be regarded as beneficiaries of the Convention can be identified:

The Committee notes that, according to the Government’s report, Peru’s population, estimated at around 24 million inhabitants, is mainly mestizo (of mixed extraction) and that over 9 million Peruvians are indigenous, principally Quechua and Aymara, living in the Andean region. There are 42 ethno-linguistic groups residing in the Amazonian region of Peru, which covers 62 per cent of the national territory. These populations have cultural, economic and political characteristics that

<sup>98</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Submitted: February 1995.

<sup>99</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Published: 2004.

<sup>100</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Peru Ratification: 1994, Submitted: 1999.

*T. Joona / International Community Law Review 12 (2010) 213–260*

are distinct from other sectors of the national population. The Indian population is made up, not only of rural and indigenous communities, but also of remote settlements: groups that are in a situation of voluntary isolation, or with which contact is sporadic. The official languages are Spanish, Quechua (spoken by more than 3 million people), Aymara (350,000 speakers) and in the Amazonian region 40 languages, belonging to 16 linguistic families, are spoken. According to the report, there is a need for greater recognition of the right to their own identity of all those communities that *do not explicitly identify themselves as native, indigenous or members of a specific linguistic group*, in addition to the 1,265 rural and indigenous communities included in the State's registers. In this regard, the Committee previously referred to the difficulties that arose from the various definitions and terms used to identify the populations covered by the provisions of the Convention: rural, indigenous and native populations and those living in the highlands, the forest and the edge of the forest.<sup>101</sup>

## 5. Implementation and Interpretation of Land Rights

The second part of the entire ILO Convention No. 169, Articles 13–19, deals with land issues. The most important article is considered to be Article 14 which clearly states that indigenous and tribal peoples have rights to the land<sup>102</sup> they traditionally occupy.<sup>103</sup> This Article has also caused most of the problems when States are considering the ratification of the Convention, or even when they have ratified it. Article 14 is worded as follows:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

<sup>101</sup> CEACR: Individual Direct Request concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Peru Ratification: 1994, Submitted: 2006.

<sup>102</sup> The Convention recognizes both individual and collective aspects of the concept of land. The concept of land encompasses the land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g. for home or dwelling. One interesting thing is that the land can also be shared among different communities or even different peoples. This means that a community or people lives in a certain area and also has access to, or is allowed to use another. This is especially the case with grazing lands, hunting, and gathering areas and forests Roy, C.K. *Land, Rights of the Indigenous peoples of the Chittagong Hill Tracts, Bangladesh*. Distr. by Jumma peoples Network in Europe (JUPNET). 1996, pp. 26–28. Also see John Bern and Susan Dodds, 'On the Plurality of Interests: Aboriginal Self-government and Land Rights'. In D. Ivison, P. Patton and W. Sanders (eds.) *Political Theory and the Rights of Indigenous Peoples*. Cambridge University Press, 2000, Australia; Hans Christian Bugge, *Human Rights and Resource Management – An Overview*. In Erling Berge and Nils Christian Stenseth (eds.) *Law and the Governance of Renewable Resources, Studies from Northern Europe and Africa*, Institute for Contemporary Studies, Oakland, CA, 1998.

<sup>103</sup> According to the ILO Manual, "these are lands where indigenous and tribal peoples have lived over time, and which they have used and managed according to their traditional practices. These are the lands of their ancestors, and which they hope to pass on to future generations. It might in some cases include lands which have been recently lost." The fact that Convention No. 169 focuses on the present situation, though historical continuity is important too, is seen problematic among the indigenous peoples. The land right articles only recognise rights over land that indigenous peoples currently use and occupy; they don't recognise any rights over lands that they used to occupy and which were taken from indigenous peoples through colonisation.

*T. Joona / International Community Law Review 12 (2010) 213–260*

Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. 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.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Here, it is impossible to go through the preliminary works of the Convention to see how Article 14 was drafted and how different texts were put together. Also, it is not possible to analyse Article 14 in more detail, but only to look at the issues that have been raised by the Committee of Experts. In my article I only examined the implementation of Article 14 in those countries which have ratified the Convention. I also show how the Committee of Experts has interpreted the implementation. In the process of going through the Articles I have paid special attention to the following issues:

- What are the “lands which indigenous and tribal peoples traditionally occupy”?
- Identification of lands.<sup>104</sup>
- Land claims<sup>105</sup>

### *5.1. Implementation and Interpretation per Country*

#### *5.1.1. Argentina*

In 2003 the Committee of Experts comments the land right situation in Argentina and recognizes that there are several problems related to indigenous ownership even though Argentina has ratified the ILO Convention No. in 2000.<sup>106</sup>

In 2005 the Committee requests the Government to provide information on the measures adopted or envisaged – with the participation of representatives of the indigenous communities – to align the national and the provincial legislation with the Constitution.<sup>107</sup> In 2005 the Committee also notes two important

<sup>104</sup> This has also been problematic issue in those countries that just consider the ratification. In order to protect indigenous and tribal peoples’ rights to the lands they traditionally occupy, it is necessary to know which these are. Therefore, the identification of indigenous and tribal peoples’ lands is important.

<sup>105</sup> The article is stating that adequate procedures shall be established within the national legal system to resolve land claims by the people concerned. This means that in some situations, problems may arise out of land claims. These can be with other indigenous communities, or with outside settlers or other stakeholders. The Convention also requires governments to make sure that there are procedures and mechanisms in place to resolve any land disputes.

<sup>106</sup> CEAR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 Argentina Ratification: 2000, Submitted: 2003.

<sup>107</sup> CEAR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Argentina Ratification: 2000, Published: 2005.

*T. Joona / International Community Law Review 12 (2010) 213–260*

issues; the identification of indigenous lands and the removal of indigenous communities. Consultations as the cornerstone of the Convention are also mentioned.<sup>108</sup>

In the Individual observation it is emphasized that consultations must furthermore be held before the adoption of such measures. As the bodies in charge of supervising application on the Convention have noted, consultation and participation constitute the cornerstone of Convention No. 169 on which all its provisions are based. The Committee hopes that the Government will provide information on this matter in its next report.<sup>109</sup>

*5.1.2. Bolivia*

In 1994 the Committee received the first report on the Convention submitted by the Government of Bolivia. As a general point of view the Committee notes that there is some conflict between the notion of respect for the principle of ethno development and cultural diversity, and the tendency to assimilate traditional organizations and institutions into the dominant culture. The Committee would like to emphasize that the Convention recognizes the right of indigenous and tribal peoples to make their own decisions in this regard, and hopes that this principle will be taken into account systematically.<sup>110</sup>

In 1994 the Committee also notes that the Government has made substantial efforts to identify the lands traditionally occupied by the indigenous peoples. However, it also notes that the limits of the landholdings of the settlers within the indigenous territories and areas have not yet been defined and that there are many lands which are registered in favour of local churches under the general legislation on colonisation. In addition, information provided under Convention No. 107 indicates that a substantial part of the demarcation and consolidation process remains to be completed due to financial and climatic constraints. The Committee asks to provide information about the progress achieved in this regard, including the allocation of land to other indigenous groups in the country.<sup>111</sup>

In 1994 the Committee also notes that the Indigenous Territories are designated to be both “multiethnic and open” in terms of composition, as they are inhabited by diverse indigenous groups; and access, as other groups who are not inhabitants of the area use it for their traditional and subsistence activities. The Committee also notes that in addition to indigenous communities, there are settlers, including cattle farmers (*ganaderos*) and wood workers (*madereros*), who can also claim title to individual allotments within these territories under the provisions of existing legislation, namely Agrarian Reform Act and the Colonization Act.

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<sup>108)</sup> *Ibid.*

<sup>109)</sup> *Ibid.*

<sup>110)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1994.

<sup>111)</sup> *Ibid.*

*T. Joona / International Community Law Review 12 (2010) 213–260*

The Committee requests the Government to provide information on any procedural mechanisms adopted or contemplated to resolve conflicting land claims, including any necessary adjustments to non-exclusive usufruct rights, or “shared use”. The Committee also asks to include information on any measures taken or envisaged by the traditional indigenous councils to provide adequate protection to the inhabitants within their jurisdiction vis-à-vis their rights of ownership and possession.<sup>112</sup>

In this respect the case of Bolivia will give important information in regard to situations in Nordic countries. Especially in Finland there are also following similarities with Bolivia:

The Committee notes that some indigenous areas fall within “specially protected zones”, an environmental protection measure. Please provide information on whether the maintenance of the traditional activities of the indigenous peoples living in these areas, namely subsistence farming, shifting cultivation, hunting or gathering, is seen to be consistent with the concept of specially protected environmental zones.<sup>113</sup>

The Committee also once again requests the Government to supply information on any procedural mechanisms adopted or contemplated *to resolve conflicting land claims*, including any necessary adjustments to non-exclusive usufruct rights or “shared use”. The Committee also asks to supply information on any measures taken or contemplated by the traditional indigenous councils to provide adequate protection to the inhabitants within their jurisdiction in respect of their rights of ownership and possession.<sup>114</sup>

### 5.1.3. *Colombia*

In 1994 the Committee notes the continuing efforts of the Government to recognize and protect the rights of ownership and possession of the indigenous peoples to the lands which they traditionally occupy, and that at present there are 377 *resguardos* and 12 *reservas*. It notes further that the ETIs remains under consideration.<sup>115</sup>

The Committee also notes the Government’s statement that the rights of nomadic groups to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, are recognised by the creation of *resguardos*. Please indicate the form and manner in which this is implemented within the structure of the *resguardos*, including

<sup>112)</sup> *Ibid.*

<sup>113)</sup> *Ibid.*

<sup>114)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

<sup>115)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1994.



*T. Joona / International Community Law Review 12 (2010) 213–260*

whether this implies a requirement for the nomadic communities to settle in one area.”<sup>116</sup>

The Committee notes that INCORA (The Colombian Institute for Agrarian Reform), which is responsible for the creation, configuration and planning of indigenous lands, is engaged in identifying indigenous lands and restructuring reserves as *resguardos*. The Committee also notes indications of certain problems inherent in this process. In this connection, the Committee notes that some settlers’ lands are included within *resguardos*, and that some indigenous communities have had their traditional lands allocated to other *resguardos*. It also notes that some *resguardos* include property which earlier title holders may still claim under existing legislative provisions. The Committee requests the Government to provide information on any procedures which may have been adopted or are envisaged to resolve conflicts in land claims within the ongoing process of land demarcation in the country.<sup>117</sup> In 1996 similar problems remain in Colombia in connection with the Convention.<sup>118</sup>

In 2003 in Individual Observation the Committee recalls that at its 282nd Session (November 2001) the Governing Body adopted a report,<sup>119</sup> concerning a representation alleging the non-observance by Colombia of the present Convention, made under Article 24 of the Constitution. The representation alleged that the Government had not complied with the Emberra Katío people, in the construction and operation of the Urrá hydroelectric dam. It recommended that the Government be requested to amend legislation concerned, and that it improve the consultation procedures to come into conformity with the Convention’s requirements. It also asked the Government to provide information to the present Committee on a wide range of issues related to consultations with indigenous peoples when planning and carrying out development projects that affect them, land rights and mineral exploitation in particular.<sup>120</sup> Convention’s requirement of consultation with the indigenous peoples concerned, in particular.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> The Committee notes from the report that the Nukak-Maku are the only indigenous group which may be identified as nomadic, and that this is directly related to their hunting and gathering activities. Within the ongoing process of demarcation, creation and restructuring of indigenous lands, the Committee requests the Government to provide information on the measures taken or envisaged to recognize and accommodate the rights of this nomadic group to use lands they do not exclusively occupy but to which they have traditionally had access. In this connection, the Committee notes with interest an “acción de tutela” in which the Constitutional Court emphasized the State’s responsibility to protect and guarantee the ethnic and cultural identity of the Nukak-Maku community. CEACR: Individual Direct Request concerning Convention no. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1996.

<sup>119</sup> Document GB.282/14/3, available through the ILOLEX database on the ILO’s web page at <http://www.ilo.org>.

<sup>120</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Published: 2003.

*T. Joona / International Community Law Review 12 (2010) 213–260*

In 2004 in Individual Observation concerning Convention No. 169, the Committee is issuing that, the adoption of Act No. 685 of 2001 issuing the Mining Code, recognizing extensive rights to indigenous communities to control the exploration and exploitation of the minerals in their lands. This issue is addressed in greater detail in a request addressed directly to the Government.<sup>121</sup>

#### 5.1.4. *Costa Rica*

In 1997 in a direct request in regard to land right Articles 13 and 14 the Committee notes that in view of the Government's statement that there are large areas of indigenous lands in the hands of non-indigenous persons and that it does not have sufficient resources to compensate these persons, the Committee requests the Government to provide information on the manner in which it attends to apply the Indigenous Act with regard to the removal of these persons, as well as the other legal measures available to return these lands to their ancestral owners. It also requests the Government to state whether adequate procedures exist within the national legal system so that indigenous peoples can claim areas which have been removed from them or of which the ownership has not been determined."<sup>122</sup>

In 1999 in a direct request the Committee repeats its comment from 1997.<sup>123</sup> In the example of Costa Rica it is interesting to notice that the removal of non-indigenous persons from certain areas could be possible according to the CEACR, if these areas are returned to their ancestral owners. The CEACR is also requesting adequate procedures within national legal system for these people to claim these areas back.

In 2000 in a direct request the difficult issue concerning the indigenous persons and non-indigenous people living in reservations is raised:

The Government indicates that removal of the non-indigenous persons who have rights within the reservations is effected against payment of compensation. The Committee requests the Government to supply information on the action brought against the State for alleged violations of indigenous rights as well as information on whether there are any lands occupied by indigenous communities which have not yet been declared reservations.<sup>124</sup>

In the 2001 direct request, shows that the approach of ILO 169 concerns with States legislation but also the actual practice. Also the nature of land right Article 14.1 is expressed in the Costa Rica's case. There are two kinds of traditionally occupied lands: those which indigenous peoples traditionally occupy and those

<sup>121</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Published: 2004.

<sup>122</sup> CEACR: Individual Direct Request Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 1997.

<sup>123</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 1999.

<sup>124</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica, Ratification: 1993, Submitted: 2000.

*T. Joona / International Community Law Review 12 (2010) 213–260*

which peoples concerned use not exclusively occupied by them, but to which they have traditionally had access for their subsistence.

In 2001 in an individual observation it seems that here are still large areas of indigenous lands in the possession of non-indigenous persons and that it does not have sufficient resources to compensate these persons upon their removal from those lands.<sup>125</sup>

The Committee trusts that the Government will continue providing information on the recovery of indigenous lands in the possession of non-indigenous persons, particularly in reservations in which the indigenous population is in the minority, and on the measures taken for the establishment of new reservations.<sup>126</sup>

5.1.5. *Denmark*

In 2001 in an individual direct request, concerning Articles 13 and 14, the Committee notes that a representation under Article 24 of the ILO Constitution has been deposited on the question of the transfer of the Thule population in May 1953. The Committee requests the Government to keep it informed of the outcome of the pending appeal to the Supreme Court.

Concerning Article 16, the Government indicated that under the Home Rule Act permission for the use of land in a field transferred to the Home Rule authorities. The Committee requests to indicate in what cases the people concerned may be removed from the lands which they occupy and the procedures followed in such cases in light of paragraph 2 of this Article.<sup>127</sup>

The Committee, recalling that the Government indicated that the Home Rule authority makes decisions on who is granted the right of use of lands and that this situation applies to both the original Greenland population and newcomers, would be grateful for clarification on what the procedure is for allocating land to people or entities outside their own communities.<sup>128</sup>

Regarding Articles 13 and 14, the Committee notes that the outcome of the pending appeal to the Supreme Court on the transfer of the Thule population in 1953 – the subject of the representation referred to in the observation – is not expected before 2003. The Committee understands as well that consideration is being given to putting the Thule base to other uses, which may have further impact on the use of this territory by people who now have access to it. It

<sup>125</sup>) CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Published: 2001.

<sup>126</sup>) CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Published: 2004.

<sup>127</sup>) CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Denmark Ratification: 1996, Submitted: 2001.

<sup>128</sup>) *Ibid.*

*T. Joona / International Community Law Review 12 (2010) 213–260*

requests the Government to keep it informed of the outcome of the appeal and of any further developments.<sup>129</sup>

Article 16. In its previous comments the Committee noted that under the Home rule Act permission for the use of land is the responsibility of the Home Rule authorities, and requested information on the cases in which indigenous peoples may be removed from the lands they occupy and the procedures followed in such cases, in light of paragraph 2, of this Article. The Government recalls in its report that there is no individual ownership of land in Greenland, and that the Home Rule authorities have complete entitlement to regulate the use of land. An Act of the Greenland Parliament would be required to decide whether areas should be reserved without access for hunters and other activities, or whether settlements should be abandoned.<sup>130</sup>

The Committee takes due note of this information, but recalls that the fact that authority is exercised by the Home Rule Government does not mean that the requirements of this Article concerning displacement of indigenous people from the lands they traditionally occupy, are not applicable. Please indicate whether any such displacements have taken place since the entry into force of the Convention, and how this provision of the Convention has been applied in any such cases.<sup>131</sup>

In 2004 the Committee notes that the Government's report has not been received. It is therefore forced to repeat its previous observation.<sup>132</sup> Also in 2005 in a general observation the Committee notes that, for the second year of succession, the reports due has not been received. It trusts that the Government will in future discharge its obligation to supply the reports due on the application of ratified Conventions, in accordance with its constitutional obligations and, if necessary, requesting appropriate assistance from the Office.<sup>133</sup>

#### 5.1.6. *Ecuador*

In a direct request in 2003 The Committee notes that “the peoples concerned have the right, by virtue of Article 84(2) of the Constitution, to maintain the imprescriptible ownership of community lands, which may not be alienated, seized or divided, except for the power of the State to declare them to be of public utility, and that by virtue of paragraph 3, they have the right to retain the ancestral possession of community lands and to obtain their adjudication free of charge in accordance with the law. With regard to the issue of declaring community lands of public utility, please provide information on cases which have occurred during the period covered by the report and on the procedure and manner in which the peoples concerned are taken into account in such cases.”<sup>134</sup>

<sup>129</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal peoples Convention, 1989 Denmark Ratification: 1996, Submitted: 2003.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Denmark Ratification: 1996, Published: 2004.

<sup>133</sup> CEACR: General Observation – Denmark, Greenland, Ratification: 1996, Published: 2005.

<sup>134</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 Ecuador Ratification: 1998, Submitted: 2003.

*T. Joona / International Community Law Review 12 (2010) 213–260*

The Committee notes the statement in the report that the peoples of the Amazon and the forest-dwelling peoples *hold their land by virtue of ancestral possession, family ownership, private ownership, community ownership and latifundium*. However, it notes that in the sierra, the most common form of land ownership is *small estates* under community, family and private ownership, as well as privately possessed lands. The Committee would be grateful if the Government would provide a map indicating the total area of lands demarcated and to which title has been adjudicated, as well as those where it has not been adjudicated. With regard to the nomadic groups, it notes that according to the report the Tagaeri, the Taroname and other groups with family links to the Huaorani living in the south of the lands adjudicated to the Huaorani and the Yasuni Park may be considered nomadic and that Decree No. 552 recognizes their lands.

In 2005 the Committee notes with interest the Government's report, which it will examine in a direct request. It nevertheless notes that the report received refers almost exclusively to *legislative texts*, and it requests the Government to provide more complete information on *the situation in practice* in its next report.<sup>135</sup>

#### 5.1.7. *Fiji*

The Committee has received two long communications from the Fiji Commercial Services Union (FCSU) under Article 23 of the ILO Constitution which were transmitted to the Government in January and September 2004 respectively. The FCSU indicated that the first of them was supported by the Fiji Mineworkers' Union and the Fiji Peacekeepers' Association. The Government has provided no comments on these communications.<sup>136</sup>

The FCSU has provided detailed information on the land rights of indigenous Fijians, which have complex historical roots. The FCSU's description of the legal situation coincides with the information furnished by the Government, though there may be disagreement on the conclusions to be drawn. It may be summarized by saying that all "native lands" are held in common and not through individual ownership, and are held in trusteeship. The right to manage these lands has been entrusted since 1940 to the Native Lands Trust Board (NLTB), with any disputes to be resolved by the Native Lands Commission. The native lands are said to be comprised of many small parcels, but – as the Government also indicated – 83 per cent of the land in the country is made up of these native lands that are managed together and form the majority of the land in the country.<sup>137</sup>

<sup>135</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Ecuador Ratification: 1998, Published: 2005.

<sup>136</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Fiji Ratification: 1998, Published: 2005.

<sup>137</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Fiji Ratification: 1998, Published: 2005.

*T. Joona / International Community Law Review 12 (2010) 213–260*

In this regard, the Committee recalls the statement in the Government's first report that "in spite of their numbers and the fact that they own 83 per cent of the land, indigenous people still feel alienated in the country of their birth", and that the "recent political crisis is the result of nationalistic elements of the indigenous population to assert their control over the country".<sup>138</sup>

#### 5.1.8. *Guatemala*

In 1999 the Committee recalls that the ratification of the Convention was one element in the settlement of the internal conflict in the country which – as indicated in the preamble of the 1996 Peace Agreement – "brought an end to more than three decades of armed confrontation in Guatemala". It notes in this respect that the ILO continues to play a part in the implementation of the Peace Agreement, and that considerable technical assistance is being provided from the international community for this purpose.<sup>139</sup>

While recognizing the complexity of the situation, the Committee nevertheless recalls that the ratification of the Convention was one element in the settlement of the internal conflict in the country which – as indicated in the preamble of the 1996 Peace Agreement – "brought an end to more than three decades of armed confrontation in Guatemala". It therefore urges the Government to renew its efforts to overcome difficulties in the application of the Convention and the Peace Agreements, and to continue to provide information to the Committee on how it is accomplishing this.<sup>140</sup>

#### 5.1.9. *Norway*

In 1993 in an individual Direct request "the Committee notes that the Government holds title to most of the traditional lands of the Sami to which the Sami have a right of usufruct. The Committee also notes in this regard that there are judicial decisions enforcing Sami prescriptive rights based on long-established use. It notes that, recognizing the need for a comprehensive analysis of the legal position of the Sami people, the Government has appointed the Sami Rights Commission to assess the current legal situation of the Sami as regards rights to, and use of, land and water resources, and to suggest concrete recommendations for requisite changes. The Committee notes from the report that the Government has demarcated certain areas to be within the Sami administrative zone, and that the Sami Rights Commission will include further definitional measures

<sup>138</sup> *Ibid.*

<sup>139</sup> In 2002 the Committee notes the Government's second report following ratification, which was received too late to be examined at the previous session. This report, supplied by the Government in October 2000, provides more detailed information on a number of matters than was included in the first report. However, on many of them it indicates that the measures taken were covered by the referendum on constitutional reforms which was drafted in implementation of the Peace Agreement. This referendum was rejected by a popular vote on 16 May 1999, but the Government has offered little additional information on the measures which have been taken since then or are contemplated, to implement the Convention and the Peace Agreement. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Guatemala Ratification: 1996, Published: 1999.

<sup>140</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Guatemala Ratification: 1996, Published: 2002.

*T. Joona / International Community Law Review 12 (2010) 213–260*

in its recommendations. The Committee requests the Government to keep the Committee informed of the progress of this study.<sup>141</sup>

The Committee notes in the report that there are no specific procedures to resolve Sami claims to land or land rights and that the Sami have to use the procedures existing in the national courts. Please provide information on the legal procedures used by Sami to resolve land claims, including court decisions.<sup>142</sup>

The Committee notes with interest that with its report on the implementation of the Convention, the Government has sent as opinion of the Council of the Saami Parliament of Norway on the application of the Convention, and that the Government has taken close account of the opinions of the Sami Parliament in its own report.<sup>143</sup> “The Committee welcomes warmly the dialogue between the Government and Sami Parliament on the application of the Convention.”<sup>144</sup>

In 1995 in a direct request

the Committee notes with interest that a seminar was held in Norway in September 1994 to examine how to give full effect to Convention no. 169 in the country. In addition to inviting the International Labour Office to take part, representatives of the Sami Parliament, several ministries and local government were also invited, along with other experts on matters dealt with in the Convention. The Committee welcomes this initiative and hopes the Government will continue to adopt the approach of seeking consensus for the Convention’s implementation. The Committee also refers to its observation.<sup>145</sup>

The Committee notes that the majority of the Land and Water Rights Group of the Sami Rights Commission have concluded that the State holds title to unregistered land areas in Finnmark, although one member considers that the Sami Population holds title to the land in Inner Finnmark. The Group agrees that the Sami do gave permanent usufructuary rights in different respects based on cus-

<sup>141)</sup> CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples Convention No. 169, Norway, Ratification: 1990, Submitted: 1993.

<sup>142)</sup> CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples Convention No. 169, Norway, Ratification: 1990, Submitted: 1993.

<sup>143)</sup> The Sami Parliament is a representative body of the country’s indigenous Sami population, which has responsibility for Sami interests inside the country, in close cooperation with the national Government. The Committee notes in addition a 1992 comment of the Sami Parliament on the Government’s first report, which was however received only in 1994. The Committee also notes that the Sami Parliament has indicated its willingness to enter into an informal dialogue with the Committee, together with the Government. The Government has stated that it shares the wish to facilitate the implementation of the Convention, believing that open cooperation between governments and representative indigenous bodies may contribute effectively to the international promotion of indigenous rights and cultures, and that the Government therefore fully supports the suggestion of a supplementary dialogue.

<sup>144)</sup> CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples Convention No. 169, Norway, Ratification: 1990, Submitted: 1993.

<sup>145)</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Submitted: 1995, February.

*T. Joona / International Community Law Review 12 (2010) 213–260*

tomary law, long-established use or legislation. The Government states that the Group supports in all essentials the view expressed in this regard by the Ministry of justice when the Convention was ratified (namely that “strongly protected usufruct must be regarded as sufficient for fulfilment of Article 14”).<sup>146</sup>

The Committee notes, however, that the Sami Parliament’s position is that ownership and possession are cumulative rights, and therefore only simultaneous implementation is acceptable, and that permanent usufructuary rights do not satisfy the requirements of Article 14, paragraph 1.

The Committee notes that the report of the Land and Water Rights Group is an interim report which has not yet been considered by the Government, and that the Sami Rights Commission has not yet submitted a final report. No final determination has therefore been made in Norwegian law of the kind of rights which the Sami have over the lands concerned. The Committee does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention. The Committee awaits with interest the final determination of this question in Norway.<sup>147</sup>

The Committee notes that, to resolve land rights claims, the Sami have two possibilities: (a) to bring action in the ordinary courts of Norway, with possibility of appeal up to the Supreme court, or (b) for the case to be heard by the Land Disputes Tribunal, which is mandated to settle disputes as to the existence of private rights on State-owned land in the counties of Nordland and Troms. The Committee notes that the Sami Assembly has requested that the work of the Land Disputes tribunal be suspended until the Sami Rights Commission has completed its work of clarifying existing laws in Sami areas with regard to rights to land and water resources. The Committee notes the Government’s position that Sami interests will not suffer by a continuation of the work of the Tribunal, and asks to be kept informed of any developments in this respect.<sup>148</sup>

In 2004 in an individual observation the main point at issue is related to the proposed Finnmark Act.<sup>149</sup> As indicated in the Government’s report on April 2003 it introduced “a bill to regulate legal relationships and administration of land and natural resources in the county of Finnmark.” As the Government’s report states, while Sami predominate in inner Norway, Sami and other Norwegians “live side by side in Finnmark County. Sami interests therefore need to be balanced against the interests of the remainder of the population in the county if the regime is to come across as just and unifying”. While the facts are not in dispute, being a matter of public record, the Sami Parliament and the Government disagree about the conformity with the Convention of both the process leading

<sup>146</sup> *Ibid.*

<sup>147</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Submitted: 1995, February.

<sup>148</sup> *Ibid.*

<sup>149</sup> Finnmark Act – A Guide 8/2005, 2. [www.jd.dep.no](http://www.jd.dep.no) by Ministry of Justice and Ministry of Local Government and Regional Development.



*T. Joona / International Community Law Review 12 (2010) 213–260*

to proposal of the bill (Articles 6 and 7), and the impact on the land rights of the Sami peoples if the bill is made law (Articles 13 to 19).<sup>150</sup>

The Committee notes that as this comment is being considered the proposed bill has not yet been enacted, but that work is under way for its enactment. A decision on whether or not to adopt it may have been taken by the time the Committee's report is published.

The substance of the Finnmark Act proposal is as follows:

In Finnmark County, which, as indicated above, is inhabited jointly by Sami and other Norwegians, the extent of land rights and access to land has been in dispute for many years. The Government acknowledges that "parts or all of Inner Finnmark consist of land which the Sami people traditionally occupy... However, the SRC has not provided any basis for the Government to identify precisely which lands the Sami people traditionally occupy within the county."<sup>151</sup>

The Government states that the proposed new arrangement is designed to protect Sami interests, and will provide security and predictability in terms of protecting the natural resources underlying Sami culture and the use of outlying land. The Act "builds on a future administrative arrangement for Finnmark based on the principle that there should be no differences in rights for the inhabitants of Finnmark based on ethnicity". The Finnmark proposal would create the Finnmark Estate and transfer to it the State's title to the 95 per cent of Finnmark County that the State now holds. The Estate would own and administer land and natural resources in Finnmark on behalf of all the inhabitants of Finnmark, both Sami and Norwegians. It would be managed by a Board that would consist of three members selected by the Sami Parliament and three elected by the Finnmark County Council, with non-voting member to be appointed by the State. The non-voting member would have the right to refer any decisions on which there was not a majority to the Government for decision. The Government states that this solution is intended to give both the Sami people and the remainder of the population in the Finnmark greater influence over the county's development, based on the obligation to protect the natural resource base for the Sami culture.<sup>152</sup>

The proposal would open up resource use in the region to all Norwegians, under the rules to be laid down by the Board. Resource exploitation in traditional areas is reserved to the Sami at present.

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<sup>150</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Published: 2004.

<sup>151</sup> *Ibid.*

<sup>152</sup> CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway Ratification: 1990, Published: 2004.

*T. Joona / International Community Law Review 12 (2010) 213–260*

## 5.2. *Compliance with the Convention in the Case of Norway*

The Committee recognizes the very difficult issues raised by mixed Sami and non-Sami occupation of Finnmark County, and the uncertainty over the rights that Sami and other Norwegians should enjoy there. It has been the subject of long and difficult negotiations until recently.

As concerns the substance of the proposal for the Finnmark Estate, it appears to go beyond what is permitted under Article 14 of the Convention, though under the proper circumstances it could be in conformity with Article 15.<sup>153</sup>

The proposal would transfer state ownership of 95 per cent of the land in the country to the Estate. It appears that this would include areas that Sami claim as their land by right of long occupation, and to which the Government acknowledges in principle that the Sami do have rights, though the extent of these lands and the content of the rights have not yet been identified as required in Article 14 of the Convention. It would give the Sami a significant role in the management and use of a larger area than that to which they now have rights, and the Government indicates that they would have more benefits from the management of the larger area under the present situation. *However, the proposal would replace the rights of ownership and possession recognized by the Convention with a right to large share in administration of the region.*<sup>154</sup>

On the other hand, the proposals for the Estate would appear to be closer to compliance with Article 15, which recognizes that the right to natural resources on indigenous lands is often retained by the State, and that if this is so indigenous and tribal peoples on whose lands these resources lie must be able “to participate in the use, management and conservation of these resources” (Article 15(1) of the Convention).<sup>155</sup>

The process and the substance are inextricably intertwined in the requirements of the Convention, and in the present conflict. It appears to the Committee that if the Sami Parliament, as the acknowledged representative of the Sami people of Norway, were to agree to the proposal, they could accept this solution as a resolution of the claims of land rights which have long been the subject of negotiation between the Sami and the Government. The adoption of the Finnmark Estate without such agreement amounts, however, to an expropriation of rights recognized in judicial decisions in Norway under the Convention.<sup>156</sup>

The Government states in its reply to the submission made by the Sami Parliament to the Committee that although the Sami Parliament has levelled criticism and has called for changes to the Act, it should be noted that the Sami Parliament has not rejected the Act.

