

Western University
Scholarship@Western

Aboriginal Policy Research Consortium International (APRCi)

2006

Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories Human Rights, International Law and Corporate Social Responsibility

Rune S. Fjellheim

John B. Henriksen

Follow this and additional works at: <https://ir.lib.uwo.ca/aprci>



Part of the [Human Rights Law Commons](#)

Citation of this paper:

Fjellheim, Rune S. and Henriksen, John B., "Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories Human Rights, International Law and Corporate Social Responsibility" (2006). *Aboriginal Policy Research Consortium International (APRCi)*. 193.
<https://ir.lib.uwo.ca/aprci/193>



GÁLDU ČÁLA

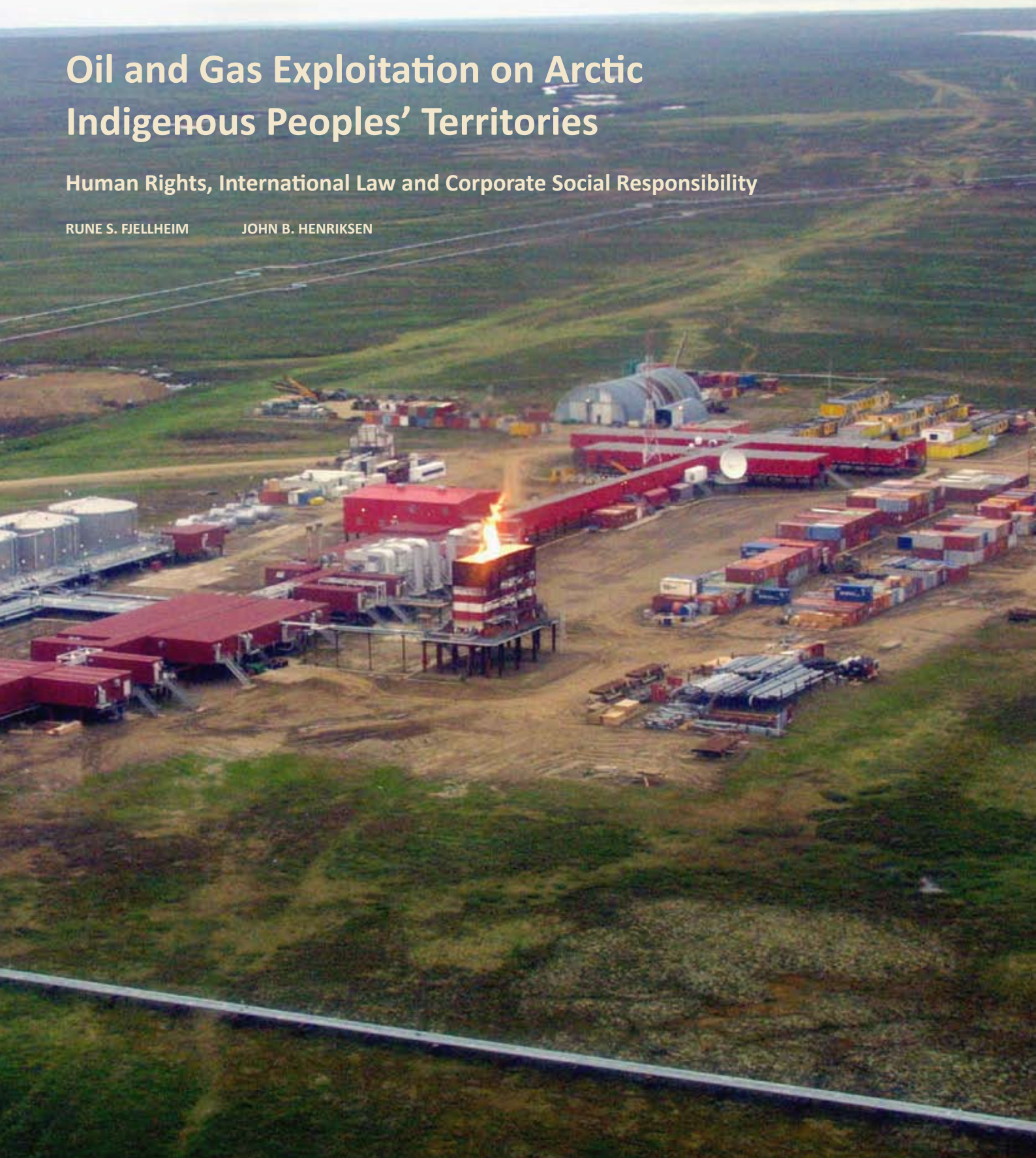
Journal of Indigenous Peoples Rights No. 4/2006

Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories

Human Rights, International Law and Corporate Social Responsibility

RUNE S. FJELLHEIM

JOHN B. HENRIKSEN



Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories

Human Rights, International Law and
Corporate Social Responsibility

Rune S. Fjellheim John B. Henriksen

Gáldu Čála – Journal of Indigenous Peoples Rights No. 4/2006
Editor: Magne Ove Varsi

Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories
Human Rights, International Law and Corporate Social Responsibility
Author: Rune S. Fjellheim and John B. Henriksen
© Rune S. Fjellheim, John B. Henriksen and Gáldu Resource Centre for the Rights of Indigenous Peoples Guovdageaidnu/Kautokeino 2007

Cover photo: Ole Magnus Rapp, Aftenposten
Graphic production: Elle Kirste Porsanger, AlfaBehta Grafiske
Print: Fagtrykk AS

The articles are made with financial support, and other contributions, from the Saami Council, the Sami Parliament and Jaruma AS.

The views expressed in these articles do not necessarily reflect the views of GÁLDU Resource Centre on the Rights of Indigenous Peoples.

Editorial office address:
Gáldu Resource Centre for the Rights of Indigenous Peoples
NO 9520 Guovdageaidnu/Kautokeino, Norway
Phone +47 7848 8000 Fax + 47 7848 8020
E-mail address: mov@galdu.org
www.galdu.org/english

ISBN 82-8144-025-2
ISSN 1504-4270

Preface

The Resource Centre for the Rights of Indigenous Peoples' *Gáldu Čála nr 4/2006* contains two articles addressing certain core social, legal and economic questions related to oil and gas operations in indigenous areas, written by Mr. Rune Sverre Fjellheim and Mr. John B. Henriksen respectively.

Around the world, including in the Arctic, there are disputes about ownership, utilization, management and conservation of traditional indigenous lands and resources - often caused by decisions or attempts to use traditional indigenous lands and resources for industrial purposes, including oil and gas exploration. This situation represents an enormous challenge, and in some cases threatens indigenous societies and their economies, cultures and ways of life.

Indigenous peoples have been, and in many cases still are, deprived of their human rights and fundamental freedoms as distinct peoples. This has resulted in the dispossession of their lands, territories and resources, and prevented them from exercising their right to development in accordance with their needs and interests. The interests of commercial development normally prevail over indigenous peoples' rights and interests, despite the fact that the survival of indigenous peoples - as distinct peoples - depends on their possibility to manage their own traditional lands and resources in a manner and mode appropriate to their specific circumstances.

The article "Arctic Oil and Gas - Corporate Social Responsibility" discusses the responsibilities of the industrial operators in the Arctic. The Arctic holds 25% of the known remaining global Oil and Gas resources. Industrial development in the Arctic poses serious environmental and Human Rights challenges. It is one of the most pristine and vulnerable ecosystems in the world and the home of 40-50 distinct Indigenous Peoples. The author shows examples of Corporate Policies designed to address their responsibilities relating to Indigenous Peoples, and discusses the difficulties in turning corporate policies into practice.

The article entitled "Oil and Gas Operations in Indigenous Peoples' Lands and Territories in the Arctic: A Human Rights Perspective" - written by Mr. John B. Henriksen - elaborates on the international human rights protection accorded to indigenous lands and resource rights, with particular reference to oil and gas exploration

Mr. Magne Ove Varsi
Director-General

Contents

Rune S. Fjellheim:

Arctic Oil and Gas – Corporate Social Responsibility	8
The visions and interests of the Arctic.....	9
Some challenges facing Indigenous Peoples regarding large scale resource extraction in the Arctic	10
Who’s deciding - governments or corporations?	11
Social Impact Assessment (SIA) as a tool for decision-making and planning – What are the alternatives?.....	11
Denied inclusion	11
Effective participation.....	11
Procedures fail to acknowledge Indigenous Peoples’ values and perspectives	12
Individual projects are assessed in isolation	12
Assessments are usually ex-ante.....	12
Assessments are usually designed to mitigate negative social impacts	12
The time span of large scale exploitation in the Arctic – The day after tomorrow.....	12
Negotiations – an alternative/supplementary approach	13
Corporate Social Responsibility – some examples and challenges.....	15
Some private sector examples of CSR policy	15
Shell	15
British Gas	16
Statoil	16
Sibneft	17
FTSE 4Good	17
Public Policy.....	17
ILO Core Labour Standards Or UN Global Compact / SA8000 / OECD Guidelines	17
UDHR	18
Guidelines on armed security guards.....	18
Indigenous people.....	18
Calvert	18
Indigenous Peoples’ Rights	18
From policies to practice	18
CSR – How to complain?.....	19
Stora Enso logging in northern Finland – A CSR complaint	20
1. Certification.....	20
2. Commitments related to listing on sustainability indexes.....	21
Concluding remarks.....	22
References – List of literature used	23

John B. Henriksen:

Oil and gas operations in Indigenous peoples lands and territories in the Arctic: A Human rights perspective.....	24
I. Introduction	25
1. The Terms Indigenous Peoples and Peoples	25
1.1. “Indigenous Peoples”	25
1.2. “Peoples”	26
II. Situation Analysis	28
III. International Human Rights Standards.....	30
1. ILO Convention No. 169 on Indigenous and Tribal Peoples	30
2. The International Covenant on Civil and Political Rights (ICCPR)	32
2.1. The Right of Self-determination	32
2.2. The Right to Culture (ICCPR Article 27)	34

IV. Recent developments	36
1. The Draft UN Declaration on the Rights of Indigenous Peoples	36
2. The Second Northern Dimension Action Plan (2004 –2006)	36
3. Draft Nordic Saami Convention	37
VI. Conclusions	39
Bibliography.....	41
Annex	42
NORDIC SAAMI CONVENTION.....	42
Chapter I: The general rights of the Saami people	43
Chapter II: Saami governance.....	44
Chapter III: Saami language and culture.....	46
Chapter IV: Saami rights to land and water	48
Chapter V: Saami livelihoods	49
Chapter VI: Implementation and development of the Convention	50
Chapter VII: Final provisions.....	51

Arctic Oil and Gas – Corporate Social Responsibility

Rune S. Fjellheim

The Arctic is an enormous territory with gigantic natural resources and is homeland to approximately 50 Indigenous Peoples. This paper will address some of the challenges facing the Arctic Indigenous Peoples as the escalated Oil and Gas exploitation has in just a few years become one of the largest industrial projects in the region.

Global demand for Oil and Gas is increasing as the supply and reservoirs are struggling to keep up. In recent years, this has resulted in an unprecedented price of oil, just hitting \$ 70/barrel¹. As oil and gas prices increase, new and previously costly development projects are becoming profitable, and the overall shortage of oil reservoirs is driving the industry to new areas, with the Arctic now probably the most attractive region in terms of new fields for exploration.

The above, combined with the Climate Change challenges of a warmer Arctic, are giving great cause for concern. The ACIA shows an accelerated warming taking place in the Arctic now². A warming of the Arctic will make the region more accessible, with less ice and longer snow free periods. On the other hand environmental risks will increase, as the permafrost melts and coastline erosion increases.

The universal dilemma is that we are witnessing an increase in Oil and Gas exploration in a warmer, more accessible, Arctic at the very same time as we are concluding that it is precisely the human use of fossil fuel that is the single biggest reason why the Arctic is getting warmer in the first place. This dilemma constitutes an important background for this paper as we take a closer look at the risks and potential involved in conducting Oil and Gas exploration in the Arctic.

The visions and interests of the Arctic

Understanding the mechanisms of project development and resource exploitation in the Arctic requires a deeper understanding of the actors involved, and their approach. A recent Arctic Council report, the Arctic Human Development Report (AHDR), discusses the “Arctic visions and interests” in its opening chapter as a backdrop for understanding the dynamics of social development and phenomena in the Arctic.

I think it is crucial to understand the different players’ perspectives in order to establish a meaningful dialogue between the parties involved. The AHDR draws a picture of mixed visions and interests, which can be described briefly as³:

- **Homeland**
The home of a diverse group of indigenous peoples across the Arctic (except for Iceland)
- **Land of discovery**
From a European perspective, the Arctic has long loomed large as a land of discovery.
- **Magnet for cultural emissaries**
As in other parts of the world, Christian missionaries arrived in the Arctic on the heels of explorers.
- **Storehouse of resources**
Starting with the activities of Basque and Dutch whalers in the 16th century, the Arctic has appealed to many as a storehouse of natural resources – both renewable and non-renewable.
- **Theatre for military operations**
Although the region’s hydrocarbons are important to the operation of advanced industrial societies, those who focus on matters of security have seldom considered the Arctic as a prize in its

¹ September 2005.

² A Warming Arctic, Arctic Climate Impact Assessment, Overview Report, 2004.

³ Arctic Human Development Report, 2004, pp. 23-25

own right. Nevertheless, the region has emerged from time to time as an important theatre of military operations.

- **Environmental linchpin**

The environmental importance of the Earth's high latitudes and especially the high latitudes of the northern hemisphere has been recognized for a long time.

- **The scientific Arctic**

The Arctic has long served as a magnet for researchers, ranging from physical scientists interested in glaciers and the Earth's climate system to cultural anthropologists seeking to reconstruct the peopling of the new world and to understand the cultures of indigenous peoples whose lives are focused on herding or hunting and gathering.

- **Destination for adventure travellers**

As the planet grows smaller in conceptual terms, regions that appeal to ecotourists as relatively unspoiled wilderness and to devotees of extreme sports as physical challenges become rarer and take on added value.

- **The Arctic of the imagination**

The region has come to occupy an important place in the thinking of many who will never set foot in the Arctic and who lead lives in urban settings that are increasingly divorced from direct contact with nature.

In the Arctic Oil and Gas context one can say that most of these perspectives apply when analyzing the players involved, although the most significant are "Home-land", "Storehouse of resources", "Environmental linchpin" and "The Arctic of the imagination". In discussing how the dynamics between Corporations, Governments and Indigenous Peoples work, and maybe should work, it is both relevant and useful to bear these perspectives in mind.

