

To Tiina Sanila Aiko, President of the Sami parliament in Finland

Sent via email: tiina.sanila-aikio@samediggi.fi

Legal analysis of the 10 January 2017 draft proposal for a Nordic Sami Convention

1. Introduction and background

1.1 About the assignment

The Saami Council first tabled the idea that the Sami people and the states within which the Sami reside should agree upon and adopt a Sami Convention 1986.¹ In 2002, the governments of Finland, Norway, and Sweden, and the Sami parliaments in the respective countries agreed to initiate the process towards an adoption of a Sami Convention. For that purpose, they appointed an Expert Group consisting of independent experts nominated by the six parties.² The Expert Group presented a unanimous proposal for a Nordic Saami Convention in 2005 (DNSC2005). One may note that the DNSC2005 was finalized two years prior to the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007). The DNSC2017 could thus not use the UNDRIP as a benchmark, although certain use was made of the then draft UNDRIP.

Following rather lengthy, and apparently complicated, discussions between the governments and the Sami parliaments, in 2011 the parties reached an agreement on the settings for political negotiations on a Nordic Sami Convention, where it among other things was agreed that the DNSC2005 should serve as point of departure for the new round of deliberations. A new draft Nordic Sami Convention was subsequently presented on 10 January 2017 (DNSC2017).

This legal analysis have been commissioned by the Sami parliament in Finland through its President. The assignment has been to analyze the DNSC2017 from an international legal perspective. The assignment has not been to measure the DNSC2017 against the 2005 text. Consequently, the legal analysis contains no such elements.

1.2 About relevant legal sources etc.

Already in the outset, some remarks with regard to relevant legal sources etc. are in order.

¹ It is worth noting that the 1986 Saami Council proposal foresaw that also the Kola Sami and the Russian Federation (then the Soviet Union) should be parties to the Sami Convention.

² They also agreed that it would be too complicated to engage the Kola Sami and the Russian Federation at this stage. The author of this legal analysis was a member of the Expert Group, appointed as an independent expert by the Sami parliament in Sweden.

Legal analyses normally focus almost exclusively on the law at the time of drafting. What is of interest is the law today (*de lege lata*) and less so the law of tomorrow (*de lege ferenda*). Such a method is, however, less relevant for a legal analysis of this kind. This analysis surveys the validity and relevance of an instrument that potentially will be in force for decades. As a consequence, the legal analysis too must be forward looking. It must seek to measure not only to what extent the DNSC2017 conforms to present day international legal standards. In addition, the legal analysis shall endeavor to survey how DNSC2017 meets up with clearly discernable developments/trends in international law. This is obviously not always an easy task. But at the very least, the legal analysis must be wary of DNSC2017 formulations that 'locks' a DNSC2017 provision in time, and thus prevents the Convention from responding to future developments in international law. The legal analysis takes such an approach, which also impacts on the weight it gives to various international legal sources.³

2. Outline of the legal analysis

The DNSC2017 contains a number of provisions that deserve a careful reading. Still, space and time-management force the legal analysis to focus on three core areas;

- The status of the Sami as a (indigenous) people and the right to self-determination
- Right to lands, waters, territories, and natural resources
- How to determine who may list in the Sami parliaments' electoral rolls⁴

The legal analysis will in addition address certain issues of a more general character, which could potentially impact on the understanding of the DNSC2017, and consequently on its acceptability.

At the very end, the legal analysis presents some concrete proposals for text amendments that would serve to improve the DNSC2017.

3. The right to self-determination

3.1 On the applicability of the right to self-determination to the Sami people

Self-determination was first introduced into the international normative order as a principle, and, subsequently, mainly through common Article 1 of the Covenants on Civil and Political Rights (CESCR) and Economic, Social and Cultural Rights (CESCR), respectively (1966), as a right. Common Art.1.1 reads as follows:

³ See in particular Section 6.

⁴ As the Sami parliament in Finland has commissioned this legal analysis, the analysis does not address DNSC2017 Art. 37 on Sami rights. That provision should, however, be subject to in depth scrutiny in other contexts, and in particular by those affected by such rights (or rather lack thereof) and their representatives, as Art. 37 presents serious concerns.

‘All 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.’

At the time of adoption of these instruments, ‘peoples’ were clearly understood as aggregate populations of states (or territories).⁵ However, a debate on the meaning of ‘peoples’ under international law soon ensued, in particular in an indigenous peoples context. These discussions sparked a development that generated a number of international legal sources and state practices increasingly arguing for that indigenous peoples are ‘peoples’, also for international legal purposes.⁶ The final, and most steadfast, confirmation came with the adoption of UNDRIP Art. 3:

‘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.’

Notably, UNDRIP Art. 3 is essentially a clone of CCPR/CESCR Art. 1.1. This strongly indicates that the provision represents binding customary international law.⁷ There is no doubt today that international law provides that indigenous peoples—including the Sami people—are peoples also for international legal purposes, with the right to self-determination. Today, the Nordic states accept this international law’s position.⁸

DNSC2017 reflects this position. For instance, Art. 4.1 provides that:

‘The Sami people has the right to self-determination. Based on that right they may freely determine their political status and their economic, social and cultural development.’
[author’s translation]

This is a strong and important principal reaffirmation in a Nordic context of that the Sami are a people also under international law, with rights as such, including the right to self-determination. This is, together with Art. 28.2, the most important positive provision in the DNSC2017.

3.2 *Generally on the content and scope of Sami self-determination*

The right to self-determination is generally considered to have one external and one internal aspect. It may be mentioned in passing that it is positive that DNSC2017 Art. 19 confirms that the Sami people has the right to represent itself internationally, it is the internal aspect that is of particular relevance here.

When applied to the aggregate population of a state, the internal aspect of the right to self-determination provides that all citizens have an equal right to participate in the political life

⁵ Cassese, *Self-Determination of Peoples* (Oxford University Press, 1995) 141–46.

⁶ See e.g. CCPR/C/79/Add112; CCPR/CO/82/FIN; CCPR/C/79/Add105; UN Doc E/C12/1/Add94 11.

⁷ Compare Section 6.