The Committee notes the need to guarantee the land rights of both the Sami and non-Sami Populations of the region, and recognizes that the solution must

<sup>153</sup>) *Ibid.*

<sup>154</sup>) *Ibid.*

<sup>155</sup>) *Ibid.*

<sup>156</sup>) *Ibid.*

*T. Joona / International Community Law Review 12 (2010) 213–260*

be fair, and perceived as fair, for both parts of the population. The Convention recognizes special rights for indigenous peoples in view of the vulnerability of their traditional way of life to the loss of land rights on which it is based, and the long occupancy that they often have practiced. The Convention does not, however, contemplate depriving other parts of the national population of the rights they have also acquired through long usage. In areas of Norway in which the Sami are the sole, or principal, inhabitants the implementation of this principle is much simpler than in Finnmark.<sup>157</sup>

In these circumstances, the Committee urges the Government and the Sami Parliament to renew discussions on the disposition of land rights in Finnmark, in the spirit of dialogue and consultation embodied in Articles 6 and 7 of the Convention No. 169. It once again draws attention to the provision in Article 14(1) that “measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them but to which they have traditionally had access for their subsistence and traditional activities”.<sup>158</sup>

### 5.3. *Summary of Sections 4 and 5*

This article has examined the implementation of Article 1 and Articles 13–19 of ILO Convention No. 169 into domestic practices through the supervisory body of the organisation, the Committee of Experts (CEACR). The reports submitted to the Committee of Experts show that the issue dealing with the beneficiaries of the Convention varies a lot in different countries. This is however, one of the most important provisions in the whole Convention because it forms the basis for the enjoyment of other rights. A few themes under this Article have been picked up here:

- Identification of individuals is important from the human right perspective, so that they can benefit from the legislation which applies to them.
- Indigenous census is needed in many cases, but problematic in some countries.
- Self-identification of indigenous peoples is highlighted as an important measure to identify these peoples.
- Exact figures on the amount of indigenous population are presented in many cases, but problematic in some countries.
- Different approaches to define indigenous person, but always including the element of descending from the “first inhabitants”.
- Language can be one element of “indigenity”, but according to CEACR, it cannot be the only one.

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<sup>157)</sup> *Ibid.*

<sup>158)</sup> *Ibid.*

*T. Joona / International Community Law Review 12 (2010) 213–260*

The problems related to Article 1 have caused problems and disagreements between different peoples in the Nordic countries, especially in Finland. At the moment it is regarded that those persons who have the right to vote in the Saami Parliament's elections (about 8000 people) would be the right holders of the land and water rights in the Saami Homeland Area. The problem is that there are persons who do not wish to be entered in the register, and some are not accepted in it.<sup>159</sup> This does not mean however, that those persons would not have rights to land according to historical jurisdiction examined in Section 1. In Sweden, the subject issue is strongly connected to reindeer herding which has been practiced as a traditional livelihood in the area since time immemorial. The state of Norway has just recently started to grant funding to examine the right holders of land and water areas in Finnmark. This means that if some person considers that he/she has a better right to some land/water, it will be examined with state funds in a special Land Right Tribunal established for the purposes. This would certainly then help to clarify the issue of "indigenoussness" and the ownership to land.

There are also several similar themes arisen repeatedly in the comments of the Committee of Experts in regard to rights to land of indigenous peoples. These themes have caused problems also in countries that are just considering the ratification. These are for example: the importance of identify the land areas provided in the Article 14.2., consultation in the case of land exploitation and exploration, resolving land claims, the situation of specially protected environmental zones, situations where there are large areas of indigenous lands in the hands of non-indigenous persons and relocation.

One issue that is raised in many of the direct requests and observations is the need for *consultation*. According to the ILO Manual the consultation is a fundamental principle of the Convention and is stipulated in Article 6.<sup>160</sup> However, one of the major problems facing indigenous and tribal peoples is that often, they may have little or no say in how, when or why measures which have or will have direct effect on their lives decided or put into practice.<sup>161</sup> The Convention provides the framework for discussions and negotiations between governments and indigenous and tribal peoples. The objective of such consultation is to reach agreement (consensus) or *full and informed consent*.<sup>162</sup>

<sup>159)</sup> See *supra* the case of Honduras.

<sup>160)</sup> Article 6.1 In applying the provisions of this Convention, governments shall: a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; 6.2 The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

<sup>161)</sup> A Manual 2000, 15.

<sup>162)</sup> Free, prior and informed consent recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent. The underlying principles of free, prior and informed consent can be summarized as follows: 1) information about

*T. Joona / International Community Law Review 12 (2010) 213–260*

Participation is another fundamental principle of the Convention and came up in many times in the States reports. According to the ILO Manual, in order to control the pace and extent of their development, indigenous and tribal peoples should be fully involved in all relevant processes. Only by participating from the beginning to the end of any initiative – be it policy-making, or implementing a project or programme – can they be responsible for it and take an active part in creating their own socio-economic self-sufficiency.<sup>163</sup> The principle of participation is constructed in Article 7.1<sup>164</sup> of the Convention.

The respect of human rights is a complex interactive process as shown in the article examining the internalization of these human rights into domestic levels. However, adjustments to a country's legal code alone thus will not effectively guarantee the protection of human rights, changes at the cultural level are just as important. This is also required in the ratification process of the ILO Convention No. 169.

## 6. Conclusion

Through ILO Convention No. 169, the non-indigenous world has informed us that our right to self-determination does not exist in the international law regime. As an indigenous person, I wonder: does an organization have the right to tell over three hundred million indigenous peoples that they do not have a right to self-determination? It seems to be very racially oriented to have non-indigenous peoples inform us of our rights.<sup>165</sup>

Although not providing the right to self-determination, Convention No. 169 can be considered as a small step for indigenous persons but a giant leap for indigenous peoples. This document of the ILO has acted as a guiding tool for many countries' policies towards its native populations. While not being the best solution to respond to the current challenges facing the world's indigenous peoples, the Convention certainly is the only one available at the moment. The Convention No. 107 was revised 30 years later, and now the 20 year old "new" Convention tries to adapt to the challenges of the 21st century. Indigenous peoples' continuing demands for self-determination and the strengthening their role also within the ILO structure are the challenges which also the ILO has to confront. It will only mean that the development of the ILO regime will go on.

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and consultation on any proposed initiative and its likely impacts; 2) meaningful participation of indigenous peoples; and 3) representative institutions. [http://www.ceaa.gc.ca/050/documents\\_statisticpost/cearef\\_3394/hearings/SM14.pfd](http://www.ceaa.gc.ca/050/documents_statisticpost/cearef_3394/hearings/SM14.pfd).

<sup>163</sup> ILO Manual 2000, 18.

<sup>164</sup> Article 7.1 The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

<sup>165</sup> Sharon Venne 1990, attorney and author. A member of the Cree nation.

Arina 2009

## Sammenliknende synsvinkel på ILO-konvensjon nr. 169 – spesielt artiklene 1 og 13-19

**Tanja Joona**

### **Innledning**

Forskningen på internasjonal rett og internasjonale forhold har de siste årene nærmet seg hverandre. Spesielt i spørsmål om menneskerett og minoritetspolitikk er forskjellene og grensene mellom rett og politikk ikke klart definerbare. I studiet av urfolkens rettigheter til land og vann har det vist seg fruktbart å kombinere metodene fra de to fagområdene. På begge områdene er det forsket svært lite på hva slags betydning internasjonale avtaler faktisk får etter at de er trådt i kraft, og hva slags praktiske tilpasninger som er nødvendige for eksempel i lovgivingen. Denne artikkelen tar for seg de praktiske utfordringene i forbindelse med rett til land og vann som oppstår for de landene som vurderer å ratifisere ILO-konvensjon nr. 169, og for de landene som har ratifisert den.

Den internasjonale arbeidsorganisasjonens (International Labour Organization, ILO) interesse for urfolkssaker stammer fra 1920-åra og Andesfjellene, der organisasjonen utførte praktisk hjelpearbeid blant arbeidere i avsidesliggende områder. Mange av arbeiderne tilhørte også urfolk, som fikk bedre kår særlig ved hjelp av ILO-konvensjonene om arbeidsforhold.<sup>1</sup> Fra hjelpearbeidet oppsto et behov for å lage en mer omfattende avtale spesielt om urfolk. Denne ble ferdig i 1957 (konvensjon nr. 107).<sup>2</sup>

Seinere, i 1980-årene, var verdenssituasjonen en helt annen, og som følge av urfolkens egen politiske aktivitet og delvis også etter påtrykk fra FN så man et behov

1. Convention to prohibit forced labour No. 29

2. ILO-konvensjon nr. 107 om vern og integrering av urfolk og andre stammegrupper som helt eller delvis lever under stammeforhold. (Indigenous and Tribal Populations Convention No. 107). ILO-konvensjon nr. 107 kan ikke lenger ratifiseres, men den forplikter de statene som har ratifisert den.

## Arina 2009

for å revidere konvensjon nr. 107, som hadde hatt som hovedmål å integrere isolerte og ”tilbakestående” urfolk i resten av befolkningen. Etter langvarige forhandlinger og mange kompromisser vedtok den internasjonale arbeidsorganisasjonens generalkonferanses 76. sesjon i 1989 konvensjonen om urfolk og stammefolk i selvstendige stater.<sup>3</sup> Den nye konvensjonen anerkjenner bl.a. urfolkens spesielle rettigheter til sine tradisjonelle leveområder og til naturressursene der, og forutsetter at statene setter i verk spesielle tiltak for blant annet å verne urfolkens kultur, språk og miljø.

Konvensjonen retter seg mot nasjonalstatene, og dens innhold er definert av representanter for statene, arbeiderne og arbeidsgiverne etter arbeidsorganisasjonens tredelte struktur. På tross av massiv kritikk har urfolkene ennå i dag ikke mulighet offisielt til å ha deltakere og representanter i ILOs tredelte forvaltningssystem (statene, arbeidsgiverorganisasjonene og arbeiderorganisasjonene) og får altså ikke delta i beslutningsprosessen i saker som angår dem.

Det er antatt at det verden over er om lag 530 millioner mennesker som regner seg som urfolksmedlemmer og om lag 5000 ulike stammefolk. De fleste av disse lever avsondret på isolerte steder og har vanligvis høy barnedødelighet, lavere forventet levealder enn resten av befolkningen og sosiale og helsemessige problem. De opplever også ofte alvorlige brudd på menneskerettighetene. Felles for disse folkene er også kampen for land, vann og de tradisjonelle leveområdene som de har mistet som følge av kolonisering. ILO-konvensjon nr. 169 er ratifisert av bare 20 stater: Argentina, Bolivia, Brasil, Colombia, Costa Rica, Chile, Danmark, Den Dominikanske Republikk, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Nederland<sup>4</sup>, Norge, Paraguay, Peru, Venezuela og Spania.<sup>5</sup> Land som Canada, USA, Russland, Australia, New-Zealand og mange land i Afrika og Asia har ikke ratifisert.

Det har vært rettet kritikk bl.a. mot måten konvensjonen er blitt til på, dens eurosentrisme<sup>6</sup>, begrensningene i selvbestemmelsesretten og svake og flertydige artikler.<sup>7</sup> ILO-konvensjonens ordformer oppleves som vanskelige å tolke eller som flertydige, og de kan forårsake konflikter mellom partene (stat – urfolk – annen lokalbefolkning). Også nasjonal lovgiving, iverksettelse, virkemidler, anvendelse og rettskultur veksler fra land til land. Selv om konvensjonen skal være fleksibel og ta hensyn til særforhold i hvert enkelt land, så har vi lite kunnskap om hvilke

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3. ILO Convention on Indigenous and Tribal peoples. Se bl.a. [www.ilo.org](http://www.ilo.org) og [www.ilo.org/ilolex](http://www.ilo.org/ilolex)

4. Nederland har ikke noe eget urfolk, men har ønsket å ratifisere konvensjonen for å vise solidaritet med sine tidligere kolonier.

5. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>

6. Eurosentrisme betyr i denne sammenheng den verdensoppfatning at europeisk kultur er mer verd enn kulturen i andre deler av verden. I videre betydning kan eurosentrisme bety en oppfatning av den vestlige, euroamerikanske kulturens merverdi. Fra gammelt av inneholder eurosentrismen også en forestilling om europeernes koloniherrdømme. Den gamle eurosentrisme menneskeoppfatningen inneholder også tanken om den europeiske hvite eller kaukasiske mennesketypens overhøyhet sammenliknet med mennesketyper fra andre områder, blant andre de mørkhudede. Det fins også en kristen eurosentrisme – tanken om at europeerne på grunn av det kristne verdensbildet skulle være mer verdifulle religiøst sett enn troende og religioner i andre områder. Jfr. <http://fi.wikipedia.org/wiki/Eurosentrisme>

7. Mer om dette hos bl.a. Venne, Sharon

## Arina 2009

faktiske forpliktelser staten binder seg til når den ratifiserer konvensjonen.<sup>8</sup> Ved å sammenlikne forholdene i ulike land kan man likevel få fram ny kunnskap, nye synsvinkler og kanskje komme fram til ulike alternativer for å løse de spørsmål som oppleves som problematiske.

Denne artikkelen baserer seg på min uferdige tverrfaglige doktoravhandling om urfolkernes landrettigheter og ILO-konvensjon nr. 169. Bakgrunnen for undersøkelsen er at det er stilt spørsmål ved den finske statens eiendomsrett<sup>9</sup> til de såkalte historiske Lapplandene, som omfatter ca. 1/3 av Finlands og Sveriges nåværende landområder.<sup>10</sup> Ratifiseringen av ILO-konvensjon nr. 169 har alt lenge vært et diskusjonstema i Finland. I Finland tar man utgangspunkt i at den gjeldende rettsordningen ikke strekker til for å oppfylle konvensjonens forpliktelser om landretten. I løpet av det siste tiåret er det i Finland kommet to utredninger<sup>11</sup>, en komitéinnstilling<sup>12</sup>, det er utarbeidet et utkast til en regjeringsproposisjon<sup>13</sup> og gjort tre historiske<sup>14</sup> og en juridisk<sup>15</sup> avhandling. Også Sametinget har kommet med egne redegjørelser. Arbeidet med lovendringer for å fjerne hindringene for ratifiseringen har til nå gått fram etter den såkalte Vihervuori-modellen.<sup>16</sup> I det videre arbeidet ble denne modellen redusert til bare et politisk beslutningsorgan. Akkurat nå er det i følge justisminister Tuija Brax ikke aktuelt å ratifisere ILO-konvensjonen.<sup>17</sup>

8. Artikkel 34, "Arten og omfanget av de tiltak som treffes for å gi denne konvensjonen virkning skal fastsettes på en fleksibel måte, og med hensyn til særegne forhold i hvert enkelt land." Uoffisiell oversettelse. Konvensjonens offisielle språk er engelsk og fransk, og konvensjonen kan bare tolkes på disse språkene:

Artikkel 44, "De engelske og franske versjoner av denne konvensjonens tekst har samme gyldighet."

9. Det er vist til den statlige eiendomsrettens uavklarte status bl. a. i grunnlovkomiteens uttalelse 29/2004 vp; Regjeringsproposisjon om endring av lov om Pallas-Yllästunturi nasjonalpark og oppretting av visse naturvernområder på statsgrunn, også tidligere, i 1989.

10. Se spesielt Juha Joonas: Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista, *Juridica Lapponica* 32, Rovaniemi 2006, 346-393

11. Vihervuori, Pekka (1999) Maahan, veteen ja luonnonvaroihin sekä perinteisiin elinkeinoihin kohdisuvat oikeudet saamelaisten kotiseutualueella. ILO:n alkuperäis- ja heimokansoja koskevan yleissopimuksen edellyttämät saamelaisten maahan ja vesiin kohdistuvia oikeuksia koskevat muutosehdotukset. Oikeusministeriön Yleisn osaston julkaisuja, 3, Helsinki.

Wirilander, Juhani (2001) Lausunto maanomistusoloista ja niidenkehityksestä saamelaisten kotiseutualueella. oikeusministeriö 8.8.2001, Helsinki.

12. Samekomiteens innstilling og forslag om styret for naturvernområdet i de samiske områdene. Justisdepartementet 3.12.2001; <http://www.om.fi/12517.htm>

13. Utkast til lovforslag om forhandlingsdelegasjon for naturvernområdet i de samiske områdene og lovforslag om endring av lov om Forststyrelsen. Justisdepartementet 14.6.2002; <http://www.om.fi/14510.htm>

14. Justitieministeriets publikationer 2006:

Enbuske, Matti (2006) Asutus ja maankäyttö keskisessä Lapissa ja Enontekiöllä;

Hiltunen, Mauno (2006) Maailma maailmojen välissä. Enontekiön asukkaat, elinkeinot ja maanhallinta 1550-1808;

Nahkiaisoja Tarja (2006) Asutus ja maankäyttö Inarissa ja Utsjoella 1700-luvun puolivälistä vuoteen 1925.

15. Joonas, Juha (2006) Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista. *Juridica Lapponica* 32. Rovaniemi.

16. En tilsvarende modell har tidligere vært framme i lovarbeidet i Norge (jfr. NOU 1997:4), noe som senere førte til Finnmarksloven

17. Intervju, Tanja Joonas – Tuija Brax, Helsinki 11.11.2008. Tuija Brax, Yle Lapin radio 2009, Lapin



## Arina 2009

Det må også nevnes at de nevnte utredningene og undersøkelserne hovedsakelig har andre juridiske utgangspunkt enn ratifisering av ILO-konvensjon nr. 169. Det har vært spørsmål om innholdet i den nasjonale lovgivingen, mens det i ratifiseringen av ILO-konvensjonen er spørsmål om å gjennomføre en internasjonal juridisk avtale. Disse to sakene sammenfaller likevel i at det nåværende Nord-Finlands historie og den rettslige fortiden kan anses å ha en egen betydning også med hensyn til hvordan man skal kunne realisere en gjennomførelse av ILO-konvensjonen.<sup>18</sup>

Som forskningsmateriale for denne artikkelen vises det til uttalelser fra den Internasjonale Arbeidsorganisasjonens ekspertkomite (CEACR, Committee of Experts on the Application of Conventions and Recommendations), de såkalte observasjoner<sup>19</sup> (Observations) og direkte forespørsler<sup>20</sup> (Direct Requests), som er en del av overvåkingsprosedyren knyttet til ILO-konvensjonene. Mer om Ekspertkomiteens rolle og betydning, bl.a. ved tolkingen av konvensjonene, senere i artikkelen. Forskningsmaterialet er analysert med den sammenliknende forskningsmetoden som er alment brukt i samfunnsvitenskapen<sup>21</sup> og ved samtidig å ta hensyn til reglene i jussens såkalte rettskildelære<sup>22</sup>. Tolkingen av ILO-konvensjon nr. 169 baserer seg på allmenne avtaler om avtaletolking<sup>23</sup> og på annet materiale spesielt om denne konvensjonen.<sup>24</sup>

Som teoretisk referansebakgrunn for forskningen brukes den kjente problematikken i forskningen om internasjonale forhold, på den ene side om statens suverenitet, rett til å bestemme på sitt eget område og rett til naturressursene, og på den annen side urfolkens selvbestemmelsesrett, som utfordrer suvereniteten på mange måter. Internasjonal rettsforskning har utviklet den såkalte TWAIL-tilnæringsmåten<sup>25</sup> (Third World Approaches to International Law) som har gitt nye synsvinkler vurderingen av ILO-konvensjon nr. 169.

Min doktoravhandling studerer praksisen ved hjelp av eksempler, hva en ratifisering av ILO-konvensjon nr. 169 om urfolkene vil kunne bety i de nordiske landene på de aktuelle områdene f.eks. for tradisjonelle næringer som reindrift.

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Kansa 2009.

18. Joona, Juha 2006 381-382. Joona J. viser her til ILO-konvensjonens artikkel 34, som sier at ved iverksettelsen av konvensjonen skal det tas hensyn til særegne forhold i hvert enkelt land. I følge Joona J. viser også dette til at områdets eiendomsrettslige fortid vil kunne ha innvirkning på den prosedyren som blir brukt til å realisere en ratifikasjon av konvensjonen, dersom dette blir besluttet.

19. Terminologi fra nettsidene til Arbeids- og inkluderingsdepartementet (oversettelsers anm.).

20. Terminologi fra nettsidene til Arbeids- og inkluderingsdepartementet (oversettelsers anm.).

21. Mer om dette bl.a. hos Hantrais, Linda (2009) *International Comparative research: theory, method and practice*. PalgraveMacMillan. Hampshire.

22. Generelt om dette bl.a. på Wikipedia.

23. Se senere i artikkelen om Wienkonvensjonen av 1969.

24. Se senere i artikkelen om se såkalte ILO-guidene.

25. Mer om dette hos bl.a. Makau, Mutua (2000) *What is TWAIL?* American Society of International Law Proceedings. 94 Am.Soc'y Intl'l L. Proc.31; Anghie, Antony (2005) *Imperialism, Sovereignty and the Making of International Law*. Cambridge University Press; Rodríguez-Pinero, Luis (2005) *Indigenous Peoples, Postcolonialism, and International Law. The ILO Regime (1919-1989)*. Oxford University Press.

Arina 2009

### **Eksperterkomiteens rolle og betydning**

Å ratifisere<sup>26</sup> en internasjonal avtale er alltid en suveren og frivillig handling for en stat. Ved å underskrive en internasjonal avtale forplikter staten seg til å etterleve avtalens ordlyd og innhold. En ratifisering av en ILO-konvensjon innleder en dialog og et samarbeid mellom regjeringen og ILO. Dette samarbeidet skal sikre at nasjonal lovgiving og praksis svarer til avtalens innhold. Til forskjell fra mange andre internasjonale avtaler kan en ILO-konvensjon ikke ratifiseres med forbehold, den må godtas i sin helhet. Derfor er det viktig at regjeringene og representantene for arbeidsgiverne og arbeidstakerne, og også urfolkene, forstår avtalens innhold. Før ratifisering er det ønskelig med en dialog mellom partene for å sikre implementeringen<sup>27</sup> av konvensjonen på en best mulig måte.<sup>28</sup>

Urfolkenes stilling varierer mye fra land til land. Det er viktig å forstå at en felles tilnæringsmåte er vanskelig å finne, for eksempel i forhold til landrettsspørsmålene. I noen land og situasjoner må man utvide og/eller endre de nasjonale lovene og politikken som berører urfolkene. Det kan også være nødvendig å vedta nye lover for at den nasjonale lovgivingen skal kunne svare til innholdet i ILO-konvensjon nr. 169. For eksempel har Bolivia og Mexico revidert grunnlovene sine etter at de ratifiserte ILO-konvensjon nr. 169, slik at lovene anerkjenner urfolkene eksistens og statenes flerkulturelle natur.<sup>29</sup> Og selv om en stat ikke skulle ratifisere ILO-konvensjon nr. 169, kan den bruke avtalens artikler som rettesnor i lovstiftingsarbeidet som angår urfolkene. Også urfolkene kan bruke ILO-konvensjonen som (politisk) verktøy.<sup>30</sup>

Den internasjonale arbeidsorganisasjonen har mange muligheter til å granske og overvåke hvordan deres konvensjoner blir anvendt i praksis. Vanligvis tar prosessen utgangspunkt i dialogen mellom staten og ILOs overvåkingsorganer. Når konvensjonen er ratifisert, er staten forpliktet til å sende regelmessige rapporter til ILO om hvordan konvensjonen er implementert i vedkommende land. Disse rapportene skal inneholde informasjon både om praktiseringen av konvensjonen og endringer i lovgivingen. Rapportene skal sendes til representantene for arbeidsgiverne og arbeidstakerne for kommentar før de sendes til ILO. Foreløpig er Norge det eneste landet som også har tatt med Sametinget i dialogen om ILO-konvensjon nr. 169. Dette er ikke et krav i konvensjonen, men en anbefaling fra ILO. Staten skal sende den første rapporten ett år etter at avtalen er trådt i kraft, vanligvis et år etter at ratifiseringen er registrert hos ILO. Rapport nummer to skal sendes to år etter dette, deretter er rapporteringsperioden for konvensjon nr. 169 normalt fem år.<sup>31</sup>

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26. Ratifisering betyr den endelige godkjenningen, stadfestingen og iverksettelsen av konvensjonen.

27. Konvensjonens anvendelse i praksis.

28. ILO Convention on Indigenous and tribal peoples, 1989, No. 169, a Manual. International Labour Organisation, Ranska 2000, 70.

29. Tomei, M. & Swepston, L. Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169. Geneva, 1996, 4.

30. ILO Manual, 2000, 72.

31. ILO Manual 2000, 70-71. Dersom saken eller situasjonen er alvorlig og krever nøyere oppfølging, kan man kreve hyppigere rapporter.

## Arina 2009

I ILO blir rapportene studert av den såkalte Ekspertkomiteen<sup>32</sup> (Committee of Experts on the Application of Conventions and Recommendations). Denne komiteen består av 20 uavhengige eksperter, stort sett jurister, og den møtes en gang i året.

Ekspertkomiteen kan kommentere de innsendte rapportene på to måter:

1. Observations – Observasjoner, konsentrerer seg hovedsaklig om alvorligere og mer langvarige tilfeller av at statene ikke har klart å oppfylle konvensjonens forpliktelser, eller saker der det ikke har funnet sted en utvikling som man kunne ønske. Observasjonene blir publisert i Ekspertkomiteens årlige rapport.

2. Direct Requests – Direkte forespørsler, brukes mest om enkeltspørsmål der Ekspertkomiteen ber om tilleggsutredninger eller presiseringer. Disse spørsmålene blir ikke publisert, men er tilgjengelige på internett.

I denne fasen kan man spørre hva Ekspertkomiteens kommentarer betyr forskningsmessig? For det første produserer observasjonene og de direkte spørsmålene en stor mengde kunnskap om de landene som har ratifisert ILO-konvensjon nr. 169 og vedkommende urfolks stilling, liv og problemer. Man må huske på at kommentarene baserer seg på rapporter fra statenes regjeringer og arbeidsgiver- og arbeidstakerorganisasjoner, som urfolkene selv sjelden har mulighet til å påvirke, med Norge eneste unntak. Urfolkene har likevel mulighet til å henvende seg til Ekspertkomiteen og ILO gjennom en vilken som helst arbeidsgiver- og arbeidstakerorganisasjon, eller ved selv å sende informasjon.<sup>33</sup> For det andre gir Ekspertkomiteens kommentarer informasjon om spesielle tiltak som statene har gjennomført etter ratifiseringen av ILO-konvensjon nr. 169. Kommentarene inneholder opplysninger både om lovendringer og om endringer i det praktiske liv på lokalplanet. Når man studerer tilstandene i de nordiske landene, må man likevel fastslå at man ikke kan gjøre sammenlikninger ved å prøve å finne ett eller flere direkte anvendbare løsningsforslag, men heller gjøre sammenlikning mellom flere land der det har oppstått problem eller spørsmål av samme type.

Dersom det i en stat skulle oppstå uklarheter om betydningen og anvendelsen av artiklene i ILO-konvensjonene, kan staten be ILOs sekretariat (International Labour Office)<sup>34</sup> om en klargjøring. Men i følge ILOs grunnlov har sekretariatet likevel ikke autoritet til å *tolke* avtalene. Den internasjonale domstolen i Haag er i følge ILOs grunnlov<sup>35</sup> det eneste organ som er kompetent til å tolke avtalene. Slike tolkingsanmodninger kommer likevel ekstremt sjelden, og det har ennå ikke vært noen i forbindelse med ILO-konvensjon nr. 169. Sekretariatet kan likevel komme med sin *mening* om saken. Det har heller ikke vært noen anmodning fra statene om sekretariatets mening i forbindelse med ILO-konvensjon nr. 169.

32. Terminologi fra nettsidene til Arbeids- og inkluderingsdepartementet (oversettets anm.).

33. ILO Manual 2000, 78-79. Ekspertkomiteen framhever spesielt viktigheten av rapporter, utredninger osv. fra urfolkene som inneholder informasjon som kan verifiseres, som lover, vedtekter eller andre offisielle dokumenter, for eksempel beslutninger om landretten.

34. Det faste sekretariatets hovedkvarter er i Geneve i Sveits. Det tar seg av organisasjonens daglige aktiviteter, forskning og dokumentasjon. Sekretariatet har 58 lokalkontor over hele verden.

35. Artikkel 37, paragraf 1.

## Arina 2009

De at de nevnte anmodningene om tolking eller oppfatning er så sjeldne, forteller litt om ILO-konvensjonenes kontrollmekanisme, særlig om dens *effektivitet*, og om Ekspertkomiteens rolle. Det kan se ut som om statene nøyer seg med Ekspertkomiteens kommentarer i form av observasjoner og direkte forespørsler. Ved hjelp av disse kommentarene søker statene å endre og forbedre de sakene som er omtalt i kommentarene. Dersom dette ikke skjer, sørger den nevnte rapporteringsprosedyren for at det også i ettertid blir grepet fatt i misforholdene, helt til Ekspertkomiteen anser at vedkommende sak oppfyller forpliktelsene i ILO-konvensjon nr. 169.

Studien min tar ikke i særskilt grad opp hvordan konvensjonen faktisk blir tolket i Ekspertkomiteen, men mer de politiske og juridiske prosessene, progresjonen og endringene, som har funnet sted når konvensjonen er tatt i bruk i de landene som har ratifisert den. ILO-konvensjon nr. 169 har som folkerettslig instrument en åpenbar innflytelse på nasjonal praksis. I følge Thomas Risse og Kathryn Sikkink, som forsker på internasjonale normer, kan vi, ved å studere forskjellige tilfeller (land) som forener internasjonale menneskerettsnormer og enkeltstaters praksis, utvikle og legge fram en teori om de mekanismene som virker når internasjonale normer fører til adferdsendring.<sup>36</sup> Selv om det er de politiske prosessene som er mine interesseområder, og tolkingen av konvensjonen nærmest er en bivirkning av disse prosessene, er det likevel interessant å se hvordan Ekspertkomiteen har kommet med tolkninger og kommentarer om visse artikler. Gjennom denne kontrollmekanismen og rapporteringsprosedyren ser det ut som om Ekspertkomiteen har en slags autoritet og makt angående hvordan avtalen skal anvendes i praksis.

Når man tolker internasjonale avtaler, ser man vanligvis til Wienkonvensjonen av 1969 om traktatretten, som inneholder den internasjonale retts alment aksepterte hovedprinsipper og hovedregler for tolking av reglene i traktater mellom stater. Såvel Finland som Sverige og Norge har ratifisert Wienkonvensjonen. Wienkonvensjonens regler om tolking anses også å være internasjonal sedvanerett som forplikter også de statene som ikke har ratifisert Wienkonvensjonen.<sup>37</sup> Blant andre relevante hjelpemiddel i tolkingen av ILO-konvensjon nr. 169 er den ovenfor nevnte eldre ILO-konvensjon nr. 107 om urfolk, og ordlyden i den.<sup>38</sup> Også forarbeidene til

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36. Risse og Sikkink 1999, 2.

37. Wienkonvensjonens hovedstatutt i artikkel 31 (1) sier at en traktat skal tolkes i god tro og ved å gi uttrykkene i traktaten den betydning de vanligvis har i den sammenhengen de står og i lys av traktatens hensikt og mål. Artikkel 31 (2) fastslår bl.a. at ved tolkingen skal det tas hensyn til traktatens innledning og tillegg. Mer om dette hos Lauri Hannikainen, Valtiosopimussäännösten tulkintaa koskevat periaatteet ja säännöt kansainvälisessä oikeudessa. Fra Tanja Tirronen, Toteutuvatko saamelaisten maa-oikeudet? ILO:n alkuperäiskansasopimus No. 169 ja Suomi/Ruotsi/Norja. Lapin yliopisto, Juridica Lapponica 28, Rovaniemi 2002, 49-58.

38. I følge Hannikainen er det helt tydelig i de to konvensjonenes hensikt og mål at når det gjelder urfolkens rett til land, var det neppe aktuelt å innrømme urfolkene mindre landretter i den senere konvensjonen enn de som var innrømt i den tidligere. Hannikainen 2002, 56.

## Arina 2009

konvensjonen kan brukes i tolkingen.<sup>39</sup> Annen litteratur<sup>40</sup> om emnet er også relevant, selv om den ikke kan anses å være en ”seinere praksis” som Wienkonvensjonens artikkel 31 (3) sikter til, som skulle ha autoritet i tolkingen av urfolksavtalen. Disse guidene er å regne som oppfatninger om avtaletolkingen som er verdt å merke seg, og som kan anses for rette.

De følgende to underkapitlene presenterer kommentarer (eller tolkinger) fra Ekspertkomiteen som baserer seg på rapporter fra statene som har ratifisert konvensjonen. Det første underkapitlet behandler problematiske punkt og utfordringer i forbindelse med artikkel 1, dvs. problem som dreier seg om avtalens subjekt. Denne artikkelen er utvalgt i denne studien fordi noen stater har hatt problem med å ratifisere konvensjonen på grunn av saker som berører innholdet i denne artikkelen, men det ser også ut som om det har oppstått problem etter ratifiseringen. Av samme årsak er artiklene 13-19, de såkalte landrettsartiklene, valgt ut i det andre underkapitlet, særlig artikkel 14.

### Artikkel 1

Av ILOs Ekspertkomites observasjoner og direkte forespørsler går det fram at de praktiske problemene som statene har med å ratifisere ILO-konvensjon nr. 169 berører en mangfoldighet av saker. Artiklene 13-19 om retten til land har muligens for det meste forårsaket diskusjon før ratifiseringen, men også i ettertid. Det kan likevel fastslås at det også er uklareheter om artikkel 1: det er av grunnleggende betydning å vite hvilke personer konvensjonen skal anvendes på. Nedenfor redegjøres det for Ekspertkomiteens kommentarer land for land, enten i direkte forespørsler eller observasjoner, i forbindelse med innholdet i artikkel 1 og iverksettelsen av denne i vedkommende land.