Without entering into a longer more theoretical discussion, it is relevant to point out some obvious consequences of the different perspectives. One would be to merge these interests and to try to find a common platform for decisions as projects are developed. The parties are working

according to different rationales, and lack a common *currency* to make useful assessments because their interests are so widespread and often incompatible. If you add the imbalance in power, both economic and legal, between the parties involved it becomes even harder to see how this can be done in a fair way.

This paper will not try to strive for overarching moral objectivity in its analysis on Oil and Gas activities in the Arctic. It will have an Indigenous Peoples' perspective, bearing in mind that other aspects and other perspectives exist.

Some challenges facing Indigenous Peoples regarding large scale resource extraction in the Arctic

The Arctic has some common features regardless of country. These features affect the planning and execution of industrial projects circumpolarly, especially when it comes to large scale resource exploitation by extractive industries like Oil and Gas, mining, forestry and fishing.

- *Climate*

Although the climate varies tremendously in the Arctic, it is fair to say that it challenges equipment and installations developed for warmer latitudes, and often demands equipment developed according to other standards.

- *Population*

The Arctic is a sparsely populated area which is usually not generically able to supply the workforce needed for larger industrial projects. Labour-intensive operations need imported labour.

- *Infrastructure*

Weak infrastructure in terms of transportation, housing, services and financing.

- *Long distances*

The Arctic is a gigantic landmass with enormous distances. Transport of equipment in, and products out, often requires new freight routes, flights, pipelines and roads to serve individual facilities.

- *Fragile environment*

The Arctic environment is fragile and

vulnerable with extremely long recovery periods.

- *Disputed jurisdiction*

Most of the Arctic landmass is regarded as so called “state property” governed by distant governments. This is circumpolarly disputed by the Arctic Indigenous Peoples who regard the same area as their ancestral lands and territories.

Who’s deciding - governments or corporations?

In an increasingly globalized world, the big multinational corporations are no longer working under single country jurisdiction, but relate to a variety of legal systems and national systems. Combine this with an increased transparency as a result of global networking between different stakeholders. The Indigenous Peoples’ rights issue has become a core element even in the corporate sector’s own policy development.

From an Indigenous Peoples’ viewpoint it might be very hard to identify the decision-making procedures. The corporate sector has traditionally had a very strong position in setting the terms in industrial project development, and the Oil and Gas industry is certainly no exception, and the legacy of extractive industries taking over lands and territories, creating new cities and communities which are more or less totally dependent on one big industrial actor, has not always been the best.

Final decisions are seldom made at local or regional level, nor by local or regional governments, nor by the corporations. This constitutes a huge challenge for indigenous peoples and local communities, often small in population. The questions become:

- How to get access to the decision makers?
- How to influence and become part of decision-making processes?
- How to take control over your constituency’s development facing dramatic changes?

The traditional way of deciding on new

«The Indigenous Peoples’ rights issue has become a core element even in the corporate sectors own policy development»

industrial projects is usually to conduct a variety of assessments, including environmental and social assessments. These tools have been developed and designed to take into account stakeholders’ interests by giving them the opportunity to give input and express their views according to a country- or region-specific scheme. Social impact assessments (SIA) are conducted to balance the interests of different parties, and Indigenous Peoples are often included as one of the stakeholders.

Social Impact Assessment (SIA) as a tool for decision-making and planning – What are the alternatives?

Recent studies show that SIAs are problematic in relation to Indigenous Peoples⁴. The problems with SIAs can be summed up as follows:

Denied inclusion

In some cases Indigenous Peoples risk being excluded from the SIA despite a proven relationship with the area in question. In such cases the issue is surely one of denial of the basic rights of the Indigenous People in question.

Effective participation

Although included in the formal procedures, Indigenous Peoples’ participation can be ineffective due to:

- An excessively short time-frame, preventing effective participation.
- Indigenous Peoples generally lack the financial resources and access to “technical information” to enable them to participate meaningfully.
- The use of culturally alien forms of inquiries, which are in a formalistic language, and technical public hearings.

4 O’Faircheallaigh, Making Social Impact Assessment Count : A Negotiation-Based Approach for Indigenous Peoples, Society & Natural Resources, 12 : 63 80, 1999, Copyright ©1999 Taylor & Francis

Procedures fail to acknowledge Indigenous Peoples' values and perspectives

This is a very common and serious problem. When conflicting values and perspectives collide, there is a strong tendency for Indigenous Peoples' interests to be marginalized from the project approval procedure.

Individual projects are assessed in isolation

Although in recent years the trend has been towards taking a broader approach in SIAs, there still is a strong tendency to conduct them on an isolated project basis with a short to medium time perspective. The cumulative effects for Indigenous Peoples are often ignored or left out in the process.

Assessments are usually ex-ante

To expect Indigenous Peoples and perhaps other stakeholders to predict all aspects of a project prior to its beginning is a major weakness in most if not all SIAs. All major decisions for a project's lifespan usually rest on the findings prior to the project start, and the procedures seldom have mechanisms to handle adverse social effects at a later stage.

Assessments are usually designed to mitigate negative social impacts

Large industrial projects are presumably designed to produce wealth. In that light it becomes problematic when Indigenous Peoples and communities are primarily regarded as objects of mitigation. A cost-benefit analysis becomes extremely imbalanced when in this case Indigenous Peoples are bearing the costs while others are getting the benefits, bearing in mind the previously mentioned visions and interests.

The obvious risk is that SIAs merely become an obligatory exercise for the corporations rather than a project lifespan commitment truly involving the peoples affected.

The problems outlined here are general but very relevant to the ongoing and planned Oil and Gas activities in the Arctic. The obvious challenge is to find models

and ways of tackling all or at least some of the major challenges facing indigenous peoples of the Arctic.

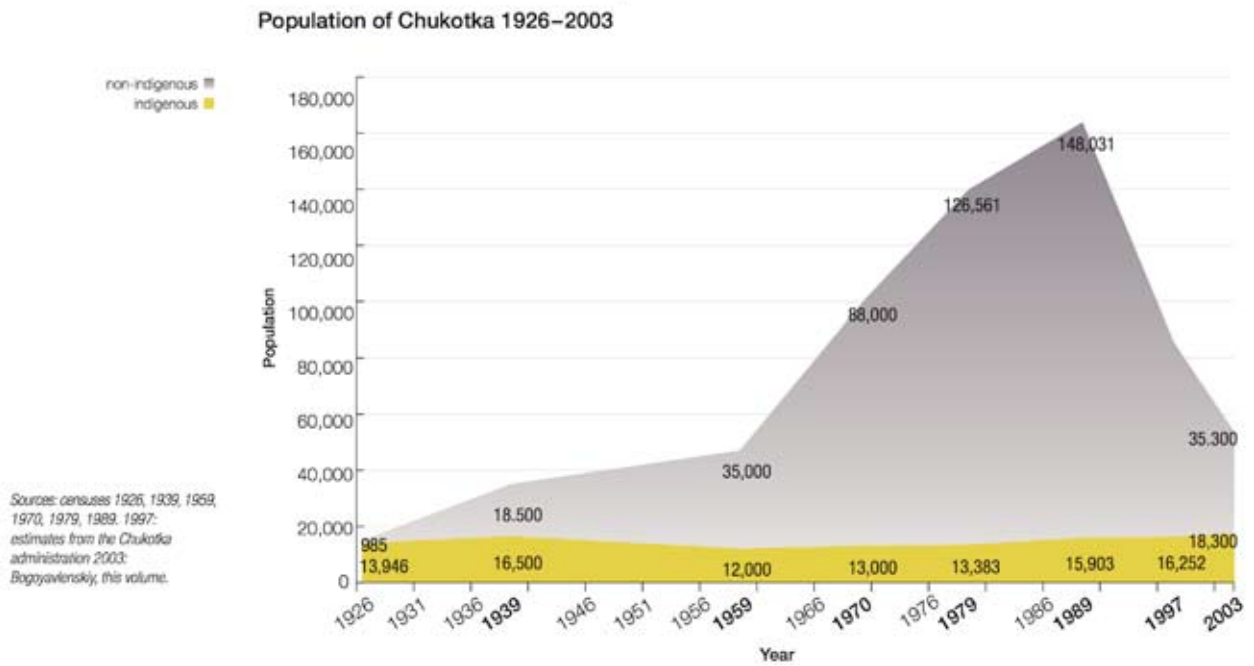
The time span of large scale exploitation in the Arctic – The day after tomorrow

The climatic conditions in the Arctic are probably the most important reason why the region is so sparsely populated. Consequently, the generic ability for the region to host larger populations is weak and constitutes a challenge when planning for extraction of non-renewable resources, exploitation of the enormous marine resources or logging in the gigantic but vulnerable boreal forests. Within the fishery sector, the development of long distance vessels has more or less resulted in a total collapse of many fishing communities in the Arctic as their logistical support is no longer needed. The local alternatives in industrial development are often non-existing and people simply move. Oil and Gas projects have a limited timespan. Most projects have a lifespan of between 20-50 years. This fact is well known in advance and should help draw attention to what should happen after a project is ended.

The Arctic has many examples of abandoned communities, especially non-indigenous, that have served their time for some reason. The cause of that is not always the resource sector. They may well be communities that have served a political, military or other purpose. The Indigenous Peoples of the Arctic have their historical roots in the same area and have therefore had their developed use of resources and way of life firmly established in the Arctic region through the millennia. As a result, they also constitute the stable population of the region, prior to, during and also **after** periods of resource extraction. As this is their homeland, Indigenous Peoples are more likely to stay on also after a major industrial project.

The illustration is from the AHDR and shows the changes in the population of Chukotka from 1926-2003⁵ where the

5 Arctic Human Development Report, Chapter 3.



immediate withdrawal of subsidies from the Arctic provinces after the collapse of the Soviet Union was the most important reason for the non-indigenous population of Chukotka to leave the region. Similar effects can be predicted for large industrial resource based projects in the Arctic region.

One might be able to predict this kind of development in the planning of such projects. A major concern for Indigenous Peoples is, however, how they can plan for their future existence after a project is over. Historically the results for Indigenous Peoples have been devastating. During the prosperous period they have often been marginalized and their traditional social structures have been destroyed. They have usually not benefited economically or socially from the project, neither collectively nor as individuals, and they are left to deal with the environmental and social damage that ensues from it.

As argued previously, Indigenous Peoples are in the risk zone of losing on all fronts: both prior to the project, during and after the end of the project period. Both governments and corporations take on an enormous responsibility when enter-

ing into such projects, and the ethical, legal and political challenges are gigantic. The only and, perhaps, the most promising, opportunity for Arctic Indigenous Peoples is that all of the Arctic states, and most if not all of the corporations involved in the Oil and Gas exploitation in the region, have committed themselves to respecting and promoting Indigenous Peoples' rights.

Negotiations – an alternative/supplementary approach

To overcome the shortcomings of SIAs and to meet international human rights standards and their concept of *Free, prior and informed consent*, direct and binding negotiations with Indigenous Peoples may well be the best approach.

Free, prior and informed consent recognizes indigenous peoples' inherent rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of prior and informed consent. The key components are⁶:

Free: It is a general principle of law that consent is not valid if obtained through

6 COMMISSION ON HUMAN RIGHTS Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations Twenty-second session 19-23 July 2004, E/CN.4/Sub.2/AC.4/2004/4

«To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources»

coercion or manipulation. While no legislative measure is foolproof, mechanisms need to be established to verify that consent has been freely obtained.

Prior: To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources.

Informed: A procedure based on the principle of free, prior and informed consent must involve consultation and participation by indigenous peoples, which includes the full and legally accurate disclosure of information concerning the proposed development in a form which is both accessible and understandable to the affected indigenous people(s)/communities.

Consent: Consent involves consultation about and meaningful participation in all aspects of assessment, planning, implementation, monitoring and closure of a project. At all times, indigenous peoples have the right to participate through their own freely chosen representatives and to identify the persons, communities or other entities that may require special measures in relation to consultation and participation. They also have the right to secure and use the services of any advisers, including legal counsel of their choice. In addition the following has to be recognized:

- Indigenous peoples have the right to specify which entity is the right entity to express the final consent.
- The timeframe for the consent process must be agreed upon in advance allowing for time to understand information received, to request additional information or clarification, to seek advice, and

to determine or negotiate conditions, as well as to ensure that the process does not serve as an undue impediment for the proponent seeking consent.

- Prior informed consent must be based on specific activities for which consent has been granted. While prior informed consent may initially be granted for one set of activities, any intended change of activities will require a new appeal for prior informed consent.

There are several case studies and concrete examples of negotiations between governments and Indigenous Peoples and also between private enterprises and Indigenous Peoples. Many of the Oil and Gas companies operating in the Arctic have experience with such agreements⁷.

Some of the issues that must be kept in mind if a negotiation path is pursued are:

- **Imbalance in power**
The imbalance in financial and technical resources between the parties may be even more institutionalized through the agreements made.
- **Fundamental differences in values**
The parties may have incompatible value systems as the basis for negotiations and the project in question might well constitute the wrong arena for finding workable solutions.
- **May become an arena for cooption**
The negotiations may well become an arena where the weaker party agrees to abstain from other legal and political alternative approaches for marginal short term gains.
- **Time**
The time frame for the negotiations are often so constrained that there is an obvious risk of unfair pressure for decisions.

⁷ The Mackenzie Gas Project and Pipeline Canada and the Aboriginal Pipeline Group. North Slope Borough, Alaska and the Arctic Slope Regional Corporation.

Bearing these shortcomings in mind, negotiations as a mutual platform for addressing project related issues, minimizing negative adverse effects and maximizing benefits and long term ability for Indigenous Peoples, is still the preferable procedure. In addition it is also a fundamental platform for complying with international law on peoples' right to self determination.

Corporate Social Responsibility – some examples and challenges

Corporate Social Responsibility (CSR) is a concept that is more and more accepted as a way of addressing the corporate world's responsibility for its actions in a number of fields. Under the concept lie environmental issues, workers' rights, universal human rights and also indigenous peoples' rights.

The driving forces behind the development of CSR are globalization, international law in general and ILO's tripartite conventions in particular, NGOs in general (with the environmental movement as the most prominent) and the indigenous peoples' movement in particular. Add to these more democratic elements transparency and consequently greater accountability, consumer power and the financially damaging effects of a negative corporate image that a lot of multinationals have experienced. Also financial actors play an important role, such as the World Bank, private banks, investment funds and international stock indexes. In short, there is a big incentive for corporations to develop a credible and substantial CSR policy.