⁸ It is another matter that they might take a restrictive position towards the content and scope of that right. See immediately below. But that does not impact on that they accept that the right attach to the Sami people.

of the state; i.e. to vote and to stand for election to official political institutions. This can, however, not be a correct understanding of the right when applied to indigenous peoples, i.e. a segment of the population of the state. Such an understanding would render the right essentially meaningless to them. For instance, members of the Sami population obviously already have the right to vote and stand for election to official political institutions.

In an indigenous context, international law instead understands the right to self-determination as a right to self-governance /autonomy. For instance, UNDRIP Art. 4 reads as follows:

‘Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.’

Further, pursuant to UNDRIP Art. 5:

‘Indigenous peoples have the right to maintain and strengthen their distinct, political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural right of the State.’ [author’s underlining].

From the provision clearly follows that indigenous peoples first and foremost exercise their right to self-determination through collective autonomy/self-government. Individual members’ participation in the political life of the state is only a secondary, and voluntary, option.

What remains to survey then is the content and scope of this right to self-government/autonomy.

3.3 Further on the content and scope of Sami self-determination; the distinction between self-government/autonomy and consultation

To determine the content and scope of the internal aspect of the Sami people’s right to self-determination, one must in the outset distinguish between this right, on one hand, and that of consultation, on the other.

The right to consultation has been an integral part of the indigenous rights discourse for decades. It is for instance a cornerstone of ILO Convention No 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169, 1989).⁹ The right to consultation provides a right to be a part of a decision-making process, but gives no power over the material outcome of that process. It is incumbent in the right to consultation that when no agreement can be reached, the state (through its various institutions), alternatively private entities, always have its/their way against the Sami position.

⁹ See in particular ILO 169 Art. 6.

The UNDRIP took almost a quarter of century to negotiate. One (perhaps the) major reason behind the delay was precisely states' opposition to the inclusion of the right to self-determination in the Declaration. This states' uneasiness would have been difficult to explain had the right to self-determination equaled that of consultation; a right that, as mentioned, states had accepted without concern for decades.

In addition, and from a legal perspective probably more important, if the idea had been that the UNDRIP, including its Art. 3, 4, and 5, should do nothing more than reaffirm that indigenous peoples are beneficiaries of the right to consultation, why did the UNDRIP drafters (and negotiators) not opt for that language? Why refer to a right to self-determination if what they really meant was a right to consultation, in particular since the latter right had already acquired a clear understanding under international law? Under the Vienna Convention on the Law of Treaties (VCLT)'s rules for treaty interpretation, the conclusion can only be that the UNDRIP proclaims that indigenous peoples have the right to self-determination. The Declaration does not contain yet a reaffirmation of that indigenous peoples are entitled to the right to consultation.¹⁰

One must infer that indigenous peoples', including the Sami people's, right to self-determination means something 'more' than the right to consultation. And 'more' in this context can reasonably only be that the Sami are not only entitled to be a part of decision-making processes. They also—and this is the core of the right—have the right to exercise genuine influence over the material outcome of the same; i.e. there are situations when the Sami have the right to see their will through, also against the position of the state.¹¹ The exact reach of this right is difficult to establish today. But what one can surely conclude is that the right will take on a more concrete—and stronger—content in the years to come.¹²

3.4 *DNSC2017's take on the content and scope of Sami self-determination and how it compares to that of the UNDRIP*

3.4.1 DNSC2017 Art. 4.2

DNSC2017 Art. 4.2 provides:

¹⁰ Pursuant to VCLT Art. 31, a treaty provision shall as a starting point be given an understanding that follows from a natural understanding of the wording. A natural understanding of "Indigenous peoples have the right to self-determination" (UNDRIP Art. 3) is that indigenous peoples have the right to self-determination.

¹¹ See in this context also UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Expert Advice No 2 (2011), paras. 2, 20, 21. 34.

¹² For a more elaborate explanation on the distinction between the right to self-determination, on one hand, and the right to consultation, on the other, see Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, 2016) 133-38. A concrete illustration of the difference between the rights to consultation and self-determination are the negotiations between Sami and state representatives on the management of the Tana River, on one hand, and on the Finnmark Act, on the other (See in this context, Henriksen, *The ILO Convention No. 169 - A Case study*). In the latter case, it was clear that no act could be enacted in the absence of the Sami people's acceptance. In contrast, the Finnish parliament adopted the Tana River Act against sharp protests by the Sami parliament. Another example is the management of the Lapland UNESCO World Heritage in Sweden. Here, the affected Sami communities refused to enter into negotiations before it was agreed that any solution presupposed consensus. In the end, the parties agreed that Lapland should be managed by a board consisting of four Sami and three Swedish representatives.

‘Self-determination is exercised through self-government in internal affairs and through consultation with regard to issues which may be of particular importance to the Sami.’
[author’s translation and underlining]

DNSC2017 Art. 4 thus follows a similar structure as UNDRIP Art. 3, 4, and 5. After a general (strong) proclamation that the Sami¹³/indigenous people(s) are entitled to the right to self-determination, the subsequent provision(s) proceeds to elaborate on how the right shall be implemented. In doing so though, there is a clear distinction between the DNSC2017, on one hand, and the UNDRIP, on the other.

During the UNDRIP end game negotiations, and during the time-period immediately following the adoption of the Declaration, UNDRIP Art. 4 was subject to certain criticism by some for ‘reducing’ the general right to self-determination to a right to self-government/autonomy. There might be some principal points there, but it is difficult to see the practical relevance.

Under international law, the right to self-determination awards no people—indigenous and other peoples alike—a right to unilaterally secede from the state within which the people reside. Peoples are expected to exercise their right to self-determination within the framework of existing states. As a consequence, it is difficult to see how indigenous, including Sami, self-determination could be exercised in other ways than through self-government/autonomy. UNDRIP Art. 4 and 5 must therefore be considered uncontroversial in this respect.

The same is then true for DNSC2017 Art. 4.2. It is unproblematic, and in conformity with international law, that this provision foresees that the Sami people exercises its right to self-determination within existing state-borders. The different approaches UNDRIP and DNSC2017, respectively, take towards the right to self-determination rather lies in the influence the two instruments offer indigenous/the Sami people(s) in the decision-making processes within state borders.

