

The Legal Position of the Sami in the Exploitation of Mineral Resources in Finland, Norway and Sweden

Giuseppe Amatulli

Institute for Human Rights
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Student: Giuseppe Amatulli

Supervisors: Prof. Markku Suksi

Dr. Mariya Riekkinen

Preface

This study was originally conceived as a master thesis of the European Master's Degree in Human Rights and Democratisation (E.MA). Hence, this published thesis represents an edited and updated version (as of January 2015) of that study, which was written from February to July 2014 at the Institute for Human Rights of Åbo Akademi University and successfully defended at the Monastery of San Nicolò (Venice) in September 2014.

To write a thesis is a complex process and in order to produce a good study, working hard is not sufficient; you must also have good supervisors. I think I have been really lucky here in Åbo with my two supervisors. I am sure that without the precious help and suggestions of Professor Markku Suksi and of my second supervisor Dr. Mariya Riekkinen, my work would not have been as good as it is now. Thank you very much for your help and all your patience. It has been a pleasure and an honour for me to have two competent persons like you as my supervisors. Many thanks also to the staff of the Institute for Human Rights, in particular to Rebecca Karlsson for her suggestions and advice, Harriet Nyback for all the help with the research in the library, Raija Hanski for her fantastic work as editor, Elvis Fokala, a good friend and brilliant Doctoral Candidate, and in general to all the people that I met in the Institute for Human Rights.

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Finally, I would like to remember three persons who have left in me an indelible memory but are no longer among us: my father, and my two friends Alessio and Alfredo. Thank you, for if I am here it is also your merit. I will never forget you!

Abstract

The situation of indigenous peoples in the world is difficult. They have to struggle against the states in order to see their rights recognised. The right to land takes a special place among these. This is one of the most important rights for indigenous peoples, due to the fact that one of the features that differentiate indigenous peoples from other groups or minorities is their relationship with ancestral lands. Moreover, if we consider the amount of natural resources that can be found in indigenous areas, it is easy to understand how complex the situation of indigenous peoples is.

The focus of this work is on the situation of the indigenous people (the Sami) of three Nordic countries (Finland, Norway and Sweden), in particular regarding the management of natural resources that can be exploited in their areas. Northern Europe is, in fact, rich in natural and subsoil resources and it is not easy for the governments to reach a balance between the rights of the Sami and the rights of the other citizens of the state. By means of analysing the Mining Acts of the three above-mentioned states, we will examine whether national law safeguards Sami rights in a satisfactory way. In order to see if there is compliance between the provisions established in national law and in international law, a comparison between the Mining Acts and ILO Convention No. 169 will be made.

This comparison is important, given the fact that one of the aims of this study is to point out the actions taken by the states in order to protect indigenous rights. Furthermore, it will be analysed whether the states are respecting the international provisions established for the protection of indigenous rights in national legislation, also without ratification of the relevant international instruments. The other goals of this study are: to analyse whether the obligations established in the Mining Acts are sufficient to guarantee a good protection of Sami rights in case of mining activities, whether the Sami are involved during the decision-making process and whether there are mechanisms of participation and legal remedies for the Sami.

Table of acronyms and abbreviations

CEO	Chief Executive Officer
CERD	Committee on the Elimination of Racial Discrimination
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
NAS	National Adaptation Strategy
NGO	Non-Governmental Organisation
RAIPON	Russian Association of Indigenous People of the North
TUKES	Finnish Safety and Chemicals Agency
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
USA	United States of America
WCIP	World Council of Indigenous Peoples
WGIP	Working Group on Indigenous Populations

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1. Introduction

1.1. General overview

It is always difficult to establish in law the adequate level of living conditions of indigenous peoples. This argument is true with respect to the indigenous peoples of the entire world, as well as with respect to the indigenous groups of Northern Europe, the Sami.

The Sami are the unique indigenous people of the entire Europe and they live in four different states: Norway, Sweden, Finland and the Russian Federation.¹ It is difficult to establish the precise number of the Sami who are living in this area; however, it is a considerable number. Around 50,000–65,000 of them live in Norway, around 20,000 in Sweden, around 8,000 in Finland and less than 2,000 in the Russian Federation. There are three different statutory assemblies that represent the Sami (one in each of the three Nordic countries), while in Russia there are NGOs, coordinated by the Russian Association of Indigenous People of the North (RAIPON). In 2000, the three assemblies established the Sami Parliamentary Council.²

The role of the Sami assemblies is to safeguard Sami interests and, in some cases, participate in defining public policies. These assemblies are public, autonomous from the states, but nonetheless dependent of public funding. They can decide how to spend the money, but only for the part of the budget that is not allocated for specific purposes (i.e. to support the Sami languages, the Sami culture, etc.).³ Thus, it appears as if these assemblies have only a marginal role in cases where economic interests of the states are at stake. In particular, this is true in cases of exploitation of natural resources in the Northern countries. This is a complex matter, in which the states are reluctant to give the possibility to the local assemblies to participate in the decision-making process.

Such reluctance can be explained with the fact that states wish to avoid problems with starting new mining activities in indigenous areas and also wish to prevent the loss of economic revenues. Northern Europe is rich in natural resources.⁴ This means that a part of the gross

¹ See annex No. 1.

² Strömgren, 2011, p. 29.

³ Ibidem, p. 30.

⁴ See annexes No. 2a and 2b.

domestic product (GDP) is obtained from these resources.⁵ In the past 20 years, the level of exploitation of natural resources in Finland, Norway and Sweden has grown significantly. For instance, there are many projects in which an Australian company called Scandinavian Resources is involved in order to exploit natural resources.⁶ They are exploring iron ore in Northern Sweden and Norway, in three Sami locations (*Laevas*, *Girjas* and *Lainiovuoma*). Another example is the Swedish-British company Beowulf Mining. They are exploring natural resources in the area of *Jokkmokk*, *Kallak* and *Grundträsk* in Northern Sweden. Also in this case two Sami communities are involved. These are only some examples of exploitation processes in the Sami areas, showing that the situation of the Sami in relation to mining processes is in need of a more serious examination.

1.2. Research questions

This brief presentation of the situation of the Sami allows a better understanding as to why the Sami are struggling to defend their rights. It is a complex situation in which many violations of indigenous rights may occur, with the result of compromising the Sami traditional lifestyle. In this study, we will focus on the situation of the Sami in Finland, Norway and Sweden, but not in Russia. This is because the situation in the Russian Federation is more complicated and the Sami of the Kola Peninsula are facing many problems with the official recognition of their rights, e.g. the right to use their lands. One of the reasons for such problems is that the Sami of Russia are not entitled to the gratuitous use of their land, given the fact that this right was removed from the Land Code of the Russian Federation in 2001.⁷ The scope of our study does not allow us to look deeper at the Russian situation, although it can give cause for further research.

The right to land is one of the main rights for indigenous peoples, together with the right to use natural resources that can be found in those lands. Unlike Russia, the three Nordic countries recognise the right of the indigenous peoples to use the land, although in many cases violations of the right to land may happen in relation to the ownership over land, as well as in

⁵ To have an idea on the amount of mineral resources in Northern states, see: <http://geomaps2.gtk.fi/website/fodd/viewer.htm> (accessed on 28/2/2014).

⁶ In 2012, Hannans acquired Scandinavian Resources Limited including its subsidiary companies Scandinavian Resources AB and Kiruna Iron AB. The purpose of the acquisition was to gain access to the Kiruna Iron Project in northern Sweden and the portfolio of copper-gold projects in Sweden and Norway. For more information, see: <http://www.hannansreward.com/company-profile.php> (accessed on 28/02/2014).

⁷ Riekkinen, 2011, pp. 111–112.

relation to the use of natural resources that can be found in that land. Violations of many articles of ILO Convention No. 169⁸ (which is the most important legally binding international instrument on the protection of indigenous peoples) may take place; in particular violations of Articles 13, 14, 15, and 16 of this treaty.

This leads us to the first research issue: although ILO Convention No. 169 is legally binding, only a few states have ratified it.⁹ Among the three Nordic states, only Norway has ratified this Convention, while Finland and Sweden have not yet done so. The question is: how is it possible to protect and safeguard the rights of the Sami if the states in question have not ratified ILO Convention No. 169? In our study it will be demonstrated that it is possible, if the states want, to defend indigenous interests also without ratification of the international conventions, with the help of due application of domestic laws.

In addition, in this work it will be studied if it is possible for states to improve the legal framework for the protection of the Sami in cases which relate to mining activities. In particular, it will be analysed if there is a possibility to increase the involvement of the Sami in decision-making processes, in order to take shared decisions to safeguard the Sami traditional lifestyle, but without compromising the economic interests of the state. Mainly, this study aims to find an answer to the following questions:

- Are the rights set out in the international instruments fully implemented in selected Nordic states? In particular, we focus on the rights set forth by ILO Convention No. 169.
- Are the obligations as prescribed in the Mining Acts of selected Nordic states sufficient to guarantee due protection of Sami rights in case of mining activities?

⁸ About ILO Convention No. 169: <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm> (accessed on 28/02/2014). The entire text of the convention is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO (accessed on 28/02/2014).

⁹ There are two ILO Conventions that are legally binding: Convention No. 107 and Convention No. 169. The main difference between the two documents is their approach to the indigenous issue. In fact, Convention No. 107 has an assimilationist approach, while Convention No. 169 safeguards indigenous rights and cultural diversity. However, it must be kept in mind that there are countries (i.e. India) that have not ratified Convention No. 169, but only Convention No. 107. Hence, in these countries, Convention No. 107 is the only legally binding instrument to protect indigenous rights. The list of the countries that have ratified ILO Convention No. 107 is available at:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO (accessed on 25/3/2014). Regarding ILO Convention No. 169, see: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (accessed on 25/3/2014).

- Are the Sami involved during the decision-making processes? Is there a special legal mechanism of indigenous participation in national law? Are there legal remedies for the Sami assemblies to stand up for indigenous rights?
- Is it possible for the states to defend indigenous interests without ratifying the international conventions, but by due implementation of domestic law?

1.3. Methods, materials and delimitations

In order to study the issue regarding mining activities in selected Nordic countries, an analysis of the right to land of the Sami will be carried out, considering natural resources that can be found in the Sami areas. After that, the International Covenant on Civil and Political Rights (ICCPR)¹⁰ will be analysed with specific focus on Article 27 on the protection of minorities. In this part of the study, the jurisprudence of the UN Human Rights Committee will be discussed. Regarding international legal instruments, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)¹¹ and the two ILO Conventions No. 107 and 169 will be analysed. In particular, ILO Convention No. 169 will be studied as the core instrument and it will be shown how Finland and Sweden are working with it, despite the fact that they have not yet ratified it.

Subsequently, in order to understand how the states deal with exploitation of natural resources in the Sami territories and whether there are specific legal provisions regarding the protection of Sami rights during mining activities, the Mining Acts of the three Nordic countries will be analysed. With the goal to find out whether there is same level of protection of Sami rights in Finland, Norway and Sweden, a horizontal comparison between the Mining Acts of these three states will be conducted. Finally, to assess whether there is compliance between national law and international law, a comparison between the provisions established in ILO Convention No. 169 and the Mining Acts of the Nordic states will be made.

The final purpose of this study is to conduct a horizontal comparison among the Mining Acts of the three Nordic countries and a vertical comparison between national law and international law.

¹⁰ The text of the ICCPR is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed on 28/02/2014).

¹¹ The full text of the Declaration is available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed on 27/02/2014).

In particular, we link the international provisions on the rights of indigenous peoples set out in ILO Convention No. 169 with the selected national legal instruments (i.e. the three Mining Acts and the Constitutions). This comparison will help us understand if there are violations of the rights established in international law at the national level or if national law contains specific provisions protecting indigenous rights in a satisfactory way. The comparison is also relevant to the states which have not ratified ILO Convention No. 169. The mechanism of participation of the Sami, the role of the Sami Assemblies and the Sami Parliament Acts will be analysed in the final chapter. It is important to underline that the following issues are not analysed in this research:

- the impact of the exploitation of natural resources in Northern Europe on the global environment;
- the situation of natural resources in the Arctic region (Greenland and Canada);
- alternative natural sources to avoid the exploitation of the Arctic;
- the situation of the indigenous peoples of the Arctic region (Greenland, Alaska);
- the impact of the exploitation of natural resources on the indigenous peoples of the entire world.

2. Mining in indigenous territories: between the right to land and economic gain

2.1. The importance of the right to land for indigenous peoples

The right to land can be seen as one of the most important rights for indigenous peoples.¹² In the definition of indigenous peoples elaborated by José Martínez Cobo, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, the right to land is the main pillar. The definition states that:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹³

Indigenous peoples have a strong tie with their territories because they:

- a) have occupied these territories in the past, given that they have a historical continuity with “pre-colonial” and “pre-invasion” societies that conquered their territories;
- b) occupy these territories nowadays, because they live on these territories;
- c) will occupy these lands in the future, because they want to transmit to future generations their ancestral territories.¹⁴

In order to help the international stakeholders to deal with the problems and the particular needs of indigenous peoples, Erica Irene Daes, Chairperson-Rapporteur of the UN Working Group on Indigenous Populations, has developed a list of factors that can be taken into account when dealing with indigenous matters. These factors are:

¹² It is important to underline that the right to land for indigenous peoples does not necessarily mean a right to self-determination in the sense of secession from the state. In the case of the Sami peoples, which is the topic of this study, the right to land means the right to use the lands for hunting, fishing and reindeer grazing. For more information regarding these issues, see: Alves, 1999, pp. 35–57; Anaya, 1996, pp. 75–109; Assies, 1994, pp. 31–72; Clech-Lam, 2000, pp. 225–248; Cole, 2000, pp. 11–66.

¹³ Martínez Cobo, *Study on the Problem of Discrimination against Indigenous Populations*, UN doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379.

¹⁴ Gilbert, 2006, p. XVI.

- 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 organisation, 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.¹⁵

Notwithstanding all provisions about the right to land of indigenous peoples in various international documents, there is still a significant debate about this right in the academic world, as well as in the human rights arena. For example, the main theme of the 2004 Session of the UN Working Group on Indigenous Populations (WGIP)¹⁶ was “Indigenous People and Conflict Resolution”.¹⁷ In his Working Paper, Mr. Miguel Martinez stated:

The fundamental root source of conflict between indigenous peoples, on the one hand, and States and non-indigenous entities and individuals, on the other, is their differing views as to which actor possesses valid title to the land and resources located in territories traditionally occupied by indigenous groups.¹⁸

The author of this study agrees with the statement of Miguel Martinez. In fact, in the past 20 years, the number of transnational corporations that have used the indigenous lands in order to exploit natural resources has grown significantly. Given that the indigenous lands are rich in natural resources, the recognition of indigenous peoples’ land rights should ensure that these peoples preserve their right to pursue their own economic and social development. In spite of all the natural wealth concentrated in indigenous areas, indigenous peoples remain at the “margins of economic development”.¹⁹ After this brief introduction regarding the general situation of indigenous peoples and the reasons explaining their strong relationship with their ancestral lands, we move on to discuss the main issue of this study, i.e. the exploitation of natural resources in indigenous homelands and the situation of the Sami peoples in the Nordic states.²⁰

¹⁵ Erica Irene Daes, *Working Paper on the concept of “indigenous people”*. UN doc. E/CN.4/Sub.2/AC.4/1996/2, para. 69.

¹⁶ The Working Group on Indigenous Populations (WGIP) was established in 1982 and it was one of the six working groups overseen by the Sub-Commission on the Promotion and Protection of Human Rights. In 2007 the Human Rights Council decided to replace it with The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). More information can be found at the official web page: <http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx> (accessed on 11/3/2014).

¹⁷ Gilbert, 2006, p. XVII.

¹⁸ Miguel Alfonso Martinez, *Working Paper on Indigenous peoples and conflict resolution*. UN doc. E/CN.4/Sub.2/AC.4/2004/2, para. 14.

¹⁹ Gilbert, 2006, p. XVIII.

²⁰ For more information about indigenous people and the right to land see: Anaya & Williams, 2001, pp. 33–88; Castellino, 2005, pp. 89–116; Fodella, 2006, pp. 565–594; Howard, 1992, pp. 105–156; Meijknecht, 2001, pp.

2.2. Mining in indigenous homelands: between public affairs and indigenous interests

2.2.1. Access to the mining process: an overview with focus on selected Nordic states

The process of mining requires a lot of time and economic effort as well explained in several academic sources.²¹ Normally, when a company identifies its target for mining and decides what geographical area must be investigated, it makes use of governmental geological data and former national research. In addition, if mineral resources are found in a certain area, the company will need a suitable right under the mining law in order to start mining and to have the exclusive rights on that area.

In fact, it must be taken into account that starting the mining process requires big capital investments and for this reason it is quite often an “all or nothing” matter, we can also say a “Hobson’s choice”.²² The companies want to be certain that the government will not stop them once a mineral site is discovered, and they do not want the government to change national laws about mining once the mining is started. Hence, it is obvious that if the government of the country is stronger (i.e. because the country is rich and the political situation is stable), the companies will be in a weaker position when they ask for advantageous conditions for the mining process. But if the state is poor and the political situation is not so stable, in order to improve its attractiveness in mining activity, the state will be more open to having a policy that gives many advantages to the companies.²³ On the one hand, a considerable part of the new mines are opened in developing countries in South America, Asia, and Africa.²⁴

On the other hand, in recent years a big effort has been put by the companies to ensuring that mining has a positive effect on the host states and on the host communities, given that many countries have seen a worsening of living conditions during the process of exploitation of

65–114; Minde, 2003, pp. 75–106; Scheinin, 2005, pp. 3–16; Tahvanainen, 2005, pp. 397–419; Westra, 2008, pp. 71–124; Xanthaki, 2007, pp. 237–279.

²¹ For more information regarding the mining process, see: Barton, 2009, pp. 1–9; Cotula, 2012, pp. 55–123; Halonen-Rinne-Sairinen-Simonett-Stuhlberger, 2012, pp. 8–57; Salminen, 1999, pp. 5–48.

²² Barton, 2008, pp. 1–2.

²³ *Ibidem*.

²⁴ *Ibidem*, p. 3.

natural resources.²⁵ It is clear then that national legislation has an important role in the mining process. National law should define the rules for every different stage in the mineral development sequence (i.e. reconnaissance, exploration and production). The allocation of land rights as well as the conditions for restrictions or limitations of these rights should be clearly defined in the law. Furthermore, the law on mining should establish clearly when the holder of an exploitation right is, for instance, entitled to obtain production rights, who has the ownership of the natural resources, how to deal with the protection of lands from mineral activity (in particular in areas where there are indigenous peoples). According to Barton, access to mining is a complex matter and it depends largely on the political and economic situation of the state.²⁶

As for those Nordic states that accommodate the Sami indigenous peoples, i.e. Finland, Norway and Sweden, there are several different types of access to the mining process. The summary analysis of the mining legislation in these selected states is based on the analysis of many academic sources, undertaken by the author of this study, such as: the Mining Acts and the Constitutions of Finland, Norway and Sweden, as well as specific documents such as “Finland’s National strategy for adaptation to climate change” and the “Finnish Action Plan for the Adaptation to Climate Change 2011–2015” by the Finnish Ministry of Agriculture and Forestry; the “Final report from the Swedish Commission on Climate and Vulnerability: Sweden facing climate change — threats and opportunities” by the Swedish government; the “Official Norwegian Reports NOU 2010: Adapting to a changing climate. Norway’s vulnerability and the need to adapt to the impacts of climate change”, issued by the Norwegian Ministry of the Environment. In chapter 4 it will be analysed in depth how the entire process of access to the mining process in Sami areas works, but before that, a brief introduction is in place.

