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The Draft for a Nordic Saami Convention

I. INTRODUCTION

During the course of the twentieth century, in particular, the Saami, as was the case for many indigenous peoples, were subjected to assimilationist practices, a development that was reversed in some parts of the Nordic states only as recently as the 1970s.¹ Especially important in this regard was the rise of both the Saami movement and the indigenous peoples' movement in general, which further strengthened the Saami claims to regain their lands and waters. The Saami have, in many ways, been pioneers in setting out policies to resist assimilation into mainstream societies, especially with the establishment of the Nordic Saami Council (now the Saami Council) in 1956, which further inspired the indigenous peoples' movement all over the world. The effort to conclude a Nordic Saami Convention will also act as such an inspiration, since it advances the Saami as a people with a right to self-determination.

At present, there are approximately 90,000 Saami living in the northernmost regions of North Calotte and Kola Peninsula. Of these, the Norwegian Saami constitute the largest group, numbering approximately 50-65,000 people, followed by Sweden (20,000), Finland (8,000) and Russia (2,000).² Currently, the Saami are recognized as an indigenous people—not only a minority group—in the constitutions of Finland and Norway. In Sweden, there is no constitutional recognition of the Saami and they

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1 See the keyword 'assimilation' in Ulla-Maija Kulonen, Irja Seurujärvi-Kari and Risto Pulkkinen, *The Saami: A Cultural Encyclopedia* (Finnbooks, Lake Worth, 2005), 24-25 and the accompanying sources.

2 These figures cannot be but rough estimates, as there is no clear definition of who constitute the Saami. See the Report, 65. See also the introduction in *ibid.*, 5.

are treated as an ethnic minority and/or indigenous people.³ In the Constitution of the Russian Federation, the Saami constitute one of the many indigenous ‘small in number’ peoples of the north. Only Norway, of all four states in which the Saami live, has become a party to the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, the only modern international convention specifically dealing with the rights of indigenous peoples.⁴ However, at least the Saami enjoy the minority protection of Article 27 of the Covenant on Civil and Political Rights,⁵ since all four states in question are parties to it. From the viewpoint of the rights of indigenous peoples in general and the Saami in particular, the recent adoption by the General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples is also important.⁶ The draft for a Nordic Saami Convention tackles the difficult legal situation facing the Saami and tries to provide a comprehensive framework for regulating the legal relationship between the Saami and the three Nordic states.

This article aims to provide a general commentary on the draft for a Nordic Saami Convention submitted by the Expert Committee (which was composed of an equal number of representatives from the three Nordic states and the three Saami parliaments) to the governments of the three Nordic states and to their Saami parliaments.⁷ This extensive document (hereinafter “the Report”) consists of nine sections and four annexes and totals altogether 340 pages.⁸ The Finnish version of the Report consists of

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- 3 See the Report on the Draft Saami Convention, “Pohjoismainen saamelaisoppimus: Suomalais-norjalais-ruotsalais-saamelaisen asiantuntijatyöryhmän 27. lokakuuta 2005 luovuttama luonnos”, Finnish Ministry of Justice Publication No. H-2183 F, 90-96 (hereinafter “the Report”).
 - 4 The Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, entered into force 5 September 1991, ILO Convention No. 169, at <www.unhcr.ch/html/menu3/b/62.htm> (hereinafter “the ILO Convention”).
 - 5 International Covenant on Civil and Political Rights (CCPR), adopted 16 December 1966, entered into force 23 March 1976, at <http://www.unhcr.ch/html/menu3/b/a_ccpr.htm>.
 - 6 The UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, at <<http://daccessdds.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement>>.
 - 7 The Report was submitted by the Expert Committee in Oslo, 26 October 2005. In Finland, it was submitted, in the presence of all the responsible Saami ministers and the presidents of the Saami parliaments, on the premises of the Ministry of Justice, on 16 November 2005. See the press release at <<http://www.om.fi/Etusivu/Ajankohtaista/Uutiset/Uutiset2005/1145624694333>>.
 - 8 See the Report, 151-246. The other parts of the Report consist of the following: how the Committee was appointed and its terms of reference (Section 2, 44-46); summary of the content of the proposed text for a Convention (Section 3, 47-56); explanation of the process leading to the appointment of the Committee and how the Committee has fulfilled its