As seen, UNDRIP Art. 4, read in conjunction with Art. 3 and 5, establish a ‘fire-wall’ between the rights to self-determination and consultation. These provisions are crystal-clear on that indigenous peoples have a right to self-determination to be exercised through self-government/autonomy, and that this is not a right to consultation. Rather, the right to self-determination that the UNDRIP enshrines is first and foremost a material right. It is a right that allows indigenous peoples to exercise genuine influence over the material outcome of the decision-making process, sometimes also against the position of the state. This is a right with far-reaching consequences. If one wants one could say that it shifts jurisdiction from the state to the indigenous people—in this case from the Finnish, Norwegian and Swedish states to the Sami people—although it is somewhat uncertain to what extent.

Still, already at this point, UNDRIP offers some concrete examples of what is contained in indigenous peoples’ right to self-determination; examples that also underline the difference

¹³ Recall discussion on DNSC2017 Art 4.1 under Section 3.1.

between consultation, on one hand, and self-determination (consent), on the other. See e.g. Art. 10 on forceful reallocation, Art. 11 on the right to control and decide over cultural elements (in the broader term), Art. 19 on legislative and administrative measures that impact on the indigenous people, Art. on hazardous material, and Art. 32 on resource extraction.

In stark contrast, DNSC2017 Art. 4.2 explicitly limits the Sami peoples' right to self-determination to a mere right to consultation in all but 'internal' affairs. The proposed Art. 4.2 seemingly has its roots in a suggested understanding of Sami self-determination that Norway—with the support of Finland and Sweden—presented in connection with then Special Rapporteur on the Rights of Indigenous Peoples (SRIP) Professor James Anaya's formal visit to Sápmi in 2010. Norway then asserted that with 'internal' affairs should be understood affairs completely internal to the Sami, i.e. affairs with no impact on or interest to the majority population and/or the state. Clearly, such affairs are hard to imagine, at least in a legal context. For instance, none of the examples from the UNDRIP listed above even come close to qualify as 'internal' affairs. And to the extent there are examples of 'internal' affairs, the Sami will do as they wish regardless. If no one else cares, there is simply no need to engage the legal system. In summary, DNSC2017 Art. 4.2 in practice reduces the Sami people's right to self-determination to a mere right to consultation. It locks the Sami in a position where they will always have to rely upon the good will of the state in decision-making processes, with no real power of their own.

3.4.2 Chapter II

DNSC2017 Chapter II seeks to concretize how the Sami people's right to self-determination shall be operationalized. Chapter II rather naturally has DNSC2017 Art. 4.2 as point of departure and thus unsurprisingly raises concerns that derives from that provision.

Chapter II includes a couple of good and helpful provisions that flesh out the more precise content and scope of Sami self-determination under DNSC2017. These include Art. 15 on the Sami parliaments' cooperation with other indigenous peoples and certain other entities, Art. 16 on state promotion of cooperation between the Sami parliaments, and, as touched upon, Art. 19 on state obligation to promote Sami international representation.

Still, Chapter II's core articles are those on the relationship between the rights to self-determination and consultation, and those that address the related question as to what governs the Sami parliaments' mandate, and, consequently, the reach of Sami 'self-determination'.

To the first category belongs DNSC2017 Art. 17 and 18. These provisions confirms that it is sufficient that the state consult the Sami parliament and other Sami institutions in order to fulfil its obligation under the Sami people's right to self-determination.

DNSC2017 Art. 12.4 and 14 address the associated issue of the mandate of the Sami parliaments. Pursuant to these provisions, state legislation unilaterally determines the Sami parliaments' mandate. Art. 14 reads:

‘The Sami parliaments make independent decisions in such matters for which they are responsible under national law and in other matters they engage in.’ [author’s translation and underlining]

The provision thus leaves it solely to the state to determine the content and scope of Sami self-determination. The Sami parliaments may engage in other matters they find interesting, but, assumingly, only as long as it conforms with national law, i.e. is not contrary to the state’s interest.¹⁴

3.5 Conclusion

DN2017 Art. 4.1 contains a strong and robust affirmation of that the Sami are a people with the right to self-determination. Such a confirmation in a specific Sami/Nordic context is important. Unfortunately, Section 4.2 then proceeds to reduce this right to a mere right to consultation, a position also reflected in Chapter II’s core provisions. This renders the DN2017’s self-determination package unacceptable in its present form. Still, the problem can be addressed. Section 10 presents a concrete amendment proposal for DN2017 Art. 4.2. Chapter II would have to be revised accordingly.

4. Rights to lands, waters, territories, and natural resources

4.1 Generally on indigenous peoples’ territorial rights under international law

Today, international law firmly establishes that indigenous peoples hold property rights over lands, waters, territories, and natural resources traditionally used in accordance with their cultural practices. For instance ILO 169 Art. 14 provides that:

‘[t]he right to ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. 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.’¹⁵

In a similar vein, pursuant to UNDRIP Art. 26.1:

‘[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of . . . traditional occupation or use. . .’¹⁶

¹⁴ There is nothing inherently problematic with implementing Sami self-determination through national law. But it is then precisely the implementation that should be achieved through national law, the mandate must be determined by international law.

¹⁵ Essentially since the adoption of ILO 169, it has been argued that despite the provision’s reference to ‘ownership’, ILO 169 Art 14.1 does not actually require state recognition of ownership. In my view, in light of later developments in international law, this position is today untenable.

¹⁶ It might be worth noting that ‘territories’ in UNDRIP Art. 26 is not limited to land territories traditionally used. It also include water territories traditionally used, including salt water territories. (The same is true for other similar international legal sources.) As indicated, this raises serious questions as to the validity of DN2017 Art. 37.

Among other international legal sources that affirm that indigenous peoples hold property rights over territories traditionally used can be mentioned that the UN Committee on the Elimination of Racial Discrimination (CERD) has held that to deprive indigenous peoples of their traditional lands constitutes a specific form of discrimination directed against them. Consequently, the Committee has called on states to ‘recognize and protect the rights of indigenous peoples to own . . . [and] control’ their lands and natural resources.’¹⁷ The UN Committee on Economic, Social and Cultural Rights (CESC) has expressed a similar opinion.¹⁸

In the DNSC20017, Art. 27.2 corresponds to the described international norm:

‘In the states, Sami have through long-lasting traditional use of lands and waters established collective or individual ownership or usufruct rights in Sami territories.’ [author’s translation]

The provision is not the most verbose. Still, it captures the essence of the described international legal norm in a good and precise manner. Similar to the self-determination chapter, the DNSC2017 land rights chapter thus starts off with a strong general, principal and important recognition of the underlying right.