CSR is the corporate parallel to an international regulatory and monitoring system developed within the private sector to develop worldwide standards resembling what in the public sector is known as international law. The corporations are only legally obligated in respect of the law of the individual countries they operate in and their activities do not necessarily follow the same standards in each and every country. Consequently, they may have different ways of dealing with environmental, labour and human rights standards within the same company, depending on the country they are operating in.

On the other hand, companies and corporations do not live completely detached from the rest of the world. Many of them, including the companies belonging to the extractive industries, rely heavily on a strong relationship with public national and international bodies for their operations, including financial support and services. They often serve customers with increasing demands with regard to the way products have been produced, not only the products themselves.

Some private sector examples of CSR policy

To give a picture of the CSR policies influencing the Oil and Gas industry, it is not sufficient to describe only the Oil and Gas companies' own policy. There is a very strong interrelationship between different categories of private sector actors that play different but linked roles in Oil and Gas projects. In the examples below you will find three different categories: Industrial Operators, Stock Index Company and Investment Fund.

Shell

Shell does not have a very visible and explicit public policy on indigenous peoples' rights. Despite that, the company has a very comprehensive system for addressing Human Rights and Community interaction, which would both address concerns listed above:

- *The Human Rights Compliance Assessment Tool*
The Human Rights Compliance Assessment Tool (HRCA), which has been field tested by Shell in South Africa and in Oman, assesses the compliance of a company in regard to human rights on the basis of some 1,000 indicators that were developed from more than 80 major human rights treaties and conventions including the Universal Declaration of Human Rights. These indicators are updated regularly to reflect changes in international human rights law.
- *Interacting with communities*
Society has become very conscious of



Rights of indigenous peoples

One target we set for 2003 in the 2002 sustainability report was to develop guidelines on the rights of indigenous peoples affected by our operations. These have now been produced, and aim to clarify how we will deal with issues relating to such peoples. They accord with the underlying principles in convention 169 on indigenous and tribal peoples adopted by the International Labour Organisation in 1989.

In our guidelines, we acknowledge that self-identification as an indigenous people is the fundamental criterion for determining which population groups are covered. Furthermore, we will respect the importance of social, cultural, religious and spiritual values and practices to the indigenous peoples affected by our operations. Similarly, we undertake that our activities will respect their special relationship with lands and territories, and particularly the collective aspects of that relationship.

Our Venezuelan subsidiary has been actively involved in a three-way dialogue between the oil industry, the Ministry of Energy and Mines, and Conive, the national organisation for indigenous peoples.

We took part in a three-day working session in October 2003 which aimed to increase knowledge of the new Venezuelan legislation on indigenous peoples. During 2004, we will be participating in two similar sessions on the legal framework for the hydrocarbon sector and on public consultation processes respectively.

An impact assessment we initiated in 2003 will look more closely at social, economic, political and cultural factors relating to the Plataforma Deltana project. This is located in a region which scores low for socio-economic development indicators and is also the home of the Warao Indians.

46 STATOIL 2003 SUSTAINABLE DEVELOPMENT

the impact of business on the environment and communities. Shell works with local residents, NGOs and governments to understand concerns, mitigate negative effects and maximize its contributions to the communities in which it operates.

British Gas

BG has a clear and visible CSR policy relating to indigenous peoples and highlights especially BG's intention to implement ILO Convention No. 169:

- BG respects the human rights of individuals affected by our operations
- As a resource company, we may find ourselves operating in territories where indigenous peoples live
- Currently we have very few operations in areas occupied by indigenous peoples
- We aim to apply the principles of ILO Convention No. 169 on Indigenous and Tribal Peoples wherever BG's operations may impact the human rights of indigenous peoples

Statoil

Statoil has no indigenous peoples' policy finalized at present. Statoil has nevertheless stated that it will develop a policy in compliance with ILO Convention No. 169 and it is temporarily listed on the FTSE 4Good index under the condition that an indigenous peoples' policy is developed.

It is interesting that the initiative to even develop a policy on indigenous peoples has not been taken by the company itself, even though Statoil has first hand experience of indigenous peoples' issues in Venezuela. The driving force behind the initiative seems to be the concern expressed by the FTSE index company with reference to its explicit criteria for the Global Resource Sector.

In presenting the issue of the rights of indigenous peoples, Statoil gives a brief description of its work on the issue, and illustrates it over half a page in its annual report for the year 2003, published in 2004:

It is noticeable how the choice of picture differs from the text, as the picture is of a Sámi man filling his snowscooter at

the Statoil petrol station in Kautokeino, Norway, whereas the text describes the concrete project in the Plataforma Deltana Venezuela. Not only is it contradictory in its description of the issue, but the fact is that Statoil first initiated a formal dialogue with the Sámi Parliament in Norway in 2003-2004.

Sibneft

Sibneft has a publicly available CSR report for 2004 and also has an explicit overview of its policy on “Northern indigenous peoples”, which states that:

- About 460 members of indigenous ethnic groups (99 families) live in Sibneft’s main upstream operations area around the city of Noyabrsk. Sibneft’s corporate policy is to sign economic agreements with each of these indigenous families. These agreements help us not only to provide financial and material support to these families, but also to get them involved in our activities.
- We hold regular meetings with the leaders of indigenous communities to discuss the social assistance program developed by Sibneft. Each year, we sponsor the Festival of Reindeer Herders to celebrate the arrival of spring - one of the most important events in the Nenets calendar.
- We help to maintain a school in the town of Muravlenko dedicated to teaching indigenous children, and we pay for university education for members of indigenous communities. For many years, Noyabrskneftegas also supported a school in the regional capital of Salekhard dedicated to promoting the art and music of indigenous peoples.
- The Nenets and the Khanty, who reside in colder climates, are renowned for their sense of direction and often work as inspectors, using snowmobiles to examine pipelines and check for damage. For this purpose, Sibneft bought 80 Buran snowmobiles for Nenets and Khanty communities, who can now

monitor and preserve the environment in their traditional lands.

- Sibneft-Noyabrskneftegas allocates tens of millions of roubles to pay for food-stuffs, fuel, clothing, transport, building materials, medical care, tuition for schools and higher education, and for other efforts aimed at protecting indigenous lifestyles.

FTSE 4Good

The well known FTSE index company has developed its 4Good index as a tool to assist investors and funds to invest in socially responsible companies. The Oil and Gas industry is identified as part of the global resource sector which in turn is defined as the Oil and Gas sector and the mining industry.

The criteria for being listed on the 4Good index as a global resource company include the following:

Public Policy

- The company has published policies covering human rights issues that are clearly communicated globally (in local languages where appropriate).
- The strategic responsibility for the human rights policy/ies rests with one or more Board members or senior managers who report directly to the CEO Board Responsibility.

ILO Core Labour Standards Or UN Global Compact / SA8000 / OECD Guidelines

- A statement of commitment to respect all the ILO core labour standards globally. The core conventions relate to: equal opportunities, freedom of association/collective bargaining, forced labour and child labour. Alternatively signatories to the UN Global Compact or SA8000, or whose policy states support for the OECD Guidelines for Multi-national Enterprises are considered to meet this requirement.

UDHR

- A clear statement of support for the Universal Declaration of Human Rights

Guidelines on armed security guards

- Guidelines governing the use of armed security guards based on UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials or the Code of Conduct for Law Enforcement Officials. Alternatively signatories to the Voluntary Principles on Security and Human Rights meet this requirement

Indigenous people

- A stated commitment to respecting indigenous peoples' rights.

Calvert

Calvert, the Washington based investment company, manages a series of social investment funds where the criteria concerning indigenous peoples are stated like this:

Indigenous Peoples' Rights

We are concerned about the security and survival of indigenous peoples around the world. Companies operating on or directly affecting impacting the land of indigenous peoples should support appropriate economic development that respects indigenous territories, cultures, environment, and livelihoods. We will not invest in companies that have a pattern and practice of violating the rights of indigenous peoples.

Calvert seeks to invest in companies that:

- Respect the land, sovereignty, natural resource rights, traditional homelands, cultural heritage, and ceremonial and sacred sites of indigenous peoples.
- Adopt and implement guidelines that include dealing with indigenous peoples. These guidelines may encompass, among others, respecting the human rights and self-determination of indigenous peoples and securing prior informed consent in any transactions, including the acquisition and use of indigenous peoples' property, including intellectual property.
- Support positive portrayals of indigenous peoples, including American

Indians and other indigenous or ethnic peoples, and their religious and cultural heritage.

From policies to practice

The obvious challenge for a meaningful CSR policy developed according to international standards on the rights of indigenous people is how it is translated into the various projects affecting those rights.

The usual approach for indigenous peoples defending their rights is to:

1. Establish a dialogue with the government, referring to whatever national legislation may exist, and engage in a process to influence the public decision-making related to the project.
2. If a national legal framework exists in support of their rights, the courts might be used to clarify any legal implications of the project if the dialogue with the government fails.
3. If the national legislation fails to protect their rights, indigenous peoples can bring the issue to the international level depending on the nature of the case in question, and the exhaustion of the options within the national court system. This is also depending on the obligations the country has signed up to in terms of treaty instruments and so on.

The process described above is usually a very long process (10 to 15 years), and there is no guarantee that the project in question is halted throughout this process. The Corporation has its responsibilities towards its shareholders and is often in close dialogue with the government, and will probably utilize the fact that the court has directly or indirectly ruled in its favour in order to continue the development.

Utilizing this procedure can be regarded as a good strategy because for many indigenous peoples it is a known route, and success on any of the 3 levels will, if the rule of law is obeyed by the parties involved, give immediate results in support of their cause. It can contribute to clarification of the overall rights of the people concerned

and have judicial consequences for future projects and cases.

An alternative is to engage in a similar process directly with the Corporation in question. A similar 3-stage process, simplified, will look like this:

1. Establish a dialogue with the Corporation in question expressing the view of the indigenous people affected, and engage in a process to influence the project's planning and governance.
2. If a policy on Corporate Social Responsibility exists it should be possible to develop a common understanding on the interpretation of such a policy and build that understanding on whatever rights the indigenous people have.
3. If the steps fail, there is the option of bringing the case to whatever standards the Corporation have signed up to with a 3rd party index and monitoring company and initiating a review to test the compliance with potential criteria that the company may have.

The two approaches are not mutually exclusive and can of course be run in parallel.

One can easily compare the evolving structures and systems of various social indexes, investment funds, financial institutions and certification companies with the systems established by governments through national and international law.

A schematic comparison of the two systems could be described as follows:

	Governmental system	Corporate system
National/Corporate level	National legislation, court system and policies, and various models for governance.	Corporate policies, governing system and self-monitoring.
International level	Intergovernmental bodies and treaty systems.	Index and certification companies, financial institutions and investment funds. Sector organizations with voluntary standardization rules/systems.

In principle, these structures operate and work in very similar ways, and are to a large extent also interlinked. The governmental system and legislative structures are influenced by industrial activity that demands regulation in some way or another. That might be the development of environmental standards or various tax schemes designed to address the social and environmental consequences of industrial activities in national and international law.

Similarly, these standards flow back into the corporate system by virtue of the fact that index companies and other standard setting companies base their criteria to a large extent on international law and inter-governmental treaties and standards.

Consequently an Indigenous People that has strong support for its rights in the intergovernmental system will have a strong case also in the corporate system described.

CSR – How to complain?

A major difficulty in holding Corporations accountable for their actions in relation to their CSR policy is to identify a way to complain. Companies and Corporations may operate in accordance with the national legal framework in question, but at the same time violate their own CSR policy. For the affected parties it might be extremely difficult to address that kind of policy violation. The role of the various index and certification companies and social investment companies becomes imperative in such processes. Then again these monitoring companies are not always very

precise in their criteria and do not usually have a very well defined complaint procedure.

A recent example of this is the issue raised by the Saami Council relating to logging activities in northern Finland vis-à-vis Stora Enso, a multinational logging company. The issue is not related to Oil and Gas activities, but nevertheless shows the challenges related to raising human rights issues with large multinational corporations.

Stora Enso logging in northern Finland – A CSR complaint

Over some years the multinational logging company Stora Enso has been buying timber from old forests in the Inari district of upper Lapland in Finland. This area is in core Sámi areas and the logging itself has been disputed by various affected Sámi communities. The traditional reindeer herding of Sámi in the area is heavily affected by the clear-cutting of old forests resulting in loss of grazing land for the herds.

The logging operations are managed by Metsähallitus, the Finnish state owned forestry company which manages the so-called state owned forests in Finland. The Sámi reindeer herders have consistently objected to the extent and intensity of the logging in the area over years and have also managed to get support from international bodies, such as the Human Rights Committee, in criticizing Finland for its forest management in Sámi areas.

During late 2004 and throughout 2005, Greenpeace and affected parts of the Sámi community ran an environmental campaign against the logging in the Inari area. The campaign was primarily targeted against the environmental damage caused by clear-cutting the slow growing old forest in the Inari area and its devastating effect on reindeer pastures.

In late August 2005, the Sámi Council at its Executive Board meeting made a visit to the area and decided to address the Human Rights aspects of the logging especially related to the commitments made by the

main buyer of the products from the area, Stora Enso. The Sámi Council had identified two areas in Stora Enso's CSR and certification policy that were relevant to their activities on Indigenous Peoples' land.⁸

1. Certification

The logging industry has come under a lot of pressure in the past decades for its activities. The NGO community, both environmental groups and Human Rights groups, have pushed the development of various sustainable certification schemes that are designed to give both the industry and consumers some assurance that the products are produced in an environmentally friendly way that also respect the fundamental rights of workers and stakeholders.

In a letter to Stora Enso dated 30 August 2005, the Sámi Council raised the question of the lack of consistency in Stora Enso's certification policy:

Firstly, we would like to understand the rationale behind the inconsistency in certification policy in your company. In most of Stora Enso's European sites your company has chosen to certify the operation in accordance with the Forest Stewardship Council's certification scheme, **except** for your operations in Finland. One of the requirements of the FSC Principles & Criteria is related to **Indigenous Peoples' Rights**. In its introduction it states clearly that:

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

Consequently, in the Inari operations, Stora Enso would most likely **not** acquire a FSC certification, as the Sami people's customary and legal rights in Finland are not recognized and respected. This suggests that Stora Enso in its corporate policy on certification chooses to certify some sites and areas in some countries and not across the corporate operations.

⁸ Letter to Stora Enso from Sámi Council dated 30 August 2005

This seems an inconsistent policy governed by convenience, and not a result of a corporate commitment to keep in line with international recognized standards.