I følge første artikkel anvendes konvensjonen på urfolk, nærmere bestemt:

”... folk i selvstendige stater som er ansett som opprinnelige fordi de nedstammer fra de folk som bebodde landet eller en geografisk region som landet tilhører, på det tidspunkt da erobring eller kolonisering fant sted eller de nåværende statsgrenser ble fastlagt og som, uavhengig av sin rettslige stilling, har beholdt noen eller alle av sine

39. Forarbeid til ILO-konvensjon nr. 169:

1) International Labour Conference 75th Session 1988, report VI (1). Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). International Labour Office, Geneva.

2) International Labour Conference 75th Session 1988, report VI (2). Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). International Labour Office, Geneva.

3) International Labour Conference 76th Session 1989, report IV (1). Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). International Labour Office, Geneva.

4) International Labour Conference 76th Session 1989, report IV (2 A). Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). International Labour Office, Geneva.

5) International Labour Conference 76th Session 1989, report IV (2 B). Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107). International Labour Office, Geneva.

40. For eksempel en guide laget av to ILO-funksjonærer. Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169, by Manuela Tomei and Lee Swepston, 1996. Dessuten en annen guide fra ILO: ILO Convention on Indigenous and tribal peoples, 1989, No. 169, a Manual. International Labour Organisation, Frankrike 2000.

## Arina 2009

egne sosiale, økonomiske, kulturelle og politiske institusjoner.<sup>41</sup>

Generelt ser det ikke ut til å være noen vesentlig uklarhet om hvilke folk som er urfolk. En annen sak er hvem som på individuelt nivå kan anses å tilhøre urfolket.<sup>42</sup> Dette er problematisk i forhold til ILO-konvensjon nr. 169 fordi konvensjonen anvendes på *et folk* som gruppe og ikke på enkeltpersoner. Av Ekspertkomiteens kommentarer går det likevel fram at det er av største viktighet å vite nøyaktig hvilke *personer* konvensjonen skal anvendes på, for at disse menneskene skal kunne vite om denne konvensjonen og lovgivingen som angår dem. Dette kan ses på som et menneskerettsspørsmål. Særlig godt kommer dette til syne i Ekspertkomiteens direkte forespørsel til Bolivia i 1995:

”... The Committee would be grateful if the Government would indicate the manner in which recognition is given to indigenous communities and individuals so that they can benefit from then legislation which applies to them.”<sup>43</sup>

Også en ILO-guide fra 2000 nevner at det er viktig å vite hvem som skal ha fordeler av konvensjonen.<sup>44</sup> I denne sammenhengen vises det til betydningen av egen-identifikasjon<sup>45</sup> som grunnleggende kriterium i artikkel 1 punkt 2.

I tilfellet **Argentina** fastslår Ekspertkomiteen i 2003 og igjen i 2005 at hva angår urfolkets egen-identifikasjon så oppfyller ikke Argentinas lovgiving kravene i artikkel 1. Ekspertkomiteen oppfordrer derfor regjeringen til å gjennomføre en folketelling og anbefaler at de personer som saken angår, tas med på å forberede tellingen.<sup>46</sup>

41. Artikkel 1 i sin helhet:

1. Denne konvensjonen gjelder for:

- a) stammefolk i selvstendige stater som gjennom sine sosiale, kulturelle og økonomiske forhold skiller seg fra andre deler av det nasjonale fellesskap, og hvis status helt eller delvis er regulert av deres egne skikker og tradisjoner, eller av særlige lover eller forskrifter;
  - b) folk i selvstendige stater som er ansett som opprinnelige fordi de nedstammer fra de folk som bebodde landet eller en geografisk region som landet tilhører, på det tidspunkt da erobring eller kolonisering fant sted eller de nåværende statsgrenser ble fastlagt og som, uavhengig av sin rettslige stilling, har beholdt noen eller alle av sine egne sosiale, økonomiske, kulturelle og politiske institusjoner.
2. Egen identifisering som urfolk eller stammefolk skal være et grunnleggende kriterium for å bestemme hvilke grupper bestemmelsene i denne konvensjonen skal gjelde for.
3. Bruken av begrepet «folk» i denne konvensjonen skal ikke oppfattes som å ha noen innvirkning på de rettigheter som forøvrig kan knyttes til begrepet i folkeretten.

42. Mer om dette hos bl.a. Thornberry, Patrick (1998) Who is Indigenous? In Frank Horn (ed.) Economic, Social and Cultural Rights of the Sami. Juridica Lapponica 19. The Northern Institute for Environmental and Minority Law, University of Lapland, Rovaniemi.  
Thornberry, Patrick (2002) Indigenous peoples and human rights. Melland Schill Studies in International Law, Manchester University press.

43. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia

Ratification: 1991, Submitted: 1995.

44. ILO a Manual 2000, 8.

45. I følge ILO-guiden inneholder egen-identifikasjon både et objektivt og et subjektivt kriterium: det objektive kriteriet innebærer at urfolket skal oppfylle kravene i artikkel 1 og anerkjenne og godta personer som tilhører dette folket. Det subjektive kriteriet innebærer at personen selv identifiserer seg med gruppen eller folket; eller at gruppen selv anser seg for å være urfolk eller stammefolk på den måten som konvensjonen forutsetter. ILO a Manual 2000, 8.

46. CEAR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989, Argentina, Ratification: 2000, Submitted: 2003.

## Arina 2009

I tilfellet **Bolivia** i 1995 fastslår Ekspertkomiteen at regjeringen har gjennomført en folketelling med støtte av FNs utviklingsprogram, og Ekspertkomiteen ber om resultatene av tellingen. Tidligere, i 1994, ber Ekspertkomiteen regjeringen om informasjon om folkeregisterets id-kort, der det gis prioritet til urfolksmedlemmer og landarbeidere. Ekspertkomiteen spør om det gjøres skille mellom urfolksmedlemmer og landarbeidere når det gjelder å bli registrert. Spesielt spørres det om hvilke kriterier som gjelder for å bli registrert.<sup>47</sup> Av regjeringens svar går det fram at folkeregisteret ikke gjør skille på personer basert på urfolkstatus. Ekspertkomiteen reiser da spørsmålet om hvordan personer i Bolivia som tilhører målgruppen for ILO-konvensjon nr. 169, kan ha fordel av konvensjonens innhold når de ikke har en status som skiller dem ut på dette punktet.<sup>48</sup>

**Colombias** regjering har i sin rapport i 1994 presentert svært nøyaktige tall om urbefolkningen i landet. I 1994 anslås urbefolkningen til 575,000 mennesker. Ekspertkomiteen ber om tilleggsopplysninger om tallgrunnlaget og hvordan egenidentifikasjonen blir realisert i praksis. I 1996 klargjør regjeringen i Colombia at i folketellingen i 1993 var det en spesiell urfolk-komponent som innebar at personen måtte være av amerindisk opphav og at han måtte ha en følelse av tilhørighet til urfolkfellesskapet.<sup>49</sup> I 1999 beregnet Colombia urbefolkningens antall til 603,000 og i 2001 til 621,186 mennesker.<sup>50</sup> Regjeringen viser til at konvensjonen berører 82 ulike folk som lever innenfor landets grenser.<sup>51</sup>

I 1997 og 1999 fastslår Ekspertkomiteen i en direkte forespørsel at **Costa Ricas** lov om urfolk (Indigenous Act) sier at ”personer er urinnvånere dersom de utgjør en etnisk gruppe som direkte stammer fra en førkolumbiansk sivilisasjon og som bevarer sin egen identitet”.<sup>52</sup> Ekspertkomiteen bemerker at denne definisjonen ikke

47. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia

Ratification: 1991, Submitted: 1994.

48. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia

Ratification: 1991, Submitted: 1995.

49. CEACR: Individual Direct Request concerning Convention no. 169, Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Submitted: 1996.

50. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Submitted: 1999.

51. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Submitted: 2001. CEACR: Individual Direct Request concerning Convention No. 169,

Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Submitted: 1994 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Submitted: 1994 CEACR: Individual Direct Request concerning Convention no. 169, Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Submitted: 1996.

52. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica

Ratification: 1993, Submitted: 1999.

## Arina 2009

inneholder egen-indentifikasjon, og at loven derfor på dette punktet ikke svarer til kravene i artikkel 1. I 2000 lar regjeringen i Costa Rica likevel forstå at dens lovgiving svarer til kravene i artikkel 1 og viser til den ovenfor nevnte setningen.<sup>53</sup> Senere i 2001 fastslår Ekspertkomiteen at i lovforslag nr. 12032, punkt 4 (a) er det fastslått at ethvert urfolk definerer autonomt hvem det regner som medlem av sitt eget folk. Ekspertkomiteen ber om tilleggsutredninger om den praktiske anvendelsen av den før nevnte saken etter at lovforslaget er godkjent.<sup>54</sup>

I følge regjeringen i **Honduras** gjelder ILO-konvensjon nr. 169 i Honduras alle personer som tilhører urbefolkningen og spesielt dem som tilhører organisasjonen CONPAH (Confederation of Autochonus Peoples of Honduras). Ekspertkomiteen ber regjeringen forklare hvordan konvensjonen anvendes på personer som ikke er medlemmer av denne organisasjonen, men som likevel er subjekter for ILO-konvensjon nr. 169. I tillegg ber den om en utredning om hvordan kravet om egen-indentifikasjon oppfylles i praksis.<sup>55</sup>

I følge artikkel 20, paragraf 1, i FNs menneskerettighetserklæring har alle rett til fritt å delta i fredelige møter og organisasjoner. I følge paragraf 2 må ingen tvinges til å tilhøre en organisasjon. I lys av menneskerettighetserklæringen og som en følge av hendelsene under annen verdenskrig er det problematisk med registrering som baserer seg på etnisitet. Det fins personer som ikke ønsker å være med i et slikt register, og dessuten kan kriteriene for å bli med i registeret være helt andre enn for eksempel å definere en person som tilhører et urfolk.<sup>56</sup>

I tilfellet **Mexico** i 1993 observerer Ekspertkomiteen at bruk av urfolkspråk ville være en avgjørende faktor i definisjonen av urfolkstilhørighet. Språk er på mange måter problematisk når det gjelder å definere tilhørighet til et urfolk. For det første kan hvem som helst lære seg et språk når som helst. Et språk kan også forsvinne; for noen er språket forsvunnet i tidligere generasjoner, for noen forsvinner språket nå i dette øyeblikk. Språkerfardighet forteller også heller lite om en persons rettigheter for eksempel til land og vann etter bestemmelsene i nasjonale lover. Etter ILO-konvensjon nr. 169 kan språket være ett element i ”ur-heten”, men ikke det eneste.<sup>57</sup> I sin kommentar til Mexico betoner Ekspertkomiteen også betydningen av egen-indentifikasjon.<sup>58</sup>

53. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica  
Ratification: 1993, Submitted: 2000.

54. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica  
Ratification: 1993, Submitted: 2001

55. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras  
Ratification: 1995, Submitted: 2000.

56. Mer hos J. Joona: Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista. *Juridica Lapponica* 32. Rovaniemi, 367-381.

57. Jfr. artikkel 1 i ILO-konvensjon nr. 169.

58. CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Mexico  
Ratification: 1990, Submitted: 1993.



## Arina 2009

I tilfellet **Peru** i 1999 ber Ekspertkomiteen regjeringen i Peru om å komme med mer nøyaktige tall på de personer som tilhører urfolk. I følge komiteen går det ikke fram av folketellingen i 1993 at Peru har gjort skille mellom urfolksmedlemmer og landarbeidere. Ekspertkomiteen fastslår også at tallet på dem som tilhører urfolkssamfunn og landarbeiderne er forholdsvis lavt sammenliknet med befolkningen i hele landet. Komiteen foreslår at regjeringen i Peru harmoniserer kriteriene for hvem ILO-konvensjon nr. 169 skal anvendes på. I denne forbindelsen må det spesielt tas hensyn til personens avstamning og egen-identifikasjon. Definisjonen av urfolksmedlemmer er spesielt vanskelig i Peru fordi landet har 24 millioner innbyggere og av av dem tilhører over 9 millioner et urfolk. I Amazonas-området lever 42 ulike etnisk-språklige grupper, og dette området dekker 62 prosent av landets flateinnhold. Her snakkes et førtitalls ulike språk som tilhører 16 ulike språkgrupper. Av alle disse gruppene er det ikke alle som klart definerer seg som urfolkssamfunn. Ekspertkomiteen fastslår at denne saken er svært vanskelig på grunn av mengden av ulike definisjonstyper og mengden av ulike grupper: landarbeidere, urfolksamfunn (indigenous and native populations), samfunn som lever i fjerne fjellstrøk, i regnskogene og i regnskogenes randområder. Av denne grunn ber Ekspertkomiteen om en harmonisering av kriteriene.<sup>59</sup>

I en direkte forespørsel fastslår Ekspertkomiteen i 1993 at det i **Norge** var folketelling i 1970 for å telle den samiske befolkningen. I 1993 anslo regjeringen at det bodde omtrent 40 000 samer på norsk jord. Ekspertkomiteen forhører seg hos regjeringen om det i framtida er planer om en ny folketelling i Norge med et særskilt urfolkselement. I 1995 svarer regjeringen i Norge at det ikke er behov for folketelling i framtida fordi det ble oppnådd så høy deltakelsesprosent (high level of participation) i Sametingsvalget og at de som stemmer i Sametingsvalget, kan identifiseres.

I følge Sametingets offisielle internettsider hadde 5497 samer registrert seg i Sametingets valgmannstall i 1989. <http://www.samediggi.noddefault.asp?selNodelID=110&lang=no> (besøkt 28.11. 2003)

I 2001 var det 9923 personer og i 2005 12 538 personer i dette registeret. <http://www.samediggi.no/Artikkel.asp?MIId1=3&MIId2=300&AIId=236&back=1> (besøkt 20.11. 2006).

Den norske regjeringen har likevel gitt ILO et overslag over antall samer (1993: 40 000). I 1995 viser regjeringen til ”den høye deltakelsesprosenten” i Sametingsvalget (1989:5497 personer). Dersom ILO-konvensjon nr. 169 i Norge angår de personene som i følge regjeringen står i Sametingets velgerliste, hva skjer med resten av de personene som antas tilhøre den samiske befolkningen (50 000-75 000 personer)? På hvilken måte er denne gruppen sikret vern under ILO-konvensjon nr. 169?

I følge det norske utenriksdepartementet kan samenes tall anslås til opp mot 75 000 personer, men anslagene varierer med hvilke kriterier som blir brukt

59. CEACR: Individual Direct Request concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Peru Ratification: 1994, Submitted: 2006 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Peru Ratification: 1994, Submitted: 1999

## Arina 2009

(genotype, morsmål, personlige forventninger osv.). De offisielle folketellingene er i følge departementet ikke pålitelige. Likevel blir Sametingets offisielle tall brukt i rapportene til ILO. Som følge av assimilasjonsprosessen har i følge utenriksdepartementet ikke alle samer villet, eller kunnet, vedkjenne seg sin etniske identitet. Derfor har Sametinget i de nordiske landa utformet sine egne kriterier for å definere en same. I disse definisjonene blir det brukt et objektivt og et subjektivt kriterium.

<http://odin.dep.no/odin/engelsk/norway/history/032005-990463/index-dok000-b-n-a.html> (besøkt 20.11.2006).

På samme måte som i tilfellet Honduras kan det her stilles spørsmål om hvordan det er mulig å sikre at de som oppfyller kriteriene i ILO-konvensjon nr. 169, artikkel 1, men som ikke er registrert på Sametingets velgerliste, likevel blir omfattet av ILO-konvensjonens vern.

### Artiklene 13-19, spesielt artikkel 14

ILO-konvensjonens artikler 13-19 omhandler spørsmål i forbindelse med eierskap til land. Den viktigste artikkelen i forbindelse med urfolkens rett til land er artikkel 14<sup>60</sup>, som fastslår at urfolkens rettigheter til eierskap og besittelse av de landområder der de tradisjonelt lever, skal anerkjennes. I tillegg skal de sikres retten til å bruke landområder som de tradisjonelt har brukt ved siden av resten av befolkningen. Det er altså spørsmål om to ulike områder, som i følge konvensjonen er berørt av forskjellige regelverk. I denne sammenhengen kan vi ikke gå nærmere inn på innholdet av begrepene eierskaps- og besittelsesrett, men vi gjør iakttagelser basert på de uttalelsene Ekspertkomiteen er kommet med i forbindelse med artikkel 14. ILO-guiden klargjør artikkel 14 (1) såpass at "landområder der de tradisjonelt lever" skal bety landområder der urfolket lever og har levt i "uminnelige" tider, og som de har brukt og forvaltet på sin tradisjonelle måte. Disse landområdene er forfedrenes land, som man nå håper skal overføres til kommende slektsledd. I noen tilfeller er dette land som nylig er tapt.<sup>61</sup> For at urfolkens rett til eierskap og besittelse på disse landområdene skal kunne anerkjennes, forutsetter artikkel 14 (2) at regjeringene definerer disse områdene. Dette framheves som svært viktig også i Ekspertkomiteens kommentarer. Noen ganger kan det oppstå konflikter omkring landeierskapet, for eksempel med andre urfolkssamfunn, staten, bosettere utenfra eller andre impliserte.

60. Artikkel 14

1. Vedkommende folks rettigheter til eierskap og besittelse av de landområder der de tradisjonelt lever, skal anerkjennes. Når forholdene tilsier det, skal det også treffes tiltak for å sikre vedkommende folks rett til å bruke landområder der de ikke er de eneste som lever, men som de tradisjonelt har hatt tilgang til for sitt livsopphold og sin tradisjonelle virksomhet. I denne sammenheng skal det legges spesiell vekt på situasjonen for nomadiske folk og personer som driver flyttejordbruk.
2. Regjeringene skal etter behov iverksette nødvendige tiltak for å identifisere de landområder der vedkommende folk tradisjonelt lever, og sikre effektivt vern av deres rettigheter til eierskap og besittelse.
3. Tilfredsstillende prosedyrer skal etableres i nasjonal rettsorden for å avgjøre rettskrav knyttet til landområder fra vedkommende folk.

61. ILO a Manual 2000, 31.

## Arina 2009

Av denne grunn forutsetter konvensjonen i artikkel 14 (3) at regjeringen utvikler de nødvendige prosedyrer innenfor rammene av den nasjonale lovgiving slik at rettstvister om landretten kan løses.

I denne forbindelse kan man gjøre noen observasjoner om forholdene i Sverige og Finland. I Sverige går man for det første ut fra at de områdene som berøres av ILO-konvensjonen, omfatter Sveriges reindriftsområder, om utgjør omtrent en tredjedel av landets flateinnhold.<sup>62</sup> Definisjonen av disse områdene anses som viktig før en mulig ratifikasjon av ILO-konvensjon nr. 169. Områdene som angår reindrift, fiske og jakt er definerte av ulike komiteer.<sup>63</sup> I Finland er ikke urfolkets tradisjonelle landområder definert i samsvar med artikkel 14 (2). I 2001 har samekomiteen i sin innstilling gått ut fra at de områdene i Finland som oppfyller kriteriene i artikkel 14, er kommunene Enontekiö, Enare og Utsjoki og dessuten Sodankylä-området, men ikke andre områder. Innstillingen begrunner ikke hvorfor ILO-konvensjonens to ulike definisjoner gjelder akkurat de nevnte områdene og ikke andre.

Den nevnte avgrensingen er i følge Juha Joonas ikke et spørsmål om noen historisk grense mellom befolkningsgrupper, men den baserer seg på en intervjuundersøkelse fra 1962.<sup>64</sup> I denne undersøkelsen var det ikke spørsmål om befolkningens avstamning fra urbefolkningen i området, heller ikke om bevaringen av de institusjonene som er nevnt i ILO-avtalen eller om utøvingen av tradisjonelle næringer, men derimot om hvor mange av de intervjuede personene som kunne si at minst en av besteforeldrene hadde hatt samisk som førstespråk. For eksempel havnet Kittilä utenfor dette området fordi man i Kittilä kommune bare fant ni slike personer.<sup>65</sup> I Finland har man generelt gått ut fra at ILO-konvensjonen bare skulle gjelde personer som står i Sametingets velgerliste, som ble laget senere med basis i den nevnte intervjuundersøkelsen, og at det geografisk skulle være spørsmål om det såkalte sameområdet, som ble definert av intervjuundersøkelsen fra 1962. For Finland er nok problemene omkring ILO-konvensjonens artikler 1 og 14 (2) blant de vanskeligste spørsmålene i forhold til en ratifisering.

Nedenfor blir det presentert eksempler på spørsmål angående urfolks rettigheter til eierskap og besittelse av de landområder de lever på. Om de latinamerikanske land blir det gitt korte utredninger fordi de samme spørsmål og problemer ofte gjentar seg i ulike land, og derfor blir det bare lagt fram saker som representerer ulike

62. SOU 1999:25, 14.

63. SOU 2006:14, Samernas Sedvanemarker. Betänkande av Gränsdragningskommissionen för renskötselområdet, Stockholm.

SOU 2005:116, Jakt och Fiske i Samverkan. Slutbetaänkande av jakt och fiskerättsutredningen, Stockholm. Two separate publications were also included in the research: SOU 2005: 17 Vem får jaga och fiska? Rätt till jakt och fiske i lappmarkerna och på renbetesfjällen. Delbetänkande av Jakt- och fiskerättsutredningen, Stockholm.

SOU 2005: 79 Vem får jaga och fiska? Historia, folkrätt och miljö. Delbetänkande av Jakt- och fiskerättsutredningen, Stockholm.

64. Ks. Erkki Nickul, Suomen saamelaiset vuonna 1962. Selostus Pohjoismaisen saamelaisneuvoston suorittamasta väestötutkimuksesta. Tilastotieteen pro gradu-tutkielma. Helsinki, 1968.

65. Väestölaskenta/folketelling. Suomen virallinen tilasto (Finlands officiella statistik) VI C:104. 1970 Osa XVII C., 11. Fra J. Joonas, Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista.

## Arina 2009

problemtyper. Deretter går vi nærmere inn på Ekspertkomiteens kommentarer om Norge. Alment kan man si at i Latin-Amerika er urfolkene retter til land-eierskap svak, men det fins også unntak. Store landområder er gitt tilbake til urinnvånerne bl. a. nylig i Brasil. Problemene i landrettsspørsmål berører generelt blant annet de store nasjonale prosjektene, som for eksempel kraftutbygging. Selv om ILO-konvensjon nr. 169 i slike tilfeller også krever av de rette instanser å forhandle med befolkningen i området og bl.a. tilby alternative landområder som kompensasjon, er saken vanskelig fordi at for eksempel i Amazonas-området er befolkningens tilknytning til et visst landområde svært sterk, kanskje til og med et livsvilkår.

I tilfellet **Argentina** i 2003 fastslår Ekspertkomiteen at det knytter seg flere problem til urfolkene rett til landeierskap. Provsregjeringene kan holde urfolkene landområder som en form for forsikring slik at de kan få låne mer penger av internasjonale finansieringsinstitusjoner. Ekspertkomiteen framhever også plikten til å forhandle med urfolket når det kan være aktuelt å flytte dem bort fra deres tradisjonelle leveområder.<sup>66</sup>

I tilfellet **Bolivia** i 2003 er det avdekket at urfolket har fått eiendomsrett til områder som nasjonalt er klassifiserte som naturvernområder. Hvordan skal urfolkets muligheter til å drive sin næring sikres på et slikt område?<sup>67</sup>

I **Colombia** er urfolkene rett til landeierskap basert på såkalte reservater. I 1994 var det 12 reservat i Colombia, samt 377 enheter mindre enn reservat. I Colombia er problemet å få nomadiske folk til å bosette seg i reservatene, og på den annen side også konflikter som de ulike urfolkgruppene har innbyrdes. Ekspertkomiteen bemerker at staten er ansvarlig for å organisere de nødvendige prosedyrer for behandling av søksmål i en konfliktsituasjon. I Colombia er urfolkene rett til land blitt bedre på mange måter, for eksempel gav den nye gruveloven i 2001 urfolkene vide rettigheter til å overvåke letingen etter og utnyttelsen av naturressurser i deres tradisjonelle bosetningsområder. Dessverre skjer det også alvorlige brudd på menneskerettighetene, kidnappinger og mord, som ofte retter seg nettopp mot urfolkene og deres ledere. I forhold til disse problemene kan kravene om visse landområder synes ubetydelige.<sup>68</sup>

I tilfellet **Costa Rica** fastslår Ekspertkomiteen i 1997 at i Costa Rica er fortsatt store landområder i hendene på personer som ikke tilhører noe urfolk, og at

66. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989, Argentina, Ratification: 2000, Submitted: 2003. CEAR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Argentina, Ratification: 2000, Published: 2005.

67. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1994.

68. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Published: 2003  
CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia

Ratification: 1991, Published: 2004 CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia, Ratification: 1991, Published: 2004.

## Arina 2009

regjeringen ikke har tilstrekkelige ressurser til å gi disse personene kompensasjon. Ekspertkomiteen ber regjeringen kunngjøre hvordan den tenker å etterkomme ”urfolksloven” (Indigenous Act), som sier at disse menneskene må fraflytte dette området slik at det kan tilbakeføres til de opprinnelige eierne.<sup>69</sup>

I tilfellet **Danmark** fastslår Ekspertkomiteen i 2001 at Danmarks ordning på Grønland garanterer innbyggerne stor autonomi i forhold til bruk av landområdene. Myndighetene i forvaltningsordningen (Home Rule) tar beslutningene om hvem som har rett til å bruke landet. Ordningen skiller likevel ikke mellom områdets urbefolkning og senere innflyttere.<sup>70</sup>

I **Ecuador** kan eiendomsretten til land være nedarvet fra forfedrene, landområdene kan være i en families eie, i privat eie eller i fellesskapets eie. Urfolkene har rett til å ta del i leting etter, utnyttning av og vern av naturressursene på sine tradisjonelle leveområder. Ekspertkomiteen ber om nærmere utredninger om hvordan dette realiseres i praksis. I denne forbindelsen betones betydningen av tosidige forhandlinger.<sup>71</sup>

På **Fiji-øyene** tilhører ”native lands” fellesskapet og forvaltes av Native Lands Commission. 83% av landet er forvaltet slik. I betraktning av at det knapt bor andre på øya enn urbefolkningen og deres etterkommere, kjenner urbefolkningen tilværelsen sin truet og fremmed på sin egen øy. Problemene viser seg spesielt innbyrdes mellom de ulike stammene og som stridigheter når avkastningen fra landet ofte dessverre havner i lommene til høvdingene.<sup>72</sup>

I **Guatemala** har ILO-konvensjonen til en viss grad bidratt til en avklaring av landets kaotiske innenrikspolitiske tilstand og hjulpet til med å få i stand en fredsavtale. Urfolkene har fått forbedret sin rett til land nettopp etter ratifiseringen av ILO-konvensjon nr. 169, selv om mye arbeid gjenstår.<sup>73</sup>

I **Honduras** er land tilbakeført til en del urfolkgrupper. En del av urfolkene landområder venter fortsatt på å bli identifisert og tilbakeført. I Honduras’ tilfelle bemerker Ekspertkomiteen også at det er viktig å rapportere til komiteen både om lovendringer som retter seg mot landområdene og om lovenes anvendelse i praksis.<sup>74</sup>

69. CEACR: Individual Direct Request Concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica

Ratification: 1993, Submitted: 1997

70. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Denmark

Ratification: 1996, Submitted: 2001.

71. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 Ecuador, Ratification. 1998, Submitted: 2003. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 Ecuador, Ratification. 1998, Submitted: 2003

72. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Fiji

Ratification: 1998, Published: 2005.

73. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Guatemala

Ratification: 1996, Published: 2002

74. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989 Honduras, Ratification: 1995, Submitted: 2003

## Arina 2009

I 1993 fastslår Ekspertkomiteen på grunnlag av **Norges** rapport at staten eier den største delen av samenes tradisjonelle landområder, mens samene har bruksrett. I denne forbindelsen fastslår Ekspertkomiteen også at det fins rettsavgjørelser om samenes eiendomsrett basert på bruk i uminnelige tider. For å granske samenes rettslige stilling har regjeringen besluttet å opprette en kommisjon (Sami Rights Commission) som skal ha til oppgave å vurdere samenes rettigheter til land og vann, og foreslå konkrete tiltak for å organisere disse rettene. I følge rapporten fra regjeringen er det ikke meningen å gi samene noen særskilte muligheter til å kunne prøve rettighetene sine for domstolene, men samene må om de så ønsker bruke de nasjonale ordningene.<sup>75</sup>

Ekspertkomiteen berømmer Norge for å ta Sametinget med på dialogen mellom ILO, regjeringen og arbeidsgiver- og arbeidstakerorganisasjonene etter ratifiseringen av konvensjonen.<sup>76</sup>

I 2004 fortelles det om tilbivelsesprosessen for den såkalte Finnmarksloven, som kom i gang etter tallrike utredninger og vanskelige forhandlinger. I følge rapporten skal Finnmarksloven få orden på tvistene om eiendomsretten til land og vann, som lenge hadde vært på både regjeringen og samenes organisasjoner.<sup>77</sup>

Ekspertkomiteen fastslår i 2004 at selv om samenes rett til land og vann nå skal reguleres ved hjelp av den nye Finnmarksloven, har Samerettsutvalget (Saami Rights Commission) ennå ikke forsynt regjeringen med midler til å definere nøyaktig de områdene som samene har rett til slik som artikkel 14 (2) krever.<sup>78</sup> I 2004 var Finnmarksloven ennå bare et lovforslag da Ekspertkomiteen vurderte den. I følge komiteen ville loven gi samene en enda mer betydelig rolle enn tidligere i beslutningene om forvaltning og bruk av området. I følge Ekspertkomiteen ville lovforslaget erstatte konvensjonens begrep om eierskap og besittelse med omfattende retter i forvaltningen av området.<sup>79</sup>

Ekspertkomiteen fastslår likevel at lovforslaget enda bedre ville oppfylle kravene i artikkel 15 om at urfolkene skal ha rett til å ta del i forvaltning, bruk og vern av områdenes naturressurser.<sup>80</sup>

I Norge er Finnmarkseiendommen (Finnmark Estate) opprettet som en følge av

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75. CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples Convention No. 169, Norway, Ratification: 1990, Submitted: 1993.

76. CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples Convention No. 169, Norway, Ratification: 1990, Submitted: 1993.

77. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway  
Ratification: 1990, Published: 2004

78. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway  
Ratification: 1990, Published: 2004

79. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway  
Ratification: 1990, Published: 2004

80. CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway  
Ratification: 1990, Published: 2004

## Arina 2009

Finnmarksloven og i forbindelse med den er det i ettertid opprettet en domstol som skal behandle landrettssøksmål fra personer som mener de på privatrettslig grunnlag har rett til land som tilhører Finnmarkseiendommen.<sup>81</sup>

### Konklusjoner

Det er viktig å huske på at ILO-konvensjon nr. 169 regulerer saker som berører grunnleggende forhold i livet som helsestell, sosial sikkerhet, arbeidsløshet, utdanning og utøvelse av tradisjonelle næringsveier. Men på det praktiske plan ser disse sakene ut til å ha havnet i skyggen av landrettighetene. Likevel er det viktig å studere praksis, for man kan finne løsningsforslag til mange spørsmål ved hjelp av sammenlikning av ulike praksiser.

Av Ekspertkomiteens observasjoner og forespørsler går det fram at komiteen stiller opp klare kriterier og forpliktelser som en stat må oppfylle for at landets lovgiving og praksis skal svare til forpliktelsene i ILO-konvensjon nr. 169. Spørsmålene som berører artikkel 1 viser særlig at konvensjonens forpliktelse strekker seg ut på det personlige plan, noe som i mange av Ekspertkomiteens kommentarer kommer fram som en betoning av betydningen av *egen-identifikasjon*. Sett fra ILO-konvensjon nr. 169 er det slett ikke spørsmål om å definere urfolkmedlemmene, men å "finne" de personene som konvensjonen gjelder. Fra et menneskerettssynspunkt er det viktig at en person vet at ILO-konvensjon nr. 169 gjelder ham og at han kan kreve en bedre realisering av rettighetene sine ved å vise til konvensjonen. Artikkel 1 stiller så opp egne kriterier for hvem konvensjonen skal anvendes på.

I forbindelse med landretten aktualiseres visse forpliktelser i artikkel 14 fram i flere land. Dette gjelder for eksempel kravet om å *definere landområdene*. For at konvensjonen skal kunne anvendes i praksis, er det viktig å vite hvilke landområder det er spørsmål om. I en fase der man planlegger utbygginger i urfolkens tradisjonelle leveområder, er det viktig at vedkommende folkegrupper *blir hørt om saken* og at de har en reell mulighet til å uttrykke sin oppfatning. Forhandlinger må også arrangeres i samarbeid med urfolket. I Ekspertkomiteens kommentarer kan man også lese om statenes *tilbøyelighet til å assimilere* urfolkens organisasjoner og institusjoner inn i den herskende kulturen. Dette burde unngås. Kommentarene forteller også ofte om urfolkens mulighet til å reise *søksmål om landretten*, og at staten er forpliktet til å få i stand de nødvendige prosedyrer for å behandle slike saker. Det er klart at urfolkens tradisjonelle landområder er i hendene på personer som ikke tilhører noe urfolk, og det forårsaker konflikter på ulike hold. I ekstreme tilfeller er det i følge ILO-konvensjon nr. 169 også mulig å flytte mennesker bort fra et område. Dette kan være tilfelle for eksempel i forbindelse med et et eller annet stort nasjonalt

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81. Mer om dette på engelsk: The Uncultivated Land Tribunal for Finnmark: <http://finnmarksloven.web4.acos.no/artikkel.aspx?AId=151&back=1&Mid1=139> (Besøkt 6.5.2009); Finnmark Act – A Guide 8/2005, 2. [www.jd.dep.no](http://www.jd.dep.no) by Ministry of Justice and Ministry of Local Government and Regional Development.