4.2 *State duty to take measures to recognition and realization of land rights*

Despite formal recognition, it has often proved difficult for indigenous peoples to have land rights acknowledged and implemented in practice. Resistance is often strong from the surrounding society, the burden of proof a challenge, and court proceedings generally speaking time-consuming, burdensome—and extremely costly. Cultural differences also play in. As a response, the international normative order has obligated states to take positive measures to provide indigenous peoples with a reasonable chance of having territorial rights recognized and effectively implemented. For instance, UNDRIP Art. 27 provides that:

‘States shall establish and implement ... a fair, independent, impartial, open and transparent process, giving the recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their, lands, territories and resources, including those which were traditionally owned or otherwise occupied or used . . .’

In the same vein, the so called World Conference on the Rights of Indigenous Peoples (WCIP) Outcome Document (2014) Art. 21 provides:

‘[States are committed to] establish at the national level . . . independent [and] impartial processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources’]

This provision places a general, almost political, obligation on states to promote the Sea Sami culture, but apparently ignores the private Sami rights that attach also to the coastal areas.

¹⁷ General Recommendation No 23.

¹⁸ General Comment No 21.

The corresponding DNSC20017 provision is Art. 28.1 and 28.2:

‘The states shall take measures to ensure the Sami’s rights to, access to, and possibilities to use such natural resources that have traditionally been used by Sami in Sami territories.

The states shall ensure that national law includes suitable mechanisms that in an enforceable manner can establish Sami rights to lands and waters.’ [author’s translation]

DNSC2017 Art. 28 shares certain commonalities with UNDRIP Art. 27 and WGIP Outcome Document Art. 21. In particular one aspect does, however, distinguish the two latter provisions from the first. In line with international law in general, UNDRIP Art. 27 and WGIP Outcome Document Art. 21 solely call on states to establish mechanisms that can effectively recognize and implement specific rights. In contrast, DNSC2017 Art. 28.1 not only address rights recognition. Rather, the provision simultaneously calls on states to ensure the possibility for Sami in general to have access to and use natural resources. What Art. 28.1 addresses here is apparently such situations where the Sami in question have no rights to the natural resource, as had they been bestowed with rights, the addition would have been redundant.

DNSC2017 Art. 28’s approach is confusing, and renders the state obligation less clear. It is also problematic for other reasons. The provision, according to its wording, suggests that all Sami shall have the possibility to use natural resources on every land traditionally used by any Sami. The position is seriously dangerous. It undermines the very foundation of the rights established by Sami communities and individuals and can thus have detrimental effects on the Sami society. The foundation for Sami right to lands, waters, and natural resources, and indeed for the Sami society as such, is customary use of Sami communities and individuals. Art. 28.1 challenges this cardinal base for Sami territorial rights and the Sami society. It also contradicts Sami customary law. As a consequence, there are also practical consequences. There is an apparent risk that any Sami having the possibility to use any part of the Sami traditional territories will create chaos. That is not least so within reindeer herding, where it is important to create order through every reindeer herding community having their designated pasture land.

As to DNSC2017 Art. 28.2, this provision comes across as rather minimalistic compared to UNDRIP Art. 27 and WGIP Outcome Document Art. 21. The two latter provisions are quite specific as to what measures the states are obliged to take in order to recognize and implement Sami territorial rights. In contrast, the former provision is very generally formulated. In fact, it would appear that it is sufficient that the state ensures the Sami access to common courts in order to fulfill the obligation, something that is of course already in place, and often proved less helpful. The provision, as currently formulated, therefore comes across as in want of real concrete content.

In conclusion, the confusing and to be frank outright dangerous DNSC2016 Art. 28.1, as well as the rather unspecific Art. 28.2, should be replaced with a single provision that better corresponds with established international norms. Section 10 presents a concrete proposal for such a provision.

4.3 *Sami territorial rights and the relationship to third parties*

4.3.1 The general rule - consent

Sami communities seek recognition of rights to land areas traditionally used for various reasons. Most important is of course the right to continuously use the land. But of increasingly greater importance has become not only the right to use the land one self, but also to prevent others from doing so without consent.

In this regard, international law today firmly underlines that indigenous property rights to land, established through traditional use, enjoy equal protection with property rights in general. Consequently, indigenous property rights holders have equal rights with other property rights holders to deny access to their territories. That includes the right to say no to industrial activities.

CERD has on numerous occasions affirmed that a resource extractor must obtain the relevant indigenous community's consent before entering its traditional territory. The Committee has for instance held that states must '[i]mplement in good faith the right to . . . free prior and informed consent of [indigenous] peoples whenever their rights may be affected by projects carried out on their lands . . .'¹⁹ CERD has called on Sweden to take measures to ensure respect for Sami communities' right to withhold their consent whenever their rights may be affected by resource extraction in their traditional territories.²⁰ In the same vein, CESCR has held that indigenous communities have the right to withhold their consent to resource extraction within their traditional territories. The SRIP has echoed these conclusions. According to him, legal sources of authority such as the UNDRIP 'lead to the general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent.'²¹ A similar conclusion follows from UNDRIP Art. 26, read in light of Art. 32.2.

In sum, international law today undoubtedly provides that, as a general rule, Sami property rights holders have the right to say no to industrial enterprises that seek access to their traditional territories.

4.3.2 The possible exception - expropriation

The possible exception to the general rule is expropriation. For expropriation to be lawful, it must i) fulfil a legitimate aim, and ii) be proportionate.²²

¹⁹ CERD/C/CAN/CO/19-20, 9 March 2012 20 (a). For examples of similar observations, see e.g. CERD Concluding observations on Suriname, UN Doc CERD/C/SUR/CO/12, 3 March 2009; Philippines, CERD/C/PHL/CO, 23 September 2009 22 and 24; Cambodia, CERD/C/KHM/CO/8-13, 1 April 2010 16; El Salvador, CERD/C/SLV//CO/14-15, 14 September 2010 19.

²⁰ CERD/C/SWECO/19-21., para 17.

