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## **Permanent Sovereignty over Natural Resources from a Human Rights Perspective**

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# PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES FROM A HUMAN RIGHTS PERSPECTIVE: NATURAL RESOURCES EXPLOITATION AND INDIGENOUS PEOPLES' RIGHTS IN THE ARCTIC<sup>1</sup>

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<sup>1</sup> The article is based on a paper presented at the Arctic symposium hosted by the Michigan State Law Review on February 21-22, 2013.

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## INTRODUCTION

Climate change and the resulting melting of the ice cap in the Arctic have opened up new opportunities for those seeking to exploit natural resources. In what increasingly resembles a race against time comparable to the notorious gold rush, States, multinationals and smaller players alike are trying to get a grip on one of the last unexploited regions of the world. Estimates of oil, gas and minerals coupled to the concern about energy shortages at the global level make this region the last frontier or the new Eldorado. The exploitation of these resources is highly controversial because it will not only increase the impact of global warming but will also affect the situation of indigenous communities living in the region. The human impact and environmental transformation of the Arctic increasingly affect the habitat of indigenous communities and threaten their cultural and economic survival.<sup>4</sup> While some indigenous communities participate in the exploitation of natural resources of the Arctic, this does not guarantee that their rights and traditional way of life are recognized and respected in practice. Tensions are consequently growing between indigenous peoples and the Arctic States when it comes to the governance and management of natural resources.

For thousands of years, northern indigenous communities have prospered in a region so often considered by others as a land of discovery or a wilderness mostly devoid of permanent human settlements due to a hostile environment. From the 16<sup>th</sup> to the 19<sup>th</sup> century, newcomers have nevertheless been able to settle and shifted the power balance in their favor by ‘colonizing’ indigenous lands and appropriating themselves important parcels of natural resources to exploit.<sup>5</sup> This process was accompanied by the extension of western sovereignties over these northern territories and the appropriation of Arctic resources by whalers,

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<sup>4</sup> MARK NUTTAL, PIPELINE DREAMS: PEOPLE, ENVIRONMENT, AND THE ARCTIC ENERGY FRONTIER 13-19 (2011).

<sup>5</sup> Else Grete Broderstad, *Political Systems, in* ARCTIC HUMAN DEVELOPMENT REPORT 85, 86-88 (2004).

explorers, fishermen, fur traders and not to forget today's entrepreneurs of the extractive industries. Moreover, a policy of assimilation of indigenous peoples was implemented all over the circumpolar region as a main strategy of the Arctic States in their nation-building process.<sup>6</sup> In North Fennoscandia, the process started with the implementation of fiscal and territorial policies in Saami territory. The policy objective was to strengthen State sovereignty over the north and resulted in the majority of Saami territory becoming State-owned land.<sup>7</sup> In addition, the colonization process imposed new State borders on Saami territory. As a consequence, the Saami peoples are now divided among four countries: Norway, Sweden, Finland and Russia.

The legacy of the Arctic colonization remains present today with the sovereign rights of western States to govern and manage natural resources in the region. In particular, the exercise of State sovereignty perpetuates the colonization process by undermining indigenous self-determination in their control of lands and natural resources. Even though States may permit some transfer of authority to local governments, this does not remove the State centred orientation of governance in matters relating to the development of land and natural resources. Thus, as long as development plans affecting the Arctic do not fully benefit the indigenous communities, but threaten their environment as well as their way of life, indigenous self-determination will not be realized. For this reason, there is an urgent need to re-assert indigenous rights to control natural resources so as to ensure that their interests prevail in the development process of the Arctic region.

This article defends the view that the international human rights corpus gives an adequate framework to achieve this goal. It advocates for indigenous self-determination as a means for its beneficiaries to control their traditional lands and resources. The article starts by describing the governance of natural resources under traditional international law and applies the doctrine of permanent sovereignty over natural resources as it is generally understood to the Arctic. It will be shown that Arctic governance

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<sup>6</sup> *Id.*

<sup>7</sup> Roger Kvist, *The Racist Legacy in Modern Swedish Saami Policy*, 14 CAN. J. NATIVE STUD. 203, 209 (1994).

does not fundamentally differ from the governance models developed elsewhere; it is equally embedded in a State centred vision of governance when it comes to matters relating to natural resources. This privileges the dominance of States and prioritizes their interests to the detriment of indigenous peoples' demands. In a second phase, the article will link the doctrine of permanent sovereignty over natural resources to self-determination and will show that they are connected to one another. The concept of sovereignty will be approached from the perspective of human rights. From this standpoint, it will be argued that sovereignty implies the duty of a State to protect and respect the right of peoples to dispose of their natural resources. As a final note, the article takes a short look at the developments that have emerged in Norway, Finland and Sweden regarding the accommodation of Saami self-determination and appraises the steps taken to integrate indigenous rights within the governance of natural resources in this context.

## I. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES FROM THE PERSPECTIVE OF TRADITIONAL INTERNATIONAL LAW

### A. Interstate Relations and the Delimitation of State Sovereignty in the Arctic

From the perspective of international law, the Arctic region includes the Arctic Ocean and parts of the territory of Canada, Denmark (Greenland), Finland, Iceland, Norway (Svalbard), the Russian Federation, Sweden and the USA (Alaska). The region is rich in natural resources such as petroleum, gas, fish and forests but its exploitation has long been hampered by natural barriers. As the ice melts and new technologies capable of enduring the extreme weather conditions of the region have been developed, the exploitation of natural resources is rapidly growing in the Arctic. The region produces about 10% of the world's oil and 25% of its gas. In addition, a US geological survey estimates that up to 25% of the earth's undiscovered oil

and natural gas reserves lay within the region.<sup>8</sup> It is thus presumed that the prominence of the Arctic region as a petroleum supplier will increase in the next decade.<sup>9</sup> In addition to oil and gas, the Arctic also contains abundant mineral deposits. To illustrate, 40% of the global production of palladium and 12% of cobalt and iron originates from the Arctic region.<sup>10</sup> Although Russia clearly accounts for the biggest share in resources extraction, other Arctic countries such as Canada, Norway and Sweden also have significant mineral reserves which have not yet been exploited. All three governments have demonstrated clear ambitions to further develop their mining industry as part of their respective Arctic economic strategy.<sup>11</sup> Therefore, even if there remains much uncertainty with regard to the total amount of resources that lay in the region, the development of natural resource exploitation in the Arctic will intensify in the near future.

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<sup>8</sup> Kenneth J. Bird, et al, U.S. GEOLOGICAL SURVEY, CIRCUM-ARCTIC RESOURCE APPRAISAL: ESTIMATES OF UNDISCOVERED OIL AND GAS NORTH OF THE ARCTIC CIRCLE, U.S. GEOLOGICAL SURVEY FACT SHEET 2008-3049 (2008), available at <http://pubs.usgs.gov/fs/2008/3049/fs2008-3049.pdf>.