In Finland, the mining process is regulated by the Mining Act²⁷ of 2011 together with other laws (among others: the Reindeer Husbandry Act of 1990, the Act on the Protection of Wilderness Reserves of 1991, the Land Use and Building Act of 1999 and the Environmental Protection Act of 2000). The authority involved in the management of mining is the Finnish Safety and Chemicals Agency (TUKES). There are two different permits that can be granted:

²⁵ Ibidem, p. 4.

²⁶ Ibidem, p. 3.

²⁷ The complete text of the Finnish Mining Act is available at: <http://www.finlex.fi/en/laki/kaannokset/2011/en20110621.pdf> (accessed on 8/4/2014).

- I. The “exploration permit”, necessary if the activity of mining is dangerous for the health of the population or for the general safety. The permit is released for a fixed term of four years and can be renewed (up to three years at time) for a maximum of 15 years.
- II. The “mining permit”, necessary to start the process of mining. This permit is normally released for an unfixed time, except in particular circumstances.
- III. Finally, for every kind of mining an “environmental permit” is required and the entire process will be supervised by the environmental authority.

In Norway, mining is regulated by the Norwegian Mineral Act²⁸ of 2010, together with some other laws (the Pollution Control Act of 1981, the Planning and Building Act of 1985 and the Nature Diversity Act of 2009). The authority involved in the management of mining is the Directorate of Mining. The licenses that the Norwegian Mineral Act provides are:

- I. “Exploration license”, which can last for a maximum of seven years, in order to allow the companies to start the exploration of the area. If there is the possibility to prove that on that area there is a considerable mining deposit, it is possible to apply for an exploitation permit.
- II. “Exploitation permit”, but without a mining concession (valid for a maximum of ten years).
- III. “Exploitation permit”, with a mining concession (valid until the area is productive).
- IV. Also in Norway, as in Finland, before starting any type of exploitation, an environmental impact assessment has to be done.

In Sweden, the law that regulates the mining process is the Swedish Minerals Act²⁹ of 1991, with other laws (the Off Road Driving Act of 1975, the Certain Peat Deposits Act of 1985, the Cultural Heritage Act of 1988, the Swedish Environmental Code of 1998 and the Planning and Building Act of 2010). Following the Swedish legislation on the mining process, two different types of licenses can be released:

²⁸ The full version of the Norwegian Mineral Act is available at: http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf (accessed on 8/4/2014).

²⁹ The complete version of the Swedish Minerals Act is available at: http://www.sgu.se/dokument/service_sgu_publ/SGU-rapport_2007-26_minerals-act_ordinance.pdf (accessed on 8/4/2014).

- I. The “exploration permit”, valid for three years, can be extended up to 15 years. With this permit the company has access to the area for the exploitation work.
- II. The “exploitation concession”, granted for a maximum of 25 years. This concession is necessary for particular types of minerals.
- III. Also in Sweden, before releasing a mining permission, the environmental impact will be thoroughly evaluated.³⁰

2.2.2. The system of remedies and compensation for indigenous peoples

Taking into account the different systems that a state can adopt in order to issue a permit for the exploration of natural resources in a specific area, it becomes evident that mining activities in indigenous homelands can cause many problems to the indigenous populations. Above all, the exploitation process can compromise the indigenous traditional lifestyle and the regime of the traditional land use. The following chapters will demonstrate that the protection of a traditional indigenous lifestyle can be considered a significant component of national legislation on mining. However, amidst the mining processes, big changes in the traditional lifestyle of indigenous populations are unavoidable. For example, in a case where a big deposit of natural resources is found in an indigenous area, it would hardly be possible to prevent the damage to indigenous lifestyle. Nonetheless, at least economic damage to indigenous communities can be reimbursed. For this purpose, national laws should provide legal remedies to protect the indigenous rights to land, acknowledging the rights to reparation or compensation. In this work, the term “remedy” does not have the same meaning as “reparation”, because the term “reparation” is used to describe only one of the aspects of the concept of “remedy”.³¹

According to the UN Secretary-General, who commented upon the right to reparation for victims of gross human rights violations, the main aim of reparation from a human rights-based perspective is to “render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations”.³² There are some features of reparation that must be respected. Firstly, reparation must be adequate; this means full

³⁰ Speight & Shabazz, 2013, pp. 1–2.

³¹ Lenzerini, 2008, p. 12.

³² Van Boven Theo, *Note by the Secretary-General on the right to reparation for victims of gross violations of human rights*, UN doc. E/CN.4/1997/104.

reparation, namely that reparation should remove all effects of injustice, using all the necessary measures (restitution, compensation, satisfaction and rehabilitation). Furthermore, the process of reparation must be effective in the sense that it is efficient in removing the suffered injustice (all types of injustice: economic, spiritual, social) and to re-establish the existing situation before the exploitation.³³ In order to ensure adequacy and efficiency in the reparation process, the remedies must be proportionate to the gravity of the case and must be considered adequate and effective by the groups to which they are addressed. Obviously, not all the types of reparation can ensure the same degree of adequacy and effectiveness.

Amongst the different potential measures of reparation the most optimal is, perhaps, the “*restitutio in integrum*”, given that there is a full re-establishment of the original situation in this case. There is the “*restitutio not in integrum*” in cases where it is impossible to restore the situation at the exact point as it was before the injustice. In the latter case, the reparation process consists of providing a possibility for the injured party or the community to return to a certain territory, which is as close as possible to the original one. These two types of reparation consist in the restitution of the original or similar land. The other forms of reparation, such as monetary compensation, can also be invoked depending on the nature of the act having violated the right and on the perception of the interested community. For example, according to Lenzerini, compensation is mostly inadequate to restore justice in the case of expropriation of indigenous lands, considering that it is impossible to evaluate the cultural damage that these populations have suffered.³⁴

The right to compensation for indigenous peoples is a novelty in the area of international law. It has been acknowledged only in the last few decades, when the principle of indigenous self-determination was recognised by the authorities of those states that had for centuries refused it.³⁵ In particular, national courts recognised a lack of strong justification for the principle of “*terra nullius*” that most European countries have used in order to conquer indigenous territories. Hence, there is evidence supporting the claim that indigenous peoples enjoy sovereignty on their original lands, although they are under the sovereignty of the territorial state.³⁶

³³ Lenzerini, 2008, pp. 12–13.

³⁴ *Ibidem*, pp. 14–15.

³⁵ Joinet Louis, *Question of the impunity of perpetrators of human rights violations (civil and political)*, UN doc. E/CN.4/Sub.2/1997/20/Rev.1, para. 40.

³⁶ Lenzerini, 2008, p. 11.

The right to land of indigenous peoples means, firstly, that indigenous peoples can be removed from their lands only in exceptional situations, unless they agree to be removed. It is useful to underline that ILO Convention No. 107³⁷ states in Article 12 that “the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations”. Even if we assume that this article grants protection to indigenous peoples, it was strongly criticised because such a legal provision allows states to remove indigenous peoples from their lands.³⁸

Article 12 was replaced by Article 16 of ILO Convention No. 169, according to paragraph 2 of which “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”.³⁹ It is useful to underline that the Sami of the Nordic states have never been forcibly removed or relocated.⁴⁰ The provisions established by Article 16 of ILO Convention No. 169 can be applied on the indigenous peoples of South America, where there have been many cases of displacement. It is important to notice the change of terminology between the two ILO Conventions. The term “removal”, used by ILO Convention No. 107 was changed into the word “relocation” by the present ILO Convention No. 169. This is an important change, reflecting the difference in the approach of the two Conventions, i.e. a change from an assimilationist approach to a protective approach.⁴¹ In this connection, José Martínez Cobo,

³⁷ ILO Convention No. 107 was adopted in 1957 and was replaced as late as in 1989 with Convention No. 169. The Convention received strong criticism because it was oriented to the integration and assimilation of indigenous people, given that it was founded on the assumption that indigenous peoples were temporary societies destined to disappear with the modernization. The full text of the Convention is available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C107 (accessed on 18/3/2014).

³⁸ Gilbert, 2006, p. 143.

³⁹ The full text of Convention No. 169 is available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf (accessed on 18/3/2014).

⁴⁰ There is only one case of relocation of Sami people: the Skolt Sami case. However, this episode happened during the Second World War, in a particular context. For more information see: Suksi, 2008, pp. 71–81, and the following web-site: <http://www.samimuseum.fi/saamjiellem/english/historia.html> (accessed on 26/3/2014).

⁴¹ Gilbert, 2006, pp. 142–143.

Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that:

Whenever the removal of populations is necessary for an exhaustively justified reason, the indigenous populations involved should be moved to areas that resemble their ancestral lands as closely as possible with fauna and flora of the same type. The suffering of these populations should be reduced to an absolute minimum and any losses compensated. Unless natural phenomena make it possible, their return to their ancestral lands should always be an essential part of any plan.⁴²

Hence, the provision on the restitution of the land rights of indigenous peoples gets more recognition on the international arena and also ILO Convention No. 169 emphasised this provision in Article 16. In cases where the restitution of land is impossible, the state should provide compensation (in terms of payment of money, another land or any other measures agreed by the involved parties). However, the UN Committee on the Elimination of Racial Discrimination claimed that mere monetary compensation is not enough to be a full remedy against the removal of indigenous peoples. In fact, in its General Recommendation No. 23, the Committee claimed that restitution of lands must be the priority and only when this is not possible compensation will be used.⁴³

This statement in the General Recommendation is important, also because for many states just compensation means providing for the indigenous peoples a just price for their land based on the market value. However, for these peoples it is obviously not enough, because it is impossible to evaluate the value of lands only in terms of market value without considering the loss of culture and the lifestyle of the indigenous community.⁴⁴ Finally, it is useful to underline that also in the UN Declaration on the Rights of Indigenous Peoples there is a provision in order to safeguard indigenous peoples from removal from their land. Article 10 provides the following:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

In this article it is possible to note that only with the free, prior and informed consent (FPIC) it is possible to relocate indigenous peoples. Furthermore, indigenous peoples are entitled to fair

⁴² Martinez Cobo, *Study on the Problem of Discrimination against Indigenous Populations*, UN doc. E/CN.4/Sub.2/1983/21/Add. 8, para. 558.

⁴³ *General Recommendation of the Committee on the Elimination of Racial Discrimination (CERD) No. 23*, UN doc. A/52/18, annex V, para. 5.

⁴⁴ Gilbert, 2006, p. 148.

compensation and the option of return must be taken into account. We can say that this provision set out in the UN Declaration on the Rights of Indigenous Peoples represents a step forward in the recognition of indigenous rights, given that 143 states voted in favour of the Declaration.

2.3. The situation of the Sami in the Nordic states

2.3.1. Historical overview of the Sami right to land

According to Sillanpää, in Sweden and Finland (at the time these two countries were unified under the Crown of Sweden) the recognition of the particular needs of the peoples who inhabited the area known as Lapland has been defined in the legislation since 1550. In particular, hunting, fishing and breeding reindeer were recognized in the legislation as sources of Lapp livelihood. In a Lapp village, each family controlled and used a specific area which documentary sources define as hereditary or tax land. The Lapp tax was based on the fact that these land areas should be taxed because of the gain that Lapp people had by fishing, hunting, etc. in that land (in Finland some form of Lapp tax was paid until the First World War).⁴⁵

Hence, while these peoples paid taxes for their land, their right to land as well as the ownership over the lands should have been recognised. In this respect, for instance, Kaisa Korpijaakko, a professor of history at the University of Lapland, has conducted many research projects with the aim to demonstrate that the Sami peoples had a legitimate title to their lands. The title of land rights is based on the fact that the law and the case-law by many courts in Lapland had recognised this situation.

Historically, Lapland was divided into six different administrative areas: Ångermanland, Ume, Pite, Lule, Torne and Kemi Laplands, which were divided into Lapp villages. These Lapp villages were, later on, divided amongst clans and families, later called Lapp tax lands.⁴⁶ This kind of division became also a way for the state to exercise in those lands a fiscal request and a judicial power. It must be underlined that the payment of the Lapp taxes could apply only if ownership by the Lapps of the land was legally and officially recognised.⁴⁷ In this regard, it is

⁴⁵ Sillanpää, 1994, p. 42.

⁴⁶ Joona, 2012, pp. 281–282.

⁴⁷ Sillanpää, 1994, p. 43.

recognised that the Sami right to their lands was comparable with ownership.⁴⁸ That regime changed in the nineteenth century when Finland was detached from Sweden and became a part of the Russian Empire.

Basically, there was an important change in the interpretation and in the practices of land administration in Northern Finland. For example, references to the Lapp tax disappeared from the official records and in many cases the authorities started to ignore the existence of the land rights in question. The new legislation did not take into account the right of the Sami to these lands but, given that none of these rights were abrogated by law, it is possible to say that the rights of the Sami in Finland continued to exist in a state of legal dormancy.⁴⁹

According to Korpijaakko the Sami progressively lost their right to land also in Sweden. Year after year, the central authorities opposed the decisions of the local courts and took steps to restrict their powers. For example, the County Governor of *Västerbotten* complained in the court against the Swedish central government and the restrictions of his powers by the latter. The reaction of the government was that the *Västerbotten* court could not make decisions in financial matters anymore. Hence, the Sami who paid Lapp tax could not go to the court as they did in the past.⁵⁰

In Norway, the situation was different, given that there was a division in the Sami community. This division concerned the Sami of the coast whose main traditional activity was fishing and the Sami of the interior, who had practiced different forms of traditional lifestyle and above all reindeer husbandry.⁵¹ During the sixteenth and seventeenth centuries, the situation of the coastal Sami community was quite different from that of the other citizens.

In fact, while Sami were paying only the “Lapp tax” that was a personal tax, the Norwegian settlers were paying also the land taxes. Furthermore, the “Sami tax” was lower than the “Norwegian tax” and the state recognized to the Sami the rights of inheritance to the lands.⁵²

⁴⁸ To know more about this topic see: Joonas Tanja & Joonas Juha, 2011, pp. 351–388.

⁴⁹ Korpijaakko, 1993, p. 17.

⁵⁰ *Ibidem*.

⁵¹ Sillanpää, 1994, p. 45.

⁵² *Ibidem*, p. 46.

All these special rights and privileges were abolished in *Nordland* in 1661. In Southern *Troms* and Northern *Troms* they were abolished in 1755.⁵³

However, the rights and privileges of the coastal Sami were confirmed in 1726 in two legal documents (the Charter of Rights for the Coastal Sami), that permitted the Sami to continue their traditional use of common lands for herding, hunting and berry picking.⁵⁴ Hence, it is quite difficult to define the real situation of the Sami at that time.⁵⁵ What is true, for the past and in particular today, is that farming, fishing and hunting are seen by the state as typical activities of all Norwegian citizens and for this reason natural resources must be seen in a national context. For example in this way the Sami of the coast, with their traditional smaller boats, have lost in the competition for the resources with the bigger international groups. In fact, amongst the relevant actors in sectors like fishing, farming, etc., there is a strong will to avoid protecting the special Sami interests, which are considered peripheral and not economically sustainable for the management and exploitation of the resources.⁵⁶

2.3.2. The two main cases about the Sami right to land: the *Taxed Mountain* case and the *Alta* case

It is important to underline that until the recent decades the official opinion in Finland, Norway and Sweden about the Sami right to land was that when the government had annexed those lands, it had taken possession of “ownerless lands” and only 40 years ago things started to change. In fact, in 1966, a Sami group of the *Jämtland* brought a case on the land ownership and usage since time immemorial against the Swedish state (so-called “*Skattefjällsmålet* – Taxed Mountain case”) to the Supreme Court of Sweden. This was the first important case about the Sami land and water rights and after 15 years, in 1981, the case was solved by the Supreme Court of Sweden. It is important to underline that the decision of

⁵³ It is useful to underline that until 1751 there was no border between Norway and Sweden in Sami territories. In fact, only with the signing of the “Sami Codicil” in that year, the borders were defined. In addition, in this agreement the Sami were recognised as an ethnic minority that could continue to use the lands without regard to the new borders.

⁵⁴ Sillanpää, 1994, p. 46.

⁵⁵ The difficulty to define the real status of the Sami of Norway in that period is due to the fact that until 1814 Norway was an integral part of Denmark, from 1814 to 1905 Norway was in personal union with Sweden and only since 1908 Norway is completely independent.

⁵⁶ Sillanpää, 1994, p. 47.

the court was unanimous (with only the dissenting opinion of judge Bengtsson regarding fishing and hunting rights of the Sami).⁵⁷

Basically, the Sami applicants wanted to see recognised the ownership of certain areas in the northern part of the province of *Jämtland* (known as *Skattefjäll*) and some adjacent properties known as “extended territories”. After a careful evaluation, the Court decided that the legal situation in the area was unequivocal before the promulgation of the “Reindeer Grazing Act” of 1886 in which it was stated that the state was the owner of the Taxed Mountain and the right of the Sami was limited to the right of use. Hence, in the opinion of the Court, the Sami could not request the ownership rights because of their use since time immemorial. The final verdict of the Court was that the Swedish State was the owner of the Taxed Mountain and that the claims of the Sami to ownership could not be sustained.⁵⁸

Notwithstanding the fact that the decision was not positive for the rights that the Sami were claiming, many legal principles in favour of the Sami rights were written in the verdict of the Court. In fact, the decision can be seen as a victory of the Sami rights, given that the Court stated that it was possible to acquire title to land for reindeer grazing, hunting and fishing. With this decision, the Court rejected the position of the Swedish government that was against the possibility for nomadic people to acquire ownership rights. Furthermore, the Court declared that, even if the Sami have no rights other than those awarded by legislation on the Taxed Mountain, these rights of use can be constitutionally protected in the same way as ownership rights. Finally, even if this does not mean that the Sami rights are protected against expropriation, their rights cannot be taken without compensation. It is important to underline that the Supreme Court clearly stated that this decision was valid only for the county of *Jämtland*, so it was not applicable to other claims by Sami in other parts of Sweden.⁵⁹

Another case connected with both the indigenous right to land and the economic interests of the state is the *Alta* case. Alta, one of the biggest municipalities in the Finnmark County, in Norway, became famous in 1979 because of the struggle of the Sami against a government decision. In 1978, the Norwegian government decided to build a hydro-electric dam on the Alta-Kautokeino river system. This project was considerably smaller than a previous project

⁵⁷ Ibidem, p. 90.

⁵⁸ Ibidem.