²¹ 'Extractive Industries and Indigenous Peoples'.

²² Expropriation must in addition be lawful, but that criterion is not relevant here.

As to the legitimate aim criterion, according to the SRIP, '[a legitimate aim] is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain.'²³ The Inter-American Court on Human Rights (IACHR) has also cautioned against simply assuming that resource extraction in indigenous territories meets the legitimate aim criterion. The IACHR accepts that indigenous communities' property rights over territories can be restricted under certain circumstances, but only when such restrictions are geared towards satisfying an imperative public interest.²⁴

With regard to the proportionality test, the SRIP has concluded that '[the proportionality criterion] will generally be difficult to meet for extractive industries that are carried out within the territories of indigenous peoples without their consent.'²⁵ In a similar vein, CERD has called on states to 'ensure that the protection of the rights of indigenous peoples prevails over commercial and economic interests'.²⁶ The IACHR has, in connection with the proportionality test, held that indigenous communities always have the right to preserve and protect their special relationship with their traditional territories and to continue to lead their traditional way of life.²⁷

Legal sources may be somewhat scarce but the general sentiment certainly clear; indigenous territories can normally not be subject to expropriation. Under no circumstances may one simply assume that expropriation of such territories are legal.

DNSC2017 Art. 30.2 takes almost the opposite approach:

'In case of infringement in Sami ownership right or usufruct right, compensation shall be provided in accordance with what follows from national law.' [author's translation]

Thus, the provision—in sharp contrast with international legal sources—precisely rests on the assumption that Sami territories can be lawfully expropriated. DNSC2017 Art. 30.2 establishes no criteria for when an infringement can legally occur. It simply takes as point of departure the wording '[i]n case of infringement', wherefrom follows that the starting point is that infringements are always lawful, i.e. expropriation of Sami territories can always occur, as long as compensation²⁸ (size of which is to be determined by national law) is provided.²⁹

²³ 'Extractive Industries and Indigenous Peoples'.

²⁴ *Yakey Axa Indigenous Community v Paraguay*, Inter-Am Ct HR (Ser C) No 141 (2005) 145.

²⁵ 'Extractive Industries and Indigenous Peoples'.

²⁶ CERD/C/CHL/CO/15-18, 22-23.

²⁷ *Saramaka People v Suriname*, Inter-Am Ct HR (Ser C) No 172 (2007).

²⁸ Arguably, it is positive that the DNSC2017 confirms that Sami property rights holders shall be compensated in cases of infringement. But at the same time, such a right follows already from the right to non-discrimination and also forms part of national law in all three states. Naturally, if Sami are indeed recognized property holders, they must be compensated if their property is expropriated. Normally, it is not compensation that is the issue, but recognition of the property right in the first place. Consequently, the reaffirmation in Art. 30.2 is of limited value.

²⁹ To be clear, the reason why DNSC2017 Art. 30.1 is not addressed in this context is not negligence but lack of relevance. That provision addresses damage to the Sami society at large, and not to individual property right holders, the subject of Art. 30.2.

4.3.3 Conclusion

In conclusion, it is well known that infringements by industrial activities etc. into Sami communities' traditional territories is one of the most pressing issues the Sami are facing at the moment. Against this background, DNSC2017 Art. 30.2, in its current wording, cannot be accepted. Section 10 presents an alternative proposal for Art. 30.2.

4.4 Benefit-sharing

Finally, the legal analysis will address two elements that are notably absent from the DNSC2017's land rights chapter. This section deals with the issue of benefit-sharing. Subsequently, Section 4.5, immediately below, turn to the right to restitution.

The right to benefit-sharing, i.e. the right of indigenous peoples/communities to share in the proceeds when resource extraction occurs on their traditional territories,³⁰ is at the very least a quickly emerging international legally binding customary norm. Norway is in addition treaty bound to respect this right. ILO 169 Art. 15.2 provides that indigenous peoples shall whenever possible 'participate in the benefits of [resource extraction] activities.' It is difficult to imagine a situation where it is not possible to share profits from resource extraction with the Sami. CERD has confirmed that indigenous communities' property rights over their traditional territories embrace a right to share in the profits when resource extraction occurs on such territories,³¹ a position that has essentially been shared by the IACHR.³² A right to benefit-sharing also follows from state practice. Finland, Norway, and Sweden are essentially the only industrialized countries with indigenous populations that do not require that benefits are shared with such when resource extraction occurs in their traditional territories.

As mentioned, even if benefit-sharing is yet to fully crystalize into a binding international norm, it is clearly about to. Consequently, leaving the right outside the DNSC2017 risks precluding future application of the Convention that takes into account the right to benefit-sharing at the time when the right has firmly emerged as an international norm (if it has not already). Under such circumstances, the DNSC2017 again risks freezing Sami rights at a level below international standards. In addition, leaving the right outside the DNSC2017 implies that it will not, irrespective of future developments, be subject to the follow-up mechanism established through DNSC2017 Art. 40.

For these reasons, the right to benefit-sharing should be included in the DNSC2017 before the Convention is adopted. As some might argue that the right is yet to firmly materialize into binding law, this could be done through relatively neutral language. Section 10 contains a concrete proposal to that effect (Art. 32 *bis*).

³⁰ One must thus distinguish the right to benefit-sharing from compensation for damages. Benefit-sharing has no relation to damages suffered. The right to benefit-sharing is triggered simply by a resource extractor making a profit on indigenous land. It should be provided irrespective of whether the resource extraction causes damages or not. DNSC Art. 30.2 is thus not a benefit-sharing provision.

³¹ CERD/C/SUR/CO/12.

³² *Saramaka*.

4.5 *The right to restitution*

As indicated, it is also unfortunate that the right to restitution, i.e. the right of indigenous peoples/communities to have territories traditionally used, but subsequently taken from them without consent, returned is absent from the DNSC2017's land rights chapter. This right too is of significant value to the Sami. As the right to benefit-sharing, the right to restitution is quickly crystalizing into a legally binding international norm—if it has not already. For instance, UNDRIP Art. 28 proclaims that:

'Indigenous peoples have the right to redress, by means that could include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally . . . used, and which have been . . . taken . . . without their . . . consent.'

Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal, size and legal quality or of monetary compensation or other appropriate redress.'