2. Commitments related to listing on sustainability indexes

Like many other large corporations, Stora Enso has seen the merit in getting listed on various sustainability indices as a sign of recognition of its CSR policy. In its initial communication with the company, the Sámi Council raised the following points:

“**Secondly**, the Sami Council would like to ask Stora Enso how, in your view, the operations in Inari are in compliance with the commitment your company has made when acquiring listing on the following index listings:

FTSE 4 Good Index.

- Requires the company to respect the Universal Declaration on Human Rights

The Nordic Sustainability Index

- Requires the company to respect the Universal Declaration on Human Rights
- Requires the company to respect the UN Convention on the Rights of the Child
- Good Stakeholder relations including relations with local communities

Ethibel Investment Register and Ethibel Pioneer Sustainability Index

- Degree to which a company has a formal policy on human rights and the scope and quality of the principles
- Degree to which a company distinguishes itself (in a positive or negative sense) in the field of respect for human rights
- Degree to which a company makes efforts to avoid violations of international conventions on human and labour rights by its suppliers and subcontractors

Dow Jones Sustainability Indexes

- Strong focus on Stakeholder relations”

Based on these two issues, the Sámi Council referred to the Human Rights commitments made by Stora Enso and pointed out that its involvement in logging in the Inari district was contributing to the violation of the rights of the Sámi people.

In its response to the Sámi Council, Stora Enso basically diverted the issue to the Finnish government and claimed that Stora Enso had no authority in addressing the land ownership dispute between the Sámi and the Finnish national state.⁹

The Sámi Council then replied to Stora Enso¹⁰ that regardless of the land ownership question, and supported by previous rulings in the UN Human Rights Committee, the logging still constituted a threat to the fundamental rights of the Sámi people.

Stora Enso did not reply to the 16 September letter from the Sámi Council. Consequently, the Sámi Council then initiated communication with the various sustainability indexes that listed Stora Enso.

Almost in parallel (in October/November 2005) with the above mentioned dialogue between Stora Enso and the Sámi Council, a group of Sámi reindeer herders took the logging issue to court to have the logging activities halted, claiming that their rights had been violated. The reindeer herders won in the district court, but bail in the amount of 1 million € was set on the part of the forestry company to stop the logging pending a second ruling in a higher court. It was impossible to raise this amount, so the reindeer herders sent a complaint to the Human Rights Committee asking for an emergency ruling as the de-facto domestic legal options had been exhausted. About a week later, on 14 November 2005, the HRC asked the Finnish government to stop all logging in the disputed area until the complaint had been finally examined by the Committee.

On the basis of no response from Stora Enso and the recent HRC ruling on the logging in the area, the Sámi Council communicated these facts to the various index companies such as FTSE, SAM-Group (Partner in managing the Dow

⁹ Stora Enso's letter to the Sámi Council dated 6 September 2005.

¹⁰ The Sámi Council's letter to Stora Enso dated 16 September 2005.

Jones Sustainability Indexes) and Ethibel. The various index companies have different approaches to monitoring the social performance of the companies on their lists. None of them has a visible description of potential complaint procedures or even a policy on whether they accept any communication from 3rd party representatives. After identifying the companies, the Sámi Council submitted their dialogue with Stora Enso to the index companies just hoping to establish a dialogue with them. All the index companies replied, and there was obviously a relatively strong interest in receiving more information on the activities.

The strongest element in the line of argument for questioning Stora Enso's compliance with the various criteria seemed to be the fact that the Human Rights Committee had actually ordered a halt to the logging activity. As of March 2006, the index companies are now awaiting the result of the Human Rights Committee's ruling in the logging case, and the following actions taken by Stora Enso. The consensus view among the index companies seems to be that if Stora Enso fails to comply with the upcoming ruling of the Human Rights Committee, it will immediately be downgraded from the listing as a socially responsible company.

Although the Stora Enso case in the Sámi area is related to a logging company and not an Oil and Gas company, the mechanisms related to social indexes and monitoring Socially Responsible performance apply. As demonstrated in this case, the link between international Human Rights law and the monitoring of socially responsible companies is very tight. On the one hand the criteria often refer to international law, and consequently company policies also reflect universal international standards. The biggest problem seems to be that there is no apparent coordinated

way in which civil society is involved in the development of the corporate policies and business standards of the index companies. They claim to monitor socially responsible performance, but have not developed a way of handling complaints. It could be argued that unless there is increased involvement by civil society and increased transparency and visible concrete rules for handling complaints, the labelling and social responsibility monitoring of the index companies runs the risk of being just labels and glossy portrayals of private companies.

Concluding remarks

The Arctic Oil and Gas boom faces a multitude of challenges in dealing with Indigenous Peoples' issues. Most of the Arctic region has potential Oil and Gas reservoirs just waiting to be exploited. The paradox of facing new industrial challenges as the Arctic warms due to the effects of the products of the very same industries now entering the Arctic region is obvious and has not only global implications, but also very concrete local/regional effects.

The Indigenous Peoples of the Arctic are well organized and positioned to face the fact that yet another resource is being exploited and wealth being exported from the region with varying degrees of involvement from the historical residents of the Arctic. All the previously mentioned aspects of Oil and Gas activities can be addressed and potential violations of the rights of the Arctic Indigenous Peoples can be prevented.

All the players in this process have both an individual responsibility and a collective responsibility, and the Arctic is well positioned to establish new common codes of conduct and standards for industrial operations that go beyond the environmental risks and also take into account that the Arctic is a culturally diverse region and homeland to many Indigenous Peoples.

«All the players in this process have both an individual responsibility and a collective responsibility and the Arctic is well positioned to establish new common codes of conduct and standards for industrial operations that go beyond the environmental risks and also take into account that the Arctic is a cultural diverse region and homeland to many Indigenous Peoples»

References – List of literature used

- Arctic Human Development Report, 2004, Arctic Council, Stefanson Arctic Institute, Akureyri, Iceland.
- Bekefi, T., “Human Rights Policy Implementation in the Oil and Gas Sector – Translating Policy to Practice” Working Paper, IPIECA, www.ipieca.com.
- Colchester, M. and MacKay, F., 2004, “In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent”, Forest Peoples Programme, UK.
- Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Twenty-second session 19-23 July 2004, E/CN.4/Sub.2/AC.4/2004/4.
- Consultation on Human Rights and the Extractive Industry, 2005, Joint NGO Submission, ESCR-Net Corporate Accountability Working Group.
- Dams and Development – A New Framework for Decision-Making, The Report of the World Commission on Dams, November 2000, Earthscan Publications Ltd.
- Downing, T., Moles, J., McIntosh, I. and Garcia-Downing, C., 2002, “Indigenous Peoples and Mining Encounters: Strategies and Tactics” Mining, Minerals and Sustainable Development No. 57. International Institute for Environment and Development and World Business Council for Sustainable Development.
- Durand, A. and Durham, B., 2003, “The Camisea Natural Gas Project: a Precedent for Corporate Behavior” <http://www.stanford.edu/class/anthsc111sc/paperale.htm>.
- Edmunds, D. and Wollenberg, E., 2002, “Disadvantaged Groups in Multistakeholder Negotiations” CIFOR Programme Report.
- Habeck, J. O., Kasten, E. (ed.) 2002, “How to Turn a Reindeer Pasture into an Oil Well, and Vice Versa: Transfer of Land, Compensation and Reclamation in the Komi Republic”, People and the Land. Pathways to Reform in Post-Soviet Siberia, Dietrich Reimer Verlag.
- Howitt, R. 2001, “Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples”, Routledge Press.
- Howitt, R., Connell, J., and Hirsch, P., (eds.) 1996, “Resources, Nations and Indigenous Peoples. Case Studies from Australasia, Melanesia and Southeast Asia”.
- Howitt, R., 2002, “Worlds Turned Upside Down: Inclusionary Research in Australia”, Intervention at the American Association of Geographers’ meeting in Los Angeles, March 2002.
- Human Rights and the Oil and Gas Industry - An IPIECA Status Report, 2004, IPIECA’s Social Responsibility Working Group.
- ILO Convention Concerning Indigenous and Tribal Peoples (No. 169), 1989, International Labour Organisation, www.ilo.org.
- International Covenant on Civil and Political Rights, 1966, www.un.org.
- International Covenant on Economic, Social and Cultural Rights, 1966, www.un.org.
- Lane, M., Dale, A., and Taylor N. (editors), 2001, “Social assessment in natural resource management: Promise, potentiality, and practice” CSIRO Publishing, Australia. www.publish.csiro.au/.
- OECD Guidelines for Multinational Enterprises, www.oecd.org.
- OECD Principles of Corporate Governance, www.oecd.org.
- O’Faircheallaigh, C. 1999, “Making Social Impact Assessment Count : A Negotiation-Based Approach for Indigenous Peoples”, Society & Natural Resources, 12 : 63
- Operational Policy on Indigenous Peoples, 2004, Inter-American Development Bank, Indigenous Peoples and Community Development Unit.
- Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance, 2003, Third Edition, Steering Group of the Global Principles Network, www.bench-marks.org.
- Render, J. and Mahoney, L. (ed.), 2004, “Recipe for Dialogue Corporate Training for Building Relationships with Indigenous Communities”, The Center for Victims of Torture – New Tactics in Human Rights Project, www.cvt.org and www.newtactics.org.
- Smith, G. & Feldman, D. 2004, “Company Codes of Conduct and International Standards: An Analytical Comparison, Part II of II: Oil and Gas / Mining”, World Bank and International Finance Corporation.
- Social Impact Assessment – International Principles, International Association for Impact Assessment, IAIA, Special Publication Series, May 2003.
- Tripartite Declaration of Principles Concerning Enterprises and Social Policy, www.ilo.org.
- United Nations Universal Declaration of Human Rights, 1948, www.un.org.
- UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, www.un.org.
- Warhurst, A., 2001, “Corporate Citizenship and Corporate Social Investment – Drivers of Tri-Sector Partnerships”, JCC 1 Spring 2001 pp. 57-73, Greenleaf Publishing Ltd.
- Weitzner, V., 2002, “Cutting-Edge Policies on Indigenous Peoples and Mining: Key Lessons for the World Summit and Beyond”, The North-South Institute, Ottawa, Canada.

**Oil and gas operations in Indigenous
peoples lands and territories in the Arctic:
A Human rights perspective**

John B. Henriksen

I. Introduction

The survival of indigenous peoples - as distinct peoples - depends on the sustainable utilization of their traditional lands and natural resources in a manner and mode appropriate to their specific circumstances.

Around the world there are disputes about ownership, utilization, management and conservation of traditional indigenous lands and resources. Such disputes are often caused by decisions to use traditional indigenous lands and resources for industrial purposes, including oil and gas exploration. This situation represents an enormous challenge, and in some cases threatens indigenous societies and their economies, cultures and ways of life.

Indigenous peoples' full and effective ownership of lands and resources is rarely recognized; a crucial issue contributing to this tension. This paper attempts to elaborate on the international human rights protection accorded to indigenous lands and resource rights with particular reference to oil and gas exploration.

1. The Terms Indigenous Peoples and Peoples

1.1. "Indigenous Peoples"

There is no generally agreed universal legal definition of the term 'indigenous peoples'. The United Nations uses a description formulated by an expert, the so-called Cobo definition, as a guiding principle when identifying indigenous peoples.¹ This is also followed in the drafting of a United Nations Declaration on the Rights of Indigenous Peoples.²

The Special Rapporteur of the UN Sub-Commission for Human Rights, José Martínez Cobo, formulated a «working definition» while conducting research on discrimination against indigenous peoples:

“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.”³

In his ground-breaking study, the first undertaken by the UN on the subject, and as yet unparalleled, the Special Rapporteur outlines a list of factors relevant to identifying indigenous peoples and linking it to their historical continuity. He believes that such a historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:⁴

- (1) Occupation of ancestral lands, or at least of part of them;
- (2) Common ancestry with the original occupants of these lands;

¹ Study of the Problem of Discrimination against Indigenous Populations, by Sub-Commission Expert/Member Jose R. Martinez Cobo, UN document E/CN.4/Sub.2/1986/7 and Add. 1-4.

² UN Document: E/CN.4/Sub.2/1994/2

³ José Martínez Cobo, Cobo 1986/7: Add.4, paragraph 379.

⁴ Ibid, paragraph 380.

- (3) Culture in general, or in specific manifestations;
- (4) Language;
- (5) Residence in certain parts of the country, or in certain regions of the world;
- (6) Other relevant factors.

Cobo also includes self-identification as indigenous as a fundamental element in his working definition. On an individual basis, an indigenous person is one who belongs to these indigenous peoples through self-identification as indigenous (group consciousness) and is recognized and accepted by the group as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

The International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples (1989), contains a statement of coverage defining indigenous peoples and tribal peoples. Article 1 of the ILO Convention No. 169 defines the scope of application of the convention:

"1. This Convention applies to:

- a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special law or regulations.
 - b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which

the provisions of this Convention apply.

3. The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

The core elements that are important for the use of the term 'indigenous peoples' are (1) that there is another group than the indigenous people concerned which presently is the dominant group [power relationship] on traditional indigenous territories within an individual country or a geographical region/area; and (2) that the indigenous people concerned identifies itself as 'indigenous.'

Although the use of the term 'indigenous peoples' is a contentious concept in some regions of the world, e.g. Africa and Asia, in the Arctic region the identification of indigenous peoples is widely decided through indigenous self-identification and processes leading to State recognition of their indigenous identity.

1.2. "Peoples"

The concept of "peoples" is important in relation to the right to self-determination. Similar to the definition of indigenous peoples, there is no universal legal definition of the term 'peoples.' However, in practice, the United Nations widely uses the so-called Kirby definition for the identification of 'peoples':⁵

"1. A group of individual human beings who enjoy some or all of the following common features:

- a) Common historical tradition;
- b) Racial or ethnic identity;
- c) Cultural homogeneity;
- d) Linguistic unity;
- e) Religious or ideological affinity;
- f) Territorial connection;
- g) Common economic life;

2. *The group must be of a certain number which need not be large but which must*

⁵ Adopted at the UNESCO International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, UNESCO HQ, Paris, November 27 – 30, 1989. The definition is named after Michael Kirby, the author of the definition.

be more than a mere association of individuals within a State;

3. *The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of such groups, through sharing the foregoing characteristics, may not have that will or consciousness, and possibly,*
4. *The group must have institutions or other means of expressing its common characteristics and will for identity.”*

The main substantive difference between the definitions of “indigenous peoples” and “peoples” respectively is the power relationship element in the “indigenous peoples” criteria. In other words a group other than the indigenous peoples concerned is the dominant group within an individual country or a geographical region/area. The indigenous peoples concerned may be dominant in their traditional territory, but

«The indigenous peoples concerned may be dominant in their traditional territory, but do exercise little influence or power, if any, in national politics, and in the State»

exercise a little influence or power, if any, in national politics, and in the State.