⁵⁹ Ibidem, p. 91.

which was supposed to submerge the Sami village of Maze.⁶⁰ Notwithstanding that the second project was smaller than the first one, the Sami peoples were concerned that this dam could have had an important impact on salmon fisheries in the Alta River, as well as on reindeer grazing.

The opposition to this project culminated with one of the largest civil disobedience cases ever in Norway, with hundreds of policemen who removed the demonstrators from the project site. The issue was brought to court and in 1982, the Supreme Court of Norway stated that the project could carry on, but the Sami had the right to receive monetary compensation.⁶¹

After the verdict of the national court, the issue was brought also to the European Commission of Human Rights, in the *E. and G. v Norway* case. Two representatives of the Sami indigenous community claimed that they suffered a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights, due to the fact that the building of the dam would compromise their traditional reindeer grazing grounds. The Commission agreed with the idea that traditional practices and indigenous lifestyle could be seen as private and family life, but found that the project was necessary for the economic well-being of the country. For this reason, the application was declared inadmissible.

Notwithstanding that the actions of the Sami in the courts were insufficient in order to stop the construction of the dam, these actions resulted in a number of meetings between the Norwegian government and the Sami delegations, with the result that the government appointed two committees to discuss the cultural issue and the legal relations of the Sami peoples.⁶² These two committees were important for the birth of the Sami Assembly in Norway in 1989 and for the adoption of the Finnmark Act by the Norwegian government in 2005.⁶³

⁶⁰ Solbakk, 2006, p. 165.

⁶¹ Sillanpää, 1994, p. 92.

⁶² Solbakk, 2006, pp. 164–167.

⁶³ *Ibidem*, pp. 168–170.

2.3.3. The mining process in the Sami areas: between traditional and non-traditional indigenous resources

In Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it is written: “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”.⁶⁴ According to this article, the rights of indigenous peoples to natural resources and lands should be considered an internal indigenous affair.

Furthermore, according to Mattias Åhrén,⁶⁵ it is useful to distinguish between two types of natural resources: the traditional resources of indigenous peoples and the non-traditional resources that are in the areas of indigenous peoples. The expression “traditional resources” means all kinds of natural resources that are used and have been used by the indigenous peoples for centuries for their traditional livelihood, while the expression “non-traditional resources” implies all types of resources that are not used by the indigenous peoples or that were not used in the past (above all oil and mineral resources).

According to Åhrén, the Sami have the full right to manage their traditional natural resources, while for non-traditional resources that are in the areas of the indigenous peoples, the Sami should have the right to exert some influence regarding the utilisation of these resources and they should have the right to have some compensation. Finally, the Sami should have the right to give their binding opinion regarding the utilisation of non-traditional resources if the exploitation can damage their land or compromise their lifestyle.⁶⁶ Hence, it is clear that participation in decision-making processes regarding land rights (which will be analysed in the following chapters) is important in order to involve the Sami in the processes of decision-making.

⁶⁴ The full text of the UNDRIP is available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed on 16/3/2014).

⁶⁵ Mattias Åhrén is a Sami, now Chief Lawyer of the Sami Council. In 2002, he took up the position as Head of the Sami Council’s Human Rights Unit. He has represented the Sami peoples in many UN conferences and other international meetings, e.g. during the successful negotiations on the UN Declaration on the Rights of Indigenous Peoples, and has also represented Sami communities in cases relating to right to land. He was also a member of the Expert Group that drafted the Nordic Sami Convention.

⁶⁶ Henriksen, 2011, pp. 9–10.

3. The sources of international human rights law on the protection of indigenous peoples

3.1. The safeguards of the right to land and traditional lifestyle in the jurisprudence of the UN Human Rights Committee

The struggle of indigenous peoples to be recognised as a group with particular features and needs has brought results only in the last few decades, when ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples were adopted. Before these two important international documents were introduced, there had been very few legal instruments on the protection of indigenous peoples.

One of the legal instruments that can be invoked for the protection of indigenous rights is the International Covenant on Civil and Political Rights,⁶⁷ which was adopted in 1966 and entered into force in 1976. In fact, there are at least two provisions most explicitly referring to indigenous peoples in this Covenant: Article 1 (self-determination and use of natural resources) and Article 27 (protection of minority groups). While the relationship between self-determination, natural resources and indigenous rights seems to be clear, understanding the link between the protection of minority groups and the protection of indigenous peoples is in need of a more detailed explanation.

In this regard, it should be noticed that, until the completion of the study on indigenous peoples by the UN Special Rapporteur Martinez Cobo, there was no legal definition of “indigenous peoples”. For this reason, indigenous peoples were considered a particular minority group. Although considering indigenous peoples as a minority group was not correct, in the past such a solution was the only way to provide them with legal protection. For this reason, the UN Human Rights Committee acknowledged the fact that persons belonging to indigenous groups could invoke Article 27 of the ICCPR in order to obtain legal protection of their rights. Article 27 guarantees the following:

⁶⁷ The ICCPR is available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed on 24/3/2014).

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 practice their own religion, or to use their own language.

This means that indigenous groups that are in a minority position in the state can take advantage of legal provisions established for the protection of minorities. In particular, in its General Comment No. 23, the Human Rights Committee claimed:

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.⁶⁸ 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.⁶⁹

One of the most important cases in which Article 27 of the ICCPR was invoked in order to protect indigenous rights is the case of *Poma Poma v. Peru*.⁷⁰ It concerns the use of water in indigenous homeland, from where the government had decided to divert the main river. The applicant, Ms. Poma Poma is a citizen of Peru and a member of the indigenous group Aymara that had been living in the Andes territory for more than 2,000 years.

During many years, several wells have been built on this territory and the normal direction of the main river was diverted, exerting a serious impact on the traditional lifestyle of the Aymara that were living in that area. Ms. Poma Poma brought the case to the Committee alleging that Article 1, paragraph 2 (right to freely dispose of natural wealth and resources) and Article 17 (right to privacy) of the ICCPR had been violated by the state of Peru.⁷¹ The case was considered admissible; however, the Committee based the validity of the complaint on Article 27 of the Covenant. In fact, Article 1 of the ICCPR could not be the subject of proceedings because Optional Protocol No. 1 to the ICCPR⁷² establishes that only individual complaints can be considered by the Committee, while the Committee did not consider it necessary to deal with the author's complaint of a violation of Article 17 of the ICCPR.

⁶⁸ Regarding the right to live in reserves and other indigenous rights that can be protected by Article 27 of the ICCPR, see the case of *Lovelace v. Canada*. UN doc. CCPR/C/58/D/671/1995.

⁶⁹ Human Rights Committee, General Comment No. 23. UN doc. CCPR/C/21/Rev.1/Add.5, 26 April 1994. The full text is available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.5&Lang=en (accessed on 24/3/2014).

⁷⁰ Human Rights Committee, UN doc. CCPR/C/95/D/1457/2006, 24 April 2009. The complete text of the case is available at: http://www.bayefsky.com/pdf/peru_t5_iccpr_1457_2006.pdf (accessed on 8/4/2014).

⁷¹ Göcke, 2010, p. 343.

⁷² The full text of Optional Protocol No. 1 to the ICCPR is available at: <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr-one.pdf> (accessed on 10/4/2014).

Although Article 27 refers to individuals, it must be seen as a provision that protects individuals belonging to a minority group, in order to ensure for those individuals the opportunity to enjoy the particular culture of that group.⁷³ In particular, in this case, the construction of the wells compromised the right of the members of Aymara indigenous community to enjoy their culture and live following their traditional lifestyle.⁷⁴ Furthermore, the Human Rights Committee stated that such a big interference in the traditional lifestyle of the indigenous peoples could be justified only if the people involved were included in the decision-making process. In addition, it is not sufficient for public authorities to merely organise a prior consultation, but to look for a “free, prior and informed consent of the members of the community”.⁷⁵

In this case, the members of the Aymara community were not involved in the decision-making process. The Peruvian government did not initiate any studies in order to understand the impact of the construction activities on indigenous life and, finally, no measures were adopted in order to prevent the negative effect of the construction of the wells on indigenous well-being.

Acknowledging that implementation of the contested governmental project had a serious impact on the indigenous lifestyle, the Human Rights Committee found a violation of Article 27 of the ICCPR by the Peruvian state. With this decision, the Human Rights Committee imposed on the state of Peru an obligation to provide an effective and full remedy for the victims and to adopt necessary measures in order to avoid similar violations in the future.⁷⁶

Regarding the concept of effective participation in the decision-making process, it is useful to remember that Article 25 of the ICCPR establishes the right to participate for every citizen.⁷⁷ Hence, indigenous peoples can invoke the provisions indicated in this article in order to safeguard their right to participate in the conduct of public affairs. There are two other

⁷³ See in particular paragraphs 7.2 and 7.3 of UN doc. CCPR/C/95/D/1457/2006 of 24 April 2009.

⁷⁴ Göcke, 2010, pp. 343–344.

⁷⁵ *Ibidem*, p. 345.

⁷⁶ *Ibidem*, p. 346.

⁷⁷ Article 25 of the ICCPR states: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country”.

international instruments that can be used to protect the right of participation of indigenous peoples: the UN Convention on the Elimination of All Forms of Racial Discrimination,⁷⁸ and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁷⁹ We must keep in mind that the decision to use these instruments is based on the indigenous peoples' will. Furthermore, the fact that indigenous peoples can use legal provisions on minority rights must not have an adverse consequence on the status of indigenous groups.⁸⁰ As for the right to self-determination,⁸⁰ it is useful to underline that this right does not run out with the notion of independence and the creation of a sovereign state. There are some cases in the jurisprudence of the UN Human Rights Committee that deal with the requests for recognition of the right to self-determination by individuals.

A relevant case is the *Lubicon Lake Band v. Canada*. The case was brought to the Committee by Mr. Ominayak, the representative of the Lubicon Lake Band, a Cree Indian Band living in Alberta, Canada, where they live since time immemorial. They claimed that, notwithstanding the Indian Act of 1970 and the Treaty of 21 June 1899 concerning aboriginal land rights in Northern Alberta, the government of Canada allowed the state of Alberta to expropriate the land of the Lubicon Lake Band for economic reasons (gas exploitation). For this reason, Canada was accused of having violated Article 1 of the Covenant. In this case, the Committee has taken a strong position in protecting the right to self-determination. The Committee stated that:

While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.⁸¹

Hence it is clear that, especially for indigenous peoples, the right to self-determination can be implemented not only under the precondition of their independence (the so-called external

⁷⁸ UN Convention on the Elimination of All Forms of Racial Discrimination, full text available at: <http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf> (accessed on 15/5/2014).

⁷⁹ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities UN doc. A/RES/47/135. Full text available at: <http://www.un.org/documents/ga/res/47/a47r135.htm> (accessed on 25/3/2014).

⁸⁰ Göcke, 2010, pp. 124–125.

⁸¹ *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990). UN doc. Supp. No. 40 (A/45/40), para. 32.1.

self-determination), but also with respect to the so-called internal self-determination (i.e. the possibility to choose freely the system of government). In this respect, one of the participants of the UNESCO Expert Conference on the Implementation of the Right of Self-Determination as a Contribution to Conflict Prevention found that the right to self-determination can include:

guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity.⁸²

Hence, from the report of the UNESCO Expert Conference it is possible to note that the right to self-determination can be implemented in different ways that affect the life of indigenous peoples and not just with the creation of a new, independent state.

3.2. The efforts of the ILO in the area of protecting indigenous peoples

3.2.1. From the establishment of the ILO to Convention No. 107/1959

The International Labour Organisation (ILO) is a specialised agency of UN that since its creation under the Statute of the League of Nations had undertaken studies on the condition of indigenous workers. In 1954, the Committee of Experts on Native Labour opened a discussion about the integration and the artificial assimilation of these populations, concluding that the cultural autonomy of these groups had to be respected. Also for these reasons, in 1957 the International Labour Conference adopted Convention No. 107⁸³ on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

Having been ratified by 27 states, ILO Convention No. 107/1957 was nonetheless replaced by Convention No. 169 in 1989, given the fact that it has an assimilationist approach to deal with indigenous issues. However, Convention No. 107 is still valid in those countries that have not yet ratified Convention No. 169.⁸⁴ Convention No. 107 has taken an assimilationist approach

⁸² Van Walt, 1998, pp. 9–22.

⁸³ The full text of Convention No. 107 is available at:
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C107
(accessed on 28/3/2014).

⁸⁴ The complete list of the states in which Convention No. 107 is still in force is available at:
http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252
(accessed on 28/3/2014).

and this is clear in the preamble, in which it is stated: “Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community”. This concept is reaffirmed in Article 1, while in Article 2 governments are encouraged to integrate indigenous people in the society. The aim of that Convention was, rather than to protect indigenous peoples, to integrate them into the societies of the states. This approach was based on the consideration that indigenous peoples were undeveloped groups and indigenous culture would have disappeared once progress would have reached these groups.⁸⁵

ILO Convention No. 169, instead, has a protective approach for indigenous rights and faces the indigenous issues without discrimination. There is no mention, in Convention No. 107, of the right to self-determination of indigenous peoples, yet in Part II of the Convention (from Article 11 to Article 14) we can find some provisions on the right to land. In particular, there is the recognition of the ownership of indigenous people (Article 11) and the right to receive compensation in case of removal (Article 12a). However, there is no mention of the right of indigenous peoples to use the resources that can be found in their territories, nor of the right to freely dispose of their natural resources. As will be pointed out below, there is a big difference between these provisions and those established in Convention No. 169, in particular, regarding the recognition of the spiritual value of lands for indigenous populations, the protection of indigenous environment, the right to participate in the management of their resources and the right to return in the indigenous territory if possible.⁸⁶

As mentioned before, the most important issue with Convention No. 107 was its assimilationist approach. In this regard, the report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention No. 107/1957 stated that:

The Meeting is unanimous in concluding that the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. In 1956 and 1957, when Convention No. 107 was being discussed, it was felt that integration into the dominant national society offered the best chance for these groups to be a part of the development process of the countries in which they lived. This had, however, resulted in a number of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society. The inclusion of this idea in the text of the Convention has also impeded indigenous and tribal peoples from taking full advantage

⁸⁵ Thornberry, 2002, pp. 330–331.

⁸⁶ *Ibidem*, pp. 333–334.

of the strong protections offered in some parts of the Convention, because of the distrust its use has created among them.⁸⁷

Hence, it was clear to the Meeting of Experts that the provisions in ILO Convention No. 107 were not adequate to protect indigenous rights. Although the aim of the Convention was to ensure a good protection of indigenous rights, in reality it was an integrationist document, also because of the use that the governments made of it. For all these reasons, a new Convention was drafted.

3.2.2. The safeguards of the right to land and the right to self-determination in ILO Convention No. 169/1989

The revision of Convention No. 107 resulted in the adoption of ILO Convention No. 169. The new Convention was adopted in 1989 with 328 votes in favour, one vote against and with 49 abstentions. It entered into force in September 1991 and it has been ratified by 22 countries.⁸⁸ Already the title of this new instrument suggests a different approach from that of the previous Convention No. 107. While Convention No. 107 is entitled the “Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries”, Convention No. 169 is called the “Convention concerning Indigenous and Tribal Peoples in Independent Countries”. Hence, it is clear that with Convention No. 169 there is a change of approach and indigenous peoples are seen not as populations that must be integrated in the state, but as peoples of the state that must be protected.

Firstly, it is possible to note that there is no word “integration” in the Convention of 1989, although the term was present in the previous Convention No. 107. This is a good indicator of the fact that the approach to the needs of indigenous peoples is different in these two Conventions. Secondly, there is reference to “peoples” but not to “populations” in the new Convention No. 169. The usage of the word “peoples” was the result of long negotiations, because many states were concerned with the link that could be made between the terms

⁸⁷ International Labour Office, Report VI (1) *Partial revision of the Indigenous and Tribal Populations Convention No. 107/1957*, 75th Session 1988. Available at: <http://www.ilo.int/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/lang--en/index.htm> (accessed on 28/3/2014).

⁸⁸ The complete list of states that have so far ratified Convention No. 169 is available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (accessed on 28/3/2014).

“people” and the right to self-determination.⁸⁹ For example, the representative of Argentina stated that notwithstanding the fact that the Argentinian government was not in favour to have this word in the Convention, it would have accepted it only with a specific provision included in the Convention in which it was affirmed that there was no relation between the word peoples and the right to self-determination.⁹⁰ All requests of other governments resulted in Article 1, paragraph 3, which states:

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.

The change in the approach taken by the new Convention No. 169 is particularly evident in its section dedicated to the land rights of indigenous peoples (Part II, Article 13 to 19). Article 13 of this instrument states that the government must respect the special relationship that indigenous people have with their territories (also in the collective aspects), in particular regarding the importance for their cultural and spiritual values. Equal importance is given to the recognition of the right to ownership over the lands that indigenous peoples had occupied and used during centuries (Article 14). Article 14 makes a claim about lands that indigenous peoples “traditionally occupy”.⁹¹ The term “occupancy” has not been fully respected in many states in their practices. For example, the USA refused to recognise the ownership of indigenous peoples over the land that they have historically occupied, but recognised only their right to the lands that they are currently occupying.⁹²

With regard to this issue, the Manual to ILO Convention No. 169 proposes a compromise between two extreme points of view, i.e. the possibility of recognition of the right over the land historically occupied and recognition of the right over the land presently occupied. This solution was proposed because the first point of view is too much in favour of the historical connection with the land, while the second fully denies the value of historical occupation of the land. Furthermore, Article 14 of Convention No. 169 guarantees not only the right to ownership, but also the right to possession of the lands, given that it is important for indigenous peoples to underline the concept of possession of their lands and not only the right to ownership. This is an important difference between the two Conventions, given that

⁸⁹ Thornberry, 2002, pp. 342–343.

⁹⁰ International Labour Conference, Provisional Record 25, Geneva, 66th Session 1989, para. 36.

⁹¹ Thornberry, 2002, pp. 351–352.

⁹² International Labour Office, Report IV (2 A) *Partial revision of the Indigenous and Tribal Populations Convention No. 107/1957*, 76th Session 1988. Available at: <http://www.ilo.int/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/lang--en/index.htm> (accessed on 31/3/2014).

Convention No. 107 recognises only the right to ownership over the lands, while Convention No. 169 acknowledges the right of possession of lands.⁹³ In the English jurisprudence, ownership implies title to land and full rights of management but not necessarily possession, which can be seen as the enjoyment of benefits that can belong to the owner at equity.⁹⁴

Article 15 of ILO Convention No. 169 is about the protection of natural resources that are found in indigenous territories. This article states:

I – 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.

II – 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.