The general sentiment of UNDRIP Art. 28 has been echoed in a number of other international legal sources.³³

The reasons for why no Sami Convention should be adopted without a provision on the right to restitution are thus essentially the same as those that have been presented with regard to benefit-sharing.³⁴ Section 10 presents a concrete proposal to that effect (Art. 32 *ter*).

5. **The Sami parliaments' electoral rolls**

5.1 *International law on indigenous peoples' right to determine the membership of the group*

Naturally, neither global nor regional international legal sources provide any definition of who are to be considered Sami.³⁵ Indeed, there is no Nordic Sami definition either, since the three Sami Parliamentary Acts all employ different definitions.³⁶

International law does stipulate, however, that indigenous peoples have the right themselves to determine the membership of the group. Pursuant to UNDRIP Art. 33.1:

'Indigenous peoples have the right to determine their own identity or membership in accordance with their own customs and traditions . . .'

³³ See e.g. CERD General Recommendation No 23, para. 5, CESC General Comment No 21, para. 36, and the IACHR's ruling in *Yakey Axa Indigenous Community v Paraguay*, IACHR, Series C No 141 (2005)

³⁴ See Section 4.4, immediately above.

³⁵ Since the Sami definition formulation is not a matter of international law, the legal analysis will not address the definition DNSC2017 Art. 13 presents for the purposes of the Sami parliaments' electoral roll. It is noted in passing, however, that it raises concerns.

³⁶ To be precise, there are in fact no national Sami definitions either, since the Sami Parliamentary Acts formally only define who may enlist in the Sami parliaments' electoral roll.

Following the Finnish Supreme Administrative Court's overturning the Finnish Sami parliament's decision not to include four individuals in the electoral roll, CERD retorted:

'[T]he Committee is concerned that the definition adopted by the Court gives insufficient weight to the Sami people's rights, recognized in [UNDRIP], to self-determination (art. 3), in particular the right to determine their own identity or membership . . . (art. 33), as well as their right not to be subject to forced assimilation . . . (art. 8)'

In conclusion, the right to determine the membership of the group, including for the purposes of the Sami parliaments' electoral rolls, vests with the Sami people itself, and not with the state.

5.2 *The implications of DNSC2017 preambular paragraph 10*

Against this background, DNSC2017 preambular paragraph (pp) 10 is of significant concern:

'[The governments of Finland, Norway, and Sweden, that take as a basis] that the Convention does not prevent the states from, taking into account Article 2 on minimum rights and Article 4 on the Sami people's right to self-determination, provide a right to be listed on the Sami parliament's electoral roll to others that consider themselves Sami and have a close connection to the Sami culture.' [my translation]

Clearly, pp 10 breaks sharply with the described international norm. Indeed, the provision goes beyond allowing the states to decide who may enlist in the Sami parliaments' electoral roll as Sami. It actually suggests that the states may determine who may enroll as non-Sami. The notion appears absurd. It is difficult, to say the least, to understand what justifies pp 10's place in DNSC2017. Most importantly, it blatantly violates the Sami people's right to self-determination. In this context, one may refer to former CERD member Professor Patrick Thornberry, who has emphasized that individuals' right to 'belong' does not apply to

' . . . absurd claims of belonging by those without community connection or acceptance.'³⁷

Clearly, a claim non-Sami should have the right to belong to the Sami group can be described as nothing else than 'absurd'.

If accepted, DNSC2017 pp 10 would provide the states with a mandate to transform the Sami parliaments into regional parliaments, open to all those in the region the state subjectively considers have a 'connection' to the Sami culture. If a state embarks on this path, the end-result is assimilation. In this context, one should recall how CERD connected the Finnish Sami parliament's right to control the electoral roll to the right not to be subject to forceful assimilation.

³⁷ Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD practice', in Allen and Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Studies in International Law, Vol 30, 2011), p 83.

5.3 *The relevance of pp 10 being a preambular, and not an operative, paragraph*

Some might argue that pp 10 being a preambular, and not an operative, paragraph, renders the provision less of a concern. To do so would, however, be an oversimplification. While pp:s do not proclaim rights in their own right, in the way operative paragraphs do, pp:s are still of significant importance for the interpretation of operative paragraphs. VCLT Art. 31.2 reads:

‘The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:’ [my underlining]

Pp 10 will thus be an integral part of the interpretation of DNSC2017 Art. 13. What is more, the provision is drafted in a very concrete and straight-forward manner³⁸; it can be given only one meaning. Consequently, the argument can easily, and convincingly, be made that DNSC2017 Art. 13 should be understood to include an element pursuant to which the state is entitled to list also non-Sami individuals of its choice in the Sami parliament’s electoral roll.

5.4 *Conclusion*

In conclusion, pp 10 is extremely dangerous as a vehicle for assimilation, and no Sami Convention must be adopted that includes this provision. Section 10 presents an alternative proposal for pp 10.

6. **Specifically on the legal relevance of the UNDRIP**

Some might argue that the legal analysis above relies on the UNDRIP to an overly extent, given the Declaration’s formally non-legally binding character. Such an observation with regard to UNDRIP’s formal legal status would certainly be correct. Still, there are at least three, interconnected, compelling reasons why the UNDRIP is nonetheless highly relevant in this context.

First, that the UNDRIP as such is formally speaking non-legally binding does in no way mean that the Declaration provisions cannot reflect binding law. Human rights declarations such as the UNDRIP are strong contributors to the creation of legally binding international customary norms, and also often indicate the existence of such norms. For instance, it is today widely held that the entire Universal Declaration on Human Rights, also formally speaking a non-legally binding instrument, represents customary international law.

The argument here is not that all UNDRIP provisions mirror international customary law. But several factors speak to that substantial parts of the Declaration are indicative of binding law. For instance, large segments of the UN system has endorsed the UNDRIP as representative of international indigenous rights law,³⁹ and the Declaration has also been accepted as reflective

³⁸ For being a pp, it is in fact formulated in an *extremely* concrete and straight-forward manner. Indeed, in style *it is* an operative paragraph and not a pp, irrespective of placed in the pp section.