The question whether indigenous peoples are to be regarded as ‘peoples’ with the right to self-determination under common Article 1 of the two International Human Rights Conventions of 1966 (the International Covenant on Civil and Political Rights ‘ICCPR’ and the International Covenant on Economic, Social and Cultural Rights ‘ICESCR’) is still disputed by some Arctic States, as it is by many other States. It has also emerged as the major issue in the current drafting process on a universal declaration on the rights of indigenous peoples.

II. Situation Analysis

The impact of oil and gas exploration on indigenous peoples' lands and territories is far-reaching, as such operations can have extremely negative consequences for indigenous societies. Oil and gas explorations can result in the destruction of traditional indigenous economies and societies. Indigenous peoples have legitimate reasons for being deeply concerned about planned oil and gas explorations in their territories, as developers' interests normally prevail wherever and whenever indigenous peoples' interests and rights clash with development projects.

Indigenous peoples have a very special relationship with their lands, territories and natural resources. The relationship with the land and all living things is often the core of indigenous societies.⁶ In the view of José Martínez Cobo, it is essential to know and understand the deep and special relationship between indigenous peoples and their lands as basic to their existence as such and to all their beliefs, customs, traditions and culture. For indigenous peoples the land is not merely a possession and a means of production. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.⁷ It is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and natural resources from that of their cultural values and differences.

Arctic indigenous peoples' economies, in particular subsistence economies based on hunting, fishing, reindeer herding and gathering, suffer disproportionately from

the negative ecological consequences of oil/gas and infrastructure projects. This is due to their subsistence economies and occupations, which are central to their cultures and dependent on their lands and resources. Oil and gas operations can have serious direct negative impact on indigenous peoples and their societies, including increased settler population on their lands, displacement of indigenous peoples, large infrastructure projects, decreased local flora and fauna, contamination of water, soil and air, and degradation of valuable lands. This often leads to an increased risk of health problems among the indigenous peoples affected, and to loss of or damage to hunting grounds, fisheries, biodiversity, medical plants and spiritual sites, among others.

«Indigenous peoples have a very special relationship with their lands, territories and natural resources. The relationship with the land and all living things is often the core of indigenous societies»

Indigenous peoples have been, and in many cases still are, deprived of their human rights and fundamental freedoms as distinct peoples. This has resulted in the dispossession of their lands, territories and resources, and prevented them from exercising their right to development in accordance with their needs and interests.

The principal problem in relation to oil and gas activities in indigenous peoples'

⁶ Erica-Irene A. Daes, "Indigenous Peoples' Rights to Land and Natural Resources", *Minorities, Peoples and Self-Determination*, (eds.) Nazila Ghanea and Alexandra Xanthaki (2005)

⁷ Cobo: 1986/7, paragraphs 196 – 197.

lands is States' failure to recognize and respect indigenous peoples' use, occupancy and ownership of their traditional lands, territories and resources, and to accord them the necessary legal status and protection. Indigenous peoples also frequently face other problems, such as:

- discriminatory laws and policies affecting indigenous peoples in relation to their lands, territories and resources;
- failure of states to enforce or implement laws protecting indigenous lands and resources;
- expropriation of indigenous lands for national interests, including oil and gas development; and
- displacement and relocation.

It is extremely important that authorities and private oil and gas enterprises understand and respect the special cultural, social, spiritual, political and economic relationship which indigenous peoples have to their lands, territories and natural resources – going far beyond what can be estimated in monetary terms. This special relationship of indigenous peoples with their lands, territories and resources is recognized by the United Nations in numerous instruments, including the ILO Convention No. 169 and numerous resolutions adopted by the UN Human Rights Commission.

III. International Human Rights Standards

International human rights law provides indigenous peoples with legal protection against state and private encroachment on their lands and resources, including protection against competing industrial uses of lands and resources, such as oil and gas operations. Indigenous peoples in the Arctic region, who more often than not are denied ownership of their traditional lands, territories and resources, are forced to actively seek international human rights protection for their rights.

International human rights protection for indigenous peoples can be summarized into four categories of rights: (1) ordinary individual human rights; (2) specific minority rights, whenever applicable to indigenous individuals; (3) specific indigenous peoples' rights; and (4) specific 'peoples' rights. This paper focuses on categories of rights enumerated in 2-4.

1. ILO Convention No. 169 on Indigenous and Tribal Peoples

The International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) is the most recent convention on indigenous rights. As such, it establishes a comprehensive set of minimum standards on indigenous rights. It contains a number of provisions related to indigenous lands and resource rights. Hence, it is of great importance in relation to legal questions related to oil and gas operations in indigenous lands and territories.

Among the Arctic States, so far only

Denmark and Norway have ratified ILO Convention No. 169. However, the relevance of the Convention is not limited to these two countries, as the other Arctic countries cannot ignore this comprehensive set of international minimum standards on indigenous rights.

Article 13 (1) of the ILO Convention No. 169 establishes a duty for States to 'respect the special importance for the cultures and spiritual values' of indigenous peoples of their relationship with the lands and territories 'which they occupy or otherwise use, and in particular the collective aspect of this relationship.' This is a legal recognition of indigenous peoples' special relationship to their lands, and an acknowledgement of the fact that their lands and resources are core elements of their cultures. This provision is the underlying principle for all the other provisions related to lands and resources. The Committee of Experts on the Application of Conventions and Recommendations of the ILO, which is responsible for monitoring how the Convention is applied in actual practice, has clarified that these provisions are also applicable in relation to oil exploitation activities in indigenous peoples' lands and territories. This was endorsed by the Committee in its comments on the oil exploitation activities in the *Resguardo Unido U'wa* in Colombia.⁸ The Committee emphasized that the Government of Colombia is obliged to adopt all necessary measures to guarantee that the indigenous U'wa people enjoy all the rights accorded by the ILO Convention No. 169.

Article 14 (1) of the Convention estab-

⁸ Report of the ILO Committee of Experts on the Application of Conventions and Recommendations, Indigenous and Tribal Peoples Convention, 1989 (No. 169), Colombia, Observations, 2003/74th Session.

lishes an obligation for States to recognize indigenous ownership and possession of lands they traditionally occupy. Although the precise and exact obligation of this provision is not specified and is still somewhat unclear, the provision strongly supports the notion that indigenous occupation and use of their traditional lands, territories and natural resources establishes legal rights that require respect and legal protection. This provision also protects indigenous rights to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic and semi-nomadic indigenous peoples, including indigenous reindeer herding people.

Article 15 (1) of the Convention is of particular importance in the context of oil and gas resources. It establishes a duty for States to safeguard especially indigenous peoples' right to the natural resources pertaining to their lands, including their right to participate in the use, management and conservation of such resources.

Article 15 (2) stipulates that in cases in which the State retains the ownership of mineral and sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these people before undertaking or permitting any programmes for the exploration or exploitation of such resources. The State is obliged to find out whether and to what degree indigenous interests would suffer from such activities.

Article 15 (2) also establishes the principle of benefit sharing. It requires that the indigenous 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.' Although this provision is somewhat vaguely formulated, it gives the legal basis to indigenous peoples' demands for a fair

share of revenues from resource explorations on their lands and territories.⁹

The use of the term 'lands' in the ILO Convention includes the concept of territories, which covers the total environment of the areas which indigenous peoples occupy or otherwise use. This wider scope of the term 'lands' is established in article 13 (2). This opens up for an interpretation of the term 'lands' which goes beyond a strictly shore-based application of article 15, and might also be applicable for coastal waters which indigenous peoples use. Thus, it can be argued that article 15 establishes an obligation for States parties to safeguard especially indigenous peoples' right to marine resources whenever oil exploitation is being conducted offshore. There is potentially an enormous conflict of interests between offshore oil activities and indigenous peoples' fishing interests. This wider scope of application is also applicable to the benefit sharing element in article 15.

Article 16 of the ILO Convention prohibits forced relocation of indigenous peoples. It is clarified that where the relocation of indigenous 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, relocation shall take place only by following appropriate procedures established by law. This article is to cover situations where relocation is urgent due to natural and health hazards, e.g. flooding, epidemics, earthquakes, war, famines, etc. With regard to oil and gas operations, it is not possible to justify forced relocation of indigenous peoples as a 'necessary exceptional measure.' In accordance with article 13, the above-mentioned broader interpretation of the term "lands" is also applicable to article 16.

Article 7 - a central pillar of the Convention - is also of paramount importance in relation to oil and gas operations on indigenous lands and territories. It states that indigenous peoples have the right to decide their own priorities for the process of de-

⁹ In accordance with article 13 (2) of the ILO Convention, the use of the term "lands" in articles 15 and 16 shall include the concept of territories, which covers "the total environment" of the areas which the peoples concerned "occupy or otherwise use". There are compelling arguments suggesting that this concept includes coastal seawater. This question has, however, still not been resolved.

velopment as it affects their lives, including the land they occupy or otherwise use, and to the extent possible, exercise control over their own economic, social and cultural development. The provision also obliges governments to take measures, in cooperation with indigenous peoples, to protect and preserve the environment of the territories they inhabit.

This provision should be interpreted in conjunction with article 6. Under article 6, governments are obliged to consult the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever considering measures which may affect them directly. Article 6 also stipulates that consultations carried out in application of the Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. This is highly relevant in relation to planned oil and gas activities in indigenous lands and territories.

2. The International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR), which is one of the core human rights instruments, and forms part of the International Bill of Human Rights,¹⁰ contains two provisions of particular importance in relation to the overall theme of this paper: Articles 1 and 27. All Arctic States have ratified the Covenant.

2.1. The Right of Self-determination

The right of self-determination is a fundamental principle and a fundamental right under international law. The international legal instruments on self-determination refer to the right of self-determination as belonging to 'all peoples'. It is embodied in the Charter of the United Nations and the

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Common Article 1 of the two Covenants of 1966 provides that:

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

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefits, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

The right of self-determination has also been recognized in many other international and regional human rights instruments, such as Part VII of the Helsinki Final Act 1975 and Article 20 of the African Charter of Human and Peoples' Rights as well as the Declaration on the Granting of Independence to Colonial Territories and Peoples.¹¹ It has been endorsed by the International Court of Justice.¹² Furthermore, the scope and content of the right of self-determination has been elaborated upon by the United Nations Human Rights Committee¹³ and the United Nations Committee on the Elimination of Racial Discrimination.¹⁴

In addition to being a right under inter-

¹⁰ *The International Bill of Human Rights*: (1) The Universal declaration of Human Rights; (2) The International Covenant on Economic, Social and Cultural Rights; (3) The International Covenant on Civil and Political Rights; (4) The Optional Protocol to the International Covenant on Civil and Political Rights; (5) The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

¹¹ UN General Assembly Resolution 1514 (XV) of 14 December 1960.

¹² See *the Namibia case* (1971) ICJ 16 and *the Western Sahara case* (1975) ICJ 12.

¹³ General Comment No. 12 of the Human Rights Committee, made at its twenty-first session, 1984. UN document: HRI/GEN/1/Rev.3.

¹⁴ UN document: CERD/C/49/CRP.2/Add.7 of 5 July 1996.

national law, the right of self-determination is also widely regarded as *Jus cogens* – a peremptory norm of general international law. Article 53 of the Vienna Convention on the Law of Treaties provides that a peremptory norm of general international law is a norm accepted and recognized by the international community as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.

ICCPR Article 1 (1) reaffirms the political dimension of the right of self-determination, through which ‘all peoples’ have the right to freely determine their political status, and freely pursue their economic, social and cultural development.

The right of self-determination also includes an economic or resource dimension, which is of particular importance in relation to extractive activities on indigenous lands and territories. This dimension is enshrined in Article 1 (2) of the Covenant. The core element of this provision is that the people concerned may, for their own ends, freely dispose of their natural wealth and resources. In no event may a people be deprived of its own means of subsistence.

The UN Human Rights Committee, which is mandated to monitor the implementation of the Covenant, acknowledges indigenous peoples’ right of self-determination under Article 1. It has several times addressed Arctic indigenous peoples’ right of self-determination under ICCPR Article 1 as enumerated below:

In its observations related to the fourth periodic report of Canada on the implementation of the Covenant (1999), the Committee raised the issue of indigenous self-determination – including the economic/resource dimension of this right. The Committee urged Canada to report adequately on the implementation of Article 1 of the Covenant in its next report, as

“the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2).”¹⁵

In its latest observations (2005) – related to the fifth periodic report of Canada – the Human Rights Committee reiterated its concerns regarding the implementation of Article 1 of the Covenant in relation to indigenous peoples’ rights.¹⁶ It believed Canadian policies and development of modern treaties with indigenous peoples may in practice amount to an extinguishment of inherent indigenous rights, incompatible with Article 1 of the Covenant. The Committee stated that Canada should “re-examine its policy and practices to ensure that they do not result in extinguishment of inherent aboriginal rights. The Committee would like to receive more detailed information on the comprehensive land claims agreement that Canada is currently negotiating with the Innu people of Quebec and Labrador, in particular regarding its compliance with the Covenant.”¹⁷

The Human Rights Committee also expressed its concerns about the fact that the land of the Lubicon Lake Band continues to be compromised by logging and large-scale oil and gas extraction, and regretted that the Government had not provided information on this specific issue. The Committee was very clear in its conclusions and recommendations on this issue, and made a reference to Article 1. It stated that Canada “should make every effort to resume negotiations with the Lubicon Lake Band, with the view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licences for economic exploitations of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.”¹⁸

The Human Rights Committee raised

¹⁵ UN Document: CCPR/C/79/Add.105, 7 April 1999, paragraphs 7-8.

¹⁶ UN Document CCPR/C/CAN/CO/5, 2 November 2005, paragraphs 8-9.

¹⁷ *Ibid*, paragraph 8.

¹⁸ *Ibid*, paragraph 9.

concerns in relation to the fourth periodic report of Norway (1999), in which it emphasized the resource dimension of the right to self-determination: “As the Government and Parliament of Norway have addressed the situation of the Sami in the framework of the right to self-determination, the Committee expects Norway to report on the [indigenous] Sami people’s right to self-determination under article 1 of the Covenant, including paragraph 2 of that article.”¹⁹ It is expected that the Committee will follow up this matter in its conclusions and observations related to the fifth periodic report of Norway sometime in 2006.