It is an important provision, in the light of the fact that Convention No. 107 was silent about natural resources of indigenous peoples. Taken in conjunction with Articles 6 and 7, Article 15 of ILO Convention No. 169 provides indigenous peoples with a good mechanism of practicing participation in decision-making processes and in management of natural wealth. Regarding this provision, the Tripartite Committee of the ILO Governing Body stated that:

When differing interests and points of view are at stake such as the economic and development interests represented by the hydrocarbon deposits and the cultural, social and economic interests of the indigenous peoples situated in the zones where those deposits are situated, [...] the parties involved seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation.⁹⁵

The content of Article 15 of ILO Convention No. 169 was strongly discussed during the negotiation process between states and indigenous representatives. Many states argued that natural resources should remain in the ownership of the state, because they are retrieved from the national territory. In contrast, the indigenous representatives argued against the possibility of guaranteeing for them the right to land without recognition of the right to natural resources.⁹⁶ Although Article 15 claims that indigenous natural resources must be safeguarded, many researchers strongly criticise this provision. In fact, in the ILO Convention, there is a

⁹³ Thornberry, 2002, pp. 353–355.

⁹⁴ Berge, 2003, pp. 12–13.

⁹⁵ ILO Governing Body, 282nd session, November 2001, GB.282/14/2, para. 36.

⁹⁶ Ulfstein, 2004, p. 27.

distinction between right to ownership over the lands and right to use natural resources, without ownership on them.⁹⁷ For this reason, MacKay claims that Article 15 is one of the most inadequate provisions of the entire Convention No. 169. In fact, in the way that it is structured it is not sufficient to prevent exploitation of natural resources on indigenous lands and the subsequent destruction of indigenous homelands.⁹⁸ Indeed, during the activities of exploration and exploitation there may be several types of problems, such as environmental problems and pollution on the area as well as serious health problems for the population.

This is the case of *Ogoni*, in which the military government of Nigeria was alleged to be directly involved in irresponsible oil exploitation practices in the Ogoni region, without consulting the peoples that were living in those territories.⁹⁹ The Nigerian National Petroleum Company (NNPC) formed a joint venture with Shell Petroleum Development Corporation (SPDC). Their activities in the Ogoni region caused environmental degradation and health problems among the Ogoni people, due to the contamination of the environment.¹⁰⁰ In this regard, the African Commission on Human and Peoples' Rights stated that Article 21 of the African Charter on Human and Peoples' Rights, which is about the right to dispose of natural resources, had been violated.¹⁰¹ The Commission declared that the lack of participation of the Ogoni people and the absence of benefits in the process of exploitation of the subsoil resources by the Nigerian government and the oil companies were without doubt contrary to Article 21 of the Charter.¹⁰²

As well pointed out by the African Commission, there were two main violations in the *Ogoni* case: the non-participation of the Ogoni in the decision-making process and the absence of benefit for them. In fact, according to the Manual to ILO Convention No. 169, the government has the responsibility to respect the provisions set out in the Convention, above all to include indigenous peoples in the decision-making process. Furthermore, it is preferable to start the consultation before a company starts an exploration, in order to avoid economic

⁹⁷ Doyle & Gilbert, 2011, p. 302.

⁹⁸ MacKay, 2002, p. 18.

⁹⁹ *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96, ACHPR 2001. Available at: http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf (accessed on 27/6/2014).

¹⁰⁰ Suksi, 2002, pp. 320–323.

¹⁰¹ Article 21, paragraph 1 of the African Charter on Human and Peoples' Rights states: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it".

¹⁰² Errico, 2011, p. 345.

loss for the company. Once starting the consultation, the indigenous peoples that can be affected of the exploitation process have the right to explain the reasons why an exploration in that land should not begin. Notwithstanding the fact that indigenous peoples do not have the right to veto, in the consultation process they can reach an agreement with the company, for instance stipulating to use particular techniques during the exploitation process in order to minimise the damage for the environment, as well as agree on benefits.¹⁰³

This was the case of an area populated by the Sami, in Norway. In 1993, the government of Norway granted a permit to the multinational company Rio Tinto-Zinc, allowing it to explore Sami areas. In taking the decision, the Norwegian government did not consult the Sami Assembly of Norway nor were the Sami informed. First of all, the Sami Assembly asked the government to nullify the permit and, as a consequence of the refusal of the government to do so, the Sami Assembly contacted the company and started to negotiate directly with it. At the end of the consultation the Assembly was able to reach an agreement with the company, according to which no mining activity would have been started without the approval of the Sami Assembly.¹⁰⁴

As for natural resources that can be found in indigenous territories, Article 16 of ILO Convention No. 169, prohibiting the removal of indigenous peoples, is also of relevance. This article establishes that if the removal is unavoidable and under the precondition of the free, prior and informed consent (FPIC), the right to compensation must be applied. The possibility for indigenous peoples to return to their lands in the future must be considered, and if return is impossible they should be provided with another land plot with the same value or with monetary compensation. The provision about the possibility to return to the indigenous homeland is important, because it was lacking from Convention No. 107.

Although Convention No. 107 had some references to the possibility of displacement of indigenous peoples,¹⁰⁵ Convention No. 169 is more “indigenous friendly”, which can be noticed from its wording. In particular, Convention No. 169 does not use the term “removal”, as Convention No. 107, opting for a more neutral term “relocation”. In addition, the new

¹⁰³ Manual to ILO Convention No. 169, 2003, p. 40.

¹⁰⁴ Ibidem.

¹⁰⁵ ILO Convention No. 107, Article 12, paragraph 2, states: “When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development”.

convention claims that indigenous peoples must be informed of the relocation and must agree with it.¹⁰⁶ Finally, Convention No. 169 introduces Article 17, guaranteeing that the traditional way of transmission of the right to land must be respected, Article 18 that protects indigenous peoples against unauthorised use of their lands, and Article 19 regarding the regulation of national agrarian programmes.¹⁰⁷

Concluding our analysis of ILO Convention No. 169, we can say that, although this Convention cannot possibly solve all the problems of indigenous peoples while being unable to protect the interests of all indigenous groups in the world, some provisions established in it are capable to improve some aspects of indigenous life. It must be kept in mind that, if Convention No. 169 is implemented in due faith, it will provide workable measures for protecting the rights of indigenous peoples, safeguarding a self-governing regime, in which these people can enjoy their cultural rights, their right to land, natural resources, etc. Finally, the fact that this Convention has abandoned a paternalistic approach towards understanding indigenous rights while taking a more indigenous friendly approach should not be underestimated.¹⁰⁸

3.2.3. ILO Convention No. 169 in the legal frameworks of Finland, Norway and Sweden

Of all the selected Nordic states, only Norway has ratified ILO Convention No. 169. The reasons why Finland and Sweden have abstained are different. However, notwithstanding that the non-ratification of ILO Convention No. 169 can be seen as a possible way to avoid legal responsibilities regarding the protection of the Sami indigenous peoples, it must be kept in mind that Finland and Sweden have introduced other effective measures for the protection of the Sami.¹⁰⁹

Finland is not a state party to Convention No. 169 because of the dispute with the Sami about land rights. In particular, the Sami argue for official recognition of their ownership over the Sami homeland, while the Finnish government is reluctant to provide such recognition.¹¹⁰ In fact, Article 14 of the Convention provides that all indigenous peoples have the right of

¹⁰⁶ Thornberry, 2002, pp. 356–357.

¹⁰⁷ Ibidem, pp. 357–358.

¹⁰⁸ MacKay, 2002, p. 19.

¹⁰⁹ Jona, 2012, p. 172.

¹¹⁰ The Sami Homeland is an area that includes the municipalities of Enontekiö, Inari and Utsjoki. Notwithstanding the name, the Sami in this area are a minority within the total population.

ownership over the lands that they have traditionally occupied, and for this reason the Finnish government has not yet ratified the Convention.¹¹¹ The Finnish government has opened the discussion on the possibility of ratifying Convention No. 169, and for this reason it appointed in 1999 a special expert whose task it was to prepare a report on the issues of land, water, natural resources and traditional lifestyle of the Sami. There is, however, no discussion on the ownership of the lands in that report, nor is there any mentioning of the possibility for Finland to ratify the Convention.¹¹² The report analyses the provisions set out in Convention No. 169 and in national legislation, proposing some modifications to national legislation on land rights.¹¹³

After this report had been presented, the Finnish Ministry of Justice decided that Finland needed to conduct even more specific studies before it could possibly ratify the Convention. Dr Wirilander was appointed a legal expert with the task to conduct a legal assessment of the regime of land ownership in the Sami homelands.¹¹⁴ In his study, Wirilander found no link between the Lapp villages and the ownership over the lands that they used, but he found clear evidence regarding the existence of the family ownership over the indigenous lands used for fishing, hunting, and reindeer herding. At this point, the Ministry of Justice had decided to start a research project in order to study the land ownership and the land use in the entire Finnish Lapland from a historical and political point of view.¹¹⁵

However, even after this detailed study on land ownership in Lapland, Finland has not yet ratified ILO Convention No. 169. However, the ratification of ILO Convention No. 169 by 2015 is one of the goals of the current government (the proposal of the government for the ratification is pending in Parliament), as stated in the Second National Report by the government of Finland of the UPR of the UN Human Rights Council.¹¹⁶

The situation around implementing indigenous rights is different in Norway. The Sami issue in Norway had its culmination in the *Alta* case, between the end of the 1970s and the beginning of 1980. After that case, the Sami Rights Commission was established, with the aim to protect the Sami rights in the Norwegian Lapland. The work of the Commission was

¹¹¹ Myntti, 2000b, p. 205.

¹¹² Vihervuori, 1999.

¹¹³ Joona, 2012, pp. 179–180.

¹¹⁴ Wirilander, 2001.

¹¹⁵ Joona, 2012, pp. 180–181.

¹¹⁶ Universal Periodic Review of the UN Human Rights Council, 2012.

important for the Sami of Norway, given that a provision regarding the Sami was included in the Norwegian Constitution in 1988 (art. 110a).¹¹⁷ Probably as the result of the active work of that Commission, Norway was the first country that ratified ILO Convention No. 169, in 1990.¹¹⁸

Although Norway was the first country that ratified Convention No. 169, there were certain problems in the interpretation of the provisions of this Convention. In Norway, there was the dispute about indigenous rights to land, in particular those guaranteed by Article 14 of Convention No. 169. The Norwegian Ministry of Justice agreed with the provisions established in Article 14, paragraph 1, about the recognition of indigenous rights of ownership and possession of the lands that have been traditionally occupied by indigenous communities. Nevertheless, the Ministry did not undertake any measures in order to identify those areas that had been occupied, as was established in paragraph 2. In practice, Norway has ratified the Convention, but without accepting “*in toto*” the provisions of Article 14. This view has been strongly criticised by the ILO Committee of Experts, although the ILO has no doubt about the good faith of the Norwegian government about the interpretation of the provisions stated in Article 14.¹¹⁹

The perspective of the Norwegian government regarding Article 14 of ILO Convention No. 169 was criticised not only at the international level, but also at the national level. In particular, many legal experts and the Sami Rights Commission complained against the interpretations of the government. For this reason, the Commission released two reports in 1997. The latter of those reports, prepared by the sub-committee of the Commission, argues that although Article 14 does not obligate the state to give to the Sami any entitlements on the lands that they have traditionally occupied, the state must give to them at least more power on that land. The Sami of Inner Finnmark (that includes the area of Karasjok, Kautokeino and Upper Tana) should have this right.¹²⁰ In this regard, the Sami Rights Commission stated that: a) Land and natural resources should be transferred from the state to a new governmental council (so-called Finnmark Land Management); b) the Sami Assembly should be given veto power when Sami interests are in danger.

¹¹⁷ Article 110a of the Constitution of Norway states: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life”.

¹¹⁸ Joona, 2012, pp. 181–182.

¹¹⁹ ILO Committee of Experts, Observation 1995, para. 17.

¹²⁰ Joona, 2012, pp. 182–183.

After a wide legal and political discussion, a bill was prepared with the aim to establish the right of the Sami to manage their lands and their natural resources in Finnmark County.¹²¹ In May 2005, the Finnmark Act was approved. With this Act, about 95% of the area in Finnmark was transferred to the Finnmark inhabitants with the creation of a proper new agency, called the Finnmark Estate. Hence, this Act is important for the management of the Sami lands and natural resources in Norway. It is important to underline that in the Act it is established that the scope and content of ownership and usage held by the Sami on the basis of prescription or immemorial usage must be identified.¹²² The Act establishes also that there should be the Finnmark Land Management Commission. This is an independent body governed by a Board of seven actors (three members are elected by the Finnmark County Council, three by the Norwegian Sami Assembly and one is appointed by the King in Council) with the aim to supervise the use of land and the management of natural resources.¹²³

As for Sweden, it has not yet ratified ILO Convention No. 169. However, this does not mean that the Swedish government has not addressed this problem, given that the government established a commission in 1997. The purpose of the commission was to analyse the Convention and point out the reasons why Sweden should have ratified it. In the conclusion of the so-called Heurgren Report of this commission it is established that Sweden could ratify the Convention if it was able to solve some controversial issues about the right to land of the Sami. In particular: a) Sweden should identify the Sami lands in order to recognise Sami rights; b) the Sami must be protected against any violations of their reindeer husbandry rights; c) Finally, the Sami have the right to have enough land for their needs, above all reindeer husbandry.¹²⁴ This case also demonstrates the problems concerning the rights to land. For this reason, the Swedish government decided to create a boundary commission, composed of experts of property law, in order to have a clearer scenario and, after the evaluation by the commission, discuss again the possibility to ratify the Convention.¹²⁵ The goal of the ratification of ILO Convention No. 169 was reiterated also in the Report of the Working

¹²¹ See annex No. 3.

¹²² Josefsen, 2007, pp. 17–18

¹²³ Joona, 2012, pp. 183–184.

¹²⁴ Ibidem, pp. 184–185.

¹²⁵ Ibidem, p. 186.

Group on the Universal Periodic Review, where it is stated that “The Swedish Government continued to study the ratification of ILO Convention No. 169.”¹²⁶

As we have tried to establish in this section, the Nordic states put a lot of effort in order to ratify (in the case of Norway) or to start the process of ratification of ILO Convention No. 169 (Sweden and Finland). The main problem regarding the ratification of this instrument is the recognition of the right to land, considering the fact that the Convention is legally binding and the states are obliged to respect the provisions established in it. Perhaps, this is another reason why the states are so reluctant to ratify this instrument and why the approach of the UN Declaration on the Rights of Indigenous Peoples is different, given that the Declaration is not legally binding. In fact, all the three Nordic states have voted for the Declaration.

3.3. The UN Declaration on the Rights of Indigenous Peoples: a step forward towards the recognition of the right to self-determination and the right to land of indigenous peoples

The United Nation Declaration on the Rights of Indigenous Peoples was adopted in September 2007.¹²⁷ This Declaration marks an important development regarding the protection of the rights of indigenous peoples in the entire world, taking into account that 143 states voted in favour of it, 11 states abstained, and only four were against of the adoption of this Declaration (Australia, Canada, New Zealand and USA).¹²⁸

However, we must keep in mind that a declaration, which is not legally binding, cannot solve all the problems of indigenous peoples, because the rights established in this document could go against national interests (above all, rights pertaining to the exploitation of resources in indigenous lands).¹²⁹ In this regard, it should be underlined that the Declaration is not a document that clearly favours the position of indigenous peoples; rather, it represents a compromise between the text proposed by the indigenous peoples and the requests of the member states of the UN.

¹²⁶ UN doc. A/HRC/15/11, Report of the Working Group on the Universal Periodic Review, para. 19.

¹²⁷ UN Resolution A/61/295. Full text of the Declaration is available at: <http://www.un-documents.net/a61r295.htm> (accessed on 6/4/2014).

¹²⁸ Daes, 2011, p. 36.

¹²⁹ Burger, 2011, p. 41.

The Declaration addresses real problems of indigenous peoples, such as the right to self-determination and prohibition of discrimination. In fact, after having once conquered their lands, the colonizing countries destroyed indigenous political, social and religious institutions, thus denying the possibility to recognise the right to indigenous self-determination. States started the process of assimilation of indigenous peoples, while denying these peoples equal treatment with others. For these reasons, one of the aims of the Declaration is to ensure for indigenous peoples their right to maintain their own institutions, cultures and traditions as well as the protection from any kind of discrimination in many areas (i.e. education, employment, health).¹³⁰

One of the main problems during the process of negotiations of the Declaration was related to the right to self-determination. However, a provision regarding the right to self-determination is included in the UN Declaration of 2007. This is a success for indigenous peoples, although the Declaration is not legally binding. Yet, the non-binding nature of the 2007 indigenous Declaration is among the reasons why states agreed to keep the right to self-determination in this document. The acceptance of this provision by the states represents an important development: states are changing their views about the right to self-determination, from a right applicable to peoples under colonial domination to a right applicable to other peoples, such as indigenous peoples.¹³¹ Article 3 of this Declaration reads as follows:

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.

Moreover, Article 4 of this document provides the following:

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.

Notably, these two articles are explicit in guaranteeing self-determination for indigenous peoples. However, the right to self-determination is understood by this Declaration in its internal sense, which becomes evident after reading of the provision in Article 4.¹³² The reason why it is possible to affirm this is Article 46, paragraph 1, according to which:

¹³⁰ Ibidem, pp. 42–43.

¹³¹ Quane, 2011, pp. 259–260.

¹³² Ibidem, pp. 264–265.

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The presence of this provision in Article 46 must be seen in the context of the compromises which led to the adoption of the Declaration. In fact, although the majority of indigenous peoples do not understand their right to self-determination as giving them a possibility to secede from the state, the states do not want to give to indigenous peoples such a possibility, taking into account the potential risk it can bring for national unity.¹³³

Related to the right to self-determination, there is the right to land, which is fundamental for indigenous peoples. Article 25 of the Declaration states that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

This article is significant for indigenous peoples, because it officially recognises for the first time the particular relationship that indigenous peoples establish with their traditional territories as well as their inter-generational approach to their lands.¹³⁴ Directly related to the right set out in Article 25, there is another fundamental right for indigenous peoples, recognised in Article 26 of the Declaration: the right to ownership over the land. The provision states:

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.

We can see that Article 26 attempts to safeguard the right to land for indigenous peoples without opening a discussion about the meaning of this concept. In fact, there is a big debate in academic literature regarding the meaning of the right to land for indigenous peoples and whether this right implies ownership or both ownership and the right to use the land. As it is possible to see from Article 26, the Declaration includes both, the right of ownership and the

¹³³ Ibidem, p. 266.

¹³⁴ Doyle & Gilbert, 2011, p. 294.

right to use the lands, in the right to land of indigenous peoples.¹³⁵ Despite the fact that Article 26 of the Declaration recognises the right to ownership and the right to use the indigenous lands, we must underline that this right is valid only for the territories which are presently occupied by indigenous peoples.

Although paragraph 1 of Article 26 of the 2007 Declaration states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”, its contents are ambiguous, given that they do not explain if the right to land is a right to use, to ownership or to control the indigenous lands. This lack of clarity is probably the result of a compromise, according to which national legislation should define which type of rights indigenous peoples will have regarding the lands that they have traditionally owned or used in the past.¹³⁶

We can see that in the two articles (25 and 26) there is a reference to lands as well as to resources that can be found in those lands. In particular, paragraph 2 of Article 26 recognises that indigenous peoples have “the right to own, use, develop and control the lands, territories and resources”. Probably, the negotiation process regarding this provision was quite difficult, given that it was necessary to find a balance between the state economic interests for the development of the nation and the rights of indigenous peoples.¹³⁷ It is useful to underline that the protection of the right of ownership and use of traditional lands of indigenous peoples should be seen in the context of the protection of their cultural, social and economic integrity. For instance, the former UN Special Rapporteur Erica Irene Daes states in this respect that:

the developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that the indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories.¹³⁸

Regarding the right of indigenous peoples over natural resources, the Inter-American Court of Human Rights has taken an active role. The decisions of this Court are important because they are based on the *rationale* adopted in the UN Declaration regarding the right over natural

¹³⁵ Ibidem, p. 297.