³⁹ Such UN bodies include CESC (UN Doc E/C12/NIC/CO/4), CERD (CERD/C/USA/CO/6), the Committee on the Rights of the Child (General Comment No 11), and UN Food and Agricultural Organization (FAO) (FAO Policy on Indigenous and Tribal Peoples (2010)).

of binding international law by human rights courts.⁴⁰ As mentioned, two areas where a strong case can be made for that the UNDRIP represents customary international law are self-determination and territorial rights.⁴¹

Second, in a similar vein, irrespective of the formal legal status of the UNDRIP, it today constitutes the principal legal standard within the international indigenous rights regime. For instance, the SRIP has observed that

‘[UNDRIP] represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.’⁴²

Thirdly, as the introduction discusses, any relevant Sami Convention must be forward-looking rather than conservative and receptive towards clearly emerging law. In those parts where the UNDRIP does not reflect already binding international law, it is certainly indicative of where the indigenous rights regime is heading. As a consequence, any relevant legal analysis of the DNSC2017 must necessarily also be forward looking. It should analyze the draft Convention not only based on present human rights standards but also take space for future developments.

In conclusion, UN system organizations, international human rights institutions etc. have endorsed and/or accepted the UNDRIP as highly reflective of international binding law. For this reason, it has become the principal international legal standard on indigenous rights, even though not all UNDRIP provisions may be reflective of binding law at this time. Any relevant Sami Convention must be forward-looking, wherefore it should be at least in line with such a principal standard. For at least these reasons, the UNDRIP is a highly relevant legal source in this context, and there is no reason to accept DNSC2017 provisions that fall below the standard set by the Declaration.

7. Non-settled issues and leaving room for future developments

It is no secret that the more precise content and scope of Sami self-determination and the reach of Sami territorial rights are contentious issues. One could therefore hardly expect the Sami parliaments and the governments to come to agreement on all such issues. The question then becomes how to handle such deadlocks. In my view and experience, the reasonable, and fair, way forward in such situations is to look for neutral language. One should try to find formulations where neither side ‘wins’, and rather allow future developments in international law to decide who was ‘correct’.

⁴⁰ *Saramaka*; African Commission on Human and People’s Rights’ decision in *Endorois People v Kenya Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Comm 276/2003.

⁴¹ On the legal status of the UNDRIP and its status as an international legal source, see further Åhrén (fn 12), Sections 4.2.4, 5.7.3, and 5.7.4.

⁴² UN Doc A/HRC/9/9 85.

In my view, the DNSC2017 is not drafted in such a manner. Rather, on several contentious issues, it would appear that the state position has been allowed to prevail. Mentioned examples are DNSC2017 Art. 4.2, which locks Sami self-determination into a right to consultation, Art. 30.2, which builds on the assumption that Sami territories can always be legally expropriated, and the decision to leave the rights to benefit-sharing and restitution out of the Convention.

8. Minimum rights

8.1 The structure of DNSC2017 and states' right 'to do more'

Some might suggest that even if there should be shortcomings or even potentially harmful elements in the present DNSC2017 text, Art. 2 on minimum rights can neutralize such:

'The rights that are protected in this Convention are minimum rights. This does not prevent a state from expanding Sami rights or from undertaking more far-reaching measures and may not be used to limit the rights the Sami have that follows from other legal norms or international undertakings.' [author's translation]

The provision addresses two issues. First, it confirms the rather obvious that a contracting state may go beyond its obligations under DNSC2017, and 'do more' for the Sami than the DNSC2017 prescribes. This part of the provision would at least be relevant for Norway, as DNSC2017 falls below ILO 169 in certain respects.

8.2 Generally on DNSC2017 Art. 2 as a minimum rights provision

The second issue is of greater interest. It says that a contracting state must not invoke the DNSC2017 to limit Sami rights that derive from other 'legal norms' (*rättsregler*) or 'international undertakings' the state has committed to elsewhere. Again, it might be argued that this 'savings-clause' renders it less of a concern if parts of the DNSC2017 falls below existing or clearly emerging international legal standards. That is so, this argument would go, as other 'legal norms' (*rättsregler*) and/or 'international undertakings' operate as a 'floor' when it comes to the state's obligations vis-à-vis the Sami. I would submit though, that such a line of argument is associated with certain problems.

This kind of minimum rights provisions are common in human rights instruments. One can question in general, however, to what extent such clauses have any real impact on the understanding and implementation of human rights instruments. That is even more so in this particular case, due to the specific nature of the DNSC2017.

8.3 *The relevance of DNSC2017 being a 'treaty similar' instrument/'constructive arrangement'*

Human rights instruments are normally elaborated without much direct involvement of the beneficiaries of the instrument.⁴³ Under such circumstances, there is a strong argument for the inclusion of and respect for a minimum rights clause. States should not be allowed to 'negotiate away' already existing human rights in subsequent treaties, with the human rights holders as powerless bystanders.

The DNSC2017 is though, a different kind of human rights instrument. True, only the states are formal parties to the DNSC2017. Still, the draft has been elaborated with the direct involvement of Sami people's representatives, and its adoption requires, if not formally so in practice, the Sami people's agreement. This implies that the DNSC2017 is akin to a 'treaty similar' instrument or 'constructive arrangement'⁴⁴ between the Sami people, on one hand, and the Finnish, Norwegian, and Swedish states, on the other. This means that if the DNSC2017 falls below existing or clearly emerging human rights standards, it is not the states that have 'negotiated away' Sami rights. Rather, this have been done with the Sami people's explicit consent. As a consequence, UN treaty bodies, courts and other similar institutions are unlikely to accept an argument that norms specifically spelled out in the DNSC2017 material provisions (Art. 3-38), and which the Sami people has explicitly consented to, do not constitute valid understandings of how general indigenous rights standards should apply themselves in a specific Sami context. That will be so irrespective of any plea to the general DNSC2017 Art. 2 on minimum rights. Under such circumstances, the provision would essentially lack meaning.

8.4 *Minimum rights and the rationale behind a Sami Convention*

In addition, one could question what is the point with a Sami Convention if drafted in a manner resulting in that one have to apply other instruments and undertakings rather than the Sami Convention's material provisions as such. Rather than 'referring to, or calling for the application of' other, already existing, treaty provisions, the DNSC2017 should reasonably bring the Sami rights discourse forward, through strengthening and/or concretizing Sami rights through its own provisions, should it serve any purpose.