The U.S. Geological Survey (USGS) has completed an assessment of undiscovered conventional oil and gas resources in all areas north of the Arctic Circle. Using a geology-based probabilistic methodology, the USGS estimated the occurrence of undiscovered oil and gas in 33 geologic provinces thought to be prospective for petroleum. The sum of the mean estimates for each province indicates that 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids may remain to be found in the Arctic, of which approximately 84% is expected to occur in offshore areas. *Id.*

<sup>9</sup> Lars Lindholt & Solveig Glomstrod, *The role of the Arctic in Future global Petroleum Supply*, Discussion paper, Statistic Norway 30 (2011). See *id.*

<sup>10</sup> Lars Lindholt, *Arctic Natural Resources in a Global Perspective*, The Economy of the North 27, 30 (Dec. 2006), available at <http://library.arcticportal.org/1553/1/economies.pdf>.

<sup>11</sup> Norwegian Ministry of Foreign Affairs, *The High North: Visions and Strategies*, 133-36 (2011-2012), available at [http://www.regjeringen.no/upload/UD/Vedlegg/Nordomr%C3%A5dne/UD\\_nordomrodene\\_innmat\\_EN\\_web.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Nordomr%C3%A5dne/UD_nordomrodene_innmat_EN_web.pdf); Sweden's *Strategy for the Arctic Region*, Sweden Ministry of Foreign Affairs 15 (2011), available at <http://www.government.se/content/1/c6/16/78/59/3baa039d.pdf>; Canadian Minister of Indian Affairs and Northern Development et al, *Canada's Northern Strategy: Our North, Our Heritage, Our Future*, Can.'s N. Strategy 16 (2009), available at <http://www.northernstrategy.gc.ca/cns/cns.pdf>.

For international lawyers, the development of natural resources is governed by the doctrine of permanent sovereignty over natural resources (hereinafter PSNR).<sup>12</sup> This doctrine, as it is generally understood, provides that every State has the inalienable right “freely to dispose of its natural wealth and resources in accordance with its national interests, and on respect for the economic independence of States.”<sup>13</sup> Every State therefore possesses sovereign rights over natural resources located within the boundaries of its territory.

Although there remains some areas of contention, all terrestrial boundaries and most of the maritime boundaries have been delimited in the Arctic region.<sup>14</sup> The 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS)<sup>15</sup>, which has been ratified by all Arctic States, with the exception of the USA, recognizes rules concerning maritime boundaries, sovereign rights over natural resources and claims to the outer continental shelf. The Convention provides that “the sovereignty of a coastal State extends, beyond its land territory and internal waters.”<sup>16</sup> Within its internal waters, States are sovereign and can fully apply and enforce their legislation. In the twelve nautical miles territorial zone, measured from the baselines, they also exercise full sovereignty but all other States have a right to innocent passage within this area.<sup>17</sup> Regarding the development of natural resources exploitation, States have also rights over resources located within their exclusive economic zone (EEZ), which is the area beyond and adjacent to the territorial sea extending to maximum two hundred nautical miles from the

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<sup>12</sup> See in particular Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962) (describing the doctrine of permanent sovereignty over natural resources).

<sup>13</sup> *Id.*

<sup>14</sup> Frédéric Lasserre, *Continental shelves and maritime boundaries in the Arctic: the new cold war will not take place*, in WHAT HOLDS THE ARCTIC TOGETHER? 107, 107-110 (Cécile Pelaudeix, Alain Faure & Robert Griffiths eds., 2012).

<sup>15</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

<sup>16</sup> UNCLOS, Art. 2.

<sup>17</sup> *Id.* art. 45.

baselines.<sup>18</sup> While the rights of Arctic States to exploit their natural resources within their two hundred nautical miles EEZ is largely undisputed, exploitation rights over natural resources located beyond this area has not been entirely resolved.<sup>19</sup> In this zone, all depends for the extent of the Arctic continental shelf which can exceptionally be extended.<sup>20</sup> Pursuant to UNCLOS, all coastal States must establish the outer limit of the continental shelf wherever it extends beyond the limit of two hundred nautical miles.<sup>21</sup> Within this outer area, the Convention gives coastal States exploration and exploitation rights with regard to natural resources of the seabed and the subsoil.<sup>22</sup> In order to establish the outer limits of its continental shelf, a State has to issue an application to the Commission on the Limits of the Continental Shelf providing supporting scientific data within 10 years after the entry into force of UNCLOS for that State.<sup>23</sup> Russia and Norway are at the present the only Arctic States that have submitted an application to extend their continental shelf.<sup>24</sup> For areas where this mechanism does not apply, coastal States are entitled to conclude multilateral and bilateral treaties so as to delimitate their ownership or jointly develop the resources in contention.<sup>25</sup>

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<sup>18</sup> *Id.* arts. 56 and 57.

<sup>19</sup> Lasserre, *supra* note 14, at 110-118.

<sup>20</sup> UNCLOS, *supra* note 15, art. 76(4).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* art. 77.

<sup>23</sup> *Id.* art. 4, annex II.

<sup>24</sup> U.N. Commission on the Limits of the Continental Shelf, Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Partial Revised Submission by the Russian Federation (Feb. 28, 2013), available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_rus\\_rev.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_rus_rev.htm); U.N. Commission on the Limits of the Continental Shelf, Outer Limits of the Continental Shelf Beyond 200 Nautical Miles from the Baselines: Submissions to the Commission: Submission by the Kingdom of Norway (Nov. 27, 2006), available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_nor.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_nor.htm).

<sup>25</sup> See UNCLOS, *supra* note 15, arts. 279, 287(1)(a-d); United Nations Convention on the Territorial Sea and the Contiguous Zone, adopted Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Sep. 10, 1964); United Nations Convention on the Continental Shelf, adopted Apr. 29, 1958, 499 U.N.T.S. 311 (entered into force June 10, 1964).



The question of sovereignty in traditional international law is thus built around the relationship among States. However, the concept of sovereignty also relates to the exercise of powers within the State's borders and then concerns the relationship of the States with its peoples. What will be discussed in the next part is this governance system through which sovereignty is exercised by the State in its relationship with its people.

#### B. Intrastate Relations and the Implication of Sovereignty for Indigenous Peoples in the Arctic

From the perspective of indigenous peoples' rights, PSNR requires the recognition of indigenous peoples' own understandings of their traditional relationship to their lands, territories and natural resources, and their own definitions of development.<sup>26</sup> In practice, however, the exercise of sovereignty over natural resources in the Arctic does not allow the realisation of those objectives. Both at the local and the regional level, PSNR remains entrenched in a State-centred model of governance that is detrimental to the traditional way of life of indigenous peoples living in the region.