¹³⁶ Ibidem, p. 298.

¹³⁷ Errico, 2011, pp. 329–331.

¹³⁸ Erica-Irene Daes, Final Report of the Special Rapporteur, “*Indigenous peoples’ permanent sovereignty over natural resources*”, UN doc. E/CN.4/Sub.2/2004/30. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/149/26/PDF/G0414926.pdf?OpenElement> (accessed on 9/4/2014).

resources of the indigenous peoples.¹³⁹ For instance, in the case *Awás Tingni Community v. Nicaragua*¹⁴⁰ the Court based its decision on Article 21 of the American Convention on Human Rights¹⁴¹ and stated that:

Property can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.¹⁴²

This position of the Court was strongly reaffirmed in the case *Saramaka People v. Suriname*. In this case it was claimed that the state had not adopted the necessary measures to safeguard the right to use and enjoyment of the lands that the Saramaka people has occupied since immemorial times and had thus violated the right of ownership over these lands of this people. The Court stated:

[...] the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life.¹⁴³

This decision is a cornerstone for indigenous peoples, given that it is established that it is meaningless to recognise the right to land of indigenous peoples without giving them also the opportunity to enjoy the right over their natural resources. Furthermore, with this decision, the impact that exploitation of natural resources can have on the survival of an indigenous community is recognised.¹⁴⁴

In order to protect and ensure the realisation of the right to territories, lands and resources, the free, prior and informed consent (FPIC) of indigenous peoples should be fulfilled.¹⁴⁵

¹³⁹ Doyle & Gilbert, 2011, p. 303.

¹⁴⁰ The Awás Tingni Community brought the state of Nicaragua to the Court alleging that Nicaragua has not adopted effective measures to guarantee the right to property of the community to its lands and natural resources and because it released a concession on lands of the community without its assent.

¹⁴¹ The full text of the American Convention on Human Rights is available at:

http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf (accessed on 22/5/2014).

¹⁴² *The Mayagna Awás Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Inter-American Court of Human Rights, No. 79 (2001), para. 144. Full text available at:

<http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (accessed on 22/5/2014).

¹⁴³ *Saramaka People v. Suriname*, Judgment of 28 November 2007, Inter-American Court of Human Rights, para. 122. Full text available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf (accessed on 22/5/2014).

¹⁴⁴ Doyle & Gilbert, 2011, p. 303.

¹⁴⁵ *Ibidem*, pp. 303–304.

Regarding the FPIC and the right to lands, territories and resources, Article 32 of the Declaration states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

According to this article, in particular paragraph 2, the FPIC is not just necessary in order to prevent exploitation of natural resources from outside, but it has a fundamental importance in order to guarantee the development of indigenous peoples. We can say that the FPIC is established, in Article 32, as the most important instrument to realise the right to development of indigenous peoples.¹⁴⁶ Also the Tripartite Committee of the ILO Governing Body expressed itself on indigenous participation, by saying that:

In order for consultation to be effective, sufficient time must be given to allow the country's indigenous peoples to engage their own decision making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions.¹⁴⁷

As it is easy to understand, the debate about the management of natural resources in indigenous territories is not easy and becomes more complex when we start to talk about the subsurface resources in indigenous areas. In this regard, it must be noticed that indigenous representatives tried in several ways to introduce into some articles of the Declaration a provision on the ownership of subsurface resources (in particular in Articles 25 and 30).¹⁴⁸ This proposal did not find the approval of the delegations of several states and for this reason it was not included in the Declaration.¹⁴⁹ The following articles of the Declaration refer to the management of lands and resources in indigenous areas (Article 27), the compensation that indigenous people are entitled to receive in case of relocation (Article 28), protection of indigenous environment (Article 29), protection against military activity in indigenous areas (Article 30) and the right to cultural heritage (Article 31).

¹⁴⁶ Ibidem, p. 314.

¹⁴⁷ ILO Governing Body, 282nd session, November 2001, GB.282/14/3, para. 79.

¹⁴⁸ UN doc. E/CN.4/2004/WG.15/CRP.4, 14 October 2004.

¹⁴⁹ Errico, 2011, pp. 340–341.

In conclusion we can say that, although the UN Declaration is not a legally binding document, its adoption is important for indigenous rights. In particular, not only courts have started to look at its provisions, but also multinational corporations have started to consider them. Notably, corporations consider the consultation process before the beginning of their activities as a useful instrument in order to avoid risks of loss of money and time as well as the protection of indigenous peoples' cultural integrity as a right that must be ensured to these peoples.¹⁵⁰

¹⁵⁰ Ibidem, p. 356.

4. Mining Acts of Finland, Norway and Sweden: compliance with the international law standards on the protection of indigenous rights

4.1. The Mining Acts of the three selected Nordic states

4.1.1. Finland: a complete Act for Sami rights

Introducing an effective legal regulation of the mining process is important in order to prevent possible violations of indigenous rights. In particular, due implementation of such legislation is significant for the protection of Sami rights. A short analysis of the provisions of the Mining Acts in the three Nordic countries entailing the protection of the Sami peoples is presented in the beginning of this chapter. Further in this chapter a comparison will be made between the obligations set out in national law and those established in international law. The final aim is to study if the provisions at the national level are sufficient to grant a good protection to Sami rights also in those states that have not yet ratified ILO Convention No. 169 (such as Finland and Sweden).

Finland adopted the new Mining Act in June 2011, in substitution of the previous Mining Act of 1965.¹⁵¹ One of the most important innovations of the 2011 Act is shifting the authority to deal with the mining issue: from the Ministry of Employment and the Economy to TUKES (Finnish Safety and Chemical Agency). Now all the permits and licenses are granted by TUKES.¹⁵²

In comparison with the former Mining Act, the new 2011 Act takes more extensively into account the rights and the responsibility of the parties involved in the process of mining, the environmental issues, and the rights of the landowners and gives more power to the municipalities in order to allow the stakeholders to influence the decision-making process.¹⁵³

¹⁵¹ PWC, 2012, p. 8.

¹⁵² New Mining Act and gold panning permit, <http://tukes.fi/en/Branches/Mining/Gold-panning/New-Mining-Act-and-gold-panning-permit/> (accessed on 9/5/2014).

¹⁵³ Mining news, <http://www.investinfinland.fi/articles/news/mining/finlands-new-mining-act-comes-into-force-at-the-beginning-of-july/49-321> (accessed on 10/5/2014).

The new approach of the 2011 Act is evident also as regards the protection and safeguarding of Sami rights. Section 1 of Chapter 1 establishes that:

The activities referred to in this Act shall be adapted in the Sami Homeland, referred to in the Act on the Sami Parliament (974/1995), so as to secure the rights of the Sami as an indigenous people. This adaptation shall pay due attention to the provisions of the Skolt Act (kolttalaki 253/1995) concerning the promotion of the living conditions of the Skolt population and Skolt area, opportunities for making a living, and the preservation and promotion of the Skolt culture.¹⁵⁴

This is a strong provision and can be seen as the complete recognition of the right of the Sami as indigenous peoples as is stated in the Finnish Constitution of 1999 (sections 17 and 121).¹⁵⁵ It is important that also the Skolt Sami are mentioned in this section and this statement can be seen as a further step of the government of Finland towards the recognition and the protection of the three different Sami groups living in Finland. Section 12 (Notification of field work and construction in the exploration area) contains another provision dealing with the Sami and Skolt peoples. It states:

Moreover, a notification must be submitted to the Sami Parliament in the Sami Homeland, the appropriate local reindeer owners' associations within an area specifically intended for reindeer herding as stipulated in the Reindeer Husbandry Act (*a special reindeer herding area*), and to a village meeting of the Skolt people in the Skolt area referred to in the Skolt Act (kolttalaki 253/1995).

Also in this case it is possible to note that the 2011 Act allows a broader protection of the Sami. A similar obligation to notify the authorities about field work in the gold panning area is included in Chapter 4, section 27, which states:

In writing, the gold panner must provide advance notification to the authority or institution responsible for management of the area of all field work that could cause damage or inconvenience. Moreover, notification shall be submitted to the Sami Parliament in the Sami Homeland, to the appropriate local reindeer owners' associations in a special reindeer herding area, and/or to a village meeting of the Skolt people in the Skolt area, as relevant. Further provisions on the notification procedure may be given by government decree.

In addition, regarding the gold mining area, section 30 stipulates that:

The mining authority shall inform the following about the final inspection: the gold panner and the authority or institution responsible for management of the area; within the Sami Homeland, the Sami Parliament; within the Skolt area, the Skolt village meeting; and, within a special reindeer herding area, the local reindeer owners' associations.

¹⁵⁴ Finnish Mining Act, 2011, Chapter 1, section 1. Full text available at: <http://www.finlex.fi/en/laki/kaannokset/2011/en20110621.pdf> (accessed on 30/4/2014).

¹⁵⁵ The full text of the Constitution of Finland is available at: <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (accessed on 30/4/2014).

References to the safeguards of Sami rights can be found in Part II, section 5, of the 2011 Mining Act, which refers to the permit procedures. When it comes to Sami rights, section 38 provides for precise obligations (such as the evaluation of the impact that a mining activity can have on that area and measures in order to decrease and prevent damage) that must be applied in the Sami homeland, the Skolt area and the special reindeer herding area. It is interesting to notice that this provision states that the permit authority must co-operate with the Sami Parliament (that we also call the Sami Assembly), the reindeer herding associations and the institution responsible for management of the area.

Beyond the fact that the provision established in this section safeguards in a good way the interests of the Sami, the most important thing is that this provision points out the will of the state to co-operate with the Sami also in the decision-making process. In addition, it is useful to underline the provisions in Chapter 6, section 50. This section, in line with the previous one, could be considered a milestone for the protection of Sami rights in the Mining Act. It is important because it establishes that it is not possible to grant a permit (exploration, mining or gold panning permit) if this permit could compromise the traditional Sami lifestyle and their culture.

The protection of the Sami people as an indigenous people is reaffirmed also in sections 51, 52 and 54. In the final part of the Mining Act we can find the provisions regarding the right of the Sami to be informed about the termination of mining activity (Chapter 15, section 146), but the most important provision is in section 165. This section is about the right of appeal and it states:

A decision on an exploration permit, mining permit, or gold panning permit; a decision to extend the validity of said permit; a decision on its expiry, amendment, or cancellation; or a decision to terminate mining activity may be challenged by way of an appeal by the following: [...] the Sami Parliament, on the grounds that the activity referred to in the permit undermines the rights of the Sami as an indigenous people to maintain and develop their own language and culture.

This is a strong provision that gives to the Sami Assembly the opportunity to challenge every decision regarding mining activities if these decisions could allegedly threaten the Sami traditional lifestyle. It is useful to underline that the right of appeal of the Sami is also present in the Water Act of 2011, in Chapter 15, section 2.¹⁵⁶

¹⁵⁶ Finnish Water Act, 2011, section 2. Full text available at: <http://www.finlex.fi/fi/laki/kaannokset/2011/en20110587.pdf> (accessed on 11/5/2014).

4.1.2. Norway: focus on the Finnmark area

The new Norwegian Mineral Act was adopted in 2010 and, as the Finnish Mining Act, it introduced some new obligations regarding the protection of the Sami living in Norway.¹⁵⁷ In Chapter 1, section 2, it is stipulated that the fundamentals Sami rights, their culture and their lifestyle must be respected in the process of using mineral resources.¹⁵⁸ Section 10 establishes that the party involved in the research of ore deposits must inform the landowners at the latest one week before the beginning of the research. However, if the research will be in the Finnmark area, the seeking parties must inform the Sami Assembly, the Finnmark Estate and, if it is possible, also the Sami village (so-called ‘Siida’, which is the traditional Sami local community and can be seen as the basic organizational unit for large-scale herding).¹⁵⁹ As is stipulated in the Finnmark Act, the Finnmark Estate is an independent legal entity whose task it is to administer the lands and natural resources in the Finnmark area.¹⁶⁰ The Finnmark area is the northern part of Norway,¹⁶¹ where around 74,000 persons live, most of whom are Sami.¹⁶²

In Chapter 4, section 13 of the Norwegian Mineral Act, which is about the requests of exploration permits, it is established that “in Finnmark, the Directorate of Mining shall inform the landowner, the Sameting (the Sami Assembly), the relevant area board and district board for reindeer management, and the municipality of the permit”. Section 17 of the same chapter, which is about the exploration of natural resources in the Finnmark area, establishes that the parties involved in the mining process must take all the possible measures in order to assess whether the exploitation of the resources in the Sami indigenous area can possibly affect the Sami interests. The same section establishes that such permission may be refused if the exploitation of natural resources will be against the interests of the Sami living in that area. Finally, in section 18 it is stipulated that in the Finnmark area the parties involved in the exploitation process must give “written notice to the Sami Parliament and the relevant area board and district board for reindeer management.”

¹⁵⁷ Speight & Shabazz, 2013, pp. 1–2.

¹⁵⁸ Norwegian Mineral Act, 2009, section 2. Full text available at: http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf (accessed on 11/5/2014).

¹⁵⁹ Sara, 2009, p. 153.

¹⁶⁰ Finnmark Act, 2005, Chapter 2, section 6. Full text available at: http://www.galdu.org/govat/doc/the_finnmark_act_act_17_june_2005_no_85.pdf (accessed on 5/6/2014).

¹⁶¹ See annex No. 3.

¹⁶² Ween & Lien, 2012, p. 96.

There are several provisions about the protection of Sami rights and many provisions in the Act are established for the regulation of the mining activities in the Finnmark area. However, no references are made to the Coastal Sami. The majority of the Coastal Sami live in the inner part of the fjords; their economy is based on fishing, hunting and animal husbandry (so-called *fiskarbonden* – fishermen farmer).¹⁶³ The Coastal Sami can be considered a different group given the fact that, in the early nineteenth century, the Mountain Sami of *Karasjok* started to consider that group of Sami as “*dáčá*”.¹⁶⁴ This word indicated persons that are not Sami when it comes to their behaviour, outlook and activities. The Coastal Sami have gone through a strong Norwegianization¹⁶⁵ process. They now live on the coast of Northern Norway. They are considered a population with Sami origins, but not as a proper Sami group.¹⁶⁶ Perhaps, this is one of the reasons why there are no special provisions on safeguarding their rights in the Norwegian Mineral Act.

4.1.3. Sweden: a lack of provisions on Sami rights

The Swedish Minerals Act¹⁶⁷ was adopted on 24 January 1991 and, in contrast to the Mineral Act of Norway and the Mining Act of Finland, which are more recent, there is no mentioning of the Sami in it.¹⁶⁸ The Sami were not recognised for a long time as an indigenous people in the Swedish Constitution and only with the constitutional amendment of 1 January 2011, they were recognised as a people.¹⁶⁹ Now the part of the Swedish Constitution entitled the Instrument of Government, establishes the following in Chapter 1, Article 2:

The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.¹⁷⁰

¹⁶³ Lätsch, 2012, p. 4.

¹⁶⁴ Im Kim, 2010, p. 5.

¹⁶⁵ The Norwegianization process was the process implemented by the Norwegian government between 1880 and 1950 with the aim to assimilate the Sami into the Norwegian national identity. In particular, all Sami children were obliged to speak, read and write in Norwegian and not to use their language in school and in public places in general.

¹⁶⁶ Im Kim, 2010, p. 5.

¹⁶⁷ The full text of the Swedish Minerals Act is available at:

http://www.sgu.se/dokument/service_sgu_publ/SGU-rapport_2007-26_minerals-act_ordinance.pdf (accessed on 10/5/2014).

¹⁶⁸ Speight & Shabazz, 2013, pp. 1–2.

¹⁶⁹ The full text of the Swedish Constitution is available at: <http://www.riksdagen.se/en/Documents-and-laws/Laws/The-Constitution/> (accessed on 9/5/2014).

¹⁷⁰ The Instrument of Government, Chapter 1, Article 2.

As it is possible to notice, there is a distinction between the Sami people and other minorities and this is the result of a long-standing request of the Sami to be seen as a people and not as a minority.¹⁷¹ In Chapter 2, Article 17, there is a provision about the protection of the rights of the Sami to practice reindeer husbandry.¹⁷² These general provisions established in the Swedish Constitution are the only obligations (together with the provisions in the Reindeer Grazing Act) on the protection of the Sami of Sweden. There is, then, a lack of protection of Sami rights in the context of mining activities and this is a shortcoming in a country rich of natural resources in Sami territories like Sweden.¹⁷³

4.1.4. Horizontal comparison of the three Mining Acts

This section is devoted to a comparison between the three Mining Acts. Our aim is to find the common features, the differences, and the legal problems that can be found in each Act. In particular, we will compare the legal regulation of the following principal issues, from the standpoint of participatory right of the Sami in mining activities:

- The specific obligations that a state must fulfil in order to protect the rights which are most important for indigenous peoples (i.e. right to land, right to self-determination, right to participate and the legal guarantee that indigenous peoples are entitled to);
- Participatory provisions, enabling the Sami to get involved in decision-making during mining activities;
- Provisions regarding environmental impact assessment and exerting control over mining activities.

In this way it will be possible to understand whether the obligations provided in the relevant international instruments (the ICCPR, ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples) regarding the safeguarding of indigenous rights have found an application in national law.

¹⁷¹ Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 — Case study: Sami rights to culture and natural resources*, 28 June 2012, full text available at: <http://www.refworld.org/docid/4fedb3de37.html> (accessed on 12/5/2014).

¹⁷² The Instrument of Government, Chapter 1, Article 2.

¹⁷³ Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 — Case study: Sami rights to culture and natural resources*, 28 June 2012.