## Arina 2009

utbyggingstiltak. I slike tilfelle skal urfolkene ha mulighet til å vende tilbake til området seinere, rett til å slå seg ned en annet sted, få likeverdige landområder et annet sted eller tilstrekkelig *kompensasjon*. Som et siste punkt i forbindelse med artikkel 14 kan man slå fast at den klart forplikter statene til å anerkjenne urfolkene *rett til eierskap og besittelse* på deres tradisjonelle leveområder. I lys av Ekspertkomiteens kommentarer er det vanskelig å forstå at retten til eierskap skulle være mindre omfattende enn det som ellers forstås med rett til eierskap.

I Finland og Sverige har en ratifisering av ILO-konvensjonen lenge stått på dagsordenen. De to landene har på mange måter hatt sammenfallende utgangspunkt med bakgrunn i felles historie og lovgiving. I Sverige er ratifiseringen et spørsmål om utøving av reindrift. Norge ratifiserte i sin tid konvensjonen på grunn av at en sterkt beskyttet rett til reindrift skulle være nok til å trygge kravene om rett til eierskap og besittelse. I Finland har ikke reindriften og dens behov for land vært et tema å samme måten. I følge et radiointervju med justisminister Brax 23.3.2009 er en ratifisering av ILO-konvensjon nr. 169 ikke aktuell akkurat nå. Men dagen etter (24.3.2009) fastslo hun at det kan bli mulig å ratifisere ILO-konvensjonen denne valgperioden.

Til tross for kritikken som har vært rettet mot ILO-konvensjon nr. 169, må man huske at den for øyeblikket er den eneste forpliktende internasjonale avtalen om urfolk, og konvensjonens forpliktelser er vidtgående for eksempel når det gjelder retten til land. For statene er det i retten til eierskap og besittelse av urfolkene tradisjonelle landområder langt på vei et spørsmål både om en revurdering av suvereniteten og om de betydelige økonomiske ressursene som ofte fins i disse områdene. Spørsmålet kan også ses på som en vedkjennelse av kolonialisasjonshistorien og urfolkets retter, og som en reparasjon av de feil som er gjort, med eller uten hjelp av ILO-konvensjonen. En ratifisering av konvensjonen har ikke i seg selv noen egenverdi, det viktigste er at på bakgrunn av konvensjonen skapes det et strev for å fremme arbeidet for å trygge urbefolkningens rettigheter og stilling. Om dette skjer med eller uten ratifisering av konvensjonen, er i seg selv uten betydning.

Til norsk ved Klaus Skoge



## Arina 2009

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*Tanja Joonas*

## 4 ILO:n vuoden 1989 alkuperäis kansasopimuksen nro 169 soveltaminen

### 4.1 Johdanto

Eräs tärkeimmistä alkuperäiskansojen oikeuksia koskevista kansainvälisistä sopimuksista on vuoden 1989 ILO-sopimus numero 169 (myöh. ILO 169 -sopimus). Kyseessä on Kansainvälisen työjärjestön (International Labour Organisation, ILO) yleiskokouksen 76. työkonferenssin hyväksymä itsenäisten maiden alkuperäis- ja heimokansoja koskeva sopimus. Sopimus tunnustaa alkuperäiskansojen erityiset oikeudet perinteisiin asuinalueisiinsa ja niiden luonnonvaroihin sekä edellyttää valtioiden ryhtyvän erityistoimenpiteisiin muun muassa alkuperäiskansojen kulttuurin, kielten ja ympäristön suojelemiseksi. Sopimuksen on ratifioinut 20 valtiota: Argentiina, Bolivia, Brasilia, Kolumbia, Costa Rica, Chile, Tanska, Dominikaaninen Tasavalta, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Alankomaat<sup>95</sup> Norja, Paraguay, Peru, Venezuela ja Espanja.<sup>96</sup> Suomessa ja Ruotsissa harkitaan sopimuksen ratifiointia, mutta kuten useissa muissakin valtioissa ratifioinnin esteeksi ovat muodostuneet ennen kaikkea sopimuksen maa-oikeusartikkelit ja niistä erityisesti artikla 14, jonka mukaan alkuperäiskansoille tulisi tunnustaa *omistus- ja hallintaoikeus* heidän perinteisesti käyttämillään alueilla. Toinen sopimuksen ongelmakohta liittyy ensimmäiseen artiklaan, eli kysymykseen siitä: keitä sopimus koskee.

Kansainvälisen työjärjestön kiinnostus alkuperäiskansojen oikeuksia kohtaan alkoi 1920-luvulta ja Andien rinteiltä, jossa järjestö teki käytännön avustustyötä paikallisten työläisten keskuudessa. Työläisistä moni kuului eri alkuperäiskansayhteisöihin ja heidän olojaan alettiin parantaa nimenomaan työolosuhteita koskevien muiden ILO-sopimusten avulla.<sup>97</sup> Avustustyössä kävi ilmi myös tarve laatia pelkästään alkuperäiskansoja koskeva sopimus, joka annettiin vuonna 1957 (numero 107).<sup>98</sup> Myöhemmin, 1980-luvulla, muuttu-

95 Alankomailla ei ole omaa alkuperäiskansaa, mutta se on halunnut ratifoida sopimuksen solidaarisuuden osoituksena entisille alusmailleen.

96 Ks. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

97 Esimerkiksi "Convention to prohibit forced labour No. 29".

98 Alkuasukas- ja heimoasteella olevia väestöryhmiä koskeva yleissopimus (Indigenous and Tribal Populations Convention No. 107). Kyseessä olevaa sopimusta ei enää voi ratifoida, mutta se sitoo niitä valtioita, jotka ovat sen ratifioineet: Angola, Argentina, Bangladesh, Bel-

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

neen maailmantilanteen ja alkuperäiskansojen oman poliittisen aktiivisuuden seurauksena sekä osittain myös YK:n vaikutuksesta, pidettiin tarpeellisenä uudistaa kokonaan vuoden 1957 sopimus, jonka pääasiallisena tarkoituksena oli ollut sulauttaa eristäytyneet ja ”takapajuiset” alkuperäiskansat muuhun väestöön. Vuonna 1989 annettu sopimus (numero 169) merkitsi ILO:n lähestymistavan muutosta alkuperäiskansoja kohtelussa. Tarkoitus on uudenkin sopimuksen perusteella suojella alkuperäiskansoja, mutta nyt suojelu pohjautuu näiden kansojen erityislaatuisen kulttuurin, elämäntavan, perinteiden ja tapojen kunnioittamiseen. ILO katsoo myös, että alkuperäiskansoilla on oikeus jatkaa oman identiteettinsä säilyttämistä ja määrittellä, miten ja millä tavoin alkuperäiskansat – niin toivoessaan – haluavat kehittyä.<sup>99</sup>

Puhuttaessa alkuperäiskansojen maa- ja vesioikeuksista liittyy näihin oikeuksiin väistämättä esikysymys siitä, miten määritellä sellaisten oikeuksien subjektit. Yleensä ihmisoikeussopimukset eivät takaa vähemmistöön kuuluville henkilöille muita oikeuksia kuin mitä on valtaväestöön kuuluvilla henkilöillä, eivätkä edes itsestään selvänä pidettävää oikeutta saada opetusta äidinkiellään. Tästä syystä kysymys, kuka kuuluu tiettyyn vähemmistöön, ei yleensä aiheuta ongelmia. Asetelma muuttuu, jos tiettyyn vähemmistöön kuulumiseen liittyy erityisiä oikeuksia. Tässä suhteessa alkuperäiskansat eroavat muista vähemmistöistä.<sup>100</sup> Jotta ILO 169 -sopimuksen velvoitteet alkuperäiskansan maoikeuksien ja muiden oikeuksien suhteen voitaisiin toteuttaa, on tärkeää tietää keitä (henkilöitä) nämä oikeudet koskevat. Tässä kirjan 4 luvussa tarkastelen erityisesti ILO 169 -sopimuksen kohteina olevia alkuperäiskansoja ryhminä, mutta myös sopimuksen yksilötasolle menevää ulottuvuutta<sup>101</sup>.

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gia, Bolivia, Brasilia, Kolumbia, Costa Rica, Kuuba, Dominikaaninen tasavalta, Egypti, El Salvador, Ecuador, Ghana, Guinea-Bissau, Haiti, Intia, Irak, Malawi, Meksiko, Pakistan, Panama, Paraguay, Peru, Portugal, Syria ja Tunisia. Ks. ILO-sopimuksen No. 107 ratifointitaulukko: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>.

99 *International Labour Office* 2000 s. 5.

100 *Myntti* 1997 s. 18–19. Vähemmistöllä tarkoitetaan tavallisesti ihmisryhmää, joka eroaa muusta vähemmistöstä etniseltä tai kansalliselta alkuperältään, kieleltään tai uskonnoltaan ja joka lukumääräisesti muodostaa vähemmistön valtion valtaväestöön tai suurimpiin kansallisiin ryhmiin verrattuna. Lisäksi on edellytetty, että vähemmistö ei ole valtiossa määrävässä asemassa ja että sen muodostava ihmisryhmä osoittaa haluavansa säilyttää kulttuurinsa, perinteensä, uskontonsa tai kielensä (*Hannikainen* 1994 s. 27–56). Alkuperäiskansalla tarkoitetaan väestöä, joka alun perin yksin asuttanut aluetta, jonka etniseltä taustaltaan ”vieras” väestö on sittemmin ottanut haltuunsa. Alkuperäiset asukkaat ovat jääneet vähemmistöön tai muuten – esimerkiksi taloudellisesti – heikompaan asemaan, mutta toisaalta säilyttäneet perinteisen kulttuurinsa ja elämäntapansa (*Hakapää* 2003 s. 175). Ks. lisää vähemmistön ja alkuperäiskansojen eroavaisuuksista *ibid.* s. 170–178.

101 Kysymystä on yleisesti käsitelty kirjan jaksossa 3.

Tanja Joona

Pohjoismaissa aiheen ympärillä käytävä julkinen keskustelu on luonut ratifiointipaineen maiden hallituksille ja asian selvittämistä on yritetty kiirehtiä. Norja ratifioi aikoinaan (vuonna 1990) ILO 169 -sopimuksen katsoen, että poronhoidon *suojattu käyttöoikeus* olisi riittävä turvaamaan sopimuksen artiklan 14 velvoitteet. Sittemmin Norjassa on tehty pitkälle meneviä lainsäädännöllisiä muutoksia, mutta sopimuksen implementoinnin voidaan katsoa olevan vielä alkutekijöissä.<sup>102</sup> Ruotsissa sopimuksen ratifiointi ei ole hallitusohjelmassa, eikä sen valmistelu ole edennyt viime vuosina. Ruotsissa ongelmat liittyvät lähinnä maa-alueiden identifioimiseen ja poronhoidon asemaan. Vuonna 1999 esitetystä komiteamietinnössä esitetään, että poronhoidon *vahvasti suojattu käyttöoikeus* olisi riittävä turvaamaan artiklan 14 velvoitteet.<sup>103</sup> Asia ei ole kuitenkaan edennyt lainvalmistelun tasolle. Suomessa lähdetään siitä, että voimassa oleva oikeusjärjestys ei riitä täyttämään sopimuksen maa-oikeusvelvoitteita. Poronhoidon suojattu asema ei ole samalla tavalla noussut esiin Suomessa kuin naapurimaissa. Sopimuksen ratifiointi ei myöskään ole Vanhasen II hallituksen ohjelmassa, joskin oikeusministeriö yhdessä maa- ja metsätalousministeriön kanssa on etsimässä edellytyksiä sopimuksen velvoitteet täyttävälle ratkaisulle lähinnä maa-oikeuksien osalta. Saamelaiskäräjät pitää valitettavana, että asiaa ei ole kuitenkaan lainkaan valmisteltu yhdessä käräjien kanssa, mikä heikentää ratifioinnin mahdollisuuksia tällä vaalikaudella.<sup>104</sup>

## 4.2 ILO 169 -sopimuksen kohteet: yksilöt, alkuperäiskansat ja valtiot

ILO 169 -sopimusta valmisteltaessa lähdettiin siitä, että alkuperäiskansan määrittelemisen ei tuottaisi suuria käytännön vaikeuksia. Tästä syystä ei nähty tarpeelliseksi ottaa sopimukseen tarkempaa määritelmää alkuperäiskansasta. Niiden alkuperäiskansojen määrittelemisen, joihin sopimusta on sovellettava, ei ole sopimuksen voimaantulon jälkeenkään tuottanut erityisiä vaikeuksia. Yleisesti voidaan vielä todeta, että on suhteellisen selvää, mitkä

102 Ks. myös "The Uncultivated Land Tribunal for Finnmark": <http://finnmarksloven.web4.acos.no/artikkel.aspx?AId=151&back=1&Mid1=139> [6.5.2009]; Finnmark Act – A Guide 8/2005, 2. [www.jd.dep.no](http://www.jd.dep.no) by Ministry of Justice and Ministry of Local Government and Regional Development".

103 SOU 1999:25 (Samerna ett ursprungssfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169, Stocholm, 31 March 1999).

104 *Brax, Tuija*, oikeusministerin haastattelu 11.11.2009, Helsinki, YLE/Lappi 23.3.09 ja YLE/Lappi 24.3.2009. Rytkösen mukaan Brax, Tuija: Maanomistukseen ei kajota Pohjois-Lapissa, Lapin Kansa 24.3.09.

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

ovat maailman alkuperäiskansoja: Australian aboriginaalit, inuitit Grönlandissa ja Pohjois-Amerikassa, intiaanit Pohjois- ja Etelä-Amerikassa, maorit Uudessa-Seelannissa, saamelaiset Pohjois-Fennoskandiassa, Venäjän alkuperäiskansat jne. Ongelmallinen voi olla sen sijaan kysymys siitä, kuka *yksilötasolla* kuuluu alkuperäiskansaan.

ILO 169 -sopimusta on usein tulkittu valtioiden ja asiantuntijoiden toimesta siten, että sillä olisi ainoastaan alkuperäiskansaan ryhmänä ulottuva vaikutus. Kokonaisuutena ILO 169 -sopimusta voidaan kuitenkin luonnehtia palapelinä, joka muodostuu eri paloista suhteessa oikeuksien ja velvollisuuksien kantajiin. Sopimuksessa on myös säännöksiä, jotka koskevat kansan tai heimon yksilöjänsiä. Esimerkiksi artiklan 28 mukaan:

”Kyseisiin kansoihin kuuluvat lapset on mahdollisuuksien mukaan opetettava lukemaan ja kirjoittamaan omaa äidinkieltään tai sitä kieltä, jota ryhmä, johon he kuuluvat, yleisimmin käyttää...”.

Artiklan 26 mukaan taas:

”Kaikille kyseisten kansojen jäsenille on turvattava mahdollisuus saada koulutusta kaikilla tasoilla vähintään tasa-arvoisina maan muun väestön kanssa”.

Sopimuksen muissa säännöksissä alkuperäiskansoihin viitataan ryhmänä.<sup>105</sup> ILO 169 -sopimuksen yksilötason vaikutuksia tarkastelen lähemmin jaksossa 4.4.

Suurin osa ILO 169 -sopimuksen artikloista on kuitenkin suunnattu sopimusvaltioiden hallituksille, jotta ne ryhtyisivät alkuperäiskansoja ja heidän kulttuuriaan suojaaviin erityistoimenpiteisiin. Esimerkiksi sopimuksen artiklan 7.4 mukaan hallitusten on ryhdyttävä, yhteistyössä kysymyksessä olevien kansojen kanssa, toimiin niiden asuttamien alueiden ympäristön suojelemiseksi. Artikla 25 puolestaan asettaa seuraavan velvoitteen:

”Hallitusten tulee huolehtia riittävän terveydenhuollon järjestämisestä näille kansoille tai myönnettävä niille varoja, joiden avulla ne voivat itse kehittää ja tarjota tällaisia palveluita omalla vastuullaan ja omassa hallinnassaan...”.

Sopimuksen artiklassa 30 todetaan myös seuraavaa:

”Hallitusten on ryhdyttävä kyseisten kansojen perinteisiin ja kulttuuriin sopiviin toimiin, jotta niille selvitettäisiin niiden oikeudet ja velvollisuudet”.

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105 Ks. lisää *Mejknecht* 2001 s. 148–152.

Tanja Joono

*Mejknectin* tulkinnan mukaan sopimuksessa on lisäksi säännöksiä, jotka on muotoiltu yleisesti siten, että niissä ei ole selkeästi määritelty subjektia/subjekteja tai edunsaajaa/edunsaajia. Esimerkiksi sopimuksen toisen osan, maasioita käsittelevässä artiklassa 13 todetaan, että sovellettaessa yleissopimuksen tämän osan määräyksiä hallitusten on kunnioitettava sitä erityistä merkitystä, joka kysymyksessä olevien kansojen suhteella on siihen maahan tai alueeseen, jolla he asuvat tai muuten käyttävät, on niiden kulttuurille ja henkille arvoille, ja erityisesti tämän suhteen yhteisöllisiä näkökohtia. Tämä yleinen kunnioittamisen vaatimus alkuperäiskansojen suhteesta maahan menee vielä pidemmälle sopimuksen artiklassa 14, jonka mukaan kyseisille kansoille on tunnustettava omistus- ja hallintaoikeus niihin maihin, joilla ne perinteisesti asuvat. *Mejknectin* mukaan em. artiklojen muotoilu asettaa valtion suojelun kohteeksi itse asiassa kyseessä olevat kulttuuriset aspektit, eikä yksilöitä tai ryhmiä.<sup>106</sup>

Alkuperäiskansojen näkökulmasta ILO 169 -sopimuksen lähestymistapa on ongelmallinen. Sopimus itsessään on valtiosopimus, jonka subjekteja ovat sen ratifioineet valtiot.<sup>107</sup> Sopimus kuitenkin koskee alkuperäiskansoja, vaikka se tosiasiaa asettaa velvoitteita vain valtioiden hallituksille, eli alkuperäiskansat voidaan nähdä sopimuksen objekteina.<sup>108</sup> Laajemmin nähtynä tämä subjekti-objekti dikotomia juontaa kansainvälisen oikeuden synnyn juurille, jonka mukaan vain valtiot voivat olla kansainvälisen oikeuden subjekteja. Teoria siitä, että yksilöt ovat kansainvälisen oikeuden objekteja, eivät subjek-

106 Ibid. s. 151–152.

107 ILO-sopimuksen No. 169 sisällön määrittivät työjärjestön kolmiportaisen rakenteen mukaisesti valtioiden, työntekijöiden ja työnantajien edustajat. Runsaasta kriittistä huolimatta alkuperäiskansoilla ei vielä nykyäänkään ole virallisesti mahdollisuutta olla osallisena ja edustettuina ILO:n hallintojärjestelmässä (valtiot, työnantajajärjestöt ja työntekijäjärjestöt), eikä siten heitä koskevien asioiden päätöksenteossa. Alkuperäiskansat voivat kuitenkin osallistua ILO:n järjestämiin kokouksiin joko 1) hallitusten, työntekijöiden tai työnantajien järjestöjen delegaatioissa tai 2) virallisten ei-valtiollisten organisaatioiden (NGO) delegaatioissa, jotka on merkitty ns. ”ILO Special List of Non-Governmental International Organizations.” International Labour Office 2000, s.78. Ks. tarkemmin information note, Representation of international non-governmental organizations at the International Labour Conference and other ILO meetings, May 2005, <http://www.ilo.org/public/english/bureau/pardev/download/civil-note-ngos.pdf>. [25.8.2009]. Alkuperäiskansat voivat myös lähettää tietoa ILOlle työnantaja- tai työntekijäjärjestöjen kautta, tai he voivat lähettää tietoa suoraan itse. ILO:n asiantuntijakomitea rohkaisee lähettämään tällaista tietoa varsinkin, jos se sisältää todennettavaa tietoa, kuten lakitekstejä, säännöksiä ja muita virallisia dokumentteja. Ks. tarkemmin *International Labor Office* 2000 s. 79.

108 Vrt. esim. YK:n alkuperäiskansojen julistus (ei valtioita oikeudellisesti velvoittava), jonka lähestymistapa on erilainen. Julistuksen laatimisessa ovat mukana olleet alkuperäiskansat itse. United Nations Declaration on the Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfi/en/drip.html> [17.8.2009].

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

teja, muotoiltiin saksalaisen juristin *Heilbornin* toimesta vuonna 1896<sup>109</sup> ja se sai laajalle levinneen kritiikittömän vastaanoton. Käytännössä tämä tarkoittaa lähinnä sitä, että kohteella ei katsottu olleen mitään suoria oikeuksia tai velvollisuuksia, eikä hän näin ollen voinut myöskään vedota mihinkään oikeuksiin.<sup>110</sup> Kansainvälisen oikeuden mukaan yksilön hyödyn ajateltiin toteutuvan vain sillä perusteella, että hän on jonkin valtion kansalainen. Kansainvälinen oikeus on valtioiden oikeutta, yksilöt ovat vain tämän oikeuden objekteja.<sup>111</sup>

Myöhemmin, 1900-luvun puolivälin jälkeen ajattelu subjekti/objekti-jaottelun suhteen muuttui. Kriittisesti asiaan suhtautuvat totesivat ajattelutavan ensinnäkin olevan epälooginen; miten yksilö voi olla objekti lain mukaan, joka koskee ainoastaan valtioita? Toiseksi, teorian katsottiin olevan epämoraalinen, koska se kohtelee ihmistä, yksilöä ”pelkkänä asiana”. Teoriaa pidettiin myös epärealistisena, koska se ei millään tavalla heijastellut todellisuutta: ihmisethän ovat oikeuksien ja velvollisuuksien toimeenpanijoita.<sup>112</sup> Vuonna 1995 *Higgins* ehdotti uutta lähestymistapaa: kansainvälistä oikeutta ei tulisi lähestyä objektin tai subjektin näkökulmista, vaan osallistujien (participants) näkökulmista.<sup>113</sup> Alkuperäiskansojen ja vähemmistöjen oikeuksia tarkasteltaessa voidaan kysyä, tulevatko he koskaan saavuttamaan ”kansainvälisen osallistujan” statusta ja mikäli näin tapahtuisi, missä laajuudessa tämä status voitaisiin hyväksyä?

ILO 169 -sopimuksen kannalta yksilön tai ryhmän oikeudet ovat rajoitettuja myös suhteessa siihen, miten sopimuksen noudattamista voidaan valvoa. ILO 169 -sopimuksessa ei ole yksilövalituksen mahdollisuutta, toisin kuin esimerkiksi YK:n Kansalais- ja poliittisia oikeuksia koskevassa sopimuksessa.

109 *Heilborn* 1896 s. 58-211, 372, 374, 382, 417.

110 *Lauterpacht* (1 st Ed. 1950, 1968 s. 8) kuvailee tätä seurausta seuraavasti: ”Fundamental rights of the individual recognized by international law are not only non-existent but also impossible in principle as being inconsistent with the structure of international law conceived as a law between States only. Similarly, if individuals have no rights under international law, it seems to follow that they can have no locus standi before international tribunals and other international agencies, though occasionally it has been argued that they are not subjects of international law because of their procedural incapacity before international tribunals.”

111 *Ibid* s. 6-7.

112 Ks. esimerkiksi *O’Connell* 1970 s. 82. *Manner* 1952 s. 430-432.

Ks. lisäanalyysia objekti-subjekti dikotomiasta kansainvälisessä oikeudessa sekä dikotomian suhteesta vähemmistöihin ja alkuperäiskansoihin *Meijknecht* 2001 s. 46-63.

113 *Higgins* 1995 s. 49: “It is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one), there are a variety of participants, making claims across State lines, with the object of maximizing various values. Determinations will be made on those claims by various authoritative decision-makers, Foreign Office Legal Advisers, arbitral tribunals, courts. Now, in this model, there are no ‘subjects’ and ‘objects’ but only participants.”



Tanja Joonas

Näin ollen alkuperäiskansoilla tai henkilöillä ei ole tosiasiallista mahdollisuutta valittaa, vaikka valtio ei ole täyttänyt ILO 169 -sopimuksen velvoitteita.<sup>114</sup> Sopimukseen liittyy valvontamekanismi, jota käsittelemme tarkemmin jaksossa 4.5.

### 4.3 Soveltaminen ryhmien tasolla

ILO 169 -sopimuksen soveltamisalaa on syytä tarkastella aluksi ryhmätasolla. Kyseinen sopimus ei kokonaisuudessaan koske alkuperäiskansoja vain ryhmänä, vaan sillä on osin, kuten edellä havaittiin, myös yksilötasolle meneviä vaikutuksia. Sopimuksen soveltamisalaa määrittelevässä artiklassa 1 ei kuitenkaan kuvata sopimuksen objekteja tai subjekteja, vaan niitä (historiallisia) lähtökohtia, joiden perusteella sopimuksen kohteet määräytyvät.

Artiklan 1 mukaan sopimus koskee:

- a) niitä itsenäisissä maissa eläviä heimokansoja, jotka eroavat selvästi maan muista väestöryhmistä sosiaalisten, kulttuuristen ja taloudellisten olojensa puolesta ja joiden asema määräytyy kokonaan tai osittain niiden omien tapojen tai perinteiden tai erityislainsäädännön mukaan;
- b) niitä itsenäisissä maissa eläviä kansoja, joita pidetään alkuasukkaina, koska
  - he polveutuvat väestöstä, joka maan valloituksen tai asuttamisen tai nykyisten valtionrajojen muodostumisen aikaan asui maassa tai sillä maantieteellisellä alueella, johon maa kuuluu, ja
  - jotka oikeudellisesta asemastaan riippumatta ovat säilyttäneet kokonaan tai osittain omat sosiaaliset, taloudelliset, kulttuuriset ja poliittiset instituutiot.
2. Määriteltäessä ryhmät, joihin tämän yleissopimuksen määräyksiä sovelletaan, on olennaisena perusteena pidettävä sitä, että kansa pitää itseään alkupe-  
räis- tai heimokansana.
3. Tässä yleissopimuksessa käytettävää ilmausta ”kansat” ei ole tulkittava siten, että sillä olisi vaikutuksia niihin oikeuksiin, joita tähän ilmaisuun saattaa liittyä kansainvälisen oikeuden mukaan.

ILO 169 -sopimusta koskevan oppaan<sup>115</sup> mukaan alkuperäiskansan käsite edellyttää historiallista jatkuvuutta tietyn alueen alkuperäisen väestön ja niiden henkilöiden välillä, jotka nyt pitävät itseään tämän väestön jälkeläisinä.<sup>116</sup> Alkuperäiskansan kriteerit ratkaistaan yleensä ns. itseidentifikaatioperiaat-

114 Ks. tarkemmin *International Labour Office* 2000 s. 76–77.

115 Oppaassa käydään läpi ILO 1989 -sopimuksen No. 169 liittyviä kysymyksiä (*International Labour Office* 2000).

116 Ks. lisää ILO 1989 -sopimuksesta ja sen artiklan 1 tulkinnasta *Thornberry* 1998 s. 1–37. Ks. myös *Thornberry* 2002.

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

teen mukaan. ILO 169 -sopimuksen artiklan 1.2 mukainen määritelmä sisältää kahden objektiivisen kriteerin lisäksi yhden subjektiivisen kriteerin. Ensimmäinen objektiivinen kriteeri on, että kansa polveutuu maan tai laajemman alueen alkuperäisestä väestöstä. Toinen objektiivinen kriteeri on, että kyseinen kansa on säilyttänyt kokonaan tai osittain omat sosiaaliset, taloudelliset, sivistykselliset ja poliittiset instituutionsa.<sup>117</sup> Ollakseen yleissopimuksessa tarkoitettu alkuperäiskansa ryhmän on täytettävä molempien edellä mainittujen objektiivisten tunnusmerkkien ohella myös määritelmän subjektiivinen kriteeri, jonka mukaan ryhmän on pidettävä itseään alkuperäiskansana. Alkuperäiskansaksi ei toisin sanoen lainsäädännössä tai muutoin tulkita ryhmää, joka ei sellaisena itseään pidä.<sup>118</sup>

Raportissaan alkuperäiskansoihin kohdistuvasta syrjinnästä,<sup>119</sup> YK:n rotusyrjinnän ja vähemmistösuojelun alatoimikunnan erikoisraportoija *José Martínez Cobo* on ehdottanut oman alkuperäiskansamääritelmänsä, johon myös usein viitataan oikeuskirjallisuudessa<sup>120</sup>. Määritelmää on käsitelty *Koivurova* edellä kirjan jaksossa 3.3.1.

Martinez Cobon alkuperäiskansamääritelmä perustuu ILO 169 -sopimuksen määritelmän tavoin tietyn alueen alkuperäisen väestön ja sen nykyisten jälkeläisten väliseen historialliseen jatkuvuuteen. Määritelmässään Martinez Cobo pyrkii selvittämään tarkemmin mitä tällä jatkuvuudella tarkoitetaan. Historiallinen jatkuvuus voi perustua yhteen tai useampaan luetelluista tekijöistä. Hänen mukaansa alkuperäiskansan tulee edelleen asuttaa ja käyttää perinteisiä alueitaan tai ainakin osia niistä. Kansalla tulee myös olla yhteinen syntyperä (geneettinen jatkuvuus) näiden perinteisten alueiden alkuperäisasukkaiden kanssa ja heillä tulee olla erityinen kulttuuri tai sen erityisiä ilmenemismuotoja, kuten muusta väestöstä poikkeava elinkeino. Kansan tulee puhua omaa kieltään ja heidän tulee ja on tullut asuttaa valtion tiettyjä alueita.<sup>121</sup>

Kansainvälisen oikeuden pysyvä tuomioistuin totesi lausunnossaan koskien kreikkalais-bulgarialaisia yhteisöjä vuonna 1930<sup>122</sup>, että ”Yhteisöjen olemassaolo on tosiasia, ei oikeus.” Yhteisön tosiasiallinen olemassaolo perustuu

117 *International Labour Office* 2000 s. 7.

118 *Myntti* 1997 s. 21

119 Study on the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, E/CN.4/Sub.2/1986/7/Add. 4, UN Publ., Sales No. 8.86.XIV.3. Ks. myös: <http://www.un.org/esa/socdev/unpfii/en/spdaip.html> [23.8.2009].

120 Ks.edellä kirjan jakso 3.3.1.

121 UN Doc. E/CN.4/Sub.2/1983/21/Add.8, E/CN.4/Sub.2/1986/7/Add. 4, UN Publ., Sales No. 8.86.XIV.3. Ks myös: <http://www.un.org/esa/socdev/unpfii/en/spdaip.html> [23.8.2009].

122 Permanent Court of International Justice, Ser. b, No.17, 1930, s. 22.

Tanja Joonas

pitkälti edellä mainittuihin objektiivisiin ja subjektiivisiin kriteereihin. Meijjnecht katsoo, että ryhmä voi tosiasiallisesti olla olemassa ilman oikeudellista tunnustusta, vaikka toisaalta tunnustuksen puuttuminen voi myöhemmin johtaa myös tosiasiallisen olemassaolon heikentymiseen. Millaisia elementtejä ryhmän muodostumiseen sitten tarvitaan? Edellä on viitattu Martinez Cobon määritelmään<sup>123</sup>. Yhteistä seuraaville määritelmille on ryhmän subjektiivinen *tahto* ja *solidaarisuus* muodostaa sellainen yhteisö.

*Capotortin* mukaan ryhmällä tulee olla tahto säilyttää kulttuurinsa, perinteensä, uskontonsa tai kielensä.<sup>124</sup> *Deschênes'n* näkemyksen perusteella ryhmän on haluttava saavuttaa tasa-arvo ja yhdenvertaisuus pääväestön kanssa sekä tosiasiallisesti että lain edessä.<sup>125</sup> ILO 169 -sopimuksen artiklassa 1 viitataan myös siihen, että [kansat, ryhmät] ”oikeudellisesta asemastaan riippumatta ovat säilyttäneet kokonaan tai osittain omat sosiaaliset, taloudelliset, kulttuuriset ja poliittiset instituutionsa.” Tätä lainattua kohtaa voi tulkita siten, että alkuperäiskansalla ei tarvitse olla esimerkiksi valtion tunnustamaa statusta, mikäli kansa muutoin täyttää artiklan 1 mukaiset kriteerit, ollakseen ILO 169 -sopimuksen soveltamisen kohde. Ongelmallisena tällaista avointa tulkintatilannetta voidaan pitää maissa, joiden alueilla asuu useita alkuperäiskansoja; esimerkiksi Kolumbiassa asuu 82 alkuperäiskansaa. Miten silloin varmistetaan, että kaikki kansat ja kansoihin kuuluvat henkilöt ovat ILO 169 -sopimuksen suojelun piirissä? Jäljempänä jaksossa 4.5 tarkastelen 1 artiklan soveltamiskäytäntöä.