Since the creation of the Arctic Council in 1996, the voices of indigenous peoples inhabiting the region have won prominence in the conduct of Arctic affairs. As a forum of intergovernmental cooperation, the Arctic Council has been established to promote cooperation, to coordinate and interact in matters relating to environmental protection and sustainable development of the Arctic.<sup>27</sup> The organisation consists of the eight Arctic States (Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the USA) and six permanent participants as well as observers. The permanent participants comprise six indigenous organisations representing the interests of local communities inhabiting the region. By

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<sup>26</sup> Commission on Human Rights, *Report on the expert seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and their Relationship to Land* presented by Special Rapporteur, Erica-Irene A. Daes, UN Doc. E/CN.4/Sub.2/AC.4/2006/3 (2006), ¶ 32.

<sup>27</sup> Declaration on the Establishment of the Arctic Council, Art. 1, *adopted* Sept. 19, 1996, 35 I.L.M. 1382.

virtue of their status as permanent participants, indigenous peoples have full consultation rights and can contribute to the decision making process in respect of issues that fall within the mandate of the Council.<sup>28</sup> Observers to the Arctic Council are allowed to attend meetings and to join working groups but without consultation powers.<sup>29</sup> Most of the decisions adopted by the Arctic Council are not legally binding. The soft law approach of the organization has nevertheless been considered as one of its strength. According to Koivurova and Heinämäki, the use of soft law contains the seeds of a revolutionary change because the adoption of measures is not constrained by the constitutional systems of the States. It also provides the possibility for non-State actors to participate in the decision making process.<sup>30</sup> It has therefore been affirmed that the Arctic Council offers indigenous communities a unique platform to influence Arctic affairs. This could serve as a new model of participation relevant for other regions.<sup>31</sup>

The full potential of the Arctic model of governance as a means to accommodate indigenous voices is nevertheless undermined by the fragile position of indigenous representation in the Arctic Council. In the decision making process, indigenous peoples are merely consulted and have no voting rights. In addition, the lack of resources to fund their effective participation in the functioning of the Arctic Council marginalizes their position when it comes to the governance of

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<sup>28</sup> *Id.* at 3 (consisting of the Aleut International Association, Arctic Athabaskan Council, Gwich'in Council International, Inuit Circumpolar Council, Russian Arctic Indigenous Peoples of the North and the Saami Council).

<sup>29</sup> Eighth Arctic Council Ministerial Meeting, *Arctic Council Rules of Procedure*, ARCTIC COUNCIL, Art. 38, (May 15, 2013), available at <http://arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting%3Fdownload%3D1781:rules-of-procedure+&cd=3&hl=en&ct=clnk&gl=us>.

<sup>30</sup> Timo Koivurova & Leena Heinämäki, *The Participation of Indigenous Peoples in International Norm-making in the Arctic*, 42(2) POLAR RECORD 101, 103-04 (2006).

<sup>31</sup> *Id.* at 105.

the region.<sup>32</sup> As the legislative powers remain exclusively in the hands of individual member States, the Arctic Council has a limited role in natural resource management.<sup>33</sup> Natural resource policies of States are normally driven by commercial interests rather than the voice of indigenous peoples.<sup>34</sup> Often indigenous peoples do not benefit from development projects located on their lands and they are left to deal with the environmental and social damages resulting from such projects.<sup>35</sup>

Taking the Russian Federation as an example, the government emphasized the role of the Arctic region for its economic development and unveiled the ambition to transform the region into its top strategic priority for natural resource exploitation.<sup>36</sup> The development policies of Russia have, however, been criticized because of the adverse impact on northern indigenous communities. Industrial activities in western Siberia have, for example, resulted in the contamination of hunting, fishing and reindeer grounds and the decrease of available lands for reindeer herding.<sup>37</sup> The cumulative impact of oil extraction in Arctic Russia also represents a major threat to the way of life of indigenous communities. Similar tensions exist in Saami territory where the development of hydropower and mineral activities sparked conflicts between indigenous communities, companies and the governments. In 2013, Saami activists have severely opposed the mining plans of the British company Beowulf in the region of Jokkmokk in Sweden because

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<sup>32</sup> Becky Rynor, *Indigenous voices 'marginalized' at Arctic Council: Inuit leaders*, IPOLITICS.com, (Nov. 7, 2011) available at <http://www.ipolitics.ca/2011/11/07/indigenous-voices-marginalized-at-arctic-council-inuit-leaders/>.

<sup>33</sup> Timo Koivurova & David Vander Zwaag, *The Arctic Council at 10 Years: Retrospect and Prospects*, 40 U.B.C. L. REV 123,191 (2007).

<sup>34</sup> Rune S. Fjellheim & John B. Henriksen, *Oil and Gas Exploitation on Arctic Indigenous Peoples' Territories*, *Gáldu Čáda*, J. OF INDIGENOUS PEOPLES RTS., Jan. 2006, at 5.

<sup>35</sup> *Id.* at 13.

<sup>36</sup> Katarzyna Zysk, *Russia's Arctic Strategy: Ambitions and Constraints*, 57 JOINT FORCE Q. 103, 105 (2010).

<sup>37</sup> Florian Stammner & Bruce C. Forbes, *Oil and gas development in western Siberia and Timan-Pechora*, 2-3 INDIGENOUS AFF.: ARCTIC AND GAS DEV. 48, 49-50 (2006).

this activity encroaches on their grazing lands and puts pressure on their traditional livelihoods.<sup>38</sup> In Canada, several aboriginal groups from Yukon raised concerns about large scale development projects and their negative social impact on local communities<sup>39</sup> while in Alberta, local communities protested against the exploitation of tar sands on their lands, which irrevocably destroys their habitat by polluting the surrounding area.<sup>40</sup>

Considering the negative impact that can result from certain development projects on their livelihoods, there is a need to reinforce and protect the special cultural, social, spiritual, political and economic relationships which indigenous peoples have to their lands, territories and natural resources.<sup>41</sup> The protection of this specific relationship must be encompassed within the exercise of PSNR. This view is supported by contemporary international human rights law.

## II. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES FROM A HUMAN RIGHTS PERSPECTIVE

While international law reserves a cardinal position to State sovereignty in the governance of natural resources, it also recognizes a human rights corpus that refers to the peoples' right to self-determination. That right proclaimed in numerous UN resolutions<sup>42</sup> and confirmed in common Article 1 of the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>43</sup> considers peoples as holders of a right to

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<sup>38</sup> Daniel Bush, *Mine dispute intensifies in Arctic Sweden*, BARENTS OBSERVER (Sep. 30, 2013).