COMPARATIVE CRITERIA	CONCRETE ISSUES	FINLAND	NORWAY	SWEDEN
STATE OBLIGATIONS	<i>Protection of Sami rights in the Purpose of the Act</i>	“The activities referred to in this Act shall be adapted in the Sami Homeland, referred to in the Act on the Sami Parliament (974/1995), so as to secure the rights of the Sami as an indigenous people.” (section 1)	“Within the framework of section 1, the administration and use of mineral resources pursuant to this Act shall ensure that the following interests are safeguarded: [...] the foundation of Sami culture, commercial activity and social life.” (section 2, b)	No mention of Sami rights
PARTICIPATORY PROVISIONS	<i>Notification of field work and construction in the exploration area/gold panning area (right to participate)</i>	“In writing, the holder of the exploration permit must notify [...] in advance of all field work that could cause any damage or harm, and of any temporary constructions to be erected. Moreover, a notification must be submitted to the Sami Parliament in the Sami Homeland.” (sections 12 and 27)	”In the case of a search in Finnmark, the searching party shall in addition give written notice to the Sameting (the Sami Parliament), Finnmarkseiendommen (the Finnmark Estate) where it is landowner, and the relevant area board and district board for reindeer management.” (sections 10 and 13)	No mention of Sami rights
	<i>Notification after the expiration of the exploration permit (right to participate)</i>	“The exploration permit holder shall submit a notification in writing to the mining authority, the owners of the properties included in the exploration area, and other holders of rights once the measures referred to in paragraph 1 of subsection 1 have been completed. Moreover, notification shall be submitted to the Sami Parliament in the Sami Homeland [...]” (section 15)	No specific provisions about the necessity to notify the Sami peoples of the expiration of the exploration permit	No mention of Sami rights

<i>PARTICIPATORY PROVISIONS</i>	<i>Information regarding a permit decision (right to participate)</i>	“The permit authority shall submit the decision concerning an exploration permit, mining permit, or gold panning permit to the applicant. [...] If the decision involves the Sami Homeland or concerns a project of the nature described in section 38(2), a copy of the decision shall be submitted to the Sami Parliament.” (section 58)	“In Finnmark, an exploring party shall in addition give written notice to the Sameting (the Sami Parliament) and the relevant area board and district board for reindeer management.” (section 18)	No mention of Sami rights
	<i>Right of appeal (right to participation)</i>	“A decision on an exploration permit, mining permit, or gold panning permit; a decision to extend the validity of said permit; a decision on its expiry, amendment, or cancellation; or a decision to terminate mining activity may be challenged by way of an appeal by the following: [...] the Sami Parliament, on the grounds that the activity referred to in the permit undermines the rights of the Sami as an indigenous people to maintain and develop their own language and culture.” (section 165)	“If the Sameting or the landowner opposes the granting of an application, the Ministry shall decide the application. If the Ministry grants an application in a case as described in the fifth paragraph, an appeal to the King by the Sameting or the landowner shall have a suspensive effect.” (section 17)	No mention of Sami rights
	<i>Control of the impact of mining activities</i>	“In the Sami Homeland, the permit authority shall — in co-operation with the Sami Parliament, the local reindeer owners’ associations, the authority or institution responsible for management of the area, and the applicant — establish the impacts caused by activity in accordance	”A special permit may be refused if granting the application would be contrary to Sami interests. In the assessment, special consideration shall be given to the interests of Sami culture, reindeer management, commercial activity, and social life.	No mention of Sami rights

ENVIRONMENTAL IMPACT ASSESSMENT & CONTROLLING MINING ACTIVITIES	<i>(right to land and to traditional lifestyle)</i>	with the exploration permit, mining permit, or gold panning permit on the rights of the Sami as an indigenous people to maintain and develop their own language and culture and shall consider measures required for decreasing and preventing damage.” (sections 38, 52, 54)	If the application is granted, conditions may be imposed to safeguard these interests.” (section 17)	
	<i>Refusal to grant a mining permit (right to land and legal guarantee to indigenous lifestyle)</i>	“An exploration permit, mining permit, or gold panning permit must not be granted if activities under the permit: alone, or together with other corresponding permits and other forms of land use would, in the Sami Homeland, substantially undermine the preconditions for engaging in traditional Sami sources of livelihood or otherwise to maintain and develop the Sami culture [...]” (section 50)	”A special permit may be refused if granting the application would be contrary to Sami interests. In the assessment, special consideration shall be given to the interests of Sami culture, reindeer management, commercial activity, and social life. If the application is granted, conditions may be imposed to safeguard these interests.” (section 17)	No mention of Sami rights
	<i>Ensuring public and private interests</i>	“The exploration permit shall include the necessary provisions for securing public and private interests.” (section 51)	”An exploring party shall take reasonable steps to obtain information about directly affected Sami interests in the area that is to be explored.” (section 17)	No mention of Sami rights
	<i>Final inspection after mine closure (right to land)</i>	“The mining authority shall inform the following about the final inspection: [...] in the Sami Homeland, the Sami Parliament; in the Skolt area, the Skolt village meeting.” (section 146)	No provision about final inspection in general	No mention of Sami rights

As mentioned earlier, we identified three different points for comparison of the legislation in Finland, Norway, and Sweden and linked them with the obligations that the states must fulfil in order to guarantee indigenous rights. Every focal point for the comparison is linked with the specific obligations regarding the protection of the rights of the Sami. Participatory provisions were matched with all obligations, starting with the necessity of notification and informing the Sami about field work and ending with the Sami right to appeal against those decisions of public authorities which possibly violate indigenous rights. Finally, the last focal point, i.e. environmental impact assessment and controlling mining activities, allowed us to survey whether the analysed national laws mention any obligations related to the control of the impact of mining activities on indigenous areas, to balancing of the rights of various stakeholders, and to arranging the final inspection after mine closure.

After this comparison of the three Mining Acts of Finland, Norway and Sweden, it is possible to say that the Finnish Act is the most “Sami friendly”. It contains several provisions on the protection of Sami rights, while guaranteeing legal safeguards for Sami interests. This approach can be seen as a natural evolution of the provisions in the new Constitution of Finland in which the Sami are recognised as an indigenous people.¹⁷⁴ Although there are still shortcomings regarding participation in the decision-making process, the provisions in the Finnish Mining Act on the participation of the Sami must not be underestimated. Among others: the duty to notify of field work, in sections 12 and 27, the duty to notify after the expiration of the exploration permit, in section 15, the duty to inform about a permit decision, in section 58 and the right of appeal, in section 165. Other rights that are taken into account and that find good protection in the Finnish Mining Act are the right to land and to traditional lifestyle of the Sami (in sections 38, 50, 51, 52, 54, 146).

However, the Sami in Finland can face certain obstacles in maintaining their traditional way of life. In particular, mining activities are expanding in the municipality of Sodankylä and this can have negative effects on reindeer husbandry.¹⁷⁵ In fact, the national legislation does not grant any specific right to the Sami community regarding reindeer husbandry, given the fact that in Finland (unlike Norway and Sweden) this practice is not exclusively for the Sami, but

¹⁷⁴ Constitution of Finland, section 17.

¹⁷⁵ Zimoch Urszula, Mining the North Pole and reindeers — my first trip to Lapland, <http://blogs.helsinki.fi/hy-ruralia/2013/03/18/mining-the-north-pole-and-reindeers-my-first-trip-to-lapland/> (accessed on 6/6/2014).

is open to everyone.¹⁷⁶ In the Finnish Reindeer Husbandry Act of 1990 it is established that state authorities must consult representatives of the Sami reindeer associations when Sami rights can be affected by governmental decisions.¹⁷⁷ Hence, although Finland has not yet ratified ILO Convention No. 169, it is possible to say that the provisions established in national law safeguard in a satisfactory way the rights of the Sami living in Finland. Hence, the protection of Sami rights is not only guaranteed in relation to the traditional uses and lifestyle of the Sami, but also regarding the subsoil resources and the mining activities, as shown in the table above.

Also Norway ensures a good protection of Sami rights in its Mineral Act. Although the provisions established in the Norwegian Mineral Act may seem narrower than those in the Finnish Mining Act (as it is possible to see in the table above, in particular regarding participatory provisions), this does not mean that they do not ensure good safeguards for Sami rights.¹⁷⁸ It is true that some provisions included in the Finnish Mining Act are not present in the Norwegian Mineral Act, among others those regarding notification after the expiration of an exploration permit and the final inspection after mine closure. Hence, it is possible to say that the Norwegian Act is more deficient than the Finnish Act, although there are provisions for guaranteeing the participation of the Sami, such as: notification of field work in sections 10 and 13, information about a permit decision in section 18, and the right of appeal in section 17. Although in a limited way in comparison with the Finnish Mining Act, also the right to land and to traditional lifestyle of the Sami are entitled to receive protection, according to section 17 of the Norwegian Mineral Act. Furthermore, it should not be underestimated that Norway has recognised and apologised for the suffering and the forced assimilation that the Sami were subjected to in the past due to the Norwegianization policies.¹⁷⁹ Maybe due to this reason, Norway was the first state that ratified ILO Convention No. 169, although there are still problems with the interpretation of some provisions of this Convention (e.g. Article 14 on the right of ownership).¹⁸⁰ It is also useful to underline that, in 1988, a provision on the

¹⁷⁶ Joona, 2012, p. 179.

¹⁷⁷ Finnish Reindeer Husbandry Act, Chapter 8, section 53. Full text available at: <http://www.finlex.fi/fi/laki/kaannokset/1990/en19900848.pdf> (accessed on 12/5/2014).

¹⁷⁸ In the Norwegian Mineral Act, Sami rights are mentioned without a complete explanation of their features, while in the Finnish Mining Act there is a complete and detailed explanation of Sami rights. However, it must be kept in mind that the entire structure of the Norwegian Act is different in comparison with the Finnish Act and, in general, it is quite short.

¹⁷⁹ Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 — Case study: Sami rights to culture and natural resources*, 28 June 2012.

¹⁸⁰ Joona, 2012, p. 21.

protection of the Sami culture, language and way of life was introduced in the Norwegian Constitution.¹⁸¹ In conclusion, it is possible to say that, according to the legal provisions established in the Mineral Act, Norway ensures a good protection to the Sami, although most of the legal provisions about safeguarding Sami rights during mining activities refer only to the Finnmark area.

The legal status of the Sami in Sweden is different, due to the fact that the Swedish Minerals Act lacks any provisions on the Sami, as was shown in the table above. The constitutional regulation of Sami rights is summed up in two vague provisions on the protection of the Sami. In addition, Sweden has not yet ratified ILO Convention No. 169.¹⁸² If we consider all this, it seems that Sweden provides the least legal guarantees for Sami rights in its mining legislation among the three Nordic countries considered in our comparison. It will be assessed in the following chapter if such a scarcity of legal provisions can have a negative effect on the everyday life of the Sami.

4.2. Comparing ILO Convention No. 169 with the Nordic Mining Acts

This section is devoted to a comparison between ILO Convention No. 169 and the Mining Acts of Finland and Norway. Although Finland has not yet ratified ILO Convention No. 169, the ratification of this convention by 2015 is one of the goals of the current government, according to the Second National Report by the government of Finland to the UPR of the UN Human Rights Council.¹⁸³ In this comparison, the Minerals Act of Sweden is not taken into account for the reason that it contains no specific provisions on the protection of Sami rights.

The aim of this comparison is to find out whether national law includes any provisions ensuring due protection and guarantees for the indigenous rights of the Sami, according to the obligations established in international law. Furthermore, in this way, it will be possible to verify if the provisions established in national law are more detailed regarding the safeguarding of Sami rights. Given the fact that this study is concerning the exploitation of natural resources in Sami territories we will concentrate on the rights of indigenous peoples related to the exploitation of natural resources.

¹⁸¹ Constitution of Norway, Article 110a, states: “It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life”.

¹⁸² Joona, 2012, p. 172.

¹⁸³ Universal Periodic Review of the UN Human Rights Council, 2012.

The comparison will be only with ILO Convention No. 169 because of the fact that the UN Declaration on the Rights of Indigenous Peoples is not legally binding and so, notwithstanding the fact that it has a symbolic meaning, it is not possible to compare it at the same level with the legally binding instruments.¹⁸⁴

<i>OBLIGATION IN ILO CONVENTION No. 169</i>	FINLAND	NORWAY
<i>Promoting the full realisation of social, economic and cultural rights (Article 2, paragraph 2b)</i>	Present, with a specific mention on the protection of Sami and Skolt rights (section 1)	Present, with specific mention on the protection of Sami rights (section 2, b)
<i>Consulting indigenous peoples when a decision can affect them directly and participation in the decision-making process (Article 6, paragraph 1a, 1b)</i>	There are no specific provisions about the previous consultation of Sami people in the Mining Act. However, there are provisions regarding the right of the Sami and Skolt Sami to be informed (sections 12, 15, 27, 58, 146). In addition, in section 9 of the Sami Parliament Act, it is stated that the authorities have an obligation to negotiate with the Sami Parliament in case of mining activities	There are no specific provisions about the previous consultation of Sami people. There are obligations that establish the right of the Sami people to be informed (sections 10, 13, 17, 18)
<i>Protecting the relationship of indigenous peoples with their lands and in particular safeguarding the natural resources that can be found in indigenous lands (Part II, from Article 13 to 19)</i>	There are no explicit provisions on the protection of the right to land of the Sami or Skolt Sami. However, there are provisions about the impact of mining activities in Sami land (section 38)	No specific provisions about right to land of Sami people are established
<i>Control of the impact of mining activities (Article 7, paragraph 3)</i>	Present, with specific provisions on the Sami and Skolt Sami (sections 38, 52 and 54)	Present, with specific provision on the Sami people (section 17)
<i>Refusing to grant a mining permit (Article 15, paragraph 2)</i>	Present, with a specific provision on the Sami and Skolt Sami (section 50)	Present, with specific provision on Sami interests (section 17)
<i>Ensuring indigenous peoples with the same rights which are granted to other citizens (Article 2, paragraph 2a)</i>	Present, with a specific provision to ensure public and private interests of the Sami and Skolt Sami (section 51)	Present, with a specific provision on Sami interests (section 17)
<i>Right of appeal (Article 12)</i>	Present, with specific provisions on the Sami and Skolt Sami (section 165)	Present, with reference to Sami Parliament (section 17)

¹⁸⁴ It should be kept in mind that also Article 27 of the ICCPR is applicable for the protection of indigenous peoples. However, for the scope of our analysis we will focus only on ILO Convention No. 169.

As shown in the table of comparison, almost all the provisions established in ILO Convention No. 169 are present also in the Finnish Mining Act and in the Norwegian Mineral Act. In particular, the two national acts mention the promotion of the full realisation of the social, economic and cultural rights of the Sami people, as established in Article 2 of ILO Convention No. 169. Other obligations that are fulfilled in the two national acts concern the issues of controlling the impact of mining activities in the Sami territories, as well as the possibility of refusing to grant an exploitation permit in cases where Sami rights can possibly be compromised. Also, the fact that the right of appeal is established in both national acts, with specific reference to the Sami people, must not be underestimated. Finally, it must be underlined that the Finnish Mining Act not only touches upon the Sami but also the rights of the Skolt Sami.

Notwithstanding all this protection granted to the Sami, it must be noticed that in the two acts there are shortcomings regarding the participation in the decision-making process, precisely because, in the two national acts, there are no provisions that ensure the previous consultation with indigenous people when a decision can affect them directly.

Regarding Finland, this issue is covered in the Sami Parliament Act, which establishes that authorities are obliged to negotiate with the Sami Parliament (also called Sami Assembly) in every case where the Sami lifestyle can be affected (also in case of mining activities). Another important deficit is the absence of a provision that clearly protects the relationship of indigenous peoples with their lands and in particular safeguarding the natural resources that can be found in indigenous lands.

Due to these shortcomings, and although there are important provisions in national law on the protection of indigenous rights (i.e. control of the impact of mining activities, refusal to grant a mining permit and the right of appeal), we cannot say that the protection ensured by national law is equivalent to that ensured by international law.

In conclusion, some case law could be mentioned, in order to observe whether case law helps to solve the problems of the Sami. In the case of *Ilmari Länsman et al. v. Finland*, the authors claimed before the UN Human Rights Committee that Finland had violated Article 27 of the ICCPR and, in support of their complaint, they referred to the view adopted by the Committee

in the cases *Kitok v. Sweden*,¹⁸⁵ and the *Lubicon Lake Band v. Canada* as well as to the provisions in ILO Convention No. 169 concerning indigenous rights. The authors are all Sami of the area of Inari and Angeli involved in reindeer herding, and they appealed against the decision of the Central Forestry Board to sign a contract with a private company (Arctic Stone Company), allowing the quarry of stone in a Sami area. Furthermore, the authors complained because of the fact that the site of the quarry, mount Etelä-Riutusvaara, is a sacred place of the old Sami religion. In its decision, the Committee refers to paragraph 7 of its General Comment on Article 27, which states that “minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken to ensure the effective participation of members of minority communities in decisions which affect them”. However, the Committee concluded that in this case there is no violation of Article 27 of the ICCPR.¹⁸⁶

In the case *Jouni E. Länsman et al. v. Finland*, a group of Sami opposed the plans of the Finnish Central Forestry Board to allow the construction of roads in an area of 3,000 hectares suitable for winter herding. Also in this case, the authors claimed a violation of Article 27 of the ICCPR and they invoked the views of the Committee in the cases of *Kitok v. Sweden*, *Lubicon Lake Band v. Canada* and *Ilmari Länsman et al. v. Finland*, as well as ILO Convention No. 169, Committee’s General Comment No. 23 on Article 27 of the ICCPR and the United Nations Draft Declaration on Indigenous Peoples. Also in this decision the Human Rights Committee recalled paragraph 7 of its General Comment on Article 27 and concluded that in its view the facts do not reveal a breach of Article 27 of the Covenant.¹⁸⁷ As it is possible to note, although in the two cases Article 27 of the ICCPR is mentioned as the main article, the fact that the authors refer also to the provisions established in ILO Convention No. 169 and, in the last case, to the UN Draft Declaration on Indigenous Peoples should not be underestimated. This means that, although Finland has not yet ratified ILO Convention No.

¹⁸⁵ In the *Kitok v. Sweden* case, a Sami individual claimed that his right to self-determination had been violated by the state of Sweden. Mr. Kitok was descendant of a Sami family, active in reindeer husbandry for a long time. The author claimed that he has inherited the right to reindeer husbandry and the right to water in Sörkaitum Sami Village. It appeared that the Swedish state denied the author the possibility to exercise these rights, because he lost his membership in the Sami village. The Committee stated that the right to self-determination in Article 1 of the ICCPR was meant for peoples and not for individuals, and that there was no violation of Article 27 of the ICCPR; for these reasons the claims of the applicant had been dismissed. *Ivan Kitok v. Sweden*, Communication No. 197/1985, UN doc. CCPR/C/33/D/197/1985 (1988).

¹⁸⁶ *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992, UN doc. CCPR/C/52/D/511/1992 (1994).

¹⁸⁷ *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995, UN doc. CCPR/C/58/D/671/1995 (1996).

169, the Sami take into account this Convention as a landmark in order to see their rights fulfilled.