ILO 169 -sopimuksen artiklassa 1.3 viitataan myös alkuperäiskansan itsemääräämisoikeuteen, toisin sanoen oikeuteen, jota alkuperäiskansoilla ei kansainvälisen oikeuden mukaan katsota olevan. Tätä näkökulmaa on pidetty myös yhtenä ILO 169 -sopimuksen heikkouksista.<sup>126</sup> Meijjnecht näkee keskustelun itsemääräämisoikeudesta liittyvän pitkälti kansainvälisen oikeuden traditioon ja edellä kuvattuun subjekti-objekti dikotomiaan.<sup>127</sup> Kysymys itsemääräämisoikeudesta on kuitenkin tärkeä lisä sopimustekstissä, sillä artikla 1.3 ei myöskään estä tämän oikeuden toteutumista, mikäli sellaiseen kehitykseen kansainvälisen oikeuden piirissä tulevaisuudessa päädytään. Subjekti-objekti keskustelusta huolimatta on huomattava, että alkuperäiskansojen erityisaseman tunnustaminen on haaste kansainväliselle yhteisölle; samalla tunnustettaisiin myös kolonialisaaion historia ja *palautettaisiin* alkuperäiskansojen itsemääräämisoikeus.

123 Ks. kirjan jakso 3.3.1.

124 *Capotorti* 1991, s. iii.

125 *Deschênes* 1985 181 §.

126 Ks. tarkemmin *Venne* 1990.

127 Ks. lisää alkuperäiskansojen itsemääräämisoikeudesta esim. *Koivurova* 2008a s. 249–269, *Koivurova* 2008b s. 1–26 ja *Lâm Clech Maivân* 2000.

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

## 4.4 Soveltaminen yksilöiden tasolla

Maailmassa arvioidaan olevan noin 350 miljoonaa alkuperäiskansoihin luokituttavaa henkilöä. Seuraavassa tarkastelen kysymystä siitä, kuka yksilötasolla kuuluu tiettyyn vähemmistöön. Tämä ratkaistaan yleensä edellä mainitun itseidentifikaatioperiaatteen mukaisesti samalla tavoin. Käytännössä periaatteen katsotaan tarkoittavan muun muassa sitä, että henkilö kuuluu tiettyyn vähemmistöön, jos hän itse tuntee kuuluvansa tähän ryhmään.<sup>128</sup> Erityisen hyvin tämä tulkinta tulee esille Kansalais- ja poliittisia oikeuksia koskevan yleissopimuksen artiklasta 27, jonka mukaan: ”Niissä valtioissa, joissa on kansallisia, uskonnollisia tai kielellisiä vähemmistöjä, tällaisiin vähemmistöihin kuuluvilta henkilöiltä ei saa kieltää oikeutta yhdessä muiden ryhmänsä jäsenten kanssa nauttia omasta kulttuuristaan, tunnustaa ja harjoittaa omaa uskontoaan tai käyttää omaa kieltään.”<sup>129</sup>

Edellä mainittu Martinez Cobon ehdotus alkuperäiskansan määritelmäksi poikkeaa ILO 169 -sopimuksen määritelmästä siinä suhteessa, että se pyrkii yksilöimään alkuperäiskansaan kuuluvan henkilön<sup>130</sup>. ”Alkuperäishenkilö” on Martinez Cobon mukaan yksilö, joka itseidentifikaation perusteella tuntee kuuluvansa alkuperäisväestöön ja jonka alkuperäisväestö tunnustaa ja hyväksyy yhdeksi sen jäseneksi.

Kansainvälisen työjärjestön oppaan<sup>131</sup> mukaan itseidentifikaatio pitää sisällään sekä objektiivisen että subjektiivisen kriteerin: ILO 169 -sopimuksen yhteydessä objektiivisella kriteerillä tarkoitetaan sitä, että alkuperäiskansan tulee täyttää artiklan 1 vaatimukset ja tunnustaa ja hyväksyä henkilöt, jotka kuuluvat tähän kansaan. Subjektiivisella kriteerillä tarkoitetaan sitä, että henkilö itse identifioi itsensä tähän ryhmään tai kansaan; tai että ryhmä itse pitää itseään alkuperäis- tai heimokansana sopimuksen edellyttämällä tavalla.

Martinez Cobon mukaan alkuperäisväestöllä on itsenäinen oikeus ja valta päättää, kuka kuuluu heidän ryhmäänsä. Myntin mukaan alkuperäiskansan ja siihen kuuluvan henkilön määritelmät eivät voi kuitenkaan poiketa toisistaan oleellisesti. Siis myös yksilötasoon tulee soveltaa samoja kriteerejä kuin ryhmätasoon. Martinez Cobon alkuperäiskansaan kuuluvan henkilön määritelmään ei ensi silmäyksellä näyttäisi sisältyvän lainkaan objektiivisia tunnus-

128 *Myntin* mukaan esimerkiksi Suomessa henkilö on suomenruotsalainen, jos hän tuntee olevansa suomenruotsalainen. Itseidentifikaatioperiaate voi myös sisältää vaatimuksen siitä, että vähemmistö hyväksyy hänet jäsenekseen. Esimerkkinä voidaan mainita, että Suomen tataarit eivät hyväksy jäsenekseen henkilöä, joka ei puhu tataarin kieltä. *Myntti* 1997 s. 18–19.

129 KP-sopimus, <http://www.finlex.fi/fi/sopimukset/sopsteksti/1976/19760008>.

130 Ks. kirjan jakso 3.3.1.

131 *International Labor Organization* 2000 s. 8.

Tanja Joona

merkkejä. Määritelmän ensimmäinen osio onkin täysin subjektiivinen. Alkuperäishenkilö on sellainen henkilö, joka itse tuntee kuuluvansa alkuperäiskansaan. Vaatimus siitä, että myös alkuperäisväestö tunnustaa ja hyväksyy tällaisen henkilön yhdeksi sen jäseneksi ei kuitenkaan enää ole subjektiivinen määrittelykriteeri. Tällä ns. objektiivisella määrittelykriteerillä Martinez Cobo tarkoittanee sitä, että valtioiden ei tulisi lainsäädännössä tai muuten omavaltaisesti yksilöidä kriteereitä alkuperäiskansaan kuulumiselle ja että kukin alkuperäiskansa ratkaisisi asian omien tapojensa ja perinteidensä mukaisesti.<sup>132</sup>

Itseidentifikaation periaate on myös sisällytetty YK:n alkuperäiskansoja koskevan julistuksen artiklaan 9, joka kuuluu:

“Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.”<sup>133</sup>

Tämä artikla antaa alkuperäiskansoille mahdollisuuden itse päättää niistä perusteista, joiden mukaan sen jäsenet valitaan. Vaikka alkuperäiskansojen omiin tapoihin ja perinteisiin pohjautuvat kriteerit eivät aina ole kirjoitettu oikeussäännöksiksi, sitovat ne alkuperäiskansaa ja sen johtajia. Varsin monella alkuperäiskansalla onkin omat määritelmänsä siitä, kuka kuuluu heidän ryhmäänsä. Myntin mukaan Pohjois-Amerikan intiaanit määrittelevät yleensä jäseniään heidän veriperimänsä mukaan.<sup>134</sup> Etnisyys periytyy heimosta riippuen joko isän tai äidin kautta. Vaatimuksena on myös yleensä, että heimon jäsenet asuvat heimonsa keskuudessa. Jos jäsen eroaa heimosta tai ei noudata heimon tapoja tai kulttuuria, menettää hän pääsääntöisesti oikeutensa intiaanina.<sup>135</sup>

Kuitenkin päätös siitä, kuka kuuluu tiettyyn alkuperäiskansaan, ei saa perustua mielivaltaan, vaan sen tulee perustua selkeisiin edellä mainittuihin tunnusmerkistöihin. YK:n alkuperäiskansajulistuksen artikla 34 edellyttää, että alkuperäiskansojen oikeudelliset tavat, perinteet, menettelytavat ja käytännöt ovat sopusoinnussa kansainvälisesti tunnustettujen ihmisoikeusnormien kanssa.<sup>136</sup> Mikäli Martinez Cobon ehdottamaa määrittelytapaa alkupe-

132 *Myntti* 1997 s. 22–23.

133 United Nations Declaration on the Rights of Indigenous Peoples at Article 9, <http://www.un.org/esa/socdev/unpfii/en/drip.html>, 17.8.2009.

134 Ks. *Myntti* 1997 s. 24, ks. myös *Canby* 1991.

135 *Myntti* 1997 s. 24.

136 YK:n alkuperäiskansajulistuksen artikla 34 kuuluu: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive.”

Lisäksi artiklassa viitataan alkuperäiskansan oikeuteen itse päättää identiteetistään ja ryh-

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

räiskansan ”itsenäinen oikeudesta ja vallasta” päättää, kuka kuuluu heidän ryhmäänsä ilman ulkopuolisten puuttumista, sovellettaisiin siten, että alkuperäiskansalla on oikeus olla hyväksymättä sellaista henkilöä jäsenekseen, joka esimerkiksi rotunsa puolesta kuuluu siihen kansaan, määritelmäehdotus olisi ongelmallinen kansainvälisten ihmisoikeusnormien valossa.<sup>137</sup>

Edellä mainittujen yleisten kansainvälisoikeudellisten ihmisoikeusnormien ja erilaisten määritelmien valossa näyttää kuitenkin siltä, että alkuperäiskansalla on *tietty* vapaus ja oikeus itse päättää identiteettikriteereistään eli alkuperäiskansaan kuulumisen perusteista. Sillä ei kuitenkaan näyttäisi olevan oikeutta *vapaasti* itse päättää, ketkä ovat alkuperäiskansan jäseniä ja ketkä eivät ole. Päätösten tulisi olla perusteltuja ja objektiivisia, ei mielivaltaisia.<sup>138</sup>

## 4.5 Soveltaminen ja ILO:n käytäntö

Kansainvälisen työjärjestön, ILO:n laatiman sopimuksen ratifointi aloittaa dialogin ja yhteistyön valtion hallituksen ja järjestön välillä. Tällä yhteistyöllä varmistetaan, että kansallinen lainsäädäntö ja käytäntö vastaavat sopimuksen sisältöä. ILO:n sopimuksia, toisin kuin monia muita kansainvälisiä sopimuksia, ei voida ratifoida varauksin, vaan se tulee hyväksyä, vahvistaa ja saattaa voimaan kokonaisuudessaan. Tämän vuoksi on tärkeää, että hallitukset, työnantajien ja -tekijöiden edustajat ja myös alkuperäiskansat ymmärtävät sopimuksen sisällön merkityksen. Ennen sopimuksen ratifointia onkin toivottavaa, että mainittujen tahojen välillä käydään vuoropuhelua, jotta sen soveltaminen käytäntöön eli implementointi varmistettaisiin parhaalla mahdollisella tavalla.<sup>139</sup>

ILO:lla on lukuisia mahdollisuuksia tarkastella ja valvoa, miten sen laatimia sopimuksia sovelletaan käytäntöön. Yleensä prosessi lähtee valtion ja ILO:n valtion välisestä dialogista. Kun sopimus on ratifioitu, valtio on velvollinen lähettämään säännöllisiä raportteja ILO:lle siitä, miten sopimus on implementoitu kyseisessä maassa. Näiden raporttien tulee sisältää tietoa sekä sopimuksen soveltamisesta käytäntöön että lainsäädännöllisistä muutoksista. Raportit tulee lähettää ensin työnantajien ja työntekijöiden edustajille kommentoitavaksi ennen niiden lähettämistä ILO:lle. Vahvempi valvontakeino on valitus, jolla valtio voi saattaa toisen valtion toiminnan kansainvälisesti tutkittavaksi. Käytännössä valtiovalituksen tekemisen kynnyks on kuitenkin korkea.<sup>140</sup>

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mänsä jäsenistä: ”1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions...”.

137 *Myntti* 1997 s. 24.

138 *Myntti* 1997 s. 26–27.

139 *International Labour Organisation* 2000 s. 70.

140 *Hakapää* 2003 s. 156–161.

Tanja Joonas

ILO:ssa raportit tutkii asiantuntijakomitea (Committee of Experts on the Application of Conventions and Recommendations). Tämä komitea muodostuu 20:stä itsenäisesti toimivasta asiantuntijasta, lähinnä juristeista, ja se koostuu vuosittain. Tarkastellessaan valtioiden lähettämiä raportteja asiantuntijakomitea voi tehdä niistä joko huomioita (Observations)<sup>141</sup> tai suoria pyyntöjä (Direct requests)<sup>142</sup>.

ILO:n asiantuntijakomitean tekemistä huomioista ja suorista pyynnöistä käy ilmi, että ILO 169 -sopimuksen ratifioineissa valtioissa käytännön ongelmakohdat liittyvät hyvin moninaisiin asioihin, eivätkä vain tiettyyn sopimuksen artiklaan. Kuitenkin eniten keskustelua ennen sopimuksen ratifiointia ja sen jälkeen lienevät aiheuttaneet sen maa-oikeusartiklat 13–19. Myös sopimuksen artiklan 1 kohdalla on epäselvyyttä, sillä käytännön esimerkit osoittavat, että aina ei ole täyttä varmuutta siitä, keihin henkilöihin sopimusta tulisi soveltaa, jotta nämä henkilöt voisivat olla tietoisia heitä koskevasta sopimuksesta ja siihen liittyvästä lainsäädännöstä. Tämä ihmisoikeuskysymys käy ilmi erityisen hyvin asiantuntijakomitean suorassa pyynnössä Bolivialle 1995:

”... The Committee would be grateful if the Government would indicate the manner in which recognition is given to indigenous communities and individuals so that they can benefit from then legislation which applies to them.”<sup>143</sup>

Myös ILO:n oppaassa vuodelta 2000 mainitaan, että on tärkeää tietää, ketkä ovat sopimuksen edunsaajia.<sup>144</sup> Tässä yhteydessä viitataan itseidentifikaation merkitykseen artiklan 1 (2) kohdan perustavanlaatuisena kriteerinä. Seuraavassa esitetään muutamia esimerkkejä eri maista artiklaan 1 liittyen. Niissä esiin nousevat edellä mainitut itseidentifikaatioon liittyvät kysymykset, mutta myös muut esimerkiksi väestölaskennalliset ongelmat.

*Argentiinan* kohdalla vuonna 2003 ja myöhemmin uudestaan vuonna 2005 asiantuntijakomitea toteaa, että maan lainsäädäntö ei itseidentifikaation osalta täytä ensimmäisen artiklan vaatimuksia. Asiantuntijakomitea kehottaa tästä syystä hallitusta suorittamaan väestölaskennan ja suosittelee, että henkilöt, joita

141 Huomiot keskittyvät yleensä vakavampiin ja pidemmälle aikavälille sijoittuviin tapauksiin, joissa valtiot ovat epäonnistuneet täyttämään sopimuksen vaatimia veloitteita tai asioihin, joissa ei ole tapahtunut toivottavaa kehitystä. Huomiot julkaistaan asiantuntijakomitean vuosittaisessa raportissa.

142 Suorat pyynnöt liittyvät enemmän yksittäisiin kysymyksiin, joista asiantuntijakomitea pyytää lisäselvityksiä tai tarkennuksia. Näitä pyyntöjä ei periaatteessa julkaista, mutta käytännössä ne löytyvät internetistä.

143 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

144 International Labor Organization 2000 s. 8: It is important to know to whom the Convention is applicable, and who its beneficiaries are.

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

asia koskee, otetaan mukaan laskennan valmisteluun.<sup>145</sup>

Vuonna 1995 *Bolivian* kohdalla asiantuntijakomitea toteaa, että hallitus on suorittanut Boliviassa väestölaskennan YK:n kehitysohjelman avustuksella ja asiantuntijakomitea pyytääkin tämän laskennan tuloksia. Ja aikaisemmin, vuonna 1994 asiantuntijakomitea oli pyytänyt hallitukselta tietoa kansallisen rekisterin myöntämistä henkilökorteista, joissa etusija annetaan alkuperäisväestöön kuuluville ja maatyöläisille. Asiantuntijakomitea kysyy, eroaako alkupe- räisväestöön kuuluvan henkilön pääsy kansalliseen rekisteriin millään tavalla maatyöläisen pääsystä. Erityisesti kysytään, millaisia kriteerejä rekisteriin pääsy edellyttää.<sup>146</sup> Hallituksen vastauksesta käy ilmi, että kansallinen rekisteri ei erottele henkilöä alkuperäiskansastatuksen perusteella. Asiantuntijakomitea nostaa esille kysymyksen, millä tavoin ILO 169 -sopimuksen kohteena olevat henkilöt Boliviassa voivat hyötyä sopimuksen sisällöstä, jos heillä ei ole tähän liittyvää statusta.<sup>147</sup>

*Kolumbian* hallitus on esittänyt raportissaan vuonna 1994 hyvinkin tarkkoja lukuja alueellaan asuvasta alkuperäiskansaväestöstä. Vuonna 1994 Kolumbiassa arvioidaan olevan 575 000 alkuperäiskansoihin kuuluvaa henkilöä. Asiantuntijakomitea pyytääkin lisäselvitystä siihen, mihin luvut perustuvat ja miten itseidentifikaatiota toteutetaan käytännössä. Vuonna 1996 Kolumbian hallitus selventää, että vuoden 1993 väestölaskennassa oli erityinen alkuperäiskansoja koskeva osatekijä, joka piti sisällään sen, että henkilön tuli olla Amerintiaalaista syntyperää ja hänellä tuli olla tunne kuulumisesta alkuperäiskansayhteisöön.<sup>148</sup> Vuonna 1999 hallitus arvioi Kolumbian alkuperäiskansaväestön lukumääräksi 603 000 ja vuonna 2001 621 186 henkilöä.<sup>149</sup> Hallitus esittää sopimuksen koskevan yhteensä 82:ta Kolumbian rajojen sisäpuolella asuvaa kansaa.<sup>150</sup>

Vuosina 1997 ja 1999 suorissa pyynnöissä asiantuntijakomitea toteaa, että *Costa Rican* alkuperäiskansalain (Indigenous Act) mukaan ”henkilöt ovat alkupe- räisasukkaita mikäli he muodostavat etnisen ryhmän, joka polveutuu suoraan esi-Kolumbian sivilisaatioista, ja jotka säilyttävät omaa identiteettiään”.<sup>151</sup>

145 CEAR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples Convention, 1989, Argentina, Ratification: 2000, Submitted: 2003.

146 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1994.

147 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

148 CEACR: Individual Direct Request concerning Convention no. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1996.

149 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 1999.

150 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia Ratification: 1991, Submitted: 2001. CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia. Ratification: 1991, Submitted: 1994 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Colombia. Ratification: 1991, Submitted: 1994 CEACR: Individual Direct Request concerning Convention no. 169, Indigenous and Tribal Peoples, 1989 Colombia. Ratification: 1991, Submitted: 1996.

151 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal



## Tanja Joonas

asiantuntijakomitea huomauttaa kuitenkin, että tämä määritelmä ei sisällä itseidentifikaatiota, minkä johdosta laki ei tältä osin vastaa artiklan 1 vaatimuksia. Vuonna 2000 Costa Rican hallitus kuitenkin antaa ymmärtää, että sen lainsäädäntö vastaisi artiklan 1 vaatimuksia ja viittaa em. lauseeseen.<sup>152</sup> Myöhemmin vuonna 2001 asiantuntijakomitea toteaa, että lakiehdotuksessa No. 12032, kohdassa 4 (a) todetaan, että jokainen alkuperäiskansa määrittelee autonomisesti ketkä he katsovat kansansa jäseniksi. Asiantuntijakomitea pyytää lisäselvityksiä em. asian soveltamisesta käytäntöön sen jälkeen, kun lakiehdotus on tullut hyväksytyksi.<sup>153</sup>

Hondurasin hallituksen mukaan ILO 169 -sopimus koskee *Hondurasissa* kaikkia sellaisia henkilöitä, jotka kuuluvat alkuperäisväestöön ja erityisesti sellaisia henkilöitä, jotka kuuluvat CONPAH-järjestöön<sup>154</sup>. Asiantuntijakomitea pyytää hallitusta selvittämään sitä, millä tavoin sopimusta sovelletaan sellaisiin henkilöihin, jotka eivät ole järjestön jäseniä, mutta jotka ovat ILO 169 -sopimuksen subjekteja. Lisäksi pyydetään selvitystä itseidentifikaation toteutumisesta käytännössä.<sup>155</sup>

Edellä mainituista tapauksista voidaan muun muassa todeta, että ILO 169 -sopimuksen artiklaan 1 liittyy ongelmakohtia sopimuksen jo ratifioineissa maissa. Tilanteet ovat erityisen hankalia maissa, joissa on useita alkuperäiskansoja. Myös Pohjoismaisella tasolla puhutaan yleisesti yhdestä Saamen kansasta, mutta kuitenkin yhtenäinen alkuperäiskansamääritelmä puuttuu. Hondurasin tapaus taas osoittaa, että henkilön määrittely alkuperäiskansaan tai vähemmistöön kuuluvaksi sen mukaan, mihin ”rekisteriin” tai ”järjestöön” hän kuuluu, on ongelmallinen monessa suhteessa.

Lähtökohtaisesti voidaan viitata YK:n ihmisoikeuksien julistuksen artiklan 20 kohtaan 1, jonka mukaan kaikilla on oikeus rauhanomaiseen kokoontumis- ja yhdistymisvapauteen. Kyseisen artiklan kohdan 2 mukaan ketään älköön pakotettako liittymään mihinkään yhdistykseen. Ihmisoikeuksien julistuksen valossa rekisterit ovat ongelmallisia. Myös monien maiden lainsäädäntö kieltää erottamasta etnisiä ryhmiä toisistaan väestökirjanpidossa tai muutoin erottelemasta kansalaisia etnisen, kielellisen tai uskonnollisen alkuperän perusteella.<sup>156</sup>

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Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 1999.

152 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 2000.

153 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Costa Rica Ratification: 1993, Submitted: 2001.

154 Confederation of Autochthonous Peoples of Honduras.

155 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras Ratification: 1995, Submitted: 2000.

156 Ks. Kaikkinaisen rotusyrjinnän poistamista käsittelevän komitean suositus (käsitelty 25.–26.2.2009) <http://formin.finland.fi/public/download.aspx?ID=41404&GUID={B3D158E8-ADCD-488E-B213-3F35955A6DB7}>.

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

Ihmisoikeusjulistuksen kokoontumis- ja yhdistämisvapautta vastaavia pykäläiä löytyy myös kansalais- ja poliittisia oikeuksia koskevasta kansainvälisestä yleissopimuksesta (22 artikla), Euroopan ihmisoikeussopimuksesta (11 artikla) sekä YK:n alkuperäiskansojen julistuksesta (9 artikla). Myös Suomessa kokoontumis- ja yhdistymisvapaus on kirjattu perustuslain 13 §:ään. Rekisteri alkuperäiskansan jäsenistä voi olla ongelmallinen myös siitä syystä, että kaikki henkilöt eivät halua jostain syystä kuulua tällaiseen rekisteriin. Esimerkiksi toisen maailmansodan kaltaisten tapahtumien seurauksena oman etnisyyden korostaminen voi olla vaikeaa.<sup>157</sup> Rekisteriin kuuluminen tai siihen kuulumattomuus eivät voikaan sulkea pois ILO 169 -sopimuksen suomia oikeuksia, mikäli henkilö muutoin täyttää artiklan 1 kriteerit.

*Meksikon* kohdalla vuonna 1993 asiantuntijakomitea tekee huomion, jonka mukaan alkuperäiskansakielen käyttäminen on keskeinen tekijä määrittelyssä sitä, kuuluuko henkilö alkuperäiskansaan. Kieli on kuitenkin monessa suhteessa ongelmallinen, mikäli sen katsotaan olevan tärkein seikka alkuperäiskansaan kuuluvaa henkilöä määrittelyssä. Ensinnäkin, kielen voi oppia kuka tahansa ja koska tahansa. Kielen voi myös kadottaa; toisilla kieli on voinut kadota esi-vanhempien ketjussa aikaisemmin, toisilla kieli katoaa nyt, tässä päivässä. ILO 169 -sopimuksen mukaan kieli voi olla yksi ”alkuperäisyyden” elementeistä, mutta se ei ole ainoa.<sup>158</sup> Kommentissaan Meksikolle asiantuntijakomitea korostaa myös itseidentifikaation merkitystä.<sup>159</sup>

Kieleen perustuvaa saamelaismääritelmää on käsitelty useasti myös Suomen kohdalla määräaikaisraporteissa kaikkinaisen rotusyrjinnän vastustamista koskevalle komitealle. Viimeisessä suosituksessaan 5.3.2009 (käsitelty 25.–26.2.2009) komitea panee merkille sopimusvaltion raportin 74 ja 75 kohdassa annetut selvitykset ja komitean kysymyksiin annetut vastaukset, joissa todetaan, että saamelaiskäräjistä annettua lakia ei ole tällä hetkellä aiheellista muuttaa ja että saamelaiskäräjien mielestä ”saamelaisten” määritelmästä olisi keskusteltava pohjoismaisella tasolla yhteisen määritelmän aikaansaamiseksi. Komitea toistaa kuitenkin käsityksensä, että sopimusvaltion katsantokanta on liian rajoittava sen määrittämiseen, ketä voidaan pitää saamelaisena ja siten saamelaisten eduksi säädetyn lainsäädännön soveltamisalaan kuuluvana siten kuin saamelaiskäräjistä annetussa laissa säädetään ja korkein hallinto-oikeus on tätä lakia tulkinnut.<sup>160</sup> Komitea toistaa suosituksensa siitä, että sopimusvaltion tulisi antaa nykyistä enemmän asiaankuuluvaa merkitystä kyseis-

157 Ks. tarkemmin *Joona* J. vuosi 2006 s. 367–381. Ks. myös *Myntti* 1997 s. 60–69.

158 Ks. aikaisemmin ILO 1989 -sopimuksen (No.169) artikla 1.

159 CEACR: Individual Direct request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 MexicoRatification: 1990, Submitted: 1993.

160 Kirjan jaksoissa 2,3 ja 8 käsitellään tarkemmin saamelaismääritelmää kansallisessa lainsäädännössä. Ks. erityisesti laki saamelaiskäräjistä (17.7.1995/974) 3 §.

Tanja Joonas

ten henkilöiden itseidentifikaatiolle, kuten komitean yleisessä suosituksessa nro 8 (1990) esitetään.<sup>161</sup> Mikäli Suomi ratifioi ILO 169 -sopimuksen, asia saattaa tulla asiantuntijakomitean selvityspyyntöjen kohteeksi, kuten jäljempänä olevat esimerkkitaupaukset osoittavat.

*Perun* kohdalla vuonna 1999 asiantuntijakomitea pyytää Perun hallitusta ilmoittamaan tarkempia lukuja alkuperäiskansoihin kuuluvien henkilöiden lukumäärästä. Komitean mukaan vuoden 1993 väestölaskennasta ei käy ilmi, että Perussa olisi tehty eroa alkuperäiskansoihin kuuluvien henkilöiden ja maalais-työläisten välillä. Asiantuntijakomitea toteaa myös, että alkuperäiskansayhteisöihin kuuluvien henkilöiden ja maalaistyöntekijöiden lukumäärä on verrattain alhainen verrattuna koko maan väestöön. Komitea ehdottaa, että Perun hallitus harmonisoi kriteerit koskemaan niitä henkilöitä, joita ILO 169 -sopimusta sovelletaan. Tässä yhteydessä tulisi erityisesti huomioida henkilön polveutuvuus ja itseidentifikaatio. Alkuperäiskansojen jäseniksi määrittäminen on erityisen vaikeaa Perussa siksi, että koko maassa on 24 miljoonaa asukasta, joista yli 9 miljoonaa on alkuperäiskansoihin kuuluvaa henkilöä. Amazonian alueella elää 42 eri etno-kielellistä ryhmää ja tämä alue kattaa 62 prosenttia maan pinta-alasta. Alueella puhutaan pelkästään 40:tä eri kieltä, jotka kuuluvat 16 eri kieliryhmään. Kaikki näistä ryhmistä eivät myöskään itse selkeästi määrittele olevansa alkuperäisyhteisöjä. Asiantuntijakomitea toteaa asian olevan erittäin vaikeaa, koska erilaisia määrittelytapoja on useita ja erilaisia ryhmiä on paljon: maalaistyöläisiä, alkuperäiskansayhteisöjä (indigenous and native populations), sellaisia jotka elävät kaukana ylämailla, sademetsissä ja sademetsien reuna-alueilla. Tämän vuoksi asiantuntijakomitea pyytää kriteerien harmonisointia.<sup>162</sup>

Vuonna 1993 suorassa pyynnössä asiantuntijakomitea toteaa, että *Norjassa* on pidetty vuonna 1970 väestölaskenta saamelaisväestön laskemiseksi. Vuonna 1993 hallitus arvioi Norjan alueella elävän noin 40 000 saamelaista. Asiantuntijakomitea tiedustelee hallitukselta, onko Norjassa aikeita järjestää tulevaisuudessa uusi väestölaskenta, joka sisältäisi erityisen alkuperäiskansoja koskevan elementin. Vuonna 1995 Norjan hallitus vastaa, että väestölaskennalle ei ole tulevaisuudessa tarvetta, koska saamelaiskäräjävaaleissa saavutettiin korkea osallistumisprosentti (high level of participation), ja että ne jotka äänestävät saamelaiskäräjävaaleissa, voidaan identifioida.

161 <http://formin.finland.fi/public/download.aspx?ID=41404&GUID={B3D158E8-ADCD-488E-B213-3F35955A6DB7}>. [25.8.2009]. Yleisen suosituksen mukaan: "The Committee on the Elimination of Racial Discrimination, having considered reports from State parties concerning information about the ways in which individuals are identified as being members of a particular racial or ethnic groups or groups, Is of the opinion that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned." General Recommendation No. 08: Identification with particular racial or ethnic group. [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)\3ae0a87b5bd69d28c12563ee00](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)\3ae0a87b5bd69d28c12563ee00).

162 CEACR: Individual Direct Request concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Peru Ratification: 1994, Submitted: 2006 CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Peru Ratification: 1994, Submitted: 1999

## 4 ILO:n vuoden 1989 alkuperäiskansasopimuksen nro 169 soveltaminen

Norjan ulkoministeriön mukaan saamelaisten lukumääräksi voidaan arvioida jopa 75 000 henkilöä, mutta arviot vaihtelevat sen mukaan, mitä kriteerejä määrittelyssä käytetään (geneettinen perimä, äidinkieli, henkilökohtaiset toiveet, jne.) Viralliset väestölaskennat eivät ole ministeriön mukaan antaneet luotettavaa tulosta. Mielenkiintoista on se, että näitä erilaisia *arvioihin* perustuvia lukuja kuitenkin käytetään raportoinnissa ILO:lle. Ulkoministeriön mukaan assimilaatioprosessista johtuen kaikki saamelaiset eivät ole halunneet tai voineet tunnustaa etnistä identiteettiään.<sup>163</sup> Tästä johtuen saamelaiskäräjät kussakin Pohjoismaassa ovat muodostaneet omat kriteerinsä saamelaisen määrittämiseksi. Näissä määrittelyissä käytetään objektiivista ja subjektiivista kriteeriä. Saamelaismääritelmään liittyvät kysymykset ovat olennaisia ILO 169 -sopimuksen ratifioinnin kannalta. Lyhyesti voidaan todeta, että yhtenäisen saamelaismääritelmän aikaansaanti voisi helpottaa Suomen ja Ruotsin ratifiointiprosesseja. ILO 169 -sopimuksen näkökulmasta asia voidaan ymmärtää niin, että Suomen ja mahdollisesti muidenkin Pohjoismaiden saamelaismääritelmä tulisi olla yhdenmukainen niiden kriteerien kanssa, jotka ILO 169 -sopimuksen artiklassa 1 esitetään.

Norjan saamelaiskäräjien virallisten internet-sivujen mukaan vuonna 1989 rekisteröitiin 5497 saamelaista saamelaiskäräjien vaaliluetteloon.<sup>164</sup> Vuonna 2001 oli merkitty rekisteriin 9923 henkilöä ja vuonna 2005 vastaavasti 12 538 henkilöä.<sup>165</sup> Norjan hallitus on kuitenkin ilmoittanut ILO:lle huomattavasti suuremman arvion saamelaisten lukumäärästä (40 000 henkilöä vuonna 1993). Vuonna 1995 hallitus viittaa saamelaiskäräjävaalien ”korkeaan osallistumisprosenttiin” (esimerkiksi vuonna 1989 vain kaikki vaaliluetteloon merkittyä 5497 henkilöä). Jos ILO 169 -sopimus koskee Norjassa hallituksen ilmoituksen mukaan vain saamelaiskäräjien vaaliluetteloon merkittyjä henkilöitä, voidaan aiheellisesti kysyä, mikä on jäljellä olevien henkilöiden asema, kun kaiken kaikkiaan arvioidaan saamelaisväestöä olevan Norjassa 50 000–75 000 henkilöä. Millä tavalla ILO 169 -sopimuksen antama suoja tällaisille vaaliluettelon ulkopuolisille henkilöille varmistetaan?