<sup>39</sup> David Roddick, *Yukon First Nations and the Alaska highway gas pipeline*, 2-3 INDIGENOUS AFFAIRS 12, 17-18 (2006).

<sup>40</sup> Clint Westman, *Assessing the Impacts of Oils and Development on Indigenous Peoples in Alberta, Canada*, 2-3 INDIGENOUS AFFAIRS 30, 33 (2006).

<sup>41</sup> Rune & Henriksen, *supra* note 34, at 29.

<sup>42</sup> E.g., UNGA Res. 1514 (XV), at 67, UN Doc. A/RES/1514(XV) (Dec. 14, 1960); UNGA Res. 1541 (XV), at 29-30, UN Doc. A/Res/1541(XV) (Dec. 15, 1960); UNGA Res. 2625 (XXV), at 123-24, UN Doc. A/RES/2625(XXV) (Oct. 12, 1970).

<sup>43</sup> International Covenant on Civil and Political Rights, Art. 1, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)

freely participate in the governance of their polity and to decide their own economic, social and cultural policies. Common Article 1 identically phrased in the two covenants holds 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 benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>44</sup>

The early drafts of Article 1 ICCPR recognised that the right of peoples to self-determination also included a reference to permanent sovereignty over their natural wealth and resources.<sup>45</sup> The inclusion of a peoples' right to PSNR was, however, strongly opposed. It was emphasised that the principle "was a dangerous concept because it would sanction unwarranted expropriation or confiscation of foreign property and would subject international agreements and arrangements to unilateral renunciation."<sup>46</sup> Consequently, the inclusion of a right of PSNR was rejected. States nevertheless agreed on the inclusion of a paragraph in Article 1 recognising the right of peoples to freely dispose of their natural wealth and resources and their right not to be deprived from their means of subsistence.<sup>47</sup>

Despite its prominence in international law, the right of peoples to freely dispose of their natural wealth and resources - sometimes labelled as economic or natural resource self-

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[hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Art. 1, adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>44</sup> *Id.*

<sup>45</sup> UNGA, "Annotations on the text of the draft International Covenants on Human Rights", UN Doc. A/2929, para 19(1955).

<sup>46</sup> *Id.*

<sup>47</sup> Art. 1(2) ICCPR and IESCR.

determination -<sup>48</sup> has been remarkably inconsistent in its application.<sup>49</sup> This may be explained by the conflation of two distinct topics: the human right to self-determination and the principle of state sovereignty. While in human rights law, the beneficiary of PSNR is peoples by virtue of their right to self-determination, the doctrine of PSNR has evolved towards promoting the understanding that control over natural resources is reserved for States.<sup>50</sup> The assertion that PSNR is an attribute of State rather than a right of the peoples is the result of an ambiguous phrasing of most documents referring to PSNR in international law which underlines the right of peoples and nations to permanent sovereignty over their natural wealth and resources but at the same time confer on States the right to exercise sovereignty.<sup>51</sup> The doctrine of PSNR has evolved over the years from a rights-based to a qualified concept encompassing duties as well as rights. Those duties are framed in the interstate relationship and do not include the obligation of the State towards its population.<sup>52</sup> As a consequence, the exercise of PSNR remains purely State-centric and leaves little space to define the States duties in such a way as to exercise PSNR for the wellbeing of the peoples.<sup>53</sup> This stands in stark contrast with international human rights law which confers on

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<sup>48</sup> Martin Scheinin, *Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights* (Paper prepared for Torkel Oppsahls minneseminar, Norwegian Centre for Human Rights, University of Oslo, 10 (2004).

<sup>49</sup> Jeremie Gilbert, *The right to freely dispose of natural resources: utopia or forgotten right?* 31-2 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 314, 316 (2013).

<sup>50</sup> Emeka Duruigbo, *Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law*, 38 GEO. WASH. INT'L L. REV. 33, 37 (2006).

<sup>51</sup> See in particular UNGA Res. 1803 (XVII), 14 Dec. 1962.

<sup>52</sup> Nico Schrijver, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* 311 (1997).

<sup>53</sup> There are only two resolutions mentioning the duty of States to exercise sovereignty over natural resources for the wellbeing of peoples: UNGA Resolution 1803 (XVII) Permanent Sovereignty over Natural Resources (14 Dec. 1962) and UNGA Resolution 2692 (XXV) Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation for Economic Development (11 Dec. 1970).

peoples the right to freely dispose of natural resources vis-à-vis their State.<sup>54</sup>

The negative impact of natural resources exploitation and concerns regarding the inequitable distribution of resources inside State borders, have brought several scholars to defend a revitalisation of the right to control natural resources from a human rights perspective.<sup>55</sup> Most advocate for revisiting the resource dimension of the right to self-determination as a means to more effectively realize human rights.<sup>56</sup> Either PSNR should in this context belong to the peoples rather than the States or the right of peoples to freely dispose of their natural resources should be revived so as to ensure that when States exercise their sovereignty over natural resources it is done with some form of accountability towards its people.<sup>57</sup> The debate consequently pushes the right to dispose of natural resources to the intrastate level and underlines the necessity to clarify the implication of such a right for the duties and responsibility of States.<sup>58</sup>

The development of indigenous peoples' rights in international law supports the growing understanding that self-determination includes the right to dispose freely of natural resources and imposes certain obligations on States. This view is supported by the Human Rights Committee which has referred several times to Article 1(2) ICCPR in relation to indigenous peoples. In 1999, while addressing the conclusions of the Royal Commission on Aboriginal peoples in Canada, the Human Rights Committee indicated that Article 1(2) includes an obligation to ensure a right for indigenous peoples to control

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<sup>54</sup> Art. 1(2) ICCPR and IESCR.

<sup>55</sup> Alice Farmer, *Towards a meaningful rebirth of economic self-determination: human rights realization in resource-rich countries*, 39 INTERNATIONAL LAW AND POLITICS 417, 420-422 (1998); Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 785, 802-806 (2012); Duruigbo, *supra* note 50 and Gilbert *supra* note 49.

<sup>56</sup> *Id.* See also Farmer, *supra* note 55, at 420-422.

<sup>57</sup> Duruigbo, *supra* note 50, at 37; Gilbert *supra* note 49, at 314.