In its concluding observations related to the fifth periodic report of Sweden, the Committee stated that “[T]he Committee is deeply concerned at the limited extent to which the Sami Parliament [in Sweden] can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the Sami indigenous people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatisation of land (articles 1, 25 and 27 of the Covenant).”²⁰ The Committee also urged Sweden to take steps to involve the Sami (or Saami as they are also known) by giving them greater influence in decision-making affecting their natural environment and their means of subsistence.

In its observations to the fifth periodic report of Finland, the Committee states that it regrets that the Government of Finland has not clearly responded in relation to the rights of the indigenous Saami people in the light of Article 1 of the Covenant.²¹

The right of self-determination has in the past primarily been interpreted in the traditional decolonization context. However, as demonstrated through the above-mentioned observations and conclusions of the UN Human Rights Committee, the interpretation of this right has evolved, and its modes of expression have changed and

adapted to new circumstances. It is now acknowledged that ‘indigenous peoples’ – similar to all other ‘peoples’ – have the right of self-determination.

Indigenous peoples’ right of self-determination is recognized by all Arctic States – at least in principle – in the UN negotiations on a draft universal declaration on indigenous peoples’ rights. This is indeed of great relevance in relation to oil and gas activities in the Arctic, in particular when State owned oil and gas companies are involved in such activities. However, the gap between governmental rhetoric and the actual implementation of this right remains wide.

2.2. The Right to Culture (ICCPR Article 27)

ICCPR Article 27 establishes legal protection for indigenous culture, language and religion, in those cases where indigenous peoples constitute a minority within the meaning of this provision. Article 27 states:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

Although Article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a ‘right’ and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons or entities within the State party.²²

With regard to the exercise of the cul-

¹⁹ UN Document: CCPR/C/79/Add. 112, 1 November 1999, paragraph 17.

²⁰ UN Document: CCPR/CO/74/SWE, 24 April 2002, paragraph 15.

²¹ UN Document CCPR/CO/82/FIN, 2 December 2004, paragraph 17.

²² UN Human Rights Committee, General Comment No. 23 on ICCPR Article 27, paragraph 6.1.

tural rights protected under Article 27, the UN Human Rights Committee acknowledges that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of these rights requires legal measures of protection and measures to ensure the effective participation of members of indigenous communities in decisions which affect them.²³

Thus, the cultural dimension of this provision establishes protection for indigenous land and resource rights, although this is not self-evident in the text itself. The cultural element is applicable in relation to indigenous land and resource rights because indigenous peoples' particular way of life is closely associated with the use of their land, territories and resources. Such an acknowledgement has clearly been stated in the practice of the Human Rights Committee.²⁴ States parties are thus under an obligation to ensure that the existence and the exercise of these rights are protected against denial or violation.

The Human Rights Committee acknowledges indigenous peoples' special relationship with their traditional lands, territories and natural resources, and emphasizes that this is relevant in relation to States parties' obligations to protect indigenous cultures:²⁵

“The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspects of these rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely

associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.”

The Committee has developed a way of assessing whether competing usage of indigenous land resources may justify an interference with traditional or otherwise typical usage by an indigenous people.²⁶ Whether the indigenous people concerned has been consulted prior to such competing usage, and whether the indigenous way of life would continue to be economically sustainable despite the competing usage, are two core elements when considering whether there is a violation of Article 27. Thus, if the indigenous way of life, due to competing usage, cannot be carried out in an economically sustainable way, it would constitute a violation of indigenous rights under Article 27. The Committee has recently also clarified and emphasized that States parties are obliged to “seek the informed consent of indigenous peoples before adopting decisions affecting them” under Article 27.²⁷

«The Human Rights Committee acknowledges indigenous peoples' special relationship with their traditional lands, territories and natural resources, and emphasizes that this is relevant in relation to States parties' obligations to protect indigenous cultures»

²³ Ibid, paragraph 7.

²⁴ The Human Rights Committee's General Comment No. 23 on the rights of indigenous peoples. See also the following individual complaint cases: I. Lansman et al. v. Finland (Communication No. 511/1992); J. Lansman et al. v. Finland (Communication No. 671/1995); Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (Communication No. 167/1984); Ivan Kitok v. Sweden (Communication 197/1985).

²⁵ Ibid, paragraph 3.2.

²⁶ A detailed elaboration on this matter can be found in an article written by Professor Martin Scheinin, former member of the UN Human Rights Committee: Martin Scheinin “The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land” - The Jurisprudence of Human Rights – A Comparative Interpretative Approach (Orlin – Rosas – Scheinin, eds., Syracuse University Press).

²⁷ The UN Human Rights Committee's Concluding Observations in relation to the fifth periodic report of the Government of Canada, UN Document CCPR/C/CAN/CO/5, 2 November 2005, paragraph 22.

IV. Recent developments

1. The Draft UN Declaration on the Rights of Indigenous Peoples

For the last ten years, the UN Commission on Human Rights has negotiated on a draft declaration on the rights of indigenous peoples.²⁸ The draft represents emerging international human rights law. The Arctic States have played an important role in these negotiations, and it is to be expected that their positions in these negotiations will also be applied at home – regardless of the final outcome of the UN negotiations.

The draft declaration reaffirms that indigenous peoples have the right of self-determination. Most of the Arctic States have actively supported the inclusion of a provision stating that indigenous peoples have the right to self-determination, including the right to freely determine their political status and pursue their economic, social and cultural development. The draft declaration also includes a provision that acknowledges that indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs. This provision is relevant to fundamental matters such as culture, religion, economic activities, and land and resource management.

There is an emerging agreement on full legal recognition and protection of indigenous lands, territories and resources that are possessed by indigenous peoples by reason of traditional ownership or other traditional occupation or use, and that indigenous peoples shall have the right to

own, use, develop and control such lands, territories and resources.

As far as specific developmental aspects are concerned, there is broad agreement that 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, and that States shall have an obligation to obtain indigenous peoples' 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 their minerals, water or other resources. The draft also includes provisions aimed at obliging States to provide effective mechanisms for just and fair redress for any activities on indigenous lands and territories, including measures to mitigate adverse environmental, economic, social, cultural or spiritual impact.

For the Arctic indigenous peoples, it is of fundamental importance that the general agreement among the Arctic States on the underlying principles for these draft provisions is given immediate effect in their respective countries. It is also fair to expect that the Arctic States share this interest, particularly in light of the progressive engagement from most of them.

2. The Second Northern Dimension Action Plan (2004 –2006)

The Second Northern Dimension Action Plan, which sets out a framework of priorities, objectives and actions to be pursued in the implementation of the Northern

²⁸ See UN Document E/CN.4/Sub.2/1994/2/Add.1.

Dimension in the external and cross-border policies of the European Union over the period 2004-2006, identifies indigenous peoples and their rights as a priority area.

The Action Plan recognizes the importance of taking into account indigenous interests in the Arctic economic development, including by ensuring their involvement in the decision-making process at all levels. It is agreed that special attention should be paid to the improvement of living conditions of people engaged in traditional livelihoods such as reindeer herding husbandry, fishing, hunting and craft making.²⁹

Most importantly, the Action Plan emphasizes that: “strengthened attention should be paid by all Northern Dimension partners to indigenous interests in relation to economic activities, and in particular extractive industries, with the view to protecting the inherited right of self-determination, land rights and cultural rights of indigenous peoples of the region.”³⁰ This is an important policy statement of the European Union and its Northern Dimension partners, with direct relevance to oil and gas activities in the Arctic.

3. Draft Nordic Saami Convention

In 2002, the Governments of Finland, Norway and Sweden and the Saami Parliaments in these countries, jointly appointed a group of experts to formulate a Nordic Saami Convention. Based on meticulous research and analysis, complemented by detailed discussions, in November 2005, the Expert Group submitted its proposal for a Nordic Saami Convention.³¹ (Please see attached unofficial English translation of the draft Nordic Saami Convention for details).

The overall objective of the Convention is to affirm and strengthen the rights of the indigenous Saami people with particular emphasis on securing and developing the Saami language, culture, livelihoods and society, while at the same time ensur-

ing minimal interference of the national borders.

The proposed Convention contains a set of minimum Saami rights, including such rights that are relevant to the utilization of natural resources in indigenous peoples' areas, in particular those provisions addressing the Saami people's right of self-determination, Saami governance, and land, water and resource rights. The draft convention is based on existing and emerging international human rights standards.

Article 3 states that the Saami people have the right of self-determination in accordance with the rules and provisions of international law and of the Nordic Saami Convention. It states that in so far as it emanates from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose of its natural resources to its benefit.

Chapter II contains detailed provisions on Saami governance, including the Saami Parliaments' right to negotiations in matters of major importance to the Saami. It provides for such negotiations to be held with the Saami parliaments before decisions are made by public authorities. The Group of Experts believes that the relevant States should not adopt or permit measures that may significantly damage the basic conditions for Saami culture, livelihoods or society, unless consented to by the Saami parliament concerned. In other words, States should not adopt or permit any such measures without the prior, free and informed consent from the highest representative body of the Saami people in the country concerned.

Chapter IV contains provisions on Saami rights to land, water and resources. Article 34 acknowledges that protracted traditional use of land or water areas constitutes the basis for individual or collective ownership rights to these areas for the Saami in accordance with national or international norms. Article 35 obliges States to take adequate measures for effective protection

²⁹ See the Action Plan, paragraph 3.6.2. (The Arctic)

³⁰ See the Action Plan, Section “Northern Dimension Activities, by priority objective, 2004-2004 - 1. Economy, Business, Infrastructure”

³¹ Nordisk samekonvensjon, utkast fra finsk-norsk-svensk-samisk ekspertgruppe. Oppnevnt 13. November 2002. Avgitt 26. oktober 2005. Publikasjonsnummer: H-2183. Kopi og distribusjonsservice (Norge).

of Saami land and water rights, including through identification of land and water areas that the Saami traditionally use.

Article 36 of the proposed Nordic Saami Convention addresses utilization of natural resources:³²

“The rights of the Saami to natural resources within such land or water areas that fall within the scope of Article 34 shall be afforded particular protection. In this connection, regard shall be paid to the fact that continued access to such natural resources may be a prerequisite for the preservation of traditional Saami knowledge and cultural expressions.

Before public authorities, based on law, grant a permit for prospecting or extraction of minerals or other sub-surface resources, or make decisions concerning utilization of other natural resources within such land or water areas that are owned or used by the Saami, negotiations shall be held with the affected Saami, as well as with the Saami Parliament, when the matter is such that it falls within Article 16.

Permits for prospecting or extraction of natural resources shall not be granted if the activity would make it impossible or substantially more difficult for the Saami to continue to utilize the areas concerned, and this utilization is essential to the Saami culture, unless so consented by the Saami Parliament and the affected Saami.

The above provisions of this article also apply to other forms of natural resource utilization and to other forms of intervention in nature in such geographical areas that fall under Article 34, including activities such as forest logging, hydro-electric and wind power plants, construction of roads and recreational housing and military exercise activities and permanent exercise ranges.”

Article 37 addresses compensation and profit sharing. It states that those Saami affected by the activities referred to in Article 36, paragraphs two and four shall have the right to compensation for all damage inflicted through such activities. Moreover, it stipulates that under certain specific circumstances persons who are granted permits to extract natural resources are obliged to pay a fee or a share of the profit from such activities to the Saami that have traditionally used and continue to use the area concerned.

³² Unofficial English translation of Article 36 of the draft Nordic Saami Convention.

VI. Conclusions

As far as oil and gas activities in indigenous peoples' lands and territories is concerned, there is no doubt that such activities can have extremely negative consequences for indigenous societies, due to their subsistence economies and occupations, and their cultural dependency on their traditional lands and resources.

This paper does not advocate the view that there should be no oil and gas activities in indigenous lands and territories, as this is something the indigenous peoples concerned have to decide for themselves. However, whenever oil and gas operations may impact on indigenous peoples in the Arctic region, States are obliged to respect and to apply internationally recognized human rights of indigenous peoples.

This implies that oil and gas activities should not take place in indigenous lands and territories without their prior, free and informed consent. Indigenous peoples also have the right to a fair share of the benefits from such activities in their lands and territories, and the right to just and fair compensation. Compensation should also include any measures to mitigate adverse environmental, economic, social or cultural impacts. These rights should be settled through appropriate negotiations and just and fair agreements with the indigenous peoples concerned.

The following core principles should be taken into account whenever considering oil and gas operations in indigenous lands and territories:

- Respect indigenous peoples' right to own, possess and use their lands, territories and resources;
- Respect indigenous peoples' right

of self-determination, as enshrined in international human rights law, including their own development priorities based on their right to exercise control over their own political, economic, social and cultural development;

- Seek indigenous peoples' prior, free and informed consent to operations in indigenous lands and territories;
- Conduct consultations with indigenous peoples in good faith and with the objective of achieving agreement or consent to the proposed plan/project, prior to any exploration or exploitation of natural resources in indigenous lands and territories;
- Undertake environmental and social impact assessment prior to any activities on indigenous lands;
- Bear in mind that forced relocation of indigenous peoples due to oil and gas operations cannot be justified under international human rights law;
- Ensure that any exploration, if agreed with by the indigenous peoples concerned, is carried out in a transparent manner, with full and timely disclosure of all information and plans;
- Acknowledge that indigenous peoples have a legitimate claim to a fair share of the revenue and other income from all oil and gas operations which take place on their lands and territories, as well as compensation for any damages which they may sustain as a result of such activities;

- Establish fair procedures for the resolution of conflicts and disputes related to operations in indigenous peoples' areas;
- Develop specific policies to ensure full respect for indigenous peoples' rights and interests in economic developmental processes, in cooperation with indigenous peoples;
- Develop a comprehensive system of bench mark indicators to monitor corporate conduct in indigenous areas in the Arctic region.

The primary responsibility for the promotion and protection of human rights rests with States. However, private business enterprises can also play an important role in this regard, as they normally have great influence in the countries in which they operate. Business enterprises have a legal obligation to respect the laws of the countries in which they do business, and an ethical obligation to respect international human rights standards and to behave in a socially and environmentally responsible manner. Thus, it should be expected that oil and gas enterprises involved in operations in indigenous lands and territories also respect and honour the above-mentioned principles, in particular State owned oil and gas enterprises.

Bibliography

Anaya, James S.

(2004) *Indigenous Peoples in International Law*. Oxford University Press

Cobo, Jose R. Martinez

(1986) *Study of the Problem of Discrimination against Indigenous Populations*, Sub-Commission Expert/Member, United Nations document E/CN.4/Sub.2/1986/7 and Add. 1-4. The United Nations, Geneva.