Samoin kuin Hondurasin ja Norjan kohdalla, samalla tavalla Suomen kohdalla voidaan tietenkin kysyä, että miten varmistetaan, että henkilöt, jotka eivät kuulu saamelaiskäräjien vaaliluetteloon, mutta jotka täyttäisivät ILO 169 -sopimuksen artiklan 1 mukaiset alkuperäiskansan kriteerit henkilötasolla, ovat Suomen valtion mahdollisesti tekemän ratifioinnin jälkeen ILO 169 -sopimuksen suojan piirissä?

163 Norjan ulkoministeriö, saamelaisasiat, <http://odin.dep.no/odin/engelsk/norway/history/032005-990463/index-dok000-b-n-a.html> [20.11.2006].

164 Valemantalet <http://www.samediggi.nodfault.asp?selNodelID=110&lang=no> [28.11.2003].

165 Valemantalet <http://www.samediggi.no/Artikkel.asp?MIId1=3&MIId2=300&AIId=236&back=1> [20.11.2006].

Tanja Joona

## 4.6 Lopuksi

Edellä on käsitelty ILO 169 -sopimuksen 1 artiklaan liittyviä näkökohtia kansainvälisen oikeuden, oikeuskirjallisuuden sekä Kansainvälisen työjärjestön, ILO:n luomien käytäntöjen valossa. Erityisesti asiantuntijakomitean kommentoissa näkyy artiklan 1.2 mukaisen itseidentifikaation merkityksen korostuminen. Samanlainen lähtökohta alkuperäiskansan määrittelylle löytyy myös YK:n vuoden 1966 KP-sopimuksen artiklasta 27. Vastikään itseidentifikaation olennaiseen merkitykseen on myös viitattu kaikkinaisen rotusyrjinnän poistamista koskevan komitean loppuraportissa 5.3.2009, ja aikaisemmin sen antamassa yleisessä suosituksessa numero VIII vuodelta 1990<sup>166</sup>.

ILO 169 -sopimuksen kannalta ei ole niinkään kysymys alkuperäiskansoihin kuuluvien henkilöiden määrittelystä, vaan sellaisten henkilöiden ”löytämistä”, joita kyseinen sopimus koskee. Ihmisoikeuksien toteutumisen kannalta on tärkeää, että henkilö tietää ILO 169 -sopimuksen koskevan itseään. Artiklan 1 sisältö asettaakin omat – joskin tulkinnanvaraiset – kriteerinsä sille, keihin sopimusta sovelletaan. Vaikka edellä tulkinnan tueksi on tunnistettu yleisiä huomionarvoisia alkuperäiskansan ja -henkilön määritelmiä, on kuitenkin huomattava, että vain ILO:n kyseessä olevalla sopimustekstillä on Suomen ratifiointin jälkeen oikeudellinen velvoittavuus.

ILO 169 -sopimusta tarkasteltaessa on myös muistettava, että se säätelee elämän perusasioita laidasta laitaan: terveydenhoitoa, sosiaaliturvaa, työttömyyttä, koulutusta ja perinteisten elinkeinojen harjoittamista. Nämä asiat jäävät kuitenkin valitettavan usein sopimukseen liittyvien vaikeiden maa-oikeuskysymysten varjoon. Vaikka on selvää, että maa-oikeuksien tunnustaminen on lähtökohta monien muiden oikeuksien toteutumiselle, olisi kansallisestikin tiedettävä, keille ylipäätään alkuperäiskansaoikeudet kuuluvat. Edellä kuvattu käytäntö osoittaa, että Suomen mahdollisesti ratifioitua ILO 169 -sopimuksen, voidaan vallitsevaa käsitystä alkuperäiskansaoikeuksien soveltamiskohteenä olevista saamelaisista etenkin yksilötasolla joutua vielä tarkentamaan.

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166 Kaikkinaisen rotusyrjinnän poistamista käsittelevän komitean suositus 25.–26.2.2009, <http://formin.finland.fi/public/download.aspx?ID=41404&GUID={B3D158E8-ADCD-488E-B213-3F35955A6DB7}>.

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# The Historical Basis of Saami Land Rights in Finland and the Application of ILO Convention No. 169

Tanja Joona\* and Juha Joona\*\*

## 1. Introduction

The contemporary knowledge of the historical land rights of the indigenous peoples in Finland has been strongly based on research material ever since the 17th century. There has, however, been a gap between the knowledge itself and political decision makers, and this gap has made it very difficult to proceed with the various negotiations within this field. One of these negotiations is related to the ratification of International ILO Convention No. 169 concerning the rights of indigenous peoples. The last few decades have shown a considerable number of attempts to clarify the issue, but no significant steps forward have been taken. This article introduces a few important concepts: *Lapp*, *Lapland border*, *Lapp villages*, *Lapp tax lands*, which all have their roots in long-ago history. These concepts, however, are the keys for understanding the complex situation of our present-day relationship with the international commitments to which Finland is bound. This article tries to address this challenge and evaluates the historical information in the light of the provisions of ILO Convention No. 169.

This article places emphasis on a few essential questions in regard to the historical background of the indigenous Saami people<sup>1</sup> and the use

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<sup>1</sup> The term Saami is understood in Finland as a person who has the right to vote in the elections of the Saami parliament. Saami is only a person whose name is marked into the Saami Parliament's voting register. In practice, these are the people (and their descendants) who claimed in the interview study in 1962 that his, her, or at least one of the grandparent's first-learned language was Saami. In this article, the word "Saami" not only refers to those

and discussion of their land rights in Finland. This article deals with those events and basis which should be taken into consideration when pursuing a legislative model for Finland to proceed with the ratification of the ILO Convention.<sup>2</sup>

This article has been divided into two parts. The first part examines the historical aspects of the Saami land rights in Finland, and the second part emphasizes such rights in connection with ILO Convention No. 169, in particular Article 14. In more detail, the first part (chapters 2–3) highlights the time period when those Saami rights were the strongest, in the 17th and 18th centuries, the subjects or the right holders of these rights, and the area in question, which are all also relevant in the context of the Convention, especially in Article 14, in dealing with the land rights of the indigenous peoples.

The legal-historical part of the article concentrates on the time period when the part of Lapland that is currently situated on the Finnish side was still mainly inhabited by indigenous peoples, or *Lapps*, as they were called at that time. This article examines the land use of the *Lapps*, land divisions and also how the right of the *Lapps* to the lands they used was understood at that time. Furthermore the article examines how the content of this right has been interpreted in modern times. In this respect the starting point is in the national legislation and property law. In the case of ILO convention No. 169, the content and the interpretation of the treaty takes the starting point from the human rights perspective.

It is considered that the State has obligations towards its citizens through the human rights instruments to which it is bound. According to the Minister of Justice in Finland, Finland is encountering pressure from both inside and outside the country to ratify the Convention, and the State also has the reputation within the international society as a country providing good human rights for all of its citizens.<sup>3</sup> However, at the moment according to

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people, but all the people who are the descendants of the indigenous people of northern Finland and who can be considered as the right holders of the land and water rights that were held by the Lapps in the 17th and 18th centuries. In this article, “Saami” is not understood as a definition for the purposes for the Act of Saami Parliament, but as a subject of rights in real estate law. For the interview study made in 1962, see: Nickul, Suomen saamelaiset vuonna 1962. Selostus Pohjoismaiden saamelaisneuvoston suorittamasta väestötutkimuksesta. Helsinki 1968; Act on Saami Parliament 17.7.1995/974.

<sup>2</sup> ILO Convention No. 169 from 1989 concerning Indigenous and Tribal Peoples in Independent Countries. Place: Geneva, Session of the Conference: 76, Date of adoption: 27 June 1989. Came into force 05 September 1991. Hereinafter ILO Convention No. 169 or Convention No. 169.

<sup>3</sup> There are different reasons for States to change their human rights practices. In fact, the process of human rights change almost always begins with some instrumentally or strategically



the Minister of Justice for Finland, the ratification of Convention No. 169 is not high on the agenda of the Ministry. New Parliamentary elections will be arranged in Spring 2011, which might shed some new light on the issue. The new Government will perhaps have different views on the issue.

ILO Convention No. 169 has been ratified by 22 States, including two Nordic countries, Norway and Denmark.<sup>4</sup> It has been noted that the main obstacles for the ratification in Finland, like for many other countries, are the obligations laid down in the land right articles of the Convention. According to Article 14, the *rights of ownership and possession* of the peoples concerned to their traditionally occupied lands shall be recognized. So far the Convention has acted only as a guideline for the Finnish State to improve the legislation concerning the Saami rights, mainly dealing with linguistic and cultural rights.<sup>5</sup>

The second part of this article analyses the knowledge of the historical land rights in connection with Convention No. 169 and in some points the text also refers to the Draft Nordic Saami Convention,<sup>6</sup> since similar challenges can be found from the draft, especially in regard to the subjects of the Draft Convention and the situation related to land rights. Convention No. 169 has often been accused of being very ambiguous and multidimensional. It leaves many doors open and it is left to the ratifying States to choose the [best] practices to implement the Convention. This is highlighted in Article 34 of ILO

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motivated adaptation by national governments to growing domestic and transnational pressures. There are examples where national governments changed their human rights practices only to gain access to the material benefits of foreign aid or to be able to stay in power in the face of strong domestic opposition. See more: Thomas Risse and Kathryn Sikkink, "The socialization of international human rights norms into domestic practices: Introduction" in Risse, Ropp and Sikkink (eds.) *The Power of Human Rights*, Cambridge University Press (1999), 9–10.

<sup>4</sup> Others: Argentina 2000, Bolivia 1991, Brazil 2002, Colombia 1991, Chile 2008, Costa Rica 1993, Dominica 2002, Ecuador 1998, Fiji 1998, Guatemala 1996, Honduras 1995, Mexico 1990, Netherlands 1998, Paraguay 1993, Peru 1994, Bolivarian republic of Venezuela 2002, Nepal 2007 and Spain 2007, Central African Republic 2010, Nicaragua 2010.

<sup>5</sup> Vihervuori Pekka, "Maahan, veteen ja luonnonvaroihin sekä perinteisiin elinkeinoihin kohdistuvat oikeudet saamelaisten kotiseutalueella", *Oikeusministeriön yleisen osaston julkaisu* 3. Helsinki (1999), 6.

<sup>6</sup> The Draft Nordic Saami Convention is a Convention submitted by an expert Committee to the Nordic Governments and the Saami Parliaments in October 2005, the text in English can be found at: <http://www.regjeringen.no/upload/BLD/Nordic%20Sami%20Convention.pdf> (accessed 1 March 2011). See more: Koivurova Timo, "The Draft Nordic Saami Convention: Nations Working Together" 10 *International Community Law Review* 3 (2008): 279–293; Mattias Åhren, Martin Scheinin, John B. Henriksen, "The Nordic saami Convention: International Human Rights, Self-determination, and other Central Provisions" 3 *Galdu Cala: Journal of Indigenous Peoples Rights* (2007).

Convention No. 169, which states that “the nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country”.

Within this context two research questions can be raised: How should we take into consideration the historical-legal information of the Saami land ownership rights, and what would the land right provisions of the Convention mean in practice, especially in the Finnish situation?

## 2. *Historical Background with emphasis on some Conceptual Definitions*

### 2.1. *Lapp*

Indigenous peoples of Northern Fennoscandia were previously called *Lapps*. *Lapp* is an old exonym.<sup>7</sup> Historically, it is closely associated with the term *Lapland* (Lapponia in Latin) used of the area. In Finnish and closely related languages the word “lappalainen” (Lapp) was used of not only the Saami but also of peoples further to the North such as Dvina or Russian Karelians and of people living in further away settled areas, which may be the basis for the common occurrence of Lappi place-names in Southern Finland. The term *Lapp* (plural *Lappar*) was already used in the Swedish language in the 13th century. The roots of this word, however, remain unknown, and it may even be Baltic-Finnic.<sup>8</sup>

Under the period of Swedish and Russian rule, *Lapp* was also an administrative concept and it was used in historical sources. Until the 1950s, the word was used to mean the original inhabitants of the area, who were not farmers but made their living from fishing, hunting and reindeer herding. Nowadays one usually uses the word *Saami*<sup>9</sup> to mean the indigenous people, but the word *Lapp* is still in use in some situations. It was used in connection with land ownership and property matters, which will be explained later on.

Fifteen years ago, *Lapp* returned to the Finnish valid legislation. In the 1995 Act on Saami Parliament it is stated that a Saami is also the descendant of a person who is marked as a mountain, forest or fishing *Lapp* in registers that are held by Swedish or Finnish authorities.<sup>10</sup> The practical consequences of this amendment were, however, very small. In the decision of the High

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<sup>7</sup> The name used by others.

<sup>8</sup> Kulonen, Ulla-Maija in *The Saami, A Cultural Encyclopaedia*, eds. Ulla-Maija Kulonen, Irja Seurujärvi-Kari, Risto Pulkkinen, Suomalaisen Kirjallisuuden Seura (2005), 184.

<sup>9</sup> Comes from the word *sápmelas* and refers to the view of the Saami for themselves.

<sup>10</sup> Act on Saami Parliament 17.7.1995/974, 3 §.

Supreme Administrative Court in 1999, it was decided that only a very limited number of people have the right to gain status as a member of the indigenous people by this subsection.<sup>11</sup>

## 2.2. Lapp Villages and Lapp Tax Lands

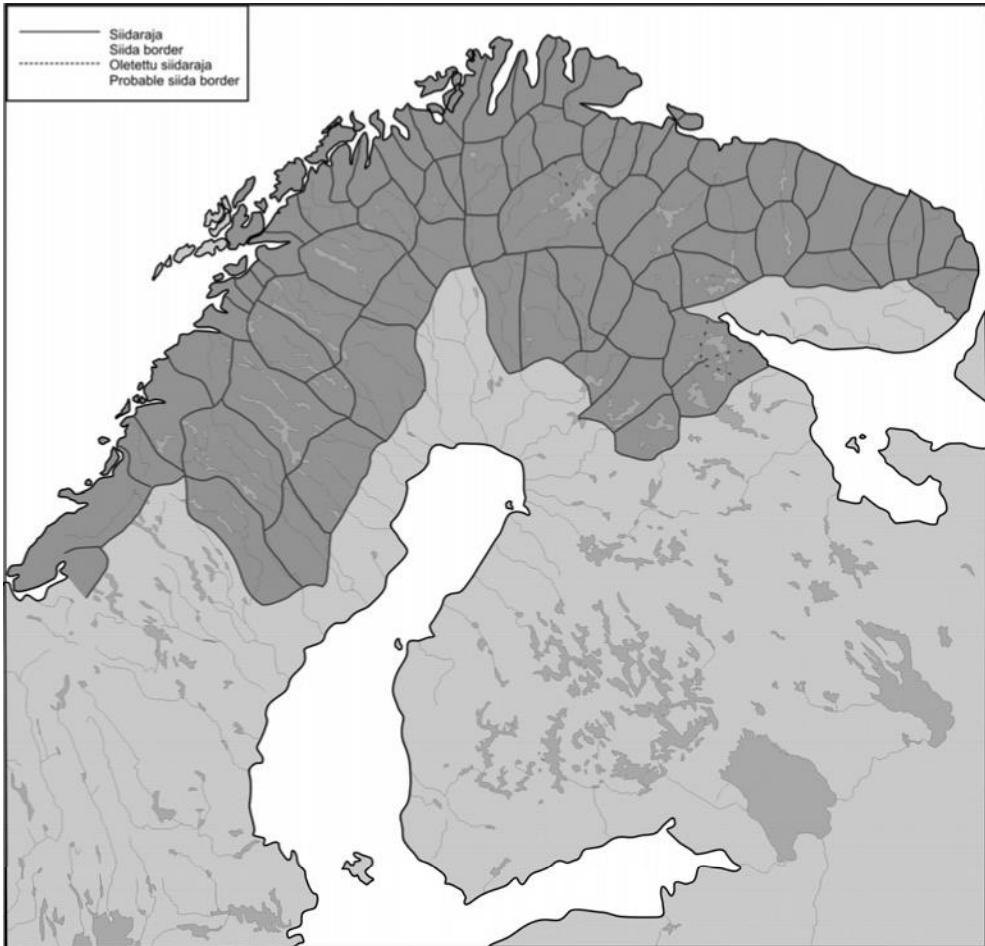


Figure 1. Possible siida border.<sup>12</sup>

<sup>11</sup> KHO (High Administrative Court) (1999): 55.

<sup>12</sup> Probable siida border. Picture drawn by Johanna Roto and published in *The Saami A Cultural Encyclopaedia*, *supra* note 10, 186–187. The Map is based on Samuli Aikio's map of Lappvillages in Northern Fennoscandia. See also: Julku, *Kemin pitäjän ja Kemin Lapin raja. Oulun yliopisto. Historian laitos. Eripainossarja 2. Oulu* (1968) 16.

The historical area of Lapland was separated by the Lapland border from the area around the Gulf of Bothnia. Historical Lapland was administratively divided into six separate areas: Ångermanland, Ume, Pite, Lule, Torne and Kemi Laplands. These were in turn divided into *Lapp villages*, which were further subdivided between clans and families into inherited lands, later known as *Lapp tax lands*.

At the beginning of the Modern Age, altogether thirteen *Lapp villages* were partly or wholly located in what is the territory of present-day Finland.<sup>13</sup> This division into *Lapp villages* and inherited lands represented an institution of land distribution that was an original feature of *Lapp* society. However, as the nation states tightened their grip on Lapland, this division also became in part an administrative partition which was used for the purposes of taxation and the judicial system.<sup>14</sup>

It has been assumed that the *Lapp village* system, based as it was on hunting, fishing and small-scale reindeer husbandry, once covered the whole area originally inhabited by the *Lapps*. However, this was the case in the forest area of present day Finnish Lapland in the 17th and 18th centuries. Regular district court sessions began to be held in Lapland from about half-way through the seventeenth century, and it is evident from the court records that the source of livelihood of the *Forest Lapps* in Kemi Lapland was hunting and fishing, which they practiced within the territory of their own *Lapp villages* according to a regular annual cycle. Also, reindeer herding was practiced, but the livelihood at the time was mainly based on fishing and hunting.

were separated from one another by fixed borders, which were defined by boundary marks such as geographical landmarks (hills, rivers, lakes) or man-made signs. Border disputes were particularly prevalent between the *Lapp villages* that were located in the territory of present-day Finland. Differences of opinion about the precise position of the border were usually connected with a dispute about which of two *Lapp villages* had ownership of specific hunting grounds, fishing grounds, or a lake. If no agreement could be reached, the matter was taken to court, where the dispute was solved according to the regulations concerning the determination of a legal border, just as elsewhere in the region.

<sup>13</sup> Rounala, Suontavaara, Teno and Utsjoki *Lappvillages* belonged to Torne Lapland, while Maanselkä, Kitka, Kuolajärvi, Keminkylä, Sompio, Sodankylä, Kittilä, Peltojärvi and Inari *Lappvillages* were part of Kemi Lapland. Later on, Peltojärvi was transferred from Kemi Lapland to Torne Lapland.

<sup>14</sup> The Saami word “siida” is also used to refer to the *Lapp village*. Usually no distinction is made between the two expressions, but “siida” can also be regarded as referring specifically to a village *community* comprising several families who were usually related to one another.

Within the *Lapp villages* there were private inherited lands (*arfweland*) belonging to individual persons or families, for which the term (*Lapp*) *tax lands* (*skatteland*) was later adopted. The size of individual tax lands might vary from a few square kilometers to fairly extensive areas. Just as in the case of borders between the *Lapp villages*, there were disputes about the borders between tax lands, and these disputes were also taken to court. In principle, every Laplander had an exclusive right to pursue his livelihood on his own tax land, but at least in the areas of *Forest Lapps' Lapp villages*, wild reindeer and beaver were hunted over all the village area for the benefit of the whole community.

Generally, the title to a unit of tax land was passed down from one generation to another. However, the holder of tax lands might also cede his title to another person; thus tax lands could be sold, exchanged, pawned, bequeathed, etc. in the same way as privately owned real estate. Indeed, it has been proposed in jurisprudential research that, since the *Lapp tax lands* were legally regarded as equivalent to privately owned real estate, the right of *Lapps* as title holders of the tax lands should correspondingly be regarded as the same kind of right as that of the holder of the title to a farm.

The change that led to the disappearance of *Lapp villages* and tax lands came from two directions. As a consequence of two placards regarding the settlement of Lapland issued in 1673 and 1695, more and more Finnish and Swedish settlers began to move from the south into the territory of the *Lapp villages*. The subsistence base was unable to support the population when the newcomers began to compete with the *Lapps* in hunting and fishing. At about the same time, a fully nomadic way of life arrived in the area of present-day Finland from the west, and it changed the traditional system of land use. Large-scale reindeer husbandry, practiced by so-called *Reindeer Lapps*, or *Mountain Lapps*, as they were also known, was based on large herds and the acquisition of new grazing ranges.<sup>15</sup> The communal nature of the original *Lapp villages* and a way of life based on hunting and fishing were replaced by a means of livelihood that depended almost exclusively on reindeer husbandry. In the northern regions, full nomadism spread from the west eastwards as far as the lands of the *Skolt-Lapps*, located in today's Russia.

The old distribution of land did nevertheless survive in some places despite the changed circumstances. The traditional division into tax lands was still

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<sup>15</sup> Arell, Nils, *Rennomadismen i Torne Lappmark – markanvändning under kolonisationsepoken I fr. a. Enontekis socken*. Geografiska institutionen. Umeå Universitet. Medellande nr. 24 pp. Umeå (1977), 252–254, 272. Holmbäck. Holmbäck, Åke, *Lappskatteinstitutet och dess historiska utveckling*. Uppsala (1922). SOU 1922:10 at 35.

practiced quite long in some forest areas that are part of present-day Swedish Lapland. Gradually, however, the old system of land use disappeared. In the current area of Finland, the original system of land use survived longest in the Inari region, but the *Lapp village* system itself lived on longest in the area inhabited by the *Skolts*, where the subsistence base and the division of land remained unchanged down to near present times. The tradition that lived on in the isolated area of Suonikylä was a relic of an ancient system of land use that was once practiced over a large part of Fennoscandia.

The term *Lapp village* has survived into the present day in connection with reindeer husbandry in Sweden. With reference to a few or even just a single reindeer-herding family, the expression *Lapp village* or *reindeer village* describes the fact that the persons in question at the time herded their reindeer communally, but any other factual connection with the old *Lapp villages* has since disappeared. In law, the term *lappby* has survived in Swedish legislation concerning reindeer husbandry.<sup>16</sup> With regard to livelihood, the present-day *Saami villages* in Sweden can perhaps also be regarded as descendants of the old *Lapp village* system.

### 2.3. Lapland Border

The *Lapland border* is a term used to refer to a fixed border running between the northern provinces of the old kingdom of Sweden(-Finland) and so-called historical Lapland, which was situated to the north of the Northern Provinces. The frontier between Lapland and the rest of the region has not always been located in exactly the same place, but has varied according to the age in question. In other words, one can say that there have been several Lapland borders. A missive issued by King Magnus Eriksson in the 1340s speaks of a *Lapp Land* (*Laepmark*) bordering on the counties of what were then the Swedish provinces of Ångermanland and Helsingland. By this definition, the whole northern coastal area of the Gulf of Bothnia belonged to Lapland at that time.

In the Modern Age, the distribution of the land had evolved in such a way that the parishes along the northern end of the Gulf of Bothnia were inhabited by Swedish and Finnish peasants, and adjacent to each parish there was a Lapland named after it. Thus the area north of Kemi parish was known as Kemi-Lapland, for example. *Lapland border* was a continuous borderline between parishes and *Laplands*. There must have been a state-recognized

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<sup>16</sup> E.g., in the Reindeer Husbandry Act of 1886.

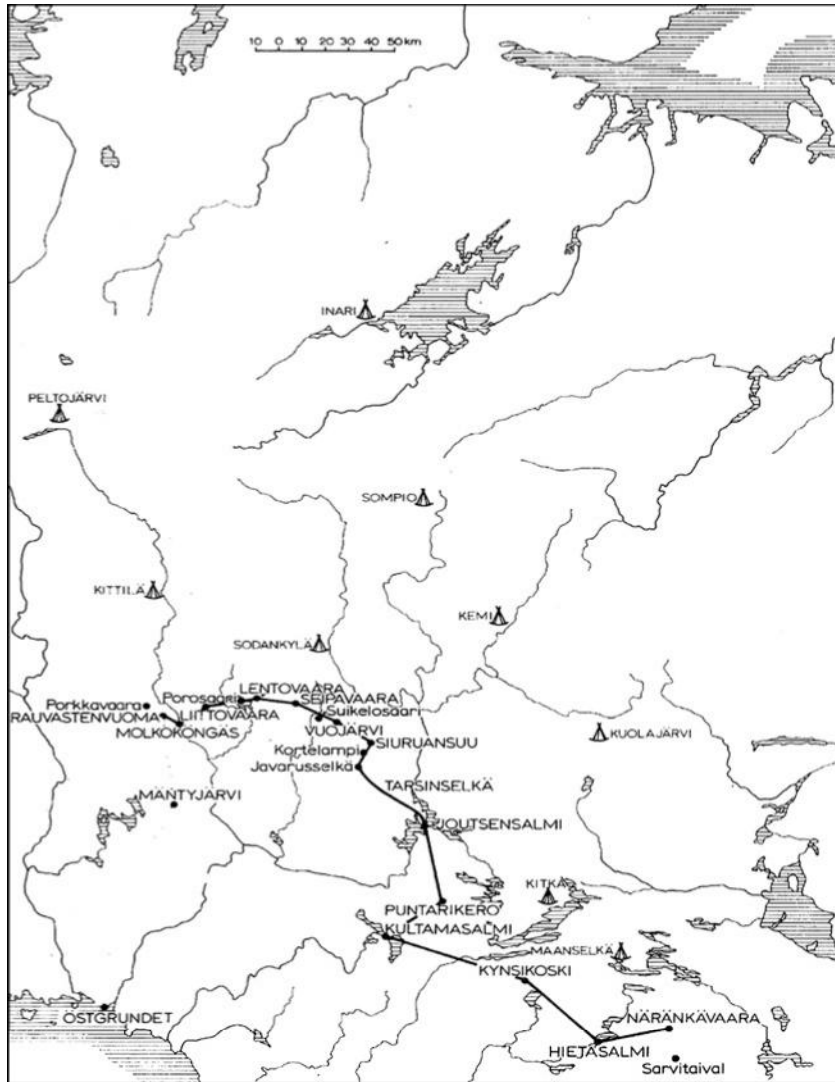


Figure 2. A map of the boundary line demanded by the Lapps.<sup>17</sup>

border already in existence by half-way through the sixteenth century because seven peasants of the parish of Ylitornio were fined in the district court sessions of 1549 for fishing in the territory beyond the *Lapland border*

<sup>17</sup> A map of the boundary line demanded by the Lapps from Molkokongäs to Sarvitaival. Map drawn by Mrs. Anja Kaunisoja. In *Kyösti Julku, Kemin pitäjän ja Kemin Lapin raja*. Oulun yliopisto, Historian laitos. Eripainossarja No: 2. Kemi (1968), 16.

(*innan Lapperåå*) without the permission of the Lapps. A letter of safeguard issued by King Johan III in 1584 forbade the peasants of Tornio and others from harassing the Lapps of the Lapp village of Suonttavaara on their own lands, which were located in Lapland within the border at Sonkamuotka.<sup>18</sup> Apparently at the end of the sixteenth century, the border between the parish of Kemi and Kemi Lapland was located much further south in Mäntyjärvi, about 20–30 kilometers north-west of the modern city of Rovaniemi.<sup>19</sup>

The *Lapland border* between the parishes and Lapland was defined in *de jure* in the years 1750–1754. The demarcation began with the border between the parish of Umeå and Ume Lapland, located in Sweden today, and ended with the definition of the border between the parish of Tornio and the Lapp village of Kittilä, which are situated in Northern Finland nowadays.

In the 17th and 18th centuries, the area south of the *Lapland border* was considered “countryside” (*landsbydgen*), where land and water use was based on farms, whereas in Lapland the land was distributed according to the so-called “Lapp village” system. The *Lapland border* also constituted a fiscal boundary in the sense that in Lapland a special tax called the Lapp Tax, which dated back to the Middle Ages, was levied on the land.

Before the 1673 decree on the settlement of Lapland, the border also separated two areas that were distinct with regard to the livelihood of their inhabitants. The Lapps of Lapland practiced their own characteristic ways of subsistence (hunting, trapping, fishing and reindeer herding), while the Finnish and Swedish peasants to the south practiced agriculture (farming and cattle raising). In practice, the division was not quite so simple. The seasonal usufruct of the backwoods lakes in the territories of the Lapp villages, which dated back to the Middle Ages, continued into the eighteenth century. Trial records of fishing disputes concerning this usufruct of the so-called “pike lakes” have survived, and from them it is clear that the objective of the State and the authorities was mainly to safeguard the fishing industry of the Lapps in the territories of the Lapp villages, although the peasants, too, sometimes obtained confirmation of their right of usufruct of the lakes beyond the *Lapland border*.<sup>20</sup>

With regard to the legal implications of the *Lapland border*, it has also been suggested that before 1673 there were no legal grounds for practicing

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<sup>18</sup> Today a border station between the municipalities of Muonio and Enontekiö.

<sup>19</sup> Julku, Kemin pitäjän ja Kemin Lapin raja. Oulun yliopisto. Historian laitoksen Eripainossarja 2. Oulu (1968) 44.

<sup>20</sup> It is not known how this fishing by the peasants beyond the border originated; in the trials, references were made to the fact that the right had been obtained by purchasing it from the Lapps, or that the fishing had begun with the agreement of the Lapps, or else that the usufruct had been obtained by various irregular means.



agriculture in Lapland. However, in the mid-seventeenth century, Finnish peasants were already farming in the Enontekiö area and in the territory of the Lapp village of Kittilä, and they had obtained the right to the land through the courts. In at least some of these cases, the right was obtained in a voluntary sale by the Lapps who were the holders of the areas in question. In any case, it can be stated that the establishment of farms was not sanctioned by the law before the 1673 decree. In the case of Kittilä, it must also be noted that the exact location of the southern boundary of this Lapp village was not clear; in other words, it was always not certain whether the farmed land was part of Lapland or of the parish of Kemi.

The decree of 1673 removed the significance of the *Lapland border* as a dividing line between different ways of livelihood. As a result of the placard, Finnish and Swedish settlers had the right to establish farms north of the border. On the Finnish side, the Lapland border is not mentioned in present-day legislation, but in Sweden it still constitutes a boundary in connection with the use of the land. The *Lapland border* (*Lappmarksgränsen*) is marked, and it is located according to its demarcation in the years 1750–1753. In the north, the border ends at the national frontier with Finland at Sonkamuoika. In Sweden there is another border regulating the practicing of occupations: in 1867 a “cultivation border” (*odlingsgränsen*) was defined north and west of the *Lapland border*. On the north and west side of this border, reindeer husbandry today enjoys the strongest legal protection.<sup>21</sup>

### 3. *The Status of the Lapps’ Land Rights*

In Finland the question of the historical land rights of the *Lapps* had not been widely debated prior to the last few decades, but in Sweden it arose in the early twentieth century. In the 1920s, a Swedish legal historian and expert on property law, Åke Holmbäck, was given the task of elucidating the legal questions regarding the *Lapp tax lands*. Holmbäck’s investigation focuses on the area that today is a part of Sweden, but he also used a collection of documents that the Finnish researcher Isak Fellman had published one decade previously. In Fellman’s documents, material regarding court records was mainly taken from local courts in *Lapp villages*, which were located in the territory of present-day Finland. Holmbäck’s findings were published in the form of a committee report.<sup>22</sup>

<sup>21</sup> Act on Reindeer Husbandry (1971:437) at 3 and 5.

<sup>22</sup> Holmbäck, Åke, *Lappskatteinstitutet och dess historiska utveckling*. Uppsala (1922).

Holmbäck's most important findings are the following: If a *Lapp* held the tenure of tax land, his right against other *Lapps* was a strong one: he alone had the right to use the land. On the other hand, he did not enjoy free power disposal over the area, and in this respect his right was not a strong one.

Holmbäck considered that although the *Lapps* had previously believed that they owned their tax lands, and despite the fact that this assumption was made in a number of individual statements, indeed in some Swedish court findings of the time, the misconception became obsolete in the seventeenth century. The reason for this lay in the right of abode assigned by the courts. Because the right of abode was assigned in respect of tax lands that were inherited, it had easily become the prevailing view that the actual right to the tax lands depended on its assignment by a court of law rather than by the law of inheritance. Holmbäck considered that the courts of law could not convey any real right of ownership, only lifelong tenure (mortmain) at best, which however did include the prerogative of the heir to obtain the same right for himself.