<sup>58</sup> Miranda *supra* note 55, at 810-833 and Commission on Human Rights, *Indigenous peoples' permanent sovereignty over natural resources, Final report of the Special Rapporteur, Erica-Irene A. Daes*, E/CN.4/Sub.2/2004/30 13, ¶ 16 at 7 (2004).

their lands and natural resources.<sup>59</sup> This view of the Committee was reiterated in its concluding observations on Norway, Sweden and Denmark.<sup>60</sup> In the case of Norway, the Committee encouraged the government to report “on the Saami peoples’ right to self-determination under article 1 of the Covenant, including paragraph 2 of that article”.<sup>61</sup> The reference to Article 1(2) ICCPR in the context of indigenous peoples confirms the interpretation of the right to self-determination as conferring natural resources rights to them and a correlative duty on States to respect and protect these rights. More recently, the indigenous peoples’ right to self-determination has explicitly been recognized at the international level with the UN Declaration on the Rights of Indigenous Peoples.<sup>62</sup> This Declaration develops further the indigenous right to control and dispose of their natural resources and confirms the shift in emphasis when exercising sovereignty over natural resources. It imposes and clarifies a State duty to respect, protect, and promote the interests of indigenous peoples in natural resources exploitation.<sup>63</sup>

### III. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES FROM AN INDIGENOUS RIGHTS PERSPECTIVE

#### A. Indigenous Peoples’ Rights to Self-Determination as a Means to Reassert their Rights to Own, Use, Control, and Develop Natural Resources in the Arctic

On 13 September 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples

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<sup>59</sup> Human Rights Committee, ‘Concluding observations: Canada’ (7 April 1999) UN Doc. CCPR/C/79/Add.105, ¶ 8 and Committee on Economic, Social and Cultural Rights, ‘Concluding observations: Canada’ UN Doc. E/C.12/1/Add.31, ¶ 18 (10 December 1998).

<sup>60</sup> Human Rights Committee, Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999). Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000). Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002).

<sup>61</sup> Human Rights Committee, Concluding Observations: Norway, UN doc. CCPR/C/79/Add.112. (1999).

<sup>62</sup> Article 3 of the UNDRIP.

<sup>63</sup> Erica-Irene A. Daes, *supra* note 58, ¶ 38-40 at 13.



(UNDRIP).<sup>64</sup> Even though it is framed as a resolution of the UN General Assembly, it is generally accepted that the Declaration (if not all provisions at least some of them) is declaratory of customary international law or at least ‘an authoritative Statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles’.<sup>65</sup> After two decades of difficult negotiations, the Declaration finally acknowledged that indigenous peoples are, as a group, holders of human rights including the right to self-determination.<sup>66</sup> Indigenous peoples have thus been able to impose their view and Article 3 of the Declaration insists on the right to self-determination in a language mirroring common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

*Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

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<sup>64</sup> UN Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295, UN Doc. A/61/L. 67 and Add. 1 (Sept. 13, 2007) (hereinafter UNDRIP).

<sup>65</sup> Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1176 (2008); ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND* 120 (2007); INTERNATIONAL LAW ASSOCIATION, *The Hague Conference 2010: the Rights of Indigenous Peoples Interim Report* 2010, at 6 available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>. See also Centre for Minority Rights Development (“CEMIRIDE”) on behalf of Endorois Welfare Council v. Kenya (Comm. No. 276/2003), 142.1 I.L.R. ¶ 83, 204 (African Comm’n on Human and Peoples’ Rights 2010) (quoting extensively, in its first decision on indigenous peoples’ rights, the UN Declaration showing that it considers it to possess an *opinio juris* character).

<sup>66</sup> Special Rapporteur (Jose Martinez Cobo 1986), *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, ¶ 196, UN Doc. E/CN.4/Sub.2/1986/7/Add.1 197.

Other provisions of the Declaration, in particular Articles 4, 5, 18, 19, 20 and 34, specify and complement this general statement. In essence, the references to self-determination in the Declaration must be understood as a right to redress past marginalization in order to be able to fully exist and develop as a distinct group. Indigenous peoples must also be able to fully participate in the decision-making process of the larger (State) society in which they live but more importantly it is also a right to an autonomous exercise of competences deemed necessary to protect their economic, social and cultural distinctness..

Indigenous self-determination further builds on the broader framework of the peoples' right to self-determination. The indigenous claims to self-determination are closely linked to the economic aspect or resource dimension of self-determination because without control of their traditional lands and natural resources, efforts to preserve indigenous distinctness are often meaningless. The UNDRIP, therefore, refers to political as well as economic self-determination, but contrary to the general pronouncements on self-determination the Declaration links it to rights over traditional land and resources. This obliges States to pay more attention to an aspect that has greatly been neglected in the traditional self-determination debate. As already stated above despite its codification as a distinct form of self-determination, economic self-determination has mainly been approached from a State centric perspective erroneously considering the State as the right holder rather than the people. From a human rights perspective it is peoples who are the right holders and the States who are the duty bearers.

Traditional lands and resources have always been important for the survival of indigenous peoples. To quote Martinez Cobo,

[i]t is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. . . . Their land is not a commodity which can

be acquired, but a material element to be enjoyed freely.<sup>67</sup>

Therefore ILO Convention No. 169 recognizes a broad catalogue of rights going from non-discrimination to specific economic, social and cultural rights as well as rights on participation, co-management and self-governance.<sup>68</sup> Also the provisions on land rights, which were highly criticized in its predecessor Convention 107,<sup>69</sup> were rephrased to better protect indigenous peoples' demands. Compared to its predecessor, Convention No. 169 has been considered a major improvement.<sup>70</sup>

While the right to land and resources are considered essential to indigenous peoples and have been recognized in various instruments, they remain controversial and the UNDRIP does not fully clarify the position of international law in this regard.<sup>71</sup> The negotiations of the land and resources provision of the Declaration were extremely difficult and until the very end delayed the adoption of the Declaration.<sup>72</sup>

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<sup>67</sup> Jose Martinez Cobo, *Final Report on the Study of the Problem of Discrimination Against Indigenous Populations, third part: Conclusions, Proposals and Recommendations*, UN Doc. E/CN.4/Sub.2/1983/21/Add.8, 26, at 197.

<sup>68</sup> ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1990, 28 I.L.M. 1382 (1989) (hereinafter ILO Convention No. 169). See Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: an Overview*, 3 NORDIC J. INT'L LAW 79, 433-56 (2010); INTERNATIONAL LABOUR ORGANIZATION, *INDIGENOUS & TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169* (2009).

<sup>69</sup> ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS. SELF-DETERMINATION, CULTURE AND LAND* 80 (2007) (asserting that the outdated land rights provision of Convention No. 107 were one of the main reasons why the Convention had to be revised).

<sup>70</sup> *Id.* at 90.

<sup>71</sup> INTERNATIONAL LAW ASSOCIATION, *The Hague Convention 2010: the Rights of Indigenous Peoples Interim Report 2010*, at 21. Available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>.

<sup>72</sup> Mattias Ahren, *The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 205-209* (Claire Charters & Rodolfo Stavenhagen eds., 2009).