Daes, Erica-Irene A.

(2005) *Indigenous Peoples' Rights to Land and Natural Resources*,

Minorities, Peoples and Self-Determination, (eds.)

Nazila Ghanea and Alexandra Xanthaki – Martinus Nijhoff Publishers.

European Council

The Second Northern Dimension Action Plan (2004-2006).

Finsk-norsk-svensk-samisk ekspertgruppe (Finnish-Norwegian-Swedish-Saami Group of Experts)

(2005) *Nordisk Samekonvensjon, Utkast fra finsk-norsk-svensk-samisk ekspertgruppe, oppnevnt 13. November 2002, avgitt 26. oktober 2005*. Publication number H-2183, Kopi og distribusjonsservice – 11/05-1000, Norge.

Henriksen, John B.

(1998) *The Implementation of the Right of Self-determination of Indigenous Peoples Within the Framework of Human Security*. The Implementation of the Right to Self-determination as a Contribution to Conflict Prevention – Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998. (Eds.) Michale C. van Walt van Praag and Onno Seroo. UNESCO Division of Human Rights, Democracy and Peace, and UNESCO Center of Catalonia.

Henriksen John Bernhard, Scheinin, Martin and hren Mattias,

(2005) *Det samiska folkets rätt till självbestämmande. Bakgrundsmateriale för den nordiska samekonventionen*. Nordisk Samekonvensjon, Utkast fra finsk-norsk-svensk-samisk ekspertgruppe, oppnevnt 13. November 2002, avgitt 26. oktober 2005. Publication number H-2183, Kopi og distribusjonsservice – 11/05-1000, Norge. Pages 299-357.

International Labour Organization (ILO)

Report of the ILO Committee of Experts on the Application of Conventions and Recommendations, Indigenous and Tribal peoples Convention, 1989 (No. 169), Colombia, Observations, 2003/74th Session.

Scheinin, Martin

(2000) *The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land*, The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach, (eds.) Theodore Orlin, Allan Rosas and Martin Scheinin - Syracuse University Press.

Scheinin, Martin

(2005) *What are Indigenous Peoples? Minorities, Peoples and Self-Determination*, (eds.) Nazila Ghanea and Alexandra Xanthaki – Martinus Nijhoff Publishers.

Thornberry, Patrick

(2002) *Indigenous Peoples and Human Rights*. Jurish Publishing and Manchester University Press.

United Nations

UN Document: E/CN.4/Sub.2/1994/2.

UN General Assembly Resolution 1514 (XV) of 14 December 1960.

UN Document: HRI/GEN/1/Rev.3.

UN Document: CERD/C/49/CRP.2/Add.7 of 5 July 1996.

UN Document: CCPR/C/79/Add.105, 7 April 1999, paragraphs 7-8.

UN Document CCPR/C/CAN/CO/5, 2 November 2005, paragraphs 8-9.

UN Document: CCPR/C/79/Add. 112, 1 November 1999, paragraph 17.

UN Document: CCPR/CO/74/SWE, 24 April 2002, paragraph 15.

UN Document CCPR/CO/82/FIN, 2 December 2004, paragraph 17.

UN Document: UN Human Rights Committee, General Comment No. 23 on ICCPR Article 27, paragraph 6.1.

UN Document: The Human Rights Committee's General Comment No. 23 on the rights of indigenous peoples.

UN Document: I. Lansman et al. v. Finland (Human Rights Committee Communication No. 511/1992).

UN Document: J. Lansman et al. v. Finland (Human Rights Committee Communication No. 671/1995).

UN Document: Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (Human Rights Committee Communication No. 167/1984).

UN Document: Ivan Kitok v. Sweden (Human Rights Committee Communication 197/1985).

UN Document: CCPR/C/CAN/CO/5, 2 November 2005, paragraph 22.

(UN Human Rights Committee: Concluding Observations in relation to the fifth periodic report of the Government of Canada,

UN Document: E/CN.4/Sub.2/1994/2/Add.1.

Van Walt Van Praag, Michael C. and Seroo, Onno (eds.)

(1998) *The Implementation of the Right to Self-determination as a Contribution to Conflict Prevention – Report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998*.

UNESCO Division of Human Rights, Democracy and Peace, and UNESCO Center of Catalonia.

Annex

Text of the Draft Convention in English (unofficial translation)

NORDIC SAAMI CONVENTION

The Governments of Finland, Norway and Sweden, affirming

- that the Saami is the indigenous people of the three countries,
- that the Saami is one people residing across national borders,
- that the Saami people has its own culture, its own society, its own history, its own traditions, its own language, its own livelihoods and its own visions of the future,
- that the three states have a national as well as an international responsibility to provide adequate conditions for the Saami culture and society,
- that the Saami people has the right of self-determination,
- that the Saami people's culture and society constitutes an enrichment to the countries' collected cultures and societies,
- that the Saami people has a particular need to develop its society across national borders,
- that lands and waters constitute the foundation for the Saami culture and that hence, the Saami must have access to such,
- and that, in determining the legal status of the Saami people, particular regard shall be paid to the fact that during the course of history the Saami have not been treated as a people of equal value, and have thus been subjected to injustice,

that take as a basis for their deliberations that the Saami parliaments in the three states

- want to build a better future for the life and culture of the Saami people,

- hold the vision that the national boundaries of the states shall not obstruct the community of the Saami people and Saami individuals,
- view a new Saami convention as a renewal and a development of Saami rights established through historical use of land that were codified in the Lapp Codicil of 1751,
- emphasize the importance of respecting the right of self-determination, that the Saami enjoy as a people,
- particularly emphasise that the Saami have rights to the land and water areas that constitutes the Saami people's historical homeland, as well as to natural resources in those,
- maintain that the traditional knowledge and traditional cultural expressions of the Saami people, integrated with the people's use of natural resources, constitutes a part of the Saami culture,
- hold that increased consideration shall be given to the role of Saami women as custodians of traditions in the Saami society, including when appointing representatives to public bodies,
- want that the Saami shall live as one people within the three states,
- emphasize the Saami people's aspiration, wish and right to take responsibility for the development of its own future
- and will assert the Saami people's rights and freedoms in accordance with international human rights law and other international law,

that have elaborated this convention in close cooperation with representatives of the Saami, deeming it to be of particular importance that the Convention, before

being ratified by the states, be approved by the three Saami parliaments and that commit themselves to secure the future of the Saami people in accordance with this convention, have agreed on the following Nordic Saami Convention.

Chapter I

The general rights of the Saami people

Article 1

The objective of the Convention

The objective of this Convention is to affirm and strengthen such rights of the Saami people that are necessary to secure and develop its language, its culture, its livelihoods and society, with the smallest possible interference of the national borders.

Article 2

The Saami as an indigenous people

The Saami people is the indigenous people of Finland, Norway and Sweden.

Article 3

The right of self-determination

As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to its own benefit, of its own natural resources.

Article 4

Persons to whom the Convention applies

The Convention applies to persons residing in Finland, Norway or Sweden that identify themselves as Saami and who

1. have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or

2. have a right to pursue Saami reindeer husbandry in Norway or Sweden, or
3. fulfil the requirements to be eligible to vote in elections to the Saami parliament in Finland, Norway or Sweden, or
4. are children of a person referred to in 1, 2 or 3.

Article 5

The scope of the State's responsibility

The responsibilities of the State pursuant to this Convention apply to all state bodies at national, regional and local levels. Other public administrative bodies and public undertakings also have such responsibilities. The same applies to private legal entities when exercising public authority or performing other public duties.

In applying this Convention, the Saami parliaments and other Saami bodies, regardless of their legal status under national or international law, shall not be deemed to fall under the concept state, except when exercising public authority.

Article 6

State measures with respect to the Saami people

The three states shall effectively establish conditions enabling the Saami people to secure and develop its language, its culture, its livelihoods and its society.

The states shall create favourable conditions for maintaining and developing the local Saami communities.

To a reasonable extent, the states' responsibility to take measures pursuant to this Convention shall apply also to Saami persons who are residing outside the traditional Saami areas.

Article 7

Non-discrimination and special measures

The Saami people and Saami individuals shall be ensured protection against all discrimination.

The States shall, when necessary for the implementation of Saami rights pursuant to this Convention, adopt special positive measures with respect to such rights.

Article 8**Minimum rights**

The rights laid down in this Convention are minimum rights. They shall not be construed as preventing any state from extending the scope of Saami rights or from adopting more far reaching measures than contained in this Convention. The Convention may not be used as a basis for limiting such Saami rights that follow from other legal provisions.

Article 9**Saami legal customs**

The states shall show due respect for the Saami people's conceptions of law, legal traditions and customs.

Pursuant to the provisions in the first paragraph, the states shall, when elaborating legislation in areas where there might exist relevant Saami legal customs, particularly investigate whether such customs exist and, if so, consider whether these customs should be afforded protection or in other manners be reflected in the national legislation. Due consideration shall also be paid to Saami legal customs in the application of law.

Article 10**Harmonization of legal provisions**

The states shall, in cooperation with the Saami parliaments, strive to ensure continued harmonization of legislation and other regulation of significance for Saami activities across national borders.

Article 11**Cooperation on cultural and commercial arrangements**

The states shall implement measures to render it easier for the Saami to pursue economic activities across national borders and to provide for their cultural needs across these borders. For this purpose, the states shall strive to remove remaining obstacles to Saami economic activities that are based on their citizenship or residence or that otherwise are a result of the Saami settlement area stretching across national borders. The states shall also give Saami individuals access to the cultural provisions

of the country where they are staying at any given time.

Article 12**Cooperation on education and welfare arrangements**

The states shall take measures to provide Saami individuals residing in any of the three countries with the possibility to obtain education, medical services and social provisions in another of these countries when this appears to be more appropriate.

Article 13**The symbols of the Saami people**

The states shall respect the right of the Saami to decide over the use of the Saami flag and other Saami national symbols.

The states shall moreover, in cooperation with the Saami parliaments, make efforts to ensure that the Saami symbols are made visible in a manner signifying the Saami's status as a distinct people in the three countries.

Chapter II**Saami governance****Article 14****The Saami parliaments**

In each of the three countries there shall be a Saami parliament. The Saami parliament is the highest representative body of the Saami people in the country. The Saami parliament acts on behalf of the Saami people of the country concerned, and shall be elected through general elections among the Saami in the country.

Further regulations concerning the elections of the Saami parliaments shall be prescribed by law, prepared through negotiations with the Saami parliaments pursuant to Article 16.

The Saami parliaments shall have such a mandate that enables them to contribute effectively to the realization of the Saami people's right of self-determination pursuant to the rules and provisions of international law and of this Convention. Further regulations concerning the mandate of the

Saami parliaments shall be prescribed by law.

The Saami parliaments take initiatives and state their views on all matters where they find reason to do so.

Article 15

Independent decisions by the Saami parliaments

The Saami parliaments make independent decisions on all matters where they have the mandate to do so under national or international law.

The Saami parliaments may conclude agreements with national, regional and local entities concerning cooperation with regard to the strengthening of Saami culture and the Saami society.

Article 16

The Saami parliaments' right to negotiations

In matters of major importance to the Saami, negotiations shall be held with the Saami parliaments before decisions on such matters are made by a public authority. These negotiations must take place sufficiently early to enable the Saami parliaments to have a real influence over the proceedings and the outcome.

The states shall not adopt or permit measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society, unless consented to by the Saami parliament concerned.

Article 17

The rights of the Saami parliaments during preparation of other matters

The Saami parliaments shall have the right to be represented on public councils and committees when these deal with matters that concerns the interests of the Saami.

Matters concerning Saami interests shall be submitted to the Saami parliaments before a decision is made by a public authority.

The states shall investigate the need for such representation and prior opinions from the Saami parliaments. This must take place sufficiently early to enable the Saami parliaments to influence the pro-

ceedings and the outcome.

The Saami parliaments shall themselves decide when they wish to be represented or submit prior opinions during such preparation of matters.

Article 18

The relationship to national assemblies

The national assemblies of the states or their committees or other bodies shall, upon request, receive representatives of the Saami parliaments in order to enable them to report on matters of importance to the Saami.

The Saami parliaments shall be given the opportunity to be heard during the consideration by national assemblies of matters that particularly concern the Saami people.

The national assemblies of the individual states shall issue further regulations concerning which matters this applies to and concerning the procedure to be followed.

Article 19

The Saami and international representation

The Saami parliaments shall represent the Saami in intergovernmental matters.

The states shall promote Saami representation in international institutions and Saami participation in international meetings.

Article 20

Joint Saami organizations

The Saami parliaments may form joint organizations. In consultation with the Saami parliaments, the states shall strive to transfer public authority to such joint organizations as needed.

Article 21

Other Saami associations

The states shall respect and when necessary consult Saami villages (samebyar), siidas, reindeer herders' communities (renbeteslag), the village assemblies of the Skolt Saami (*byastämma*) and other competent Saami organizations or local Saami representatives.

Article 22**A Saami region**

The states shall actively seek to identify and develop the area within which the Saami people can manage its particular rights pursuant to this Convention and national legislation.

Chapter III**Saami language and culture****Article 23****Saami language rights**

The Saami shall have the right to use, develop and pass on to future generations its language and its traditions and have the right to make efforts to ensure that knowledge of the Saami language is also disseminated to Saami persons with little or no command of this language.

The Saami shall have the right to decide and retain their personal names and geographical names, as well as to have these publicly acknowledged.

Article 24**The states' responsibility for the Saami language**

The states shall enable the Saami to preserve, develop and disseminate the Saami language. To meet this end, states shall ensure that the Saami alphabet can be used effectively.

It shall be possible to use the Saami language effectively in courts of law and in relation to public authorities in the Saami areas. The same shall also apply outside these areas in disputes and cases first dealt with in the Saami areas or which in any other manner have a particular association with these areas.

The states shall promote the publication of literature in the Saami language.

The provisions of this article shall also apply to the less prevalent Saami dialects.

Article 25**Saami media**

The states shall create conditions for an

independent Saami media policy which enables the Saami media to control its own development and to provide the Saami population with rich and multi-faced information and opinions in matters of general interest.

The states shall ensure that programmes in the Saami language can be broadcast on radio and TV, and shall promote the publication of newspapers in this language. In cooperation with the Saami parliaments, the states shall also promote cooperation across national borders between media institutions that provide programmes or articles in the Saami language.

The provision of the second paragraph concerning the Saami language shall also to a reasonable extent apply to the less prevalent Saami dialects.