According to Holmbäck, not even in the seventeenth century, when the *Lapps'* right to the tax lands was strongest, did the courts accept these rights as rights of ownership. Nor did the *Lapps* subsequently receive rights of ownership; on the contrary, the *Lapps'* rights to the lands in their possession began to weaken. He saw two factors that prevented them from obtaining rights of ownership: the Crown had seized the right of ownership of the *Lapp tax lands*, and the authorities began to make strong demands that these lands should be opened to settlement.

In Holmbäck's view, it was the Forest Statute of 1683 in particular that deprived the *Lapps* of the right to obtain ownership of the land and indeed made this right out of the question. Because not even those peasants who possessed an indisputable right of ownership to their real property could, contrary to the royal right, obtain the right of ownership of areas that they nevertheless considered to be their own, it was naturally out of the question for the *Lapps*, whose right of ownership of the *Lapp tax lands* had never been generally recognized, and who used the lands only for hunting, fishing and reindeer herding, to obtain a right of ownership of the lands contrary to the royal right.

The question of the conditions for ownership was detailed in the so-called Taxed Mountain Case, which was initiated at the district court in 1966. In the end, this case was dealt with by the Supreme Court in Sweden and it was the biggest case in Swedish legal history.<sup>23</sup> The litigation concerned not only

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<sup>23</sup> Nytt Juridiskt Arkiv. Avd. 1 Rättsfall från Högsta Domstolen i Sverige. NJA 1981 p. 1 See further: in Bengtsson, Bertil, "The decision of the Supreme Court" in *The Saami national*

the legal basis for the State's right of ownership of the mountain regions in the county of Jämtland but also the question of whether in earlier times it was possible to obtain the right of ownership of unowned land on the basis of its being used only for reindeer husbandry, hunting and fishing, i.e. without its being farmed.<sup>24</sup>

With regard to the question of the right of ownership, the Supreme Court found that it could be obtained for unowned land purely on the basis of its being used for reindeer husbandry, hunting and fishing. Acquisition was based on occupation and immemorial prescription. The seventeenth century is the crucial period in this respect. According to the court, however, it was a condition of ownership that this use of the land had been intensive in nature, permanent and such that outsiders had not significantly impeded this use. Fixed borders of some kind were also required.<sup>25</sup> The court found that in the fell region of North Jämtland that was under dispute, these conditions had not been satisfied, and the action of the Saamis to obtain an enhancement of their rights was dismissed.<sup>26</sup>

However, in the same litigation the court was also given material of case law from the late 1600s regarding what is now northern Sweden and Finland. Based on this material, the Supreme Court suggested that, at that time, in local courts the Saami were seen as the landowners of the lands which they occupy. The Court states also that in Tornio and Kemi Lapplands in particular there was a tendency to compare the Saami people's rights with peasants' rights.<sup>27</sup> Concerning this tendency, the court referred to the documents that were first published by Finnish researcher Isak Fellman in the early 1900s. Later on, this state of affairs was confirmed by several legal history and real estate studies.<sup>28</sup>

One can say that the question of indigenous peoples' landownership in accordance with national legislation is blurry. In the legal praxis of the local courts, the *Lapps* were seen as land owners as late as the 1740s. Today, the presumption and the prevailing opinion is that the Finnish State owns all

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*minority in Sweden*, Stockholm (1982) and Kristina Allard *Two sides of the coin – rights and duties*. Luleå (2006), 258–262.

<sup>24</sup> Nytt Juridiskt Arkiv. Avd. 1 Rättsfall från Högsta Domstolen i Sverige. NJA 1981 p. 1

<sup>25</sup> *Ibid.*, 191.

<sup>26</sup> *Ibid.*, 196.

<sup>27</sup> *Ibid.*, 196.

<sup>28</sup> Korpijaakko(-Labba) Kaisa, Saamaleisten oikeusasemasta Ruotsi-Suomessa. Oikeushistoriallinen tutkimus Länsi-Pohjan Lapin maankäyttöoloista ja -oikeuksista ennen 1700-luvun puoliväliä. Rovaniemi 1989; Lausunto maanomistusoloista ja niiden kehityksestä saamelaiten kotiseutualueella. 2001. Made by Doctor of Law Juhani Wirilander on the request of the Ministry of Justice 2001; Joonas, Juha, *Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista* Rovaniemi (2006).

of the areas that earlier belonged to the *Lapps*. However, when the existing Act on Reindeer husbandry of 1990 was enacted by the Finnish Parliament, the Committee for Constitutional Law stated that the “latest scientific research has presented noteworthy considerations in support of the existence of the Saami’s landowner”.<sup>29</sup> Later, the Committee stated that State landownership had been questioned in recent research. In the same opinion it is said that “it has been proven that families have had ownership of those tax lands they used”.<sup>30</sup>

#### 4. *The Relation between ILO Convention No. 169 and Historical Land Rights*

##### 4.1. *Introduction*

Independent of who specifically owns an area of land, land in general, has continued to be a cause of many conflicts. There are also many complexities, dimensions and themes associated with land administration and management. According to Bell, land rights are particularly relevant to vulnerable groups such as ethnic minority groups. It is a fact that fees and taxes on land are often a significant source of government revenue, particularly at the local level. In many societies, there are also many competing demands on land, including development, agriculture, pasture, forestry, industry, infrastructure, urbanization, biodiversity, customary rights, and ecological and environmental protection. Many countries have great difficulty in balancing the needs of these competing demands.<sup>31</sup>

The situation in Finland in regard to the historical land rights of the Saami and the contemporary understanding of these issues is, in many ways, a puzzle of complexities as described above. Finland has a strong reputation as a country of safeguarding the overall human rights of its citizens, including national minorities. On the other hand, the State is constantly being reminded of its obligations towards the Saami people.<sup>32</sup> The ratification

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<sup>29</sup> Opinion of the Constitutional Committee 3/1990, 3.

<sup>30</sup> Opinion of the Constitutional Committee 29/2004, 4.

<sup>31</sup> Bell, Keith Clifford, “World Bank Support for Land Administration and Management: Responding to the Challenges of the Millennium Development Goals”, the paper was presented at the XXIII FIG Congress in Munich, Germany, 8–13 October 2006.

<sup>32</sup> Finnish League for Human Rights and Advisory Board for Human Rights, statement 26 October 2010. When applying for membership in the United Nations Human Rights Committee, the Government of Finland promised that the Government Bill concerning the Saami land rights would be given to the Parliament by the end of 2006. However, Finland

of ILO Convention No. 169 has been under discussion for a long time in Finland. The main obstacle for ratification according to the Ministry of Justice<sup>33</sup> is that the current status of legislation does not fulfill the requirements set down in the Convention. And this is mainly due to the legislation concerning the land rights of the Saami.

In the context of ILO Convention No. 169, the questions concerning the historical land rights become interlinked. This part of the article analyses this linkage and evaluates certain fundamental aspects of the Convention and what they would mean in practice in Finnish Lapland. In the fields of international law and international relations, relatively few studies have been carried out based on the actual impacts of international treaties on the everyday practices of the States. This is especially interesting in the context of human rights, since they are the “rights for everyone”, and therefore possess a challenge for their implementation.<sup>34</sup> The approach of the article contains diverging views of the contemporary political understanding of the issues related to Saami rights. Two main themes arise within this context: first, the question of ownership is explored in the light of ILO Convention No. 169 and the historical knowledge presented in the first part of this article; secondly, the subjects or the right holders of the Convention’s land right Articles are to be examined.

The internalization and interpretation of these Articles into domestic legal and political practices is examined through the supervisory mechanism of the Convention.<sup>35</sup> The role of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) is, in this respect, of vital

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received its membership in the Human Rights Committee, but has so far not fulfilled its obligations towards its indigenous peoples.

<sup>33</sup> *Supra* note 5.

<sup>34</sup> See more: Thomas Risse and Kathryn Sikkink, “The socialization of international human rights norms into domestic practices: introduction. The Power of Human Rights” in *International Norms and Domestic Change*, Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds. Cambridge University Press (1999), 1–38.

<sup>35</sup> The ILO has a number of procedures to examine how its conventions are being applied. There is thus a process of dialogue between the country and the ILO supervisory bodies. Once a Convention has been ratified, Article 22 of the ILO Constitution requires that member States report regularly to the International Labour Office on the measures they have taken to give effect (implementation) to the Conventions to which they are party. These reports should include information on the situation in the relevant area, both in law and in actual practice. The reports sent by governments and by employers’ and workers’ organisations are reviewed by the *Committee of Experts on the Application of Convention and Recommendations* (CEACR). It is made up of 20 independent experts and convenes every year. The Committee’s response to the State reports include more general *Observations* and also *Direct Requests* for further information and clarification. These are also published on the ILO website.

importance. The Committee of Experts has, on a number of occasions, stated that, although its mandate does not require it to give a definitive interpretation of ILO Conventions, in order to carry out its function of determining whether the requirements of the Conventions are being respected, it has to *consider and express its views* on the legal scope and meaning of the provisions of Conventions, where appropriate. In doing so, the Committee has always paid due regard to the *textual meaning* of the words in light of the Convention's purpose and object as provided for by Article 31 of the *Vienna Convention on the Law of Treaties*, giving equal consideration to the two authoritative texts of ILO Conventions, namely the English and French versions (Article 33 of the Vienna Convention). In addition and in accordance with Articles 5 and 32 of the Vienna Convention, the Committee takes into account the organization's practice of examining the *preparatory work* leading to the adoption of the Convention. This is especially important for ILO Conventions in view of the tripartite nature of the Organization and the role the tripartite constituents play in setting standards.<sup>36</sup>

Following the guidelines of the CEACR the authors have found tools for examining the important questions related to indigenous peoples' landownership and subjectivity questions under ILO Convention No. 169 and have analyzed the wordings of the previous Convention, No. 107, concerning Indigenous and Tribal Populations from 1957<sup>37</sup> and the legislative preparatory works of Convention No. 169<sup>38</sup> when it was drafted in the late 1980s. Notable importance is also given to the two guides for ILO Convention

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<sup>36</sup> Summary of the 902-page report on International: ILO Report Of The Committee Of Experts On The Application Of Conventions And Recommendations – Indigenous And Tribal Peoples Convention, 1989. International Labour Conference, 100th Session, 2011, at: <http://indigenouspeoplesissues.com> (accessed 21 February 2011).

<sup>37</sup> Convention No. 107 is closed for ratification. However, it remains binding on those who have already ratified it, until they ratify Convention No. 169. The Convention has 17 ratifications. <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107> (accessed 22 February 2011).

<sup>38</sup> International Labour Conference, 75th Session, 1988, Report VI (1) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1987; International Labour Conference, 75th Session, 1988, Report VI (2) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1988; International Labour Conference, 76th Session, 1989, Report IV (1) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1988; International Labour Conference, 76th Session, 1989, Report IV (2A) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1989; International Labour Conference, 76th Session, 1989, Report IV (2B) Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107) ILO, Geneva, 1989.

No. 169<sup>39</sup> and the texts of the authorities within this field.<sup>40</sup> Interpretation of an international convention is always a challenge, therefore the general guidelines can be found in the Vienna Convention on the Law of Treaties from 1969.<sup>41</sup> Article 31 lays down the general rule of interpretation and states that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Other rules also exist within the Vienna Convention.<sup>42</sup>

ILO Convention No. 169 itself gives certain guidelines on how the Convention is to be internalized and implemented into domestic legal and political practices: As was mentioned earlier, according to Article 34, the interpretation and application of Convention No. 169 “shall be determined in a flexible manner, having regard to the conditions characteristic of each country”. Article 33 also specifies that the application of the provisions of this Convention shall not adversely affect the rights and benefits of the peoples concerned pursuant to national laws. In the Finnish context, Article 33 and 34 have special relevance, because they actually allow one to take into account

<sup>39</sup> Manuela Tomei and Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169. Policies for Development Branch, Equality and Human Rights Coordination Branch*. International Labour Office, Geneva, 1996; A Manual. ILO Convention on Indigenous and Tribal Peoples, 1989 (no.169). ILO, Geneva, 2000.

<sup>40</sup> To mention a few, Lennart Lundmark, *Samernas skatteland*. Institutet för Rättshistorisk Forskning, Stockholm (2006); Sven Heurgren, *Samerna – ett ursprungsfolk i Sverige, Frågan om Sveriges anslutning till ILO:s konvention Nr 169*. SOU 1999:25. Betänkande av Utredningen om ILO:s konvention nr 169, Stockholm (1999); Malgosia Fitzmaurice, “The New Developments Regarding the Saami Peoples of the North”, 16 *International Journal on Minority and Group Rights* (2009) 67–156; Luis Rodriguez-Pinero, *Indigenous Peoples, Postcolonialism, and International law, The ILO Regime (1919–1989)*, Oxford University Press (2005); L. Swepston, “A New Step in the International Law of Indigenous and Tribal Peoples”, 15(3) *The Saami Traditional Dress & and Beauty Pageants: Indigenous Peoples’ Rights of Ownership and Self-Determination over Their Cultures*. University of Tromsø (2010); Christina Allard, *Two sides of the Coin: Rights and Duties. the Interface between Environmental law and Saami Law based on a Comparison with Aotearoa/ New Zealand and Canada*, Luleå University of Technology (2006); Athanasios Yupsanis, “ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview. 79 *Nordic Journal of International Law* (2010): 433–456.

<sup>41</sup> Vienna Convention on the Law of Treaties, done in Vienna on 23 May 1969, entered into force on 27 January 1980. United Nations, *Treaty Series*, vol. 1155, p. 331. Can be found at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (accessed 22 February 2011).

<sup>42</sup> Article 32 and Article 33 of the Vienna Convention on the law of Treaties deals with the supplementary means of interpretation and the interpretation of treaties authenticated in two or more languages.

the historical information that we share in our modern-day understanding and to evaluate this information in the context of Convention No. 169.

The second part of Convention No. 169 contains provisions dealing with the land rights of the indigenous peoples. These articles, from 13 to 19, highlight the special relationship that these peoples share with the land.<sup>43</sup> According to the ILO Manual, the concept of land usually embraces the whole territory they use, including forests, rivers, mountains and sea, the surface as well as the sub-surface.<sup>44</sup> Land is considered to be central to many indigenous and tribal peoples' cultures and lives. It is often the basis for their economic survival, their spiritual well-being and their cultural identity. Thus, loss of ancestral lands threatens their very survival as a community and people. These issues are highlighted in particular in Article 13 of the Convention.<sup>45</sup>

The most central provision of the land rights is Article 14, as follows:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. 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.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

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<sup>43</sup> It is where they live, and have lived for generations and in many cases their traditional knowledge and oral histories are connected to the land, which may be sacred or have a spiritual meaning.

<sup>44</sup> *Supra* note 39, 29.

<sup>45</sup> Article 13.1. In applying the provisions of this Part of the Convention, governments shall respect the special importance of the cultures and spiritual values of the peoples concerned and their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use. At: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (accessed 22 February 2011).



The Convention clearly states that indigenous and tribal peoples have rights to the land that they traditionally occupy. According to the ILO Manual, *traditionally occupied lands* are lands where indigenous and tribal peoples have lived over time, and which they have used and managed according to their traditional practices. These are the lands of their ancestors, and which they hope to pass on to future generations. It might in some cases include lands that have been recently lost.

Below, Article 14 has been thoroughly examined and evaluated from the Finnish perspective. Also, some of the plans within this matter so far are explained, although they have not yet materialized. In some points, the Draft Nordic Saami Convention has been referred to, as its provisions pose similar challenges.<sup>46</sup>

#### 4.2. *The Rights of Ownership/Possession and Usufruct Rights, Article 14.1*

The basic provision on land rights in Convention No. 169 is Article 14. According to the ILO Guide from 1996 conducted by two ILO officials, Manuela Tomei and Lee Swepston,<sup>47</sup> it requires that the rights of ownership and possession of the peoples concerned of the land they traditionally occupy shall be recognized. The question is raised: Does this mean that indigenous and tribal peoples always have the right to title over their traditional lands? According to the Guide, not necessarily – the Convention talks of “rights” in plural. The Guide refers to many cases in which indigenous and tribal peoples do not have full title to their traditional lands, but however do not give any examples or references of these situations. After a long discussion at the ILO Conference, at the end of the 1980s, when ILO 169 was drafted, it was concluded that in some circumstances the right to possession and use of the land would satisfy the conditions laid down in the Convention, as long as there was a firm assurance that these rights would continue. This *may be* the case, for instance, in situations where isolated indigenous and tribal peoples live on reserves or where there is shared use of certain lands. In the latter case, the right to possession may be more appropriate than full title. Finally, according to the Guide, there are many situations in which indigenous and tribal peoples have a restricted right of ownership and are not able to exercise all of the rights which full title would confer. This may be the case, for instance, when their lands have been declared inalienable. It should be made very clear that this sentence is not meant to deprive these peoples of the greatest degree

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<sup>46</sup> The Draft Nordic Saami Convention, Article 34 speaks about rights to traditional use of land and water and Article 35 describes the protection of Saami rights to land and water.

<sup>47</sup> *Supra* note 39, 18.

of land rights attainable. It had to be drafted in a way that would take into account different situations, and the fact that not all indigenous and tribal peoples are in a position to exercise the full rights of ownership.<sup>48</sup>

Article 14.1 makes a division between **two different kinds of areas** occupied by the indigenous peoples. First, the rights of ownership and possession of the peoples concerned shall be recognized over the lands which they traditionally occupy. Secondly, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. It was suggested at various times during the discussion of the adoption of the Convention that this provision should read “have traditionally occupied” which would have indicated that the occupation would have to continue into the present to give rise to any rights. The wording, as it was adopted, does indicate that there should be some connection with the present – a relatively recent expulsion from these lands, for example, or a recent loss of title.<sup>49</sup> It should also be read in connection with paragraph 3 of Article 14, which requires that a procedure for land claims be established, without any limits in time being laid down as to when those claims should have arisen. It does not require that the land must be occupied in a traditional manner. This would confine these peoples to a particular lifestyle, instead of giving them the opportunity to change as they see fit.<sup>50</sup>

“Use” of lands which indigenous and tribal peoples do not occupy, but to which they have had access for their “subsistence and traditional activities”, was recognized as an “*additional*” right, and not as an *alternative to ownership*. This provision was inserted to cover the situation of many indigenous and tribal peoples with long-established grazing, hunting or gathering rights over the lands to which they do not have written title. Measures need to be taken, in appropriate cases, *to safeguard this right*. Though the Convention does not specify what an appropriate case would be, this provision has to be read in the context of Article 23, which calls for the recognition and strengthening of traditional activities, including hunting and grazing. In other words, indigenous and tribal peoples should not lose their use rights when those

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<sup>48</sup> *Ibid.*

<sup>49</sup> There are different views on what it is meant by “traditionally occupy”. In the context of the Saami, Hannikainen supports a narrow view: “The words “traditionally occupy” appear to mean that the Saami (1) must have traditionally occupied those lands, and (2) must *also at present occupy* them.” Lauri Hannikainen, The status of minorities, indigenous peoples and immigrant and refugee groups in four Nordic states 65 *Nordic Journal of International Law* (1996): 53.

<sup>50</sup> *Supra* note 39, 18–19.

lands are developed; they do have those rights, and governments should take steps towards recognizing them. Finally, this Article says that these rights “shall be recognised”. This means that the Convention requires governments to recognize that, when there is traditional occupation, the indigenous and tribal peoples do have rights to the lands concerned. They may still have to determine what these rights are and the lands in which they exist, but it is clear that rights do already exist.<sup>51</sup>

#### 4.3. *The Process in Finland, Norway and Sweden*

In Finland, the bicentric approach of Article 14.1 has had very little attention. The identification of the traditionally occupied areas has not been conducted in Finland. This relates much to the question of Saami Homeland in the Northernmost part of today’s county of Lapland vs. the land area of historical land rights, which is a much more extensive area, covering approximately 1/3 of the total surface of Finland. This will be examined in detail later on in connection to Article 14.2.

For Finland to proceed towards ratifying ILO Convention No. 169, in 1999 the Ministry of Justice decided to invite Dr. (of law) Pekka Vihervuori to prepare a report clarifying issues of land, water, natural resources and traditional livelihoods in the Saami Homeland.<sup>52</sup> The purpose of the report was not, however, to deal with landownership. He pays special attention to the obligations of ILO Convention No. 169 and examines the provisions of the national legislation in force. Finally, he gives proposals for modifications to legislation concerning land use. As guiding tools he uses the ILO Guide and the examples of similar situations in Sweden and Norway.

Norway ratified ILO Convention No. 169 in 1990 considering that the ; was enough to fulfill the requirements of Articles 13 and 14 of the Convention. Since then, different views on the matter have emerged and demands for stronger rights to land and water areas have been expressed. In 2005 Norway adopted the Finnmark Act, which guarantees the Saami people and others rights to land and natural resources in Finnmark.<sup>53</sup> The question of ownership has been left to be decided by a special Commission established for this purpose.<sup>54</sup> This will be dealt with more closely later in the text.

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<sup>51</sup> *Ibid.*, 19.

<sup>52</sup> *Supra* note 5.

<sup>53</sup> Finnmark Act, 17 June 17 2005, No. 85.

<sup>54</sup> Finnmark Act at 29 (See more: “The Uncultivated land Tribunal for Finnmark and background to the Act” in [www.finnmarksloven.no](http://www.finnmarksloven.no) (accessed 6 May 2009)).

In 1999 Sweden also conducted an extensive study on the matter, and the rapporteur Sven Heurgren concluded that the *strongly protected right to use* would satisfy the conditions laid down in the Convention.<sup>55</sup> However, since then the ratification process of Sweden has progressed slowly.<sup>56</sup> As suggested by Heurgren, a Commission was set to investigate the outer boundary for the reindeer herding right and where the Saami have rights under the Convention. This committee submitted its findings in 2006.<sup>57</sup> Also, two Committee reports concerning the fishing and hunting rights have been conducted.<sup>58</sup> However, in this article it is not possible to review these reports due to space limitations, but only to conclude that the reports expressed significant views related to the possible Swedish ratification of ILO Convention No. 169.

In Finland, Pekka Vihervuori took a similar approach to Norway, which led to the idea of developing a political instrument with representatives from indigenous communities and also other local people. All the lands would still remain in the State's possession. This plan was never realized, but it has formed a sort of basis for ongoing negotiations between the Ministry of Justice and the Saami Parliament. Attention could be paid to the fact that diverging interests of members in a political body would not necessarily mean protection for traditional livelihoods. Only 10% of the Saami who are registered in the Saami Parliament's electoral roll practice reindeer herding while many of them get their livelihood from conventional occupations.

#### 4.4. *Ownership or Administration?*

According to the ILO Manual, the Convention recognizes both **individual and collective** aspects of the concept of land. The concept of land encompasses the land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g., for a

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<sup>55</sup> SOU 1999:25, Samerna – ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169, p. 125.

<sup>56</sup> . The commission was set as a response to the 1999 SOU by Heurgren. This report investigated the outer boundary for the reindeer herding right.

<sup>57</sup> SOU 2006:14, Samernas Sedvanemarker. Betänkande av Gränsdragningskommissionen för renkötselområdet, Stockholm.

<sup>58</sup> SOU 2005:116, Jakt och Fiske i Samverkan. Slutbetaänkande av jakt och fiskerättsutredningen, Stockholm; SOU 2005: 79 Vem får jaga och fiska? Historia, folkrätt och miljö. Delbetänkande av Jakt- och fiskerättsutredningen, Stockholm.

home or dwelling.<sup>59</sup> This approach has its roots in the previous Convention, No. 107, where Article 11 deals with land rights. It states as follows:

The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.

In the process of the partial revision of Convention No. 107, it was concluded by ILO officials that if this amendment concerning Article 14 in Convention No. 169 were to be accepted (as it was later on), there would appear to be no need to retain the words “collective or individual” in the first paragraph of the revised Article 11. No preference would be expressed, and *it could be left to the peoples concerned to determine their own preferential form of land holding and ownership*.<sup>60</sup>

In the Finnish context, it is also relevant to discuss whether the ownership could be described as individual or collective by its nature. As a response to the requested 57 opinions of the above-mentioned report by Vihervuori, in November 2001 the Ministry of Justice in Finland therefore appointed a new rapporteur, Dr. (of law) Juhani Wirilander, to make a legal assessment from the perspective of real estate law on analyses made on the land ownership question in the Saami Homeland.<sup>61</sup> The expert opinion of Juhani Wirilander showed that there was no clear evidence that Lapp villages had owned their traditionally used areas in the middle of the 18th century. He did argue, however, that it was evident *that single families had had ownership* over the special areas until that time. As was shown earlier in this text, in the legal praxis the Lapps were considered to be land owners and their rights were strong in this respect. This approach should be taken into consideration according to Article 34 and 35 when determining the manner in which ILO Convention No. 169 could be implemented in Finland.

**Ownership or administration?** At the same time as Wirilander’s task, the ministry also appointed a Saami Commission with the task of assessing whether it would be advisable to implement the proposals of Dr. Vihervuori’s report, or whether the proposals should be modified.<sup>62</sup>

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<sup>59</sup> According to the ILO Manual, land can also be shared among different communities or even with different peoples. This means that a community or people lives in a certain area and also has access to, or is allowed to use another area. This can be the case with grazing lands, hunting and gathering areas and forests. ILO Manual 2000, 30.

<sup>60</sup> *Ibid.*

<sup>61</sup> Wirilander, Juhani, Lausunto maanomistusoista ja niiden kehityksestä saamelaisten koti-seutualueella, Oikeusministeriö, 2001.

<sup>62</sup> See more: Tanja Joona, “Finland and the Process of Ratifying ILO Convention No. 169”, *Indigenous Affairs*, IWGIA, 3/2003, 40–45.

The Saami Commission's proposals were to meet the minimum criteria of the ILO Convention. Later on, the Commission proposed that land ownership should remain with the Finnish State, but that a certain Directorate of Saami Homeland, with 11 members, should be established. The Chairperson of this Directorate would be elected by the Government of Finland, with 5 members elected by the Saami Parliament and 5 by the municipalities. Decisions would be taken by a simple majority. This Directorate would have the competence to decide on general guidelines governing the use of state-owned land in the Saami Homeland. These proposals received several dissenting

The Ministry of Justice, however, proceeded to draft a government bill via the Saami Homeland Consultative Committee in 2002, which was later disbanded due to negative comments from numerous stakeholders.<sup>64</sup> Demands were made for substantial historical and legal research, which was later conducted in 2006, based on an extensive territory and time frame in order to clarify the previously unclear legal and historical development.<sup>65</sup>

Within the connection to estimate whether the administrative model for Finland, similar to the Finnmark Act in Norway, is enough to fulfill the obligations of the Convention or whether full ownership is required, especially in the Finnish case, it is reasonable to evaluate the Norwegian situation more precisely. In 1995 the *Committee of Experts on the Application of Conventions and Recommendations* (CEACR) evaluated the Norwegian situation and pronounced its view: "The Committee of Experts does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention".<sup>66</sup> Later on, it

<sup>63</sup> Saamelaistoimikunnan mietintö – Ehdotus maahan, veteen, luonnonvaroihin ja perinteisiin luontaiselinkeinoihin liittyvien oikeuksien järjestämisestä saamelaisten kotiseutualueella valtion mailla. Oikeusministeriö, Helsinki, 2001.

<sup>64</sup> Two alternative possibilities were suggested: 1. Similar to the Saami Commission's proposal; 2. 12 members: Similar to the above but one extra member would be nominated by the reindeer-herding associations of the Saami Homeland. A two-thirds majority would make decisions.

<sup>65</sup> Matti Enbuske, Asutuksen ja maankäytön historia keskisessä Lapissa ja Enontekiöllä 1900-luvun alkuun, *Oikeusministeriön julkaisuja* (2006):6; Tarja Nahkiaisola, Asutus ja maankäyttö Inarissa ja Utsjoelle 1700-luvun puolivälistä vuoteen 1925. Oikeusministeriön julkaisuja 2006:7. Mauno Hiltunen. Maaailma maailmojen välissä. Enontekiön asukkaat, elinkeinot ja maanhallinta 1550–1809. Oikeusministeriön julkaisuja 2006:5 ja Juha Joonas, Entisiin Tornion ja Kemin Lapinmaihin kuuluneiden alueiden maa- ja vesioikeuksista, *Juridica Lapponica*, Rovaniemi (2006), 32.

<sup>66</sup> ILOLEX: CEACR, Individual Direct Request, Submitted 1995.

was the national policy and pressure in Norway which started the development towards stronger rights to land than just the usufructuary rights. This development leads to the adoption of the Finnmark Act in 2005, which will be concisely described below.

The Finnmark Act was adopted by the Storting (Norwegian Parliament) in the spring of 2005. The Act involves the transfer of approximately 95% (about 46,000 km<sup>2</sup>) of the area in Finnmark to Finnmark's inhabitants through a new agency called the Finnmark *Estate*. The Finnmark Act, and the establishment of the Finnmark Estate, is in response to the Saamis' demands that Saami rights to lands and waters needed to be acknowledged and resolved.<sup>67</sup>

Consequently, in 1984, the Government appointed the Saami Rights Committee to discuss these questions and make the necessary conclusions and recommendations. The Saami Rights Committee's recommendations have formed the basis for the Finnmark Act, and the establishment of the Finnmark Estate. The Norwegian authorities were of the view that the Saamis' use of lands, waters and natural resources did not establish any formal legal rights. This was due to the misconception that a nomadic way of life did not lead to any land rights. This view has changed, and gradually, Saami rights to lands, waters and resources are being strengthened.<sup>68</sup>

The basis for the Finnmark Act is that the Saamis, through protracted traditional use of the land and water areas, have acquired individual and/or collective ownership and right to use lands and waters in Finnmark County.

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<sup>67</sup> *The Committee of Experts* (CEACR) commented on the proposal for the Finnmark Act: "The proposal would transfer State ownership of 95 per cent of the land in the country to the Estate. It appears that this would include areas that Sami claim as their land by right of long occupation, and to which the Government acknowledges in principle that the Sami do have rights, though the extent of these lands and the content of the rights have not yet been identified as required in Article 14 of the Convention. It would give the Sami a significant role in the management and use of a larger area than that to which they now have rights, and the Government indicates that they would have more benefits from the management of the larger area under the present situation. However, the proposal would *replace* the rights of ownership and possession recognized by the Convention with a right to large share in administration of the region". CEACR: Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples of 1989, Norway Ratification: 1990, Published in 2004.

<sup>68</sup> When preparing the Finnmark Act, the CEACR observed in the Norwegian Government's report from April 2003 where it introduced "a bill to regulate legal relationships and administration of land and natural resources in the county of Finnmark", that the proposed new arrangement is designed to protect Saami interests, and will provide security and predictability in terms of protecting the natural resources underlying Saami culture and the use of outlying land. The Act "builds on a future administrative arrangement for Finnmark based on the principle that there should be no differences in rights for the inhabitants of Finnmark based on ethnicity. See: *ibid.*

One of the most important objectives of the Act is to give the population in Finnmark greater influence over the administration of the property in the county. Discussion and recognition of existing rights is an important element of the Finnmark Act, and the rights of use and ownership in Finnmark must still be discussed and clarified further. A *commission* and a *tribunal* will be set up for this purpose. The principles of established custom and immemorial usage will form the foundation for this work. The Commission was established to clarify whether there are groups that have, over time, acquired rights to use or own land. The Act does not interfere with any established rights, nor shall the Finnmark Commission grant rights that do not already exist. Their task is to identify rights that have already been acquired, but for which no “formal documents” exist. The mapping shall be carried out on the basis of applicable national legislation as it has evolved through case law over a long period of time. A special court has also been established – the Uncultivated land Tribunal for Finnmark – which will decide disputes in matters of this kind.

Fishing rights in the sea are not included in the Act. However, fishing rights in saltwater in Finnmark County will be subject to further elaborations and discussions. The Finnmark Estate is managed by a board of directors, with six members, three appointed by Finnmark County Council District, and an equal number appointed by the Samediggi (Saami Parliament).

The Finnmark Act has been seen as an important step forward in land rights issues in Norway. It has clearly shown the process starting from the recognition of indigenous rights and leading to the establishment of adequate procedures to resolve difficult issues. It is an example of the commitment to co-operation from every stakeholder. Even though the progress has been slow, at least there has been some kind of on-going process. It is reasonable to carefully evaluate whether this example provide some approaches to our Finnish situation.

#### 4.5. *Identification of Land, Article 14.2*

Article 14.2 points out that in order to protect indigenous and tribal peoples' rights to the lands which they traditionally occupy and to guarantee the effective protection of their rights of ownership and possession, it is necessary to know what these lands are. Therefore, the **identification of indigenous and tribal peoples' lands** is important. The word “effective” means that there has to be real and practical protection and not just protection in law. In Finland the identification of land areas has received very little attention in the political field. The Committee of Experts of the ILO also commented on this regarding the Norwegian situation, as indicated in the citation above.