The dependence on lands and resources for indigenous peoples' survival is recognized in the preamble of the Declaration (in recital 6) and various provisions specify the content of indigenous peoples' land and resource rights.<sup>73</sup> The most important provisions of the Declaration are the following:

*Article 25:* Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

*Article 26:* 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

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

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

*Article 28:* 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

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<sup>73</sup> Similar but less far-reaching and less detailed provisions are found in Arts. 13, 14 and 15 of ILO Convention No. 169.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.<sup>74</sup>

The first of the above cited provisions recognizes the special (spiritual) relationship between indigenous peoples and their traditional lands. This is arguably a general statement without far reaching legal consequences. The two latter provisions are more relevant as they stipulate that indigenous peoples have a right of ownership over these lands and resources and that they consequently have a right to control and decide freely how to use and develop them. Ownership should not be construed in its traditional Western view of property rights, but more in the sense of custody and usufructs of something belonging collectively to past, present and future generations.<sup>75</sup>

The UN has consistently, through its human rights bodies, acknowledged that to be effective the indigenous peoples' right to exist as a distinct cultural community must include rights over their traditional lands and resources.<sup>76</sup> For example, in its General Recommendation XXIII on indigenous peoples the Committee on the Elimination of Racial Discrimination stipulated what follows:

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<sup>74</sup> See UNDRIP, *supra* note 64.

<sup>75</sup> INTERNATIONAL LAW ASSOCIATION, Indigenous Peoples Committee Report 27-28 (2012), at *available at* <http://www.ila-hq.org/en/committees/draft-committee-reports-sofia-2012.cfm>.

<sup>76</sup> See, e.g., UNITED NATIONS EDUCATIONAL, SCIENTIFIC, AND CULTURAL ORGANIZATION, UNESCO AND INDIGENOUS PEOPLES: PARTNERSHIP TO PROMOTE CULTURAL DIVERSITY (2006); Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous People*, 1, 34, U.N. Doc. E/CN.4/Sub.2/1986/7 (by Jose R. Martinez Cabo); Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (by Erica-Irene A. Daes).

5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.<sup>77</sup>

Although for political and financial reasons the consensus around the rights to traditional lands and resources was hard to reach, the UNDRIP essentially codifies existing rules on the issue. This view, combined with the growing recent State practice, has shown that land and resources rights, although not fully crystallized, have entered the domain of customary international law.<sup>78</sup>

#### B. Redefining Sovereignty Over Natural Resources Through Indigenous Self-Determination: the Case of the Saami

Over the past decades, efforts have been made to promote new modes of governance for the Arctic. In light of the multiplicity in the governance approaches that differ from one country to the other, the choice has been made here to analyse the recent developments which have occurred in the Nordic countries with regard to the accommodation of Saami self-determination and their rights over land and natural resources.<sup>79</sup>

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<sup>77</sup> International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted By Human Rights Treaty Body*, 213, UN Doc. HRI/GEN/1/Rev.6 (May 12, 2003).

<sup>78</sup> INTERNATIONAL LAW ASSOCIATION, *supra* note 75, at 23.

<sup>79</sup> Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, The situation of the Sami people in the Sápmi region of*

It is not the purpose of this article to give a detailed account of Saami history. The article will only point to the changes that have been introduced in the governance system of the Nordic countries following Saami demands to be considered as a separate people possessing a right to self-determination as well as land and natural resource rights.<sup>80</sup>

Saami identity is closely linked to their language, culture and territory, and the conduct of reindeer herding, fishing and hunting form the basis of their traditional livelihood. Thus, lands and natural resources are fundamental to the Saami and constitute the basis for expressing their self-determination.<sup>81</sup> The preservation of Saami identity and their relationship with their traditional lands and natural resources is increasingly threatened. Saami communities have long been marginalized both economically and culturally by the majority population of the State they live in and their rights over land and natural resources have also been severely encroached.<sup>82</sup> Unless lands have been acquired for private and individual ownership, the government of Norway, Sweden and Finland traditionally held the position that land belongs to the State. As a result of the absence of ownership over their lands and natural resources, the Saami people have lost access and control over significant parts of their territories and their traditional livelihood has been deeply eroded.<sup>83</sup>

During the past three decades, intensive discussions on Saami rights took place and relevant changes in relation to Saami demands have started to emerge in each of the Nordic

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*Norway, Sweden and Finland*, UN Doc. A/HRC/18/35/Add.2 (June 6, 2011) (by James Anaya) (hereinafter Anaya's report).

<sup>80</sup> Lars-Anders Bear, *The right of self-determination and the case of the Saami*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 224 (Pekka Aiko & Martin Scheinin eds., 2000).

<sup>81</sup> The Saami Council, *Review of developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous people: environment, land and sustainable development*, UN Working Group on Indigenous Population, ¶ 9 (1997).

<sup>82</sup> See Anaya's report, *supra* note 79, ¶ 46 at 13.

<sup>83</sup> Anaya's report, *supra* note 79, ¶ 46 at 13; Oyvind Ravna, *Samenes rett til land og vann, sett i lys av vekslende oppfatninger om samisk kultur i retts- og Historievitenskapene (Sami rights to land and water, in the light of changing perceptions about Sami culture in law and history sciences)*, HISTORISK TIDSSKRIFT UNIVERSITETSFORLAGET 189-212 (2011).

countries.<sup>84</sup> The creation of a Saami Parliament in Finland, Norway and Sweden has been a fundamental step forward for Saami representation and a vehicle for exercising their right to self-determination.<sup>85</sup> It has changed the Saami position in their respective country and fostered their international legal standing. In addition, all three countries have started to adopt specific measures recognizing and protecting Saami rights. The Constitutions of the three countries now recognize the Saami identity as distinct from the rest of the population.<sup>86</sup> With respect to land and natural resources, all three States have adopted legislation to protect the rights of reindeer herders. Due to the cultural and economic importance of reindeer herding for the Saami, it was fundamental to take measures for protecting this activity. The right to reindeer herding has now become an exclusive right of the Saami people both in Norway and Sweden.<sup>87</sup> Even though this is not the case for Finland, where both Saami and non-Saami are indistinctively allowed to herd reindeer, the country has nevertheless recognised important consultation rights to the Saami Parliament regarding all matters that may affect the Saami status as indigenous peoples.<sup>88</sup>

However, the road leading toward Saami self-determination and control over lands and natural resources remains long. Despite the existence of specific arrangements supporting Saami rights over land and resources, the level of recognition of Saami

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<sup>84</sup> Anaya's report, *supra* note 79, at 11.