Article 26**Saami education**

The Saami population residing in the Saami areas shall have access to education both in and through the medium of the Saami language. The education and study financing system shall be adapted to their background. Such education shall enable attendance of further education at all levels while at the same time meet the needs of Saami individuals to continuously be active within the traditional Saami livelihoods. The study financing system shall be arranged in such a way as to enable higher education through the medium of the Saami language.

Saami children and adolescents outside the Saami areas shall have access to education in the Saami language, and also through the medium of the Saami language to the extent that may be deemed reasonable in the area concerned. The education shall as far as possible be adapted to their background.

The national curricula shall be prepared in cooperation with the Saami parliaments and be adapted to the cultural backgrounds and needs of Saami children and adolescents.

Article 27 **Research**

The states shall, in cooperation with the Saami parliaments, create good conditions for research based on the knowledge needs of the Saami society, and promote recruitment of Saami researchers. In planning such research, regard shall be paid to the linguistic and cultural conditions in the Saami society.

The states shall, in consultation with the Saami parliaments, promote cooperation between Saami and other research institutions in the various countries and across national borders, and strengthen research institutions with a primary responsibility for such research referred to in the first paragraph.

Research concerning Saami matters shall be adapted to such ethical rules that the Saami's status as an indigenous people requires.

Article 28 **Education and information about the Saami**

The Saami people's culture and society shall be appropriately reflected in education outside the Saami society. Such education shall particularly aim to promote knowledge of the status of the Saami as the country's indigenous people. The states shall, in cooperation with the Saami parliaments, offer education about the Saami culture and society to persons who are going to work in the Saami areas.

The states shall, in cooperation with the Saami parliaments, provide the general public with information about the Saami culture and society.

Article 29 **Health and social services**

The states shall, in cooperation with the Saami parliaments, ensure that health and social services in the Saami settlement areas are organized in such a way that the Saami population in these areas are ensured health and social services adapted to their linguistic and cultural background.

Also health and social services outside the Saami settlement areas shall pay

regard to the linguistic and cultural background of Saami patients and clients.

Article 30 **Saami children and adolescents**

Saami children and adolescents have the right to practise their culture and to preserve and develop their Saami identity.

Article 31 **Traditional knowledge and cultural expressions**

The states shall respect the right of the Saami people to manage its traditional knowledge and its traditional cultural expressions while striving to ensure that the Saami are able to preserve, develop and pass these on to future generations.

When Saami culture is applied commercially by persons other than Saami persons, the states shall make efforts to ensure that the Saami people gains influence over such activities and a reasonable share of the financial revenues. The Saami culture shall be protected against the use of cultural expressions that in a misleading manner give the impression of having a Saami origin.

The states shall make efforts to ensure that regard is paid to Saami traditional knowledge in decisions concerning Saami matters.

Article 32 **Saami cultural heritage**

Saami cultural heritage shall be protected by law and shall be cared for by the country's Saami parliament or by cultural institutions in cooperation with the Saami parliament.

The states shall implement measures for cooperation across national borders on documentation, protection and care of Saami cultural heritage.

The states shall make efforts to ensure that Saami cultural heritage that has been removed from the Saami areas and that is of particular interest to the Saami community is entrusted to suitable museums or cultural institutions as further agreed with the countries' Saami parliaments.

Article 33**The cultural basis**

The responsibilities of the states in matters concerning the Saami culture shall include the material cultural basis in such a way that the Saami are provided with the necessary commercial and economic conditions to secure and develop their culture.

Chapter IV**Saami rights to land and water****Article 34****Traditional use of land and water**

Protracted traditional use of land or water areas constitutes the basis for individual or collective ownership rights to these areas for the Saami in accordance with national or international norms concerning protracted usage.

If the Saami, without being deemed to be the owners, occupy and have traditionally used certain land or water areas for reindeer husbandry, hunting, fishing or in other ways, they shall have the right to continue to occupy and use these areas to the same extent as before. If these areas are used by the Saami in association with other users, the exercise of their rights by the Saami and the other users shall be subject to due regard for each other and for the nature of the competing rights. Particular regard in this connection shall be paid to the interests of reindeer-herding Saami. The fact that the Saami use of these areas is limited to the right of continued use to the same extent as before shall not prevent the forms of use from being adapted as necessary to technical and economic developments.

Assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water and bearing in mind that Saami land and water usage often does not leave permanent traces in the environment.

The provisions of this article shall not be construed as to imply any limitation in

the right to restitution of property that the Saami might have under national or international law.

Article 35**Protection of Saami rights to land and water**

The states shall take adequate measures for effective protection of Saami rights pursuant to article 34. To that end, the states shall particularly identify the land and water areas that the Saami traditionally use.

Appropriate procedures for examination of questions concerning Saami rights to land and water shall be available under national law. In particular, the Saami shall have access to such financial support that is necessary for them to be able to have their rights to land and water tried through legal proceedings.

Article 36**Utilization of natural resources**

The rights of the Saami to natural resources within such land or water areas that fall within the scope of Article 34 shall be afforded particular protection. In this connection, regard shall be paid to the fact that continued access to such natural resources may be a prerequisite for the preservation of traditional Saami knowledge and cultural expressions.

Before public authorities, based on law, grant a permit for prospecting or extraction of minerals or other sub-surface resources, or make decisions concerning utilization of other natural resources within such land or water areas that are owned or used by the Saami, negotiations shall be held with the affected Saami, as well as with the Saami parliament, when the matter is such that it falls within Article 16.

Permits for prospecting or extraction of natural resources shall not be granted if the activity would make it impossible or substantially more difficult for the Saami to continue to utilize the areas concerned, and this utilization is essential to the Saami culture, unless so consented by the Saami parliament and the affected Saami.

The above provisions of this article also apply to other forms of natural resource

utilization and to other forms of intervention in nature in such geographical areas that fall under Article 34, including activities such as forest logging, hydroelectric and wind power plants, construction of roads and recreational housing and military exercise activities and permanent exercise ranges.

Article 37

Compensation and share of profits

The affected Saami shall have the right to compensation for all damage inflicted through activities referred to in Article 36, paragraphs two and four. If national law obliges persons granted permits to extract natural resources to pay a fee or share of the profit from such activities, to the landowner, the permit holder shall be similarly obliged in relation to the Saami that have traditionally used and continue to use the area concerned.

The provisions of this article shall not be construed as to imply any limitation in the right to a share of the profit from extraction of natural resources that may follow under international law.

Article 38

Fjords and coastal seas

The provisions of Articles 34–37 concerning rights to water areas and use of water areas shall apply correspondingly to Saami fishing and other use of fjords and coastal seas.

In connection with the allocation of catch quotas for fish and other marine resources, as well as when there is otherwise regulation of such resources, due regard shall be paid to Saami use of these resources and its importance to local Saami communities. This shall apply even though this use has been reduced or has ceased due to the fact that catch quotas have not been granted or owing to other regulations of the fisheries or other exploitation of resources in these areas. The same shall apply if the use is reduced or has ceased owing to a reduction of marine resources in these areas.

Article 39

Land and resource management

In addition to the ownership or usage rights that the Saami enjoy, the Saami parliaments shall have the right of co-determination in the public management of the areas referred to in Articles 34 and 38, pursuant to Article 16.

Article 40

Environmental protection and environmental management

The states are, in cooperation with the Saami parliaments, obliged to actively protect the environment in order to ensure sustainable development of the Saami land and water areas referred to in Articles 34 and 38.

Pursuant to Article 16, the Saami parliaments shall have the right of co-determination in the environmental management affecting these areas.

Chapter V

Saami livelihoods

Article 41

Protection of Saami livelihoods

Saami livelihoods and Saami use of natural resources shall enjoy special protection by means of legal or economic measures to the extent that they constitute an important fundament for the Saami culture.

Saami livelihoods and Saami use of natural resources are such activities that are essential for the maintenance and development of the local Saami communities.

Article 42

Reindeer husbandry as a Saami livelihood

Reindeer husbandry, as a particular and traditional Saami livelihood and a form of culture, is based on custom and shall enjoy special legal protection.

To that end, Norway and Sweden shall maintain and develop reindeer husbandry as a sole right of the Saami in the Saami reindeer grazing areas.

Acknowledging Protocol No. 3 of its Affiliation Agreement with the European Union concerning the Saami as an indigenous people, Finland undertakes to strengthen the position of Saami reindeer husbandry.

Article 43
Reindeer husbandry across national borders

The right of the Saami to reindeer grazing across national borders is based on custom.

If agreements have been concluded between Saami villages (samebyar), siidas or reindeer grazing communities (renbeteslag) concerning the right to reindeer grazing across national borders, these agreements shall prevail. In the event of dispute concerning the interpretation or application of such an agreement, a party shall have the opportunity to bring the dispute before an arbitration committee for decision. Regarding the composition of such an arbitration committee and its rules of procedure, the regulation jointly decided by the three Saami parliaments shall apply. A party who is dissatisfied with the arbitration committee's decision on the dispute shall have the right to file a suit on the matter in a court of law in the country on which territory the grazing area is situated.

In the absence of an applicable agreement between Saami villages (samebyar), siidas or reindeer grazing communities (renbeteslag), if a valid bilateral treaty regarding reindeer grazing exists, such a treaty shall apply. Notwithstanding any such treaty, a person asserting that he or she has a reindeer grazing right based on custom that goes beyond what follows from the bilateral treaty, shall have the opportunity to have his or her claim tried before a court of law in the country on which territory the grazing area is situated.

Chapter VI

Implementation and development of the Convention

Article 44
Cooperation Council of Saami ministers and presidents of Saami parliaments

The ministers in Finland, Norway and Sweden responsible for Saami affairs and the presidents of Saami parliaments from each of these countries shall convene regularly.

The said cooperation shall promote the objectives of this Convention pursuant to Article 1. The meetings shall consider relevant Saami matters of common interest.

Article 45
Convention Committee

A Nordic Saami Convention Committee shall be established to monitor the implementation of this Convention. The committee shall have six members serving in their independent capacity. Each of the three states and each of the three Saami parliaments appoint one member each. Members shall be appointed for a period of five years.

The committee shall submit reports to the governments of the three countries and to the three Saami parliaments. It may submit proposals aimed at strengthening the objective of this Convention to the governments of the three countries and to the three Saami parliaments. The committee may also deliver opinions in response to questions from individuals and groups.

Article 46
National implementation

In order to ensure as uniform an application of this Convention as possible, the states shall make the provisions of the Convention directly applicable as national law.

Article 47
Economic commitments

The states shall provide the financial resources necessary to implement the provisions of this Convention. The joint expenses of the three countries shall be

divided between them in relation to the Saami population in each country.

In addition to situations referred to in paragraph 2 of Article 35, it shall be possible for the Saami to receive the necessary financial assistance to bring important questions of principle concerning the rights contained in this Convention before a court of law.

Chapter VII

Final provisions

Article 48

The approval of the Saami parliaments

After being signed, this Convention shall be submitted to the three Saami parliaments for approval.

Article 49

Ratification

This Convention shall be subject to ratification. Ratification may not take place until the three Saami parliaments have given their approval pursuant to Article 48.

Article 50

Entry into force

The Convention shall enter into force thirty days after the date that the instruments of ratification are deposited with the Norwegian Ministry of Foreign Affairs.

The Norwegian Ministry of Foreign Affairs shall notify Finland, Sweden and the three Saami parliaments of the deposit of the instruments of ratification and of the date of entry into force of the Convention.

The original of this Convention shall be deposited with the Norwegian Ministry of Foreign Affairs, which shall provide authenticated copies to Finland, Sweden and the three Saami parliaments.

Article 51

Amendments to the Convention

Amendments to this Convention shall be made in cooperation with the three Saami parliaments, and with respect for the provision in Article 48.

An amendment to the Convention enters into force thirty days after the date that the parties to the Convention notify the Norwegian Ministry of Foreign Affairs that the amendments have been approved by them.

In witness whereof the representatives of the parties to the Convention have signed the present Convention.

Which took place at on 20.... in a single copy in the Finnish, Norwegian, Swedish and Saami languages, all texts being equally authentic.

Rune S. Fjellheim

is of South Saami origin (Røros, Norway) and grew up in Kárášjohka/Karasjok, Norway (a Saami village in the North Saami region). He has a Master of Science degree in Economics from the University of Oslo, Norway.

Rune started out as an advisor and deputy head of the office for Planning and Political Issues in the Saami Parliament in Norway in 1991 and served in several posts within the Saami Parliament. From 1998-2002 he headed the Saami Parliament's Office for Planning and Administration, first as Assistant Director, later as Director. From 1995-1999 he led the Saami Parliament's work on International Indigenous Peoples' Issues, especially UN-related processes.

In 2002 Rune co-founded a consultancy company, Jaruma AS, together with two other experts on Indigenous Peoples' Is-



sues. At the same time he joined the Saami Council as Head of the Arctic and Environmental Unit. He was elected as Executive Committee member to the Arctic Human Development Report, an assessment under the auspices of the Arctic Council.

Since January 2006, Rune has worked as Executive Secretary at the Arctic Council Indigenous Peoples' Secretariat in Copenhagen, Denmark.

John B. Henriksen

is a Saami from Guovdageaidnu/Kautokeino which is situated on the Norwegian side of the traditional Saami territory. He is a lawyer by profession. He also holds an MSc degree in International Policy from the University of Bristol in the United Kingdom.

John headed a public legal aid office serving Saami municipalities in the county of Finnmark in Norway during 1991-94. He subsequently worked as an advisor to the Saami Parliament in Norway with special responsibility for legal and international issues. John has also for many years served as a Legal Adviser to the Saami Council, a pan-Saami organization, and was its permanent representative to the United Nations. In 1995, at the request of the Saami Parliaments in Finland, Norway and Sweden and within the framework of the Nordic Saami Institute, John outlined the basic principles and modalities leading to the Saami Parliamentary Council, which was established in 2000.

From 1996-99 he served at the Office of the United Nations High Commissioner for Human Rights in Geneva. On his return to



Norway, John practised law in a private law firm in Oslo (1999-2002) before taking up an advisory position in the Human Rights Department of the Norwegian Ministry of Foreign Affairs (2002-2004). He is currently working as a consultant specializing in human rights and international law.

John was a member of the Norwegian Legal Committee mandated to propose new national legislation against ethnic discrimination, and of the Nordic Group of Experts tasked to develop a new Nordic Saami Convention. He has written extensively on Saami and indigenous peoples' rights, in particular on indigenous peoples' right of self-determination.