In Finland, the area in question has generally been considered to be the so-called “Saami Homeland Area”, which consists of the three northernmost municipalities: Inari, Utsjoki and Enontekiö, and the northern part of Sodankylä, called Vuotso. This is an area where the Saami were granted a *cultural autonomy* in 1995, which means that Saami persons within that area have the right to pursue their language before the authorities, in schools, health care, etc. The rights are mainly limited to cultural and linguistic rights.

The approach is interesting in Finland for the reason that the current Saami Homeland and the Historical Homeland of the Saami are different entities. The Historical Homeland on the Finnish side is the area explained in Chapter 2.3 dealing with Lapp villages. And this is an area much wider than the present Saami Homeland, covering the majority of the current Lapland County. In Sweden, however, in relation to preparing the ratification of ILO Convention No. 169, the starting point has been that the Convention would apply to the whole area of former Lapp villages and extending to include the whole reindeer herding area, which makes up 1/3 of the total surface area of Sweden. In this respect it is also understandable that the preamble of the Draft Nordic Saami Convention refers to the Historical Homeland of the Saami, because this in reality is located in Sweden.<sup>69</sup> In this respect the Draft, however, forms a contradiction between the different areas.

#### 4.6. *Land Claims, Article 14.3*

Article 14.3 refers to situations where problems may arise out of **land claims**. These can be with other indigenous communities, or with outside settlers or other stakeholders. According to the ILO Guide, there will be many cases in which these peoples are only now able to make claims to lands which they once held. The government has to establish procedures to resolve these claims in a way that gives these peoples a real possibility of obtaining the return of their lands or compensation for lost lands.<sup>70</sup>

Proceedings which concern indigenous peoples’ claims to land often involve heavy legal expenses. It has been shown in Sweden that in practice the Saami have only meager opportunities to have their land claims examined in the courts since they do not have the financial resources to pay the

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<sup>69</sup> The Draft Nordic Saami Convention states at the preamble: “The Governments of Finland, Norway and Sweden, that take as a basis for their deliberations that the Saami parliaments in the three states particularly emphasise that the Saami have rights to the land and water areas that constitutes the Saami people’s historical homeland, as well as to natural resources in those.”

<sup>70</sup> *Supra* note 39, 32–33.

legal costs. Regarding the Swedish situation, Rapporteur Heurgren suggested that if Sweden is to fulfill the conditions of the Convention in this respect, the parties involved in cases concerning important questions of principle with respect to the Saami land claims must be able to receive compensation from the State for legal expenses.<sup>71</sup> The same conclusion is also presented by Dr. Vihervuori about the Finnish situation.<sup>72</sup>

In the Finnish situation, the national legal system already provides quite effective methods to investigate and treat claims concerning property law issues. It is, however, reasonable to consider whether the Government would be obliged to arrange trials free of charge whenever indigenous land claims appear. So far, there have not been any such cases dealing with the land rights of the Saami in Finland. It would be possible to establish a separate Tribunal in Sweden and Finland to deal with these issues, as has already been done in Norway, although in Norway it applies only to Finnmark County. The experience so far, however, has not been very encouraging, so this would perhaps encourage the use of the already existing national legal systems to resolve these issues.

## 5. *Who are the Right-holders of ILO Convention No.169?*

### 5.1. *The Subject-object Dichotomy*

The following chapter describes the interesting dichotomy between the concepts of *subject* and *object* in the context of ILO Convention No. 169, which is worth examination, since the Convention's real subjects are states, but it is targeted towards indigenous peoples. This approach has its roots in the history of international law. According to Verzijl, international law has originated as a body of law regulating the relations between "political entities" which later transformed and grouped together into "States".<sup>73</sup> The positivistic doctrine during the eighteenth and nineteenth centuries claimed that only sovereign states could be the subjects of international law, therefore the individual human being is the "object" and not the "subject" of international law.<sup>74</sup>

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<sup>71</sup> *Supra* note 55, 27.

<sup>72</sup> *Supra* note 5, 21.

<sup>73</sup> J. H. W. Verzijl, *International Law in Historical Perspective, Part II*, A. W. Sythoff, Leiden (1969), 4.

<sup>74</sup> P. Heilborn, *Das System der Völkerrechts*, Julius Springer (1896), 58–211, 372, 374. See also: Anna Meijknecht, *Towards International Personality: The Position of Minorities and*

According to the object theory, the attribution of rights and benefits to entities other than States can only take place in an indirect way. According to the positivist school, Lauterpacht explained, “in cases in which individuals derive benefits under international law, such benefits are enjoyed not by virtue of a right which international law gives to the individual but by reason of a right appertaining to the State of which the individual is a national. The right is a right of the State; the individual is only the object of that right”.<sup>75</sup>

In the second half of the 20th century, views on the subject-object dichotomy changed. Manner criticized the “object” theory and listed several reasons for the rejection of this theory. In principle, the theory can be called illogical because an individual can be neither subject nor object of a law that deals exclusively with states. Later on, Higgins suggested a different view on international law: International law should not be perceived and discussed in terms of subjects and objects, but in terms of participants.<sup>76</sup> What about the case of minorities and indigenous peoples? Can they ever achieve the status of an “international person” and, if so, to what extent and in what form?

Framed by recognition of indigenous peoples as “peoples”, ILO Convention No. 169 takes a decisive stand on the collective nature of indigenous rights, transforming what the earlier convention defined as an object of applied anthropological concern into a collective subject of rights. The very subject of these rights, with its flexible formulation of “indigenous and tribal people” was not even questioned. In this way, the ILO bridged the bitter controversy in modern political theory and human rights law on individual versus collective rights by simply affirming a set of collective rights on an equal footing with the individual rights of indigenous persons.<sup>77</sup>

However, ILO Convention No. 169 is a mosaic of different approaches which refer to different entities as bearers of rights or duties. There are provisions which relate to the individual members of the tribe or group. For instance, Article 28 reads: “Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language...” or Article 26. “Measures shall be taken to ensure that

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*Indigenous Peoples in International Law*, 10 School of Human rights Research Series (2001), 46–47. Also see: G. Manner, “The object theory of the individual in international law”, *American Journal of International Law* (1952): 428–449.

<sup>75</sup> H. Lauterpacht, *International Law and Human Rights*, Archon Books, Cambridge (1968), 8.

<sup>76</sup> R. Higgins, *Problems & Process*, Clarendon Press, Oxford (1995), 49.

<sup>77</sup> Rodriguez – Pinero Luis, *Indigenous Peoples, Postcolonialism and International Law, The ILO Regime (1919–1989)*, Oxford University press (2005), 321–322.

members of the peoples concerned have the opportunity to acquire education

Most of the enforceable rights affirmed in the Convention are affirmed collectively for indigenous peoples as such: Articles 8 and 9 (indigenous peoples' rights to their own institutions, legal systems and jurisdiction), Articles 13–19 (land and resource rights). The collective aspect of indigenous rights is underscored in some instances by reference to indigenous representative institutions.

Moreover, the collective nature of indigenous rights is expressly affirmed in relation to the crucial issue of land and resource rights (Article 13). The affirmation of collective rights in the convention does not by any means prejudice the enjoyment of individual rights by the members of the peoples concerned, who are also expressly affirmed in the instrument. (Article 3(1) "The Provisions of the Convention shall be applied without discrimination to male and female *members* of these peoples") or (Article 4(1) "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned") or (Article 8(3) "stating that the application of indigenous law shall not prevent members of these peoples from exercising the rights granted to all citizens").<sup>79</sup>

It seems as if the indigenous and tribal group as such is the subject of these rights, and many States and scholars actually interpret these rights as collective rights. However, the fact that in all provisions the word "shall" is used can also be interpreted as implying that a slight measure of discretion concerning the implementation is left to the State's governments. It needs to be emphasized that a great deal of the provisions in this Convention are clearly aimed at the governments of States and contain obligations to take specific measures relating to indigenous and tribal peoples.<sup>80</sup> It can be concluded that the partial revision of Convention No. 107 marked a change in the ILO's conduct towards indigenous peoples, but also in the approach from "policy" to "rights". This transition was considered problematic and, to a certain extent, an incomplete process. ILO Convention No. 169 stands out as a multifaceted text, placed at a normative crossroads.

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<sup>78</sup> Meijknecht Anna, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, 10 School of Human Rights Research Series. INTERSENTIA Antwerpen – Groningen – Oxford (2001), 149–150.

<sup>79</sup> *Ibid.*, 149–152.

<sup>80</sup> *Supra* note 78, 150–152.

## 5.2. *Who are the Right-holders of ILO Convention No.169 in Finland?*

Article 1 of the Convention describes the peoples it aims to protect:<sup>81</sup>

1. This Convention applies to:
  - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
  - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

At an international level it is considered to be quite obvious who the indigenous peoples of the world are (even though disagreement appears as well).<sup>82</sup>

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<sup>81</sup> Convention No. 107, according to Article 1, applies to: (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong. 2. For the purposes of this Convention, the term *semi-tribal* includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community. 3. The indigenous and other tribal or semi-tribal populations mentioned in paragraphs 1 and 2 of this Article are referred to hereinafter as “the populations concerned”.

<sup>82</sup> Thornberry, Patrick, *Indigenous Peoples and Human Rights*, Manchester University Press, 2002, 12–18. Besides ILO Convention No. 169 Article 1 definition, there are also different kinds of definitions expressed to describe the indigenous people. In 1972 the United Nations Working Group on Indigenous Populations (WGIP) accepted as a preliminary definition a formulation put forward by Mr. Jose Martinez Cobo on Discrimination against Indigenous Populations with amendments in 1983 FICN. 41Sub.211983121 Add. para. 3 79 and 1986. E/CN.4/Sub.2/1986/7/Add.4. para.381; The World Bank (operational directive 4.20, 1991) has its own definition. Views on the issue have also been expressed by

On the other hand, many times at a personal level it is a more complex issue to define who belongs to a certain group. In the context of ILO Convention No. 169 it is, however, necessary to know exactly who are regarded as indigenous persons. It is necessary to know to whom the Convention is applicable, and who its beneficiaries are, so that these peoples are aware of their special rights. This is a question of human rights and was highlighted in the following direct request by the Committee of Experts of the ILO concerning Bolivia in 1995 and also in Manual 2000: "...The Committee would be grateful if the Government would indicate the manner in which recognition is given to indigenous communities and individuals so that they can benefit from the legislation which applies to them".<sup>83</sup>

In the case of Honduras, the Committee of Experts has the opinion that according to the statement of the Government of Honduras, the ILO Convention covers those persons who are members of indigenous and tribal peoples and particularly those belonging to the CONPAH, an association of indigenous persons. The Committee does, however, raise the question as to *whether and in what manner the Convention is applied to those indigenous and tribal peoples that are not affiliated with this association*.<sup>84</sup>

This is an interesting observation in the Finnish context, since the beneficiaries of the Convention have been taken more or less for granted, i.e., persons who are registered on the Saami Parliament electoral roll. However, as explained earlier above, the historical information proves that the indigenous peoples living in the territories of Northern Finland until the mid-1700s<sup>85</sup> were considered to be land owners by the Swedish-Finnish jurisdiction. In the ILO context, it is reasonable to ask whether the descendants of these indigenous land owners should be understood as the right holders of

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Capotorti, F.: Study on the Rights of persons belonging to Ethnic, religious and Linguistic Minorities. UN.Doc.E/CN.4/Sub.2/ /384/Add.1-7. United Nations publication, 1991, as well as Deschênes, J.: United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities Proposal Concerning a Definition of the Term "Minority" Submitted by Mr Jules Deschênes. UN Doc. E/CN.4/Sub.2/1985/31 & Corr.1, 14. May 1985; The UN has also prepared a Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people". E/CN.4/Sub.2/AC.4/1996/2 10 June 1996.

<sup>83</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Bolivia Ratification: 1991, Submitted: 1995.

<sup>84</sup> CEACR: Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Honduras Ratification: 1995, Submitted: 2000.

<sup>85</sup> In the legal praxis the Lapps were considered to be land owners and their rights were strong in this respect. In 1743 the situation changed in a special legal case called Haukiniemi in Kemi Lapland, in a Lapp village that was located in an area of Maanselkä, at present known as the Kuusamo area.

Article 14 of the Convention. In continuation, it is also relevant to consider what the relation of these peoples should be towards Article 1. This approach would at least be targeted to those persons who still live in the area and have continued their traditional indigenous livelihoods, reindeer herding, fishing and hunting.

The issue related to subjectivity was also raised in the Swedish context in a Committee report from 1999.<sup>86</sup> According to the rapporteur Sven Heurgren, it is the obligation of the State to clarify the right holders of ILO Convention No. 169. According to him, the definition of a Saami in the Swedish Act on Saami Parliament already contains many of the elements also expressed in Article 1 of Convention No. 169. However, he continues, even if the Saami definition is close to the definition in the Convention, it is not decisive that these are the persons who should be considered to be the right holders of the Convention in Sweden. He continues to explain that the Saami definition has been made for the purposes of the legislation to define those persons who have the right to vote in the Saami Parliament elections. Therefore, in the connection for the ratification of ILO Convention No. 169, there might be a need to make a separate criterion on who are to be regarded as the right holders of Convention No. 169 according to the criteria in Article 1. According to him, the current Saami definition would be adequate when determining the right holders of the other Articles of Convention No. 169, except the land right Articles. The beneficiaries of the land right articles are defined in the Swedish reindeer herding legislation. In practice, this would mean reindeer herders whose right is based on immemorial prescription.<sup>87</sup>

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<sup>86</sup> *Supra* note 55, 83–84.

<sup>87</sup> Quotation: “Enligt konventionen får varje stat som ansluter sig til konventionen, inom konventionens ram, och I samarbete med dem som berörs, I detalj bestämma vilka grupper som skall omfattas av konventionens tillämpning. Definitionen av vem som skall anses som same i sametingslagen innehåller flera av de kriterier som artikel 1 i konventionen innehåller. Liksom konventionen innehåller definitionen i Sametingslagen både ett subjektivt och ett objektivt element. Även om således definitionen i sametingslagen ligger nära definitionen av ursprungsfolk i konventionen är det inte självklart att sametingslagens definition skall vara avgörande för den närmare bestämningen av vilken personkrets som skall omfattas av en svensk tillämpning av konventionen.” SOU 1999:25 Samerna – ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169. Stockholm 1999, 120–140. It should be noted that contrary to Finland, the Swedish reindeer herding legislation contains a considerable amount of other rights related to traditional livelihoods, e.g., the right to fish and hunt, the right to build with certain limitations, the right to take timber, etc. See also: Myntti, Kristian, Saamelaismääritelmä oikeudelliselta kannalta in Irja Seurujärvi-Kari (ed.) *Beaivvi Mánát, Saamelaisten juuret ja nykyaika*. Tietolipas 164, Suomalaisen kirjallisuuden seura, Vammala 2000, 216–226.

In this context it is reasonable to ask whether this kind of sorting would be useful also in Finland.

In the Nordic States and in Russia so far it has been reasonable to present only *estimations* of the total amount of Saami people in the population. In Norway, figures varying from 50 000 up to 75 000 Saami can be found in different sources. In Sweden, similar figures vary from 15 000 to 27 000, and in Russia the number is about 2000. In this respect Finland is an exception; Saami are understood to be the only persons entitled to vote in the Saami Parliament election register, a total of about 9200.<sup>88</sup> In the State's official structures there is no assumption that there could be more Saami persons in Finland in addition to those registered in the election register. This is a rather interesting approach compared to Sweden and Norway. In Norway, 13 890 people are registered on the electoral roll,<sup>89</sup> and in Sweden, 7809 people are registered on the electoral roll.<sup>90</sup> Similar to the situation in Honduras, it is reasonable to ask: how do we make sure *whether and in what manner the Convention is applied to those indigenous and tribal peoples who are not affiliated with this association?*<sup>91</sup> But if the register is the basis for determining different rights for people, how can we make sure that every possible person is registered? Another difficult issue can be raised in the connection of the register: it determines a person's identity.<sup>92</sup> In Norway and Sweden it seems that a person can still be regarded as Saami, even though he or she is not registered in the election register, especially when this concerns persons who descend from the original inhabitants and are still practicing reindeer husbandry. This has not yet been under discussion in Finland, although it seems that the current Saami definition is not in conformity with Article 1 of ILO Convention No. 169.

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<sup>88</sup> The Saami Parliament in Finland (There are about 6000 persons who had the right to vote in elections of 2007, the rest are minors.) [www.samediggi.fi](http://www.samediggi.fi) (accessed 14 March 2011).

<sup>89</sup> Saami Parliament in Norway (in 2009) [www.samediggi.no](http://www.samediggi.no) (accessed 14 March 2011).

<sup>90</sup> The Saami Parliament in Sweden (in 2009) [www.samediggi.se](http://www.samediggi.se) (accessed June 16 2010).

<sup>91</sup> *Supra* note 84.

<sup>92</sup> According to Gudmundur Alfredsson, the subjective element, or self-identification, is now acknowledged as part of the minority definition. This is the case for ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, in Article 1, paragraph 2, and UN Special Rapporteur Francesco Capotorti also recommended adherence to this element. It presumably comes in two layers: an individual decides whether he/she is a member of a minority; and the group must accept the individual concerned on the basis of the characteristics, do so in a non-arbitrary fashion, and it must be possible to subject the group's decision to independent review. Article by Alfredsson, "Institutional Trends – Minority Rights", at: <http://www.wcl.american.edu/humright/hracademy/documents/Class2-Reading3MinorityRightsNormsandInstitutions.pdf?rd=1> (accessed 22 February 2011).



## 6. *Conclusions*

The ratification of the ILO Convention has been under discussion in Finland for almost two decades. The main obstacles for the ratification have been the land right articles of the Convention and the recognition of ownership and possession of the peoples concerned of their traditionally occupied lands. So far, it has not been possible to find a legislative solution that would have an adequate political endorsement.

The question about Saami land rights has until now been approached from two different directions that have been kept apart. On one hand there have been discussions regarding the historical land rights determined in the national legislation according to the property law, and the promulgation of these rights has been demanded. On the other hand, relief has been sought from international treaties that would improve the Saami land rights and the rights related to traditional livelihoods. In this respect the land right provisions of the ILO Convention are essential.

Although there do not necessarily have to be any linkages between the rights determined in the national legislation and the rights in international law, in this respect the ILO Convention has a special status. The Convention deals with rights concerning indigenous peoples and usually a long historical dimension is related to those rights. A concrete requirement to take into consideration in this historical dimension is already expressed in the first article of the Convention. Article 1 states that the Convention applies to indigenous peoples who are regarded as indigenous on account of their descent from the populations that inhabited the country at the time of the establishment of the present state boundaries. In the area of present-day Finland, this means the 17th and 18th centuries.

Crucial in this respect is Article 34 of the Convention, which states that the nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country. In the models so far presented in the land rights issue in Finland, the starting point has not been the special characteristics of Northern Finland but rather an administrative model in which the Saami would have a stronger decisive role on land use questions and stronger usufructuary rights, but the actual ownership would still belong to the State. The northern lands would be administrated by a council with local and Saami members. Norway has established a Commission to investigate the issues of ownership and has established a special Tribunal to resolve land claims. This has not yet been under discussion in Finland. It can be argued that the described administrative model does not in any way take into account the legal-historical characteristics of the area. This relates to the area

where application of the Convention is planned, the persons it shall affect and also the information that already exists from the property law history of the area.

The administrative models thus far presented<sup>93</sup> take the starting point that the Convention would only apply to the area of the three northernmost municipalities of Lapland County and one reindeer herding district. However, the area that was occupied by the indigenous peoples in the 17th and 18th centuries is much bigger, consisting of also the middle and eastern parts of today's Lapland County.

In this respect, the best comparison can be made to Sweden, with whom Finland has a joint property law history. In the context of the ratification of ILO Convention No. 169 in Sweden, the Convention would apply to the whole area where the Lapp villages were situated in the 17th and 18th centuries. The area is actually even bigger than this, because the area consists of the whole current reindeer herding area, which in some points extends south of the Lapland border. Even though Sweden has tried to clarify the ratification of ILO Convention No. 169 as long as Finland has, under no circumstances has it been claimed that the Convention would apply only to a certain small, limited area north of the Lapland border.

Another question relates to the subjects of the Convention. In the context of the presented administrative model, it has been considered that the Convention would apply only to the persons registered in the Saami Parliament election register, as well as other local people regardless of whether they are the descendants of the original inhabitants of the area or whether they practice traditional Saami livelihoods. In this respect it is notable that the Convention deals with indigenous peoples and it should apply explicitly to indigenous peoples. An essential approach of the Convention is to safeguard the possibility to practice traditional livelihoods. Also in this respect a comparison can be made to Sweden, where the Convention applies to Saami reindeer herders. According to Swedish reindeer herding legislation, the right to practice reindeer herding belongs to all persons of Saami descent but can only be practiced through a Saami village, so membership in a particular village is mandatory.<sup>94</sup> Therefore, the thoughts presented in the Swedish situation are in line with what is normally nowadays understood to be Saami (an indigenous person). In the Finnish context, the subjects would not necessarily be only reindeer herders since, as described above, the Forest Lapps who lived in the

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<sup>93</sup> There have been different models presented in the land rights issue with different variations, mainly in the combinations of the decision-making bodies.

<sup>94</sup> Reindeer Husbandry Act, 1 and 11.

Northern parts of Finland had their subsistence from reindeer herding but also from fishing and hunting. In the light of this information it would be reasonable to defend an arrangement where the Convention would apply to the peoples who descend from the original inhabitants of the area and receive a considerable amount of their subsistence from traditional livelihoods.

In respect to clarify the question of right holders of ILO Convention No. 169 in Finland, a possible solution can be found in a census to be carried out in at least the areas of the historical land rights. The census is a recommended expedient of the Committee of Experts of the ILO (CEACR) when States have difficulties in determining the right holders of ILO Convention No. 169. For example, in the case of Ecuador, the Committee notes that the peoples covered by the Convention are, in accordance with Article 83 of the Constitution, the indigenous peoples who are defined as nationalities of ancestral origin and black and Afro-Ecuadorian peoples. The Committee would be grateful for the Government to indicate the total number of indigenous persons in Ecuador, as well as the number of indigenous persons in each region by people, according to the latest census carried out. The Committee also asks for an indication as to whether a person's self-identification as indigenous was taken into account in determining their ethnic origin.<sup>95</sup>

On several other occasions the Committee has requested the census to be undertaken to determine the right holders of the Convention, an example being in the case of Argentina in 2003.<sup>96</sup> It seems that censuses have already been conducted in Bolivia with the assistance of the United Nations Development Programme<sup>97</sup> and in Colombia.<sup>98</sup> In the case of Norway, the Committee notes that there are no plans for further censuses targeting a specific indigenous criterion.<sup>99</sup> The Norwegian Government uses the figures of the Saami Parliament electoral lists to determine the amount of Saami population, although in some connections bigger amounts are presented as well. In its views on Article 1 of ILO Convention No. 169, the Committee highlights four different things: 1) The census is the official way for the State to determine the indigenous people(s) of the country, 2) the census should include a specific "indigenous component" 3) the census should be based on the self-identification of a person and 4) the indigenous peoples concerned should be consulted for the formulation of questions that would provide

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<sup>95</sup> CEACR: Individual Direct Request for Ecuador, Submitted in 2003.

<sup>96</sup> CEACR: Individual Direct Request for Argentina, Submitted 2003.

<sup>97</sup> CEACR: Individual Direct Request for Bolivia, Submitted 1995.

<sup>98</sup> CEACR: Individual Direct Request for Colombia, Submitted in 1996.

<sup>99</sup> CEACR: Individual Direct Request for Norway, Submitted in 1995.

guidance for the indigenous census.<sup>100</sup> It is clear, however, according to the views expressed by the Committee, that the identification of the indigenous peoples is a crucial thing in regard to the human rights situation of these peoples. The implementation of Article 1 can be regarded as a challenging task for the States, but at the same time the starting point for the other rights to become realized.

As a last comment, one can make a reference to Article 14.1 of the Convention, which implies that the rights of ownership and possession of the indigenous peoples shall be recognized. As has been already stated above, the indigenous peoples of the area, Lapps, were considered to be the land owners until the mid-18th century. It would be possible to fulfill the obligations of the Convention's land right provisions by taking into consideration the starting point that Lapps were land owners before the mid-18th century even though the national law did not consider this to be the situation later on. If this perspective is taken, ratification could be justified on the basis of repairing the injustice that confronted the Saami at that time. In addition, one could assume that it would be easier politically to enforce such an arrangement in which the Saami people's ownership would be returned in the areas where they have previously held ownership. The ownership can be tested through land claims procedures on the basis of national property law or through the procedures of the establishment of a Commission similar to the Finnmark Act that investigates and reports on still existing ownership and other rights.

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<sup>100</sup> These views are expressed repeatedly in the cases of Argentina, Ecuador, Bolivia and Colombia. Almost all of the ratified countries face problems with the implementation of Article 1. This is especially difficult in countries with a large indigenous population and in countries with many different peoples. For example, in Peru, there are 24 million inhabitants, of which 9 million are indigenous, and there are 42 different ethno-linguistic groups. The Committee has often referred to the difficulties that have arisen from the various definitions and terms used to identify the populations covered by the provisions of the Convention. CEACR: Individual Direct Request for Peru, Submitted 2006.

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## Appendices

### **Annex 1 Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)** **(Note: Date of coming into force: 05:09:1991;** **Date of adoption: 27:06:1989)**

**The General Conference of the International Labour Organization, Having** been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

**Noting** the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957, and

**Recalling** the terms of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

**Considering** that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

**Recognising** the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

**Noting** that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

**Calling** attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

**Noting** that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organisation and the World Health Organisation, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

**Having** decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), which is the fourth item on the agenda of the session, and

**Having** determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957; adopts the twenty-seventh day of June of the year one thousand nine hundred and eighty-nine, the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

## **Part I. General Policy**

### **Article 1**

1. This Convention applies to:
  - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
  - (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3. The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

### **Article 2**

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
2. Such action shall include measures for:
  - (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
  - (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

(c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

### **Article 3**

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

### **Article 4**

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

### **Article 5**

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

(b) the integrity of the values, practices and institutions of these peoples shall be respected;

(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

### **Article 6**

1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their

representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

### **Article 7**

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

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

### **Article 8**

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national

legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

### ***Article 9***

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

### ***Article 10***

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

### ***Article 11***

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

### ***Article 12***

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

## Part II. Land

### Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
2. The use of the term *lands* in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

### Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
2. 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.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

### Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

**Article 16**

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

**Article 17**

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.
2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.
3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

**Article 18**

Adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

### **Article 19**

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

- (a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
- (b) the provision of the means required to promote the development of the lands which these peoples already possess.

## **Part III. Recruitment and Conditions of Employment**

### **Article 20**

1. Governments shall, within the framework of national laws and regulations, and in co-operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.
2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular as regards:
  - (a) admission to employment, including skilled employment, as well as measures for promotion and advancement;
  - (b) equal remuneration for work of equal value;
  - (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
  - (d) the right of association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organisations.
3. The measures taken shall include measures to ensure:
  - (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
  - (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
  - (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;



(d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

## **Part IV. Vocational Training, Handicrafts and Rural Industries**

### ***Article 21***

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

### ***Article 22***

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.
2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.
3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organisation and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organisation and operation of such special training programmes, if they so decide.

### ***Article 23***

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic selfreliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.
2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional

technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

## **Part V. Social Security and Health**

### ***Article 24***

Social security schemes shall be extended progressively to cover the peoples concerned, and applied without discrimination against them.

### ***Article 25***

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.
2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.
3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.
4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

## **Part VI. Education and Means of Communication**

### ***Article 26***

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

### ***Article 27***

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall

incorporate their histories, their knowledge and technologies, their value systems and their further social, economic and cultural aspirations.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples. Appropriate resources shall be provided for this purpose.

### **Article 28**

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

### **Article 29**

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

### **Article 30**

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

**Article 31**

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of these peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.

**Part VII. Contacts and Co-operation across Borders****Article 32**

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

**Part VIII. Administration****Article 33**

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfilment of the functions assigned to them.
2. These programmes shall include:
  - (a) the planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
  - (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

## **Part IX. General Provisions**

### ***Article 34***

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

### ***Article 35***

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

## **Part X. PROVISIONS**

### ***Article 36***

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

### ***Article 37***

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

### ***Article 38***

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

**Article 39**

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

**Article 40**

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.

2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

**Article 41**

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

**Article 42**

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

**Article 43**

1. Should the Conference adopt a new Convention revising this Convention in whole or in part,

then, unless the new Convention otherwise provides—

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

**Article 44**

The English and French versions of the text of this Convention are equally authoritative.

## **Annex 2 Standing Orders concerning the procedure for the examination of representations under articles 24 and 25 of the Constitution of the International Labour Organization**

### **General provision**

#### ***Article 1***

When a representation is made to the International Labour Office under article 24 of the Constitution of the Organization, the Director-General shall acknowledge its receipt and inform the government against which the representation is made.

### **Receivability of the representation**

#### ***Article 2***

1. The Director-General shall immediately bring the representation before the Officers of the Governing Body.
2. The receivability of a representation is subject to the following conditions:
  1. it must be communicated to the International Labour Office in writing;
  2. it must emanate from an industrial association of employers or workers;
  3. it must make specific reference to article 24 of the Constitution of the Organization;
  4. it must concern a Member of the Organization;
  5. it must refer to a Convention to which the Member against which it is made is a party; and
  6. it must indicate in what respect it is alleged that the Member against which it is made has failed to secure the effective observance within its jurisdiction of the said Convention.
3. The Officers shall report to the Governing Body on the receivability of the representation.
4. In reaching a decision concerning receivability on the basis of the report of its Officers, the Governing Body shall not enter into a discussion of the substance of the representation.



## Reference to a committee

### *Article 3*

1. If the Governing Body decides, on the basis of the report of its Officers, that a representation is receivable, it shall set up a committee for the examination thereof, composed of members of the Governing Body chosen in equal numbers from the Government, Employers' and Workers' groups. No representative or national of the State against which the representation has been made and no person occupying an official position in the association of employers or workers which has made the representation may be a member of this committee.
2. Notwithstanding the provisions of paragraph 1 of this Article, if a representation which the Governing Body decides is receivable relates to a Convention dealing with trade union rights, it may be referred to the Committee on Freedom of Association for examination in accordance with articles 24 and 25 of the Constitution.
3. The meetings of the committee appointed by the Governing Body pursuant to paragraph 1 of this article shall be held in private and all the steps in the procedure before the committee shall be confidential.

## Examination of the representation by the Committee

### *Article 4*

1. During its examination of the representation, the committee may:
  - request the association which has made the representation to furnish further information within the time fixed by the committee;
  - communicate the representation to the government against which it is made without inviting that government to make any statement in reply;
  - communicate the representation (including all further information furnished by the association which has made the representation) to the government against which it is made and invite the latter to make a statement on the subject within the time fixed by the committee;
  - upon receipt of a statement from the government concerned, request the latter to furnish further information within the time fixed by the committee;
  - invite a representative of the association which has made the representation to appear before the committee to furnish further information orally.
2. The committee may prolong any time-limit fixed under the provisions of paragraph 1 of the article, in particular at the request of the association or government concerned.

### **Article 5**

1. If the committee invites the government concerned to make a statement on the subject of the representation or to furnish further information, the government may:

- communicate such statement or information in writing;
- request the committee to hear a representative of the government;
- request that a representative of the Director-General visit its country to obtain, through direct contacts with the competent authorities and organizations, information on the subject of the representation, for presentation to the committee.

### **Article 6**

When the committee has completed its examination of the representation as regards substance, it shall present a report to the Governing Body in which it shall describe the steps taken by it to examine the representation, present its conclusions on the issues raised therein and formulate its recommendations as to the decisions to be taken by the Governing Body.

## **Consideration of the representation by the Governing Body**

### **Article 7**

1. When the Governing Body considers the reports of its Officers on the issue of receivability and of the committee on the issues of substance, the government concerned, if not already represented on the Governing Body, shall be invited to send a representative to take part in its proceedings while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government.

2. Such a representative shall have the right to speak under the same conditions as a member of the Governing Body, but shall not have the right to vote.

3. The meetings of the Governing Body at which questions relating to a representation are considered shall be held in private.

### **Article 8**

If the Governing Body decides to publish the representation and the statement, if any, made in reply to it, it shall decide the form and date of publication. Such publication shall close the procedure under articles 24 and 25 of the Constitution.

***Article 9***

The International Labour Office shall notify the decisions of the Governing Body to the government concerned and to the association which made the representation.

***Article 10***

When a representation within the meaning of article 24 of the Constitution of the Organization is communicated to the Governing Body, the latter may at any time in accordance with paragraph 4 of article 26 of the Constitution adopt, against the government against which the representation is made and concerning the Convention the effective observance of which is contested, the procedure of complaint provided for in article 26 and the following articles.

**Representations against non-members*****Article 11***

In the case of a representation against a State which is no longer a Member of the Organization, in respect of a Convention to which it remains party, the procedure provided for in these Standing Orders shall apply in virtue of article 1, paragraph 5, of the Constitution.