<sup>85</sup> In Finland, the delegation of the Saami affairs, founded in 1973 was replaced with the Saami parliament in 1996. In Norway, the Saami parliament was founded in 1989 by an act of parliament (1992:1433), it replaced the Provincial Saami Council in function since 1953. In Sweden, the Saami Parliament was established in 1993. *See, e.g.,* Kristian Myntti, *The Nordic Saami Parliaments*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 203-221 (Pekka Aiko & Martin Scheinin eds., 2000).

<sup>86</sup> *See* Constitution of Finland, *suomen perustuslaki*, 2 luku, 17§; *see also* Constitution of Norway, Grl. ¶ 110(a); Constitution of Sweden as amended in 2011 [Law amending the instrument of government] (Svensk författningssamling [SFS] 2010:1408), as a result the Constitution of Sweden explicitly recognizes the Saami as a people, as distinguished from a minority group, SFS,109 (2011).

<sup>87</sup> Norway, Lov om reindrift 2007-06-15-40 (The Reindeer Herding Act of 2007); Sweden, Rennäringslag 1971:437 (The Reindeer Husbandry Act of 1971).

<sup>88</sup> The Saami Parliament Act (974/1995), ¶ 9.



rights in all three countries remains insufficient to fully protect their livelihood.<sup>89</sup> In the absence of authority and property rights over the lands they have traditionally owned, the Saami lifestyle is under pressure from competing activities such as mining, forest logging and the building of hydraulic dams.<sup>90</sup> In a report on the situation of the Saami people in the Sápmi region, the UN Special Rapporteur on the Rights of Indigenous Peoples commented that:

laws and policies in the Nordic States with respect to natural resource extraction and development do not provide sufficient protections for Saami rights and livelihoods, and do not involve Saami people and the Saami parliaments sufficiently in the development processes. There is often no compensation for loss of pasture areas from natural resource extraction or other development projects. Additionally, benefit sharing opportunities are rare, especially with respect to mining and oil and gas development.<sup>91</sup>

With the intensification of development projects targeting the exploitation of natural resources in the Arctic, it becomes a matter of urgency to recognize and enforce Saami rights over land and natural resources. In recent years, two answers have been given to address these particular issues: the drafting of the cross-border Nordic Saami Convention and the implementation of the Finnmark Act in Norway. Considering the progressive nature of these developments,<sup>92</sup> each of them will be shortly examined with respect to their capacity for accommodating Saami self-determination as well as demands for land and natural resources rights.

The governments of Norway, Sweden and Finland together with the Saami communities living in these countries are

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<sup>89</sup> Anaya's report, *supra* note 79, ¶¶ 55 at 16.

<sup>90</sup> *Id.* at 15.

<sup>91</sup> *Id.* at 16.

<sup>92</sup> Malgosia Fitzmaurice, *The New Developments Regarding the Saami Peoples of the North*, 16 INT'L J. MINORITY & GROUP RTS 67, 68 (2009).

currently negotiating a Draft Saami Convention.<sup>93</sup> Its objective is to affirm and strengthen the rights of Saami “that are necessary to secure and develop its language, its culture, livelihoods and society, with the smallest possible interference of the national borders.”<sup>94</sup> The document recognises the Saami as the indigenous people of the three countries and as one people residing across international borders.<sup>95</sup> The Convention has been acclaimed particularly because it has been drafted by an equal number of representatives from the three Nordic States and the three Saami Parliaments.<sup>96</sup> The recognition of the Saami right to self-determination in the document represents a major advancement in the field of indigenous peoples’ rights. If ratified, the Convention would be the first international treaty explicitly recognizing a right to self-determination for indigenous peoples. Article 3 of the Convention formulates the right in the following way:

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 their own benefit, over its own natural resources.<sup>97</sup>

This provision draws upon Article 1 ICCPR and IECSR and defends the view that the Saami have the same rights to self-

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<sup>93</sup> The Draft Nordic Saami Convention, pmbL, (submitted Nov. 2008) [hereinafter Draft Convention]. An unofficial English translation of the Convention is available at [http://www.regjeringen.no/upload/BLD/Vedlegg\\_5\\_d.pdf](http://www.regjeringen.no/upload/BLD/Vedlegg_5_d.pdf) (last visited Sept. 28, 2013). For an analysis of the drafting process see in particular, Mattias Åhrén, et al., *The Nordic Saami Convention: International Human Rights, Self-Determination and other Central Provisions*, 3 Gáldu Čála . INDIGENOUS PEOPLES RTS. 1-109 (2007); Nigel Bankes & Timo Koivurova, *The Proposed Nordic Saami Convention* (Hart Publishing, Oxford 2013).

<sup>94</sup> Draft Convention, *supra* note 93, art. 1.

<sup>95</sup> *Id.* at pmbL.

<sup>96</sup> Anaya’s report, *supra* note 79, ¶ 36, at 10.

<sup>97</sup> Draft Convention, *supra* note 93, art. 3.

determination as other peoples. This includes the right to freely dispose of their natural resources. Although the Nordic Saami Convention has not yet been adopted, it constitutes a milestone on the path towards Saami self-determination.

In the area of lands and natural resources rights, the efforts of Norway to accommodate Saami demands must be acknowledged. These efforts culminated in 2005 with the Finnmark Act, adopted in the framework of Norway's international commitments under ILO Convention No. 169.<sup>98</sup> As the Convention recognises indigenous ownership and rights over traditional land and natural resources, Norway has committed itself to reform its governance system in a way that accommodates indigenous rights. The Finnmark Act has the objective to "facilitate the management of land and natural resources in the county of Finnmark . . . for the benefit of the residents of the county and particularly as a basis for Saami culture."<sup>99</sup> In practice, the implementation of the Act led to the decentralisation of authority to the Finnmark Estate in matters relating to the administration of land and natural resources of the region.<sup>100</sup> In addition, ownership of lands and natural resources located in Finnmark has been transferred to the Finnmark Estate.<sup>101</sup> The body governing the Finnmark Estate is composed of six members; three elected by the Finnmark County Council and three elected by the Saami Parliament.<sup>102</sup> Its main function is to administer the lands and natural resources of Finnmark in a balanced and ecologically sustainable manner while at the same time respecting Saami culture.<sup>103</sup> In order to meet its international obligations imposed by Article 14 of the ILO Convention, the Finnmark Act has also created the Finnmark Commission. Its role is to identify Saami rights to land and natural resources in Finnmark, including ownership rights.<sup>104</sup> To

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<sup>98</sup> Finnmark Act, Section 3, Act 85 of 17 June 2005 relating to Legal Relations and Management of Land and Natural Resources in the County of Finnmark (hereafter the Finnmark Act).

<sup>99</sup> *Id.* ¶ 1.

<sup>100</sup> Finnmark Act, Section 6.

<sup>101</sup> Finnmark Act, Section 49.