In a similar vein, assumingly at least one rationale behind the Sami Convention project is that 'the other legal norms' and 'undertakings' to which DNSC2017 Art. 2 refers do not sufficiently ensure recognition and implementation of Sami rights. If they had, there had reasonably been no need for a Sami Convention. There is a need for a Sami Convention because the Nordic states have not adhered to these legal norms and undertakings before. And if that is the case, why should they do so just because Art. 2 refers to these?

In my view, the main reason behind the short-comings of existing 'legal norms' and 'undertakings' is a tendency among the Nordic states to apply a restrictive interpretation as

⁴³ One exception being the UNDRIP, and, to some extent, the WCIP Outcome Document.

⁴⁴ Compare UNDRIP Art. 37.

to what rights the Sami possess under international indigenous rights law, unless these are spelled out in formally legally binding sources in a concrete and unambiguous fashion.⁴⁵ This is in turn partly a result of what legal sources these countries deem relevant when determining what are indigenous, and thus Sami rights. This position among the Nordic states not only highlight the limited relevance of DNSC2017 Art. 2. In addition, it underlines the need for a robust, forward-looking legally binding Sami Convention that in concrete terms spells out what rights the Sami possess vis-à-vis the Nordic states, in conformity with existing and clearly emerging international law.

8.5 Conclusion

The argument here is not against the presence of DNSC2017 Art. 2 in the Convention. The point is to caution against a conclusion that the provision constitutes a 'quick fix' for the serious shortcomings that are embedded in many of the DNSC2017 material provisions, including in some of the most fundamental ones.

9. Conclusion

9.1 On the DNSC2017 proposal

The DNSC2017 contains 46 operative paragraphs, whereof 36 material (3-38). A number of these contain good and useful proposals that, if implemented, would strengthen Sami rights and further the Sami people and society. Many of these provisions do, however, address 'softer' and less controversial issues. For space and time management reasons, this legal analysis unfortunately have had to focus on the most fundamental Sami rights; the right to self-determination and the territorial rights. These rights are of such cardinal importance, that a shortcoming in just one of the provisions on these rights immediately places any Sami Convention proposal in jeopardy of being unacceptable.

It is therefore unfortunate that the self-determination and territorial rights chapters contained in DNSC2017 are riddled with shortcomings and in some cases outright danger essentially throughout. Both chapters fall way below existing and clearly emerging international legal standards. The same is true for the also critical provisions on who may list in the Sami parliaments' electoral roll.

For this reason, I in the strongest possible terms concludes that the DNSC2017 cannot be accepted in its present form.

⁴⁵ One may note that this is not only true for the international level. For instance, the Norwegian Finnmark Act § 3 provides that the Act should be applied in accordance with ILO 169 and international law in general. The Finnmark Commission's application of the Act demonstrates that such a general provision has little, if any, impact on the application of the specific and concrete provisions of the Act.

9.2 Some strategic points

I also strongly advise against a 'step-by-step' approach, as I understand have been suggested by some. Here, the argument seems to be that if the Sami accept the imperfect now, they can work together with states for improvements later. In my view and experience, it is futile to believe that if the DNSC2017 is adopted in its present form, there will be further negotiations on amendments/additions/improvements within the foreseeable future. On the contrary, if the DNSC2017 is adopted now in its present form, that will in all likelihood be the Sami Convention for many years to come.

Therefore, any desired amendments should be done prior to the adoption of the Sami Convention. And that need not be an unsurmountable task. Immediately below are presented a small number of proposed amendments to the DNSC2017 text that would immediately significantly improve the Convention.

Finally, I underline that no Sami Convention is not the worst outcome, albeit it would admittedly be a failure. But should it prove impossible to reach agreement on a Sami Convention that conforms with existing and clearly emerging international legal standards, then that is the reality. It is far better to have no Sami Convention than a bad and harmful one. And DNSC2017—in its present form—is clearly a bad and harmful proposal for a Sami Convention.

10. Concrete text proposals for improvement of DNSC2017

Preambular paragraph 10

~~"[The governments of Finland, Norway, and Sweden, that take as a basis] that the Convention does not prevent the states from, taking into account Article 2 on minimum rights and Article 4 on the Sami people's right to self-determination, provide a right to be listed on the Sami parliament's electoral roll to others that consider themselves Sami and have a close connection to the Sami culture."~~

that the Sami people's right to self-determination encompasses a right to determine the membership of the people, including a right to decide who may list in the Sami parliaments' electoral rolls.

Article 4.2

~~"Self-determination is exercised through self-government in internal affairs and through consultation with regard to issues which may be of particular importance to the Sami"~~

Is replaced by:

'The Sami people, in exercising its right to self-determination, has the right to autonomy or self-government, in matters relating to its internal and local affairs, as well as ways and means for financing its autonomous functions.'

Chapter II

Would have to be revised in accordance with the revised DNSC2017 Art. 4.2.

Article 28

~~'The states shall take measures to ensure that the Sami's rights to, access to, and possibilities to use such natural resources that have traditionally been used by Sami in Sami territories.'~~

~~The states shall ensure that national law includes suitable mechanisms that in an enforceable manner can establish Sami rights to lands and waters.'~~

'The states shall establish and implement independent, impartial and effective processes to identify, recognize, and adjudicate rights of Sami individuals and communities to lands, waters, territories, and natural resources which they have traditionally occupied or used. They should also establish relevant mechanisms to further this aim, and finance principally important adjudication.

Article 30.2

~~'In case of infringement in~~As a general rule, Sami ~~ownership right or usufruct right~~property right holders to lands, waters, territories and natural resources have the right to offer or withhold consent to third parties seeking access to territories traditionally used~~;~~. In such instances when infringements still occur in accordance with international law, just and fair compensation shall be provided in accordance with what follows from national law.'

Article 32 bis (new)

When resource extraction occurs on Sami traditional territories, affected Sami communities and the Sami people have the right to such benefit-sharing that follows from international law.

Article 32 ter (new)

Sami communities have the right to redress with regard to territories and natural resources traditionally used but subsequently taken without their consent, to the extent and in the forms that follows from international law.

Tromsø 28 March 2017


Mattias Åhrén

Professor, Indigenous and Sami Rights

UiT – The Arctic University of Norway