Finally, regarding mining activities in Finland, in a recent (2014) case the Supreme Administrative Court of Finland decided in favour of the request of the Sami Assembly. In this case, the Finnish Safety and Chemicals Agency (TUKES) had granted a permit to start mining activities in the so-called Valley of the Kings, a gold-panning area of 4.9 acres in the municipality of Inari, in Sami territories. In accordance with section 165 of the Finnish Mining Act, the Sami Assembly appealed against this decision and the Court decided in favour of the Sami Assembly. After that decision, TUKES appealed to the Supreme Administrative Court of Finland which, however, dismissed the case, in favour of the Sami Assembly. This is an important case because it is one of the first occasions where the Sami Assembly has used its right of appeal established in section 165 of the Finnish Mining Act of 2011.¹⁸⁸

4.3. General comments and reflections on the relevant international law and national law

This section examines the provisions established in national law in accordance with the provision of international law which entail in one way or another the issue of mining activities and indigenous rights. As it is possible to see from the table above, both Mining Acts (the Finnish one and the Norwegian one) set out provisions for the protection of Sami rights. However, both of these Acts avoid certain important issues, outlined by ILO Convention No. 169. For example, while the Convention establishes an obligation to consult the indigenous peoples regarding the decisions that can affect their rights and interests, the two Mining Acts do not introduce any specific provisions about consultations with the Sami. This lacuna in the consultation of the Sami is covered in the Finnish legislation thanks to the Finnish Sami Parliament Act, which provides in section 9(3) that:

The authorities shall negotiate with the Sámi Parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people and

¹⁸⁸ The complete text of the case (KHO 2014:111) is available at: <http://www.kho.fi/fi/index/maatoksia/vuosikirjapaatokset/vuosikirjapaatos/1403502404022.html> (accessed on 3/7/2014).

which concern the following matters in the Sámi homeland: [...] (3) applications for licenses to stake mineral mine claims or file mining patents.¹⁸⁹

This is an important provision for the protection of the rights of the Sami, in particular because it provides that authorities are obliged to negotiate with the Sami Assembly in every situation that can affect the life of the Sami and their status as an indigenous group.

The fact that authorities must negotiate also in case of mining is a provision with fundamental importance, considering the fact that for the first time such a provision is written in a legal document of a state. In addition, there are obligations to inform the Sami peoples at the beginning and at the end of mining activities (sections 12 and 15 of the Finnish Mining Act and sections 10 and 13 of the Norwegian Mineral Act). Also, the issue of land rights (that is broadly regulated in the Convention) is not sufficiently regulated in national law, given the fact that there are no provisions on the right to land of the Sami in the two Acts, although the impact of mining activities in Sami lands is taken into account in both Acts.

Notably, the two Mining Acts of Norway and Finland and ILO Convention No. 169 contain provisions regarding the refusal to grant a mining permit, if indigenous interests could be compromised. In the two Acts there are also provisions about the protection of public and private interests (section 51 in the Finnish Mining Act and section 17 in the Norwegian Mineral Act). This provision finds full application in national law, given the fact that it is established in the Finnish Act and in the Norwegian Act. At the same time, ILO Convention No. 169 introduces a provision ensuring the equality of rights for everybody but keeps silent about the necessity to balance between private and public interests during the mining process. Finally, in Article 12 of the ILO Convention, in section 165 of the Finnish Mining Act and in section 17 of the Norwegian Mineral Act, there is a provision that establishes the right of appeal. While it is quite normal that this right is established in the Convention (given the fact that the Convention is not directly applicable at national level), it is noteworthy to have this right in national law. In fact, the presence of this provision in national law gives the Sami the right of appeal in the cases established by law.

In conclusion, it is possible to say that the provisions set out in the national law of Finland and Norway ensure a good protection for the Sami, following the general obligations in ILO

¹⁸⁹ Finnish Sami Parliament Act, section 9(3). Full text available at: <http://www.finlex.fi/en/laki/kaannokset/1995/en19950974.pdf> (consulted on 4/6/2014).

Convention No. 169. Although it is not possible to say that all indigenous rights are protected, there is a satisfactory safeguarding of their rights in the Mining Act of Finland and in the Mineral Act of Norway (obligation to consult the Sami when a decision can affect them, protection of their relationship with their land, control of the impact of mining activities on their lands, right of appeal).

Hence, although Finland has not yet ratified ILO Convention No. 169, the provisions established in the Finnish Mining Act and in the Sami Parliament Act grant a satisfactory safeguard to the Sami and this showed that it is upon the will of the state to protect indigenous peoples with or without ratification of the relevant international conventions. Furthermore, with the last steps regarding the protection of the Sami in the Finnish legislation it is highly likely that Finland will soon ratify ILO Convention No. 169.

Also Norway (the first state to ratify the Convention) is in a good position about the safeguarding of Sami rights. This is so notwithstanding the fact that the obligations in the Norwegian Mineral Act are less extensive than the provisions set out in the Finnish Act and considering the fact that there are still problems in the interpretation of the meaning of Article 14 of ILO Convention No. 169 by the Norwegian government.

Hence, in the framework of the protection of Sami rights among the Nordic states, Sweden has the weakest position. As it is possible to see from the table of comparison above, Sweden has no obligations on Sami rights in its Minerals Act, while in the Constitution and in other national laws there are only vague references to the Sami as an indigenous people. In such conditions, it is unlikely that Sweden will ratify ILO Convention No. 169 in a short time.

5. Legal mechanisms of indigenous participation in decision-making

5.1. Types of mechanisms of participation of the Sami and legal remedies

5.1.1. The three Sami assemblies and the three Parliament Acts

Among the provisions in ILO Convention No. 169 there is Article 6, paragraph c, in which it is stipulated that:

In applying the provisions of this Convention, governments shall: [...] (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.

This obligation has been respected by all the three Nordic states, given the fact that in Finland, Norway and Sweden, Sami assemblies have been established. In the report of the Finnish State Commission on Sami Affairs, drafted in 1973, there was a strong recommendation about the creation of a “delegation” that could represent the interests of the Finnish Sami. At the end of that year, Cabinet Decree No. 824 was signed by the President of Finland, so creating the Sami Delegation. The Delegation was composed of 20 members, freely elected among the Finnish Sami every four years.¹⁹⁰ Since the beginning, the Sami referred to this Delegation with the appellation of “Sami Parliament”. This Assembly was conceived as an advisory body, with the aim to draft recommendations regarding Sami affairs in particular areas such as:

- a) Environmental issues and establishment of natural areas in the Sami homeland;
- b) Mining issues and construction of hydro and water reservoirs;
- c) Administration of fishing, hunting and reindeer herding in the Sami areas;
- d) Primary, secondary and adult education.¹⁹¹

The position of the Delegation was unclear, due to the fact that it was not an association and not an ordinary state authority. Furthermore, it was not authorized to represent the Finnish Sami in the international arena and there were no compulsory provisions for the state to

¹⁹⁰ Myntti, 2000b, p. 207.

¹⁹¹ Sillanpää, 1994, p. 114.

finance its activities.¹⁹² For this reason, although the Sami Delegation must be taken into account regarding Sami participation in Finland, the important step was realised only with the adoption of the Sami Parliament Act in 1995.

The Sami Parliament (that we also call Assembly), established with the Sami Parliament Act (974/1995),¹⁹³ is an elected and representative assembly (like the Sami Delegation) with the aim to govern the Sami cultural autonomy (as provided at section 121 of the Constitution of Finland). It is useful to underline that, although the Sami Assembly has not a real independent decision-making power, its competence does not lie only in the cultural field, given the fact that it should be consulted every time that a decision can affect the Sami homeland. Hence, it is possible to say that this cultural autonomy of the Sami is realised with the involvement of the Sami Assembly in the decision-making process.¹⁹⁴

An important difference between this Sami Assembly and the Sami Delegation is that the new actor is put under the purview of the Ministry of Justice and is completely financed by the state (as established in sections 1 and 2). Despite this economic dependence, the Sami Assembly is completely autonomous from the state and it decides on its own internal matters. In section 3 of the Sami Parliament Act, there is a provision that establishes who can be considered a Sami person, while section 4 defines the extension of the Sami homeland.

As underlined before, the Sami Assembly should be consulted every time that a decision can affect the Sami homeland and this is particularly important when speaking about mining activities. In fact, section 9(3) stipulates that the authorities should negotiate with the Sami Parliament if a mineral license can or cannot be released.

This provision is of fundamental importance in the context of this study, due to the fact that it can be seen as complementing the Finnish Mining Act, in which there are no provisions about the duty to negotiate with the Sami. Regarding the composition of the Sami Parliament, section 10 stipulates that the Parliament is formed by 21 members and four deputy members, chosen by the Sami in free elections that take place every four years.¹⁹⁵ The right to vote in

¹⁹² Myntti, 2000b, p. 207.

¹⁹³ The full text of the Finnish Sami Parliament Act is available at: <http://www.finlex.fi/en/laki/kaannokset/1995/en19950974.pdf> (accessed on 26/5/2014).

¹⁹⁴ Myntti, 2000b, p. 207.

¹⁹⁵ Sami Parliament Act, section 10, para. 1.

the elections for the Sami Parliament is reserved to all Sami (regardless of the domicile) that are at least 18 years old.¹⁹⁶ As outlined before, section 3 of the Sami Parliament Act explains who is a Sami by stating:

For the purpose of this Act, a Sámi means a person who considers himself a Sámi, provided: (1) That he himself or at least one of his parents or grandparents has learnt Sámi 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 Sámi Delegation or the Sámi Parliament.

As it is possible to notice, the linguistic aspect is not the only way in order to demonstrate that a person is a Sami, given the fact that also a descendent of Lapps¹⁹⁷ or a descendent of a person registered for an election to the Sami Delegation can be considered a Sami.¹⁹⁸ However, the Sami Parliament was not satisfied with the contents of section 3, asking for an amendment to the law. In the opinion of the Sami Assembly, a person can be considered a Sami only if he or she is able to speak a Sami language, due to the fact that the language is a fundamental feature for a Sami. However, the law was not changed.¹⁹⁹

In Norway, after the Second World War the first Sami institution was created. In fact, in 1953, the Provincial Government of Finnmark decided to create a Provincial Sami Council, composed of five members, with the aim to assist the Governor of Finnmark in matters related to Sami traditional lifestyle. Around ten years later, in 1964, the Provincial Council was replaced by the Norwegian Sami Council. The aim of this new Council was to give advisory opinions in issues related with culture and economy. At the beginning of the 1980s the Council was reorganised, becoming an advisory body regarding Sami issues. With this reorganisation, the authorities of all levels were obliged to consult the Council in all the matters regarding Sami issues, including the exploitation of natural resources.²⁰⁰ In the same period, as a consequence of the *Alta* case, a Sami rights commission was established with the aim to analyse the special needs of the Sami of Norway. The Commission drafted a report in which it was proposed that the Constitution of Norway should be amended by introducing a provision on Sami rights. This proposal brought with it the insertion of Article 110a in the Norwegian Constitution, in which it is established: “It is the responsibility of the authorities

¹⁹⁶ Myntti, 2000b, p. 209.

¹⁹⁷ In this regard it is useful to point out that the term *lappalainen* (Lapp) is the old term used in Finnish language to indicate Sami. There is a difference between the term Lapp and Sami: Lapp is used to refer to people that lost their contact with the Sami language several generations ago.

¹⁹⁸ Myntti, 2000b, p. 210.

¹⁹⁹ *Ibidem*, pp. 201–211.

²⁰⁰ *Ibidem*, p. 213.

of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life.”

The turning-point for the Sami of Norway was the year 1989, when the Norwegian Sami Parliament was founded by an Act of Parliament (56/1987).²⁰¹ With this Act and the consequential creation of the Sami Parliament (also called Assembly), full application of the new Article 110a of the Norwegian Constitution was realised. The Sami Parliament is the representative political body of the Norwegian Sami and it is politically autonomous from the central government, although it is completely financed by the state. The role of the Assembly is to safeguard and develop the Sami culture, language and way of life, as established in Chapter 1(1) of the Sami Parliament Act.

In particular, the Sami Parliament can take initiatives and make petitions to public authorities and private parties (Chapter 2). In theory, all public authorities should consult the Sami Parliament before taking any decisions that can affect the life of the Sami in their lands.²⁰² The Sami Parliament of Norway is composed of 31 members, chosen in free election. To vote for the Sami Parliament, a person must be a Sami and also in Norway the first definition of a Sami was based on the language. In particular, according to a previous definition, a Sami was:

a person who, according to his/her declaration, considered himself/herself a Sami and who a) has Sami as his/her home language, or b) at least one of his parents or grandparents either has or has had Sami as his/her home language.²⁰³

Due to this restrictive definition of a Sami, only 5,613 persons voted in the election in 1993. This low participation was also the result of the norm, according to which many Sami who had lost their language could not be considered Sami anymore. In order to solve the problem with lack of participation, the definition of a Sami entitled to vote was changed in 1997 at the initiative of the Sami Parliament. According to the new definition, a Sami is:

a person who, according to his/her own declaration, considers himself/herself a Sami and who a) has Sami as his/her home language, or b) at least one of his/her parents, grandparents or their parents has or has had Sami as his/her home language, or c) is a child of a person who is entered or has been entered in the Sami electoral roll.²⁰⁴

²⁰¹ The full text of the Norwegian Sami Parliament Act is available at: <http://www.regjeringen.no/en/doc/laws/acts/the-sami-act-.html?id=449701> (accessed on 28/5/2014).

²⁰² Myntti, 2000b, p. 214.

²⁰³ Ibidem, p. 215.

²⁰⁴ Ibidem.

However, notwithstanding this amendment, the number of Sami voters did not increase as expected. Before concluding this analysis of the Norwegian Sami Parliament Act, it is useful to underline that, although there is no provision that in an explicit way prescribes on mining activities, in section 2.2 of the Norwegian Sami Parliament Act it is stipulated: “Other public bodies should give the Sameting an opportunity to express an opinion before they make decisions on matters coming within the scope of the business of the Sameting.”

This is an important provision, also considering the fact that in the Norwegian Mineral Act there are no provisions on consultation. Also in this case, as in the case of Finland, this provision can be seen as complementing the Mineral Act, albeit not in the same explicit manner as in Finland.

In Sweden, after the *Taxed Mountain* case, the discussion began about the necessity to create a representative Sami Assembly. For this reason, in 1983, the Swedish government appointed a Sami Committee with the task to analyse the needs of the Sami in Sweden. In its final report, the Committee pointed out that the best solution in order to meet the needs of the Sami was to create an elected and representative Sami Parliament. Following the suggestion of the Committee, the Swedish government adopted the Sami Parliament Act in 1992 and the Sami Parliament was established in 1993.²⁰⁵

As established in Chapter 2 of the Act, the Sami Parliament is to:

- 1) Decide on the distribution of state subsidies to the Sami culture;
- 2) Appoint the board of the Sami school;
- 3) Direct the effort towards the promotion of the Sami language;
- 4) Contribute to social planning and ensure that the interests of the Sami are taken into account; among them, the interests of reindeer breeding in relation to the exploitation of land and water;
- 5) Provide information on Sami conditions.

It must be underlined that the state is not obliged to consult the Sami Parliament, also not in cases in which a decision can directly affect the Sami. Moreover, the Swedish government had pointed out that the Sami Parliament is not superior in respect to other authorities and, in this sense, the interests of the Sami do not have to prevail in every case.²⁰⁶

²⁰⁵ The full text of the Swedish Sami Parliament Act is available at: <http://www.notisum.se/rnp/sls/lag/19921433.HTM> (accessed on 28/5/2014).

²⁰⁶ Myntti, 2000b, p. 219.

The Sami Parliament of Sweden is composed of 31 members, elected every four years by the Sami. Hence, also in this case, in order to be entitled to vote it is necessary to be a Sami. In the Swedish Sami Parliament Act there is a definition of the Sami, according to which a Sami is a person who considers himself/herself a Sami and:

1. Shows that it is likely that he/she has or has had Sami as a home language;
2. Shows that it is likely that at least one of his/her parents or grandparents has or has had Sami as a home language;
3. That at least one of his/her parents is or has been registered in the Sami electoral register.²⁰⁷

As it is easy to notice, also in Sweden, the language is a fundamental feature in order to define a Sami person. However, unlike the Finnish and Norwegian definitions, it is not required that a person must know the Sami language and in fact, before the election of 1997, the election committee of the Sami Parliament decided that also non-Sami spouses could vote in the Sami elections.²⁰⁸

5.1.2. The Sami Council and the Sami Parliamentary Council

The Sami Council was founded in 1956 in Karasjok, during the second Nordic Sami Conference. At the time of its foundation it was called the Nordic Sami Council, and its name was changed to the Sami Council in 1992, when it became a cooperative body also for the Sami of the Peninsula of Kola, in Russia.²⁰⁹

The purpose of the Sami Council is to promote and safeguard the interests of the Sami, as well as to ensure social, economic and cultural rights of the Sami. The Council has eight member organizations: three from Norway (the Norwegian Sami Association, the Sami Reindeer Herders' Association of Norway and the Federation of the Sami People), two from Sweden (the Sami Association of Sweden and the National Association of Samiland), one from Finland (the Saami Association of Finland), and two from Russia (the Kola Sami Association and the Association of Sámi in Murmansk Region).²¹⁰

As for the composition of the Council, it has 15 members: five from Norway, four from Sweden and Finland, and two from Russia. Every four years the Sami Conference is

²⁰⁷ Ibidem, p. 220.

²⁰⁸ Ibidem.

²⁰⁹ Solbakk, 2006, p. 232.

²¹⁰ Ibidem.

convened; it is the most important decision-making body of the Council. Furthermore, the Conference sets up the statutes of the Sami Council and drafts the guidelines for its work. In 1976, the Sami Conference decided that the Sami Council should be part of the World Council of Indigenous Peoples (WCIP).

However, the Sami Council has also a role outside the borders of the Nordic countries. In fact, it proposed many amendments to ILO Convention No. 107 and to ILO Convention No. 169, it has taken part in the UN Working Group on Indigenous Populations and it has an active part in the establishment of the Permanent Forum on Indigenous Issues.²¹¹ Another Sami institution is the Sami Parliamentary Council, a coordinating body for the Sami Parliaments in Finland, Norway and Sweden. The aim of this institution is to improve the cooperation of the three Sami Assemblies, given the fact that several interests must be protected regarding the entire Sami people.²¹²

5.2. Listening to the stakeholders: the opinions of the Sami, the points of view of the non-Sami groups and the reasons of the commercial companies

An Australian company, Hannans Reward Ltd, is planning to start an exploration exercise just a few kilometres from the town of Kiruna, in Sweden. The project is well established and by the end of 2014 the company was planning to apply for exploitation concessions in order to start with the activities of mining. According to Mattias Åhren, a member of the Sami Council, this project will affect forests and Sami territories, and taking into account the fact that mines produce a big amount of waste, it is easy to imagine that the mining activities will destroy reindeer herding in that area.

The Sami community is continuing its struggle and a complaint was submitted to the United Nations Committee on the Elimination of Racial Discrimination (CERD). However, the company stated that the project must go on, according to the estimation that one billion tonnes of ore can be extracted in the area of Kiruna. A similar case took place in Rönnebäcken, a town 300 kilometres south-west of Kiruna, and in that case a nickel mining project was stopped by UN intervention. The Swedish mining inspectorate granted to Nickel Mountain, a Swedish company, exploitation concessions. This decision was brought to the court by local reindeer

²¹¹ Ibidem, p. 236.

²¹² Ibidem, p. 243.

herders, in order to safeguard their right of reindeer herding. In August 2013, the appeal was dismissed and the applicants took their complaint to the CERD.²¹³ After some months, the CERD asked the Swedish government to suspend all mining activities at the Rönnbäcken sites. Fredric Bratt, director of the Nickel Mountain society, said that “the company was in dialogue with local reindeer herders and want to mine alongside them. However, their consent was not necessary and as the CERD only had an advisory role, the decision on mining was ultimately down to the Swedish government”.²¹⁴

Another case of exploration of natural resources occurred in Jokkmok, Sweden, where there was a strong division among the population, namely between the Sami and the environmentalists, on the one hand, and non-Sami and entrepreneurs, on the other. The position of the Sami can be summarised in this affirmation made by Henrik Blind, a Sami of Jokkmok: “I’m a Sami. And we are standing on Sami ground.”²¹⁵ However, non-Sami have a different opinion due to the economic situation, as is pointed out by Kjell Ek: “Stores are empty, houses are empty — if no one comes to this society it will slowly die out. Unfortunately, we can’t live on reindeer herding alone.”²¹⁶ According to Fred Boman, the CEO of Beowulf Mining of Sweden, “the Sami village closest to the mine has a herding area for its 4,500 reindeer of around 4,000 square kilometers and the mine would use no more than 20 square kilometers. Furthermore, mining would create around 250 jobs, as well as opportunities for local businesses”.²¹⁷ As it is possible to notice from these examples, it is not easy to find shared solutions in order to respect the rights of the Sami as well as the rights of non-Sami. Moreover, also the position of the state must be taken into account, together with the interests of the companies involved in the mining process, due to the fact that the revenues from mining activities can be important for the national economy, as well as for companies. How to deal with all these issues is not easy, but we will try to do it in the conclusion of this study.

²¹³ Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session, UN doc. CERD/C/SWE/CO/19-21, August 2013.

²¹⁴ Nguyen Kim Paul, *Reindeer herds in danger as Australia’s mining boom comes to Sweden*, <http://www.minesandcommunities.org/article.php?a=12540> (accessed on 4/6/2014).

²¹⁵ Risong Malin & Mac Dougall David, *Sweden’s indigenous Sami in fight against miners*, <http://www.minesandcommunities.org/article.php?a=12431> (accessed on 4/6/2014).

²¹⁶ Ibidem.

²¹⁷ Ibidem.

6. Conclusions

The protection of indigenous rights is problematic already regarding the traditional rights, like the right to land, the right to participate in the decision-making process, the right to enjoy the indigenous culture and lifestyle. For this reason, it is easy to understand how difficult it can be to ensure indigenous rights in relation to the exploitation of natural resources and subsoil resources. As explained in this study, the main problem is the right to land, which is directly related to natural resources that can be found in indigenous areas.

Among the three Nordic countries, only Norway has ratified ILO Convention No. 169. However, there are still problems in the full application in the Norwegian legal framework of the provisions in the Convention. In fact, as pointed out in chapter 4, Norway has a particular interpretation of Article 14 of ILO Convention No. 169. For the Norwegian government it is sufficient to recognise that the Sami have the right to use their land that they have occupied since immemorial times, without any recognition of the right to ownership of the Sami over their lands. Notwithstanding this anomaly in the interpretation of ILO Convention No. 169, the fact that Norway has amended its Constitution, adding an article on the protection of the Sami (Article 110a), must not be underestimated. In addition, it is of great value that Norway was the first country that ratified ILO Convention No. 169, and one of the few countries in the world that have publicly apologised for the policy of Norwegianization implemented until the 1960s against its indigenous peoples. Furthermore, it must be underlined that the Norwegian Mineral Act established good protection for Sami rights. In fact, it must be taken into account that with this law the Sami are entitled to be informed when a mining process is going to start and to finish (although there are shortcomings in the decision-making process). In addition, the state, together with the company involved in the exploitation process, is obliged to evaluate the impact that the mining process can have on the Sami traditional lifestyle and there is the possibility to deny the concession of a permission if there may be a negative impact on the Sami lifestyle.

Finally, the Sami Parliament of Norway is entitled to the right of appeal to the King in those cases where a permission was conceded without taking into account the needs of the Sami. In general, it is possible to say that Norway ensures a good protection of the rights of the Norwegian Sami, although the role of the Norwegian Sami Parliament is still marginal, above

all during the decision-making process. This weakness is due to the fact that national authorities of Norway are not obliged to consult the Norwegian Sami Parliament in every case that can affect the Sami lifestyle (unlike in the Finnish Sami Parliament Act, in the Norwegian Sami Parliament Act there is no provision regarding the duty to negotiate with the Sami).

Among the three Nordic states that we have analysed in this study, the most active in guaranteeing the protection of Sami rights is, without doubt, Finland. Already in the Finnish Constitution it is possible to find obligations on the protection of Sami rights. However, it is the Finnish Mining Act adopted in 2011 that establishes broad provisions for the protection of the Sami in the context of mining activities. The Act establishes that the Sami must be informed when a mining process is going to start and to finish (and in the Sami Parliament Act there is also a provision about the duty to negotiate with the Sami in every case that a decision can affect their life and so, also in case of the start of a mining activity). In addition the state, together with the company involved in the exploitation process, must evaluate the impact that the mining process can have on the Sami areas, and it is possible to deny the concession of a permission if there may be negative impacts on the Sami lifestyle. Finally, section 165 establishes the right of appeal for the Sami in those cases where a permit was conceded without taking into account the needs of the Sami.

Although Finland has not yet ratified ILO Convention No. 169, it is possible to say that it ensures a good protection of Sami rights in the national framework. Furthermore, the contents of the Mining Act, which is very protective of the Sami, represent a step forward for Finland towards the ratification of ILO Convention No. 169 by 2015, which is the goal of the current government.

Sweden has the weakest position in the protection of Sami rights among the Nordic countries. As pointed out in chapter 4, there are no provisions regarding the protection of Sami rights in the Minerals Act of Sweden and this lack of obligations is also present in the Constitution. Although the Swedish government is making an effort in order to ratify ILO Convention No. 169 in the future, there is so far no comfortable progress in the protection of Sami rights. It seems that the position of the Swedish government regarding the protection of indigenous rights is only theoretical and it does not find any application in practice. Hence, it seems clear that for the moment the ratification of ILO Convention No. 169 is not the goal of the Swedish government.

In conclusion, we can say that generally in all cases of mining activities, the right to land of the indigenous peoples is threatened. When we say right to land, all the implications that this right can have must be considered, among them the right to use natural resources that can be found in that land, the right to enjoy the traditional lifestyle and the right to freely decide the way of development. Is it possible to ensure the protection of the right to land of indigenous peoples and, at the same time, satisfy the economic needs of the states? This is a difficult issue, but a good way to try to ensure a balance between the interests of the indigenous people and states is through participation.

In particular, the right to free, prior and informed consent (FPIC) can be used to deal with such problems. As pointed out in the comparison between the Mining Acts and ILO Convention No. 169, the real problem that must be solved is to guarantee to the indigenous peoples the opportunity to participate in the entire decision-making process, from the beginning to the end. Only in this way can it be possible to ensure good protection for indigenous rights, to satisfy the economic interests of the states and also to create new economic opportunities for the indigenous communities.

If participation will be seen by the states as an important instrument to protect Sami rights and also their interests, it will be possible in reality to involve the Sami in the entire decision-making process. It seems that the FPIC and the right to participate of indigenous peoples in general, established in the international instruments, does not find an application in the real world. In fact, it is interesting to think that the right to participate is established in ILO Convention No. 169 and that it is broadly confirmed in the UN Declaration on the Rights of Indigenous Peoples, which are two international documents, but it does not have a complete application in the national framework.

It seems that there is a top-down approach in order to solve the lack of participation of indigenous peoples in the decision-making processes. In effect, it is possible to say that the duty to guarantee the right to participation of indigenous peoples is not born at the local level before reaching the international level (bottom-up approach), but was conceived in the international arena, in order to be applicable also at the local level (top-down approach).

However, it does not mean that this is negative, because it can be seen as a signal that for the international community the protection of indigenous rights and the indigenous heritage is a value that must be fulfilled. It seems that the international community has been more active in order to adopt instruments to protect indigenous rights than national actors. This must not be underestimated, because it means that the international community can forerun states in decisions that can have an impact in the entire world.

We can say that the most important thing is that the decisions must not be imposed upon indigenous communities, but states should negotiate with them (as is already happening in Finland). Participation is a means to protect indigenous rights, but also to avoid useless loss of time and money for the states as well as the only way to reach an agreement between the states and the indigenous communities.

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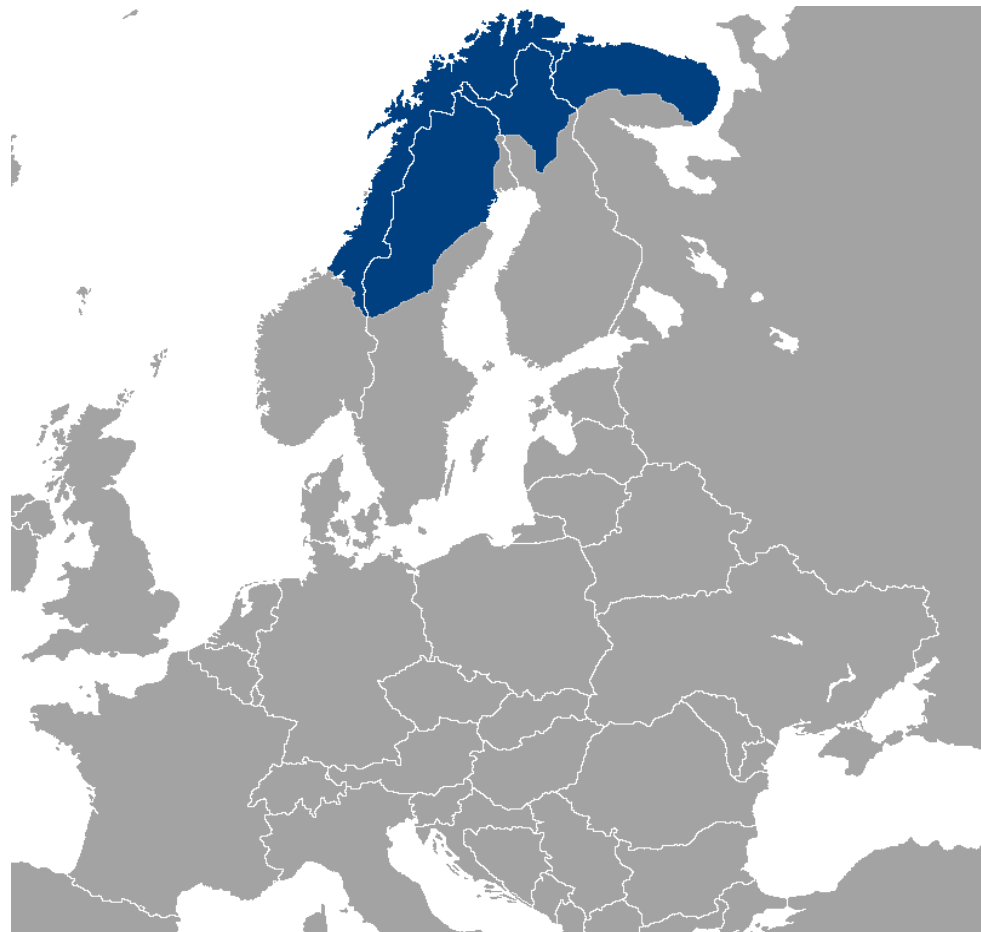
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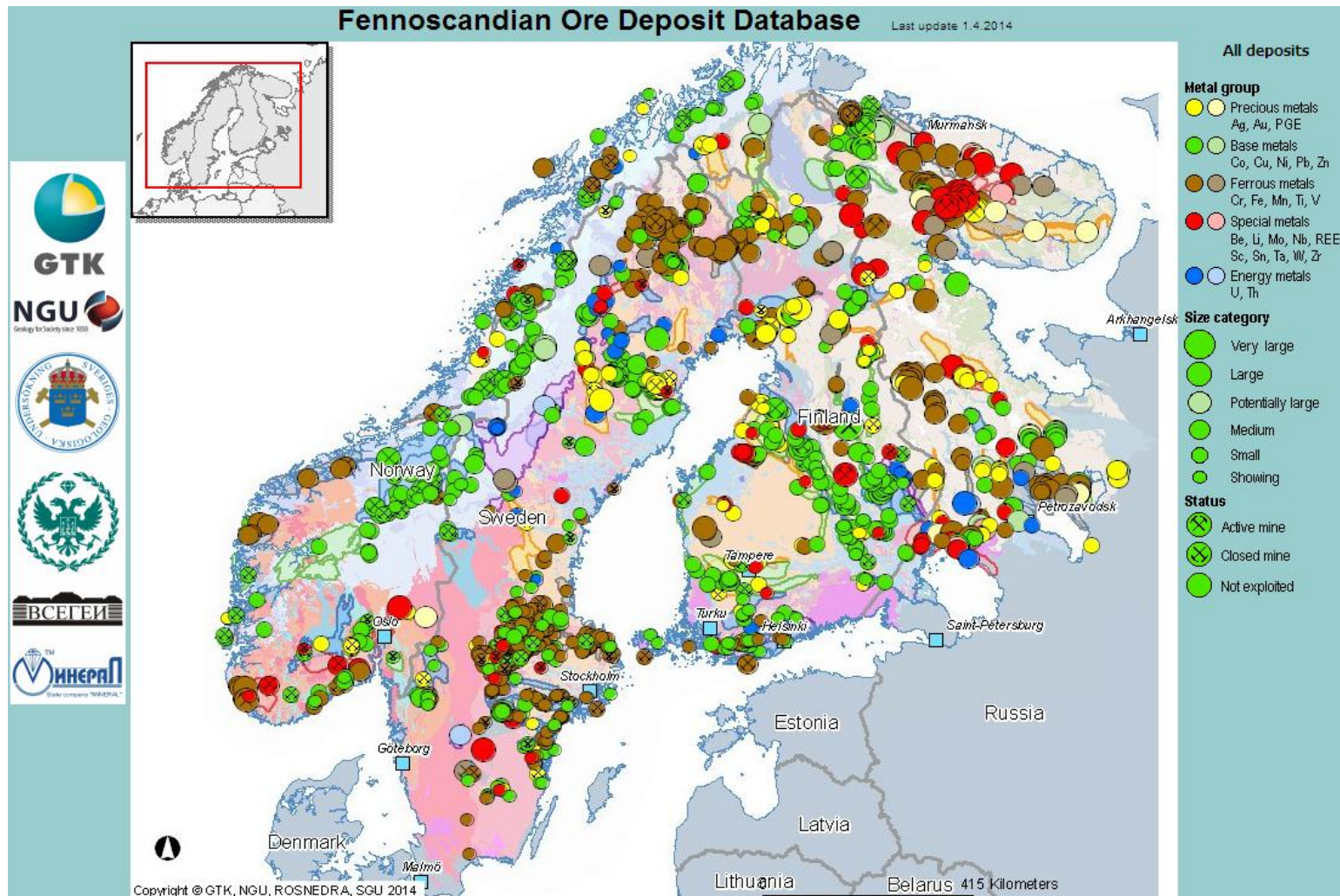
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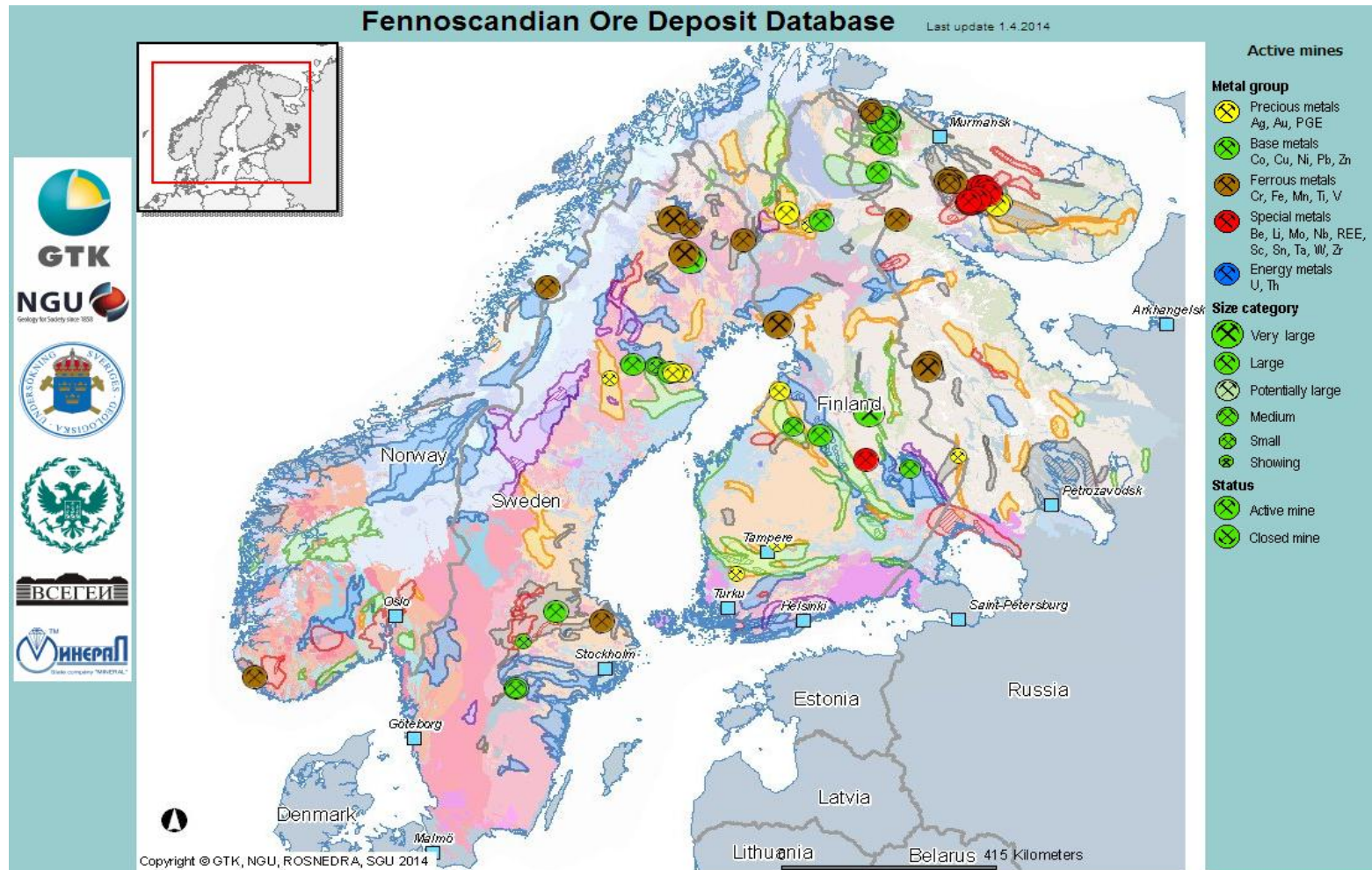
Annex No. 1 – In blue the area in which the Sami inhabit.

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Annex No. 2a – Map of all the deposits of natural resources present in Fennoscandia.

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Annex No. 2b – Map of all the active mines in Fennoscandia.

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Annex No. 3 – In red the Finnmark area.

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