<sup>102</sup> *Id.* ¶ 7.

<sup>103</sup> *Id.* ¶¶ 1, 6.

<sup>104</sup> *Id.* ¶ 29.

settle issues arising from the Commission investigations, a special tribunal has been set up.<sup>105</sup> All these bodies have as their main priority investigation of the historical use of lands and resources located in different parts of the Finnmark County and to identify, document and recognize existing usufructuary and ownership rights on areas previously considered State-owned.<sup>106</sup> The work of the Commission should lead to the demarcation of Saami lands and to the recognition of their rights to natural resources as proclaimed in ILO Convention No. 169 and the UNDRIP.<sup>107</sup> In its first three reports on the identification of land and resources rights held by Saami and other peoples in the county of Finnmark in 2012-2013,<sup>108</sup> the Finnmark Commission did, however, not conclude on the ownership rights of any Saami communities in areas that were under scrutiny. The reports have not clarified Saami ownership and use rights at the local level and therefore do not provide for more detailed geographic definition of legal rights beyond that of the Finnmark Act.<sup>109</sup> In practice, the Finnmark Estates remain therefore the landowner of the land and resources located in the county. If the conclusions of the Commission are not modified in the following reports, Ravna concludes that “the ownership conditions which have been established through several hundred years of State governance and ownership disposal of the Sámi lands will not change appreciably in practice.”<sup>110</sup> Thus, serious doubts remain as to the compatibility of the Finnmark Act with indigenous peoples’ rights.<sup>111</sup> Although, future reports of the Finnmark

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<sup>105</sup> *Id.* ¶ 36.

<sup>106</sup> See generally *Id.* at ¶ 5; Oyvind Ravna, *The Process of Identifying Land Rights in Parts of Northern Norway: Does the Finnmark Act prescribe an Adequate Procedure within the National Law?*, 3 Y.B. POLAR L. 423 (2011).

<sup>107</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, I.L.O. No. 169, 1650 U.N.T.S. 383 [hereinafter ILO Convention No. 169].

<sup>108</sup> See FINNMARK COMMISSION, REPORT OF FINNMARK COMMISSION: REPORT FIELD 1 STJERNOJA/SEILAND (Mar 20, 2012); REPORT FIELD 2 NESSEBY (Feb.13,2013); REPORT FIELD 3 SORAYA (Oct.16,2013) in Norwegian.

<sup>109</sup> See generally Oyvind Ravna, *The First Investigation Report of the Norwegian Finnmark Commission*, 20 INT’L J. MINORITY & GRP. RTS. 443-457 (2013).

<sup>110</sup> *Id.* at 455-457.

<sup>111</sup> *Id.*

Commission may clarify the extent of the rights of ownership and use of the Saami in their traditional lands, this process demonstrates how difficult it is to reform governance systems in ways that fully accommodate indigenous rights.

The adoption of a new mining Act in 2009 has also raised some issues regarding Saami rights and the functioning of the Finnmark Act in relation to mining activities.<sup>112</sup> In particular, the ILO Committee pointed to the absence of a clear understanding as to whether the Finnmark Act provides a model of benefit sharing that is respectful of Saami rights.<sup>113</sup> As the Finnmark Estate is currently the landowner of the Finnmark lands, it receives the revenues from mining activities and decides how to use them. However, there is no certainty on whether the mechanisms provided by the Finnmark Act guarantee Saami participation in the revenues generated by these development projects.<sup>114</sup> In its conclusion, the ILO Committee supports the claim that Saami who are not the landowners of the land concerned but who have traditionally used it, should benefit from the mining projects. It, however, additionally emphasised that there is no single model for benefit sharing under Article 15 of the ILO Convention. Appropriate systems have to be established on a case by case basis.<sup>115</sup> These conclusions leave a great deal of ambiguity as to the compatibility of the Finnmark Act with the ILO Convention.

The adoption of legislation such as the Finnmark Act or the drafting of the Nordic Saami Convention are evidences that indigenous peoples' rights are increasingly taken into account. There is a growing understanding that the State has a duty to respect and protect indigenous interests in the governance and development of natural resources. The integration of indigenous peoples' rights is, however, still in its infancy and needs to be

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<sup>112</sup> Act of 19 June 2009 No. 101 relating to the acquisition and extraction of mineral resources (the Minerals Act), *see* unofficial translation *available at* [http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact\\_translation\\_may2010.pdf](http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf).

<sup>113</sup> International Labour Organization, Observation (CEACR) on Norway, Indigenous and Tribal Peoples Convention, 1989 (No. 169), adopted 2009, published 99th ILC session (2010).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

developed more accurately in new policies and legal arrangements.

## CONCLUSION

The concept of sovereignty is multifaceted and can be approached from different angles. For a traditional international lawyer, sovereignty is embedded in the interstate relationship and the delimitation of State powers. A human rights lawyer, on the other hand, would construe sovereignty in the framework of the relationship between the State and its people(s). This article defended the human rights perspective by emphasising upon the duty of States to protect the rights of indigenous peoples in the governance and management of natural resources. In light of the growing interest in Arctic resources, there is an urgent need to clarify and strengthen the rights of indigenous communities. Taking the adverse effect of resource exploitation on indigenous peoples in the Arctic, the exercise of sovereignty over natural resources cannot solely be approached on the premise of an interstate relationship.

Pursuant to their right of self-determination, indigenous peoples have the right to own, use, control and develop their lands and natural resources. To implement self-determination, it is not sufficient to recognize indigenous autonomy and to create independent political institutions. It is crucial to protect their interests in the governance and management of natural resources so as to ensure that their right to freely dispose of their natural resources is also realized. State legislation and measures relating to indigenous peoples' rights to land and natural resources must be revisited taking into account international human rights law and more specifically the standards provided by the ILO and the UNDRIP. There is, however, no one-size-fits-all model of governance and management to accommodate indigenous self-determination and each country must adapt its own legal framework so as to take its own context into account.

In the Nordic countries efforts have been made in recent years to more effectively implement indigenous peoples' rights. At the regional level, the role of the Arctic Council is commendable even though the role played by indigenous

communities in it must be strengthened, especially in issues relating to the governance of natural resources. Individual countries such as Norway have adopted new management models for ensuring Saami rights to lands and natural resources in the county of Finnmark. However, the exercise of sovereignty over natural resources at all levels remains predominantly State-centric. Consequently, there is a need to invigorate indigenous peoples' rights as a new source of authority for governing and managing land and natural resources and to stimulate the establishment of new legal arrangements through which indigenous rights can flourish. Only then will sovereignty be capable to work in tandem with indigenous self-determination with the goal to promote a more equitable, peaceful, stable and humane world.<sup>116</sup>

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<sup>116</sup> JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 85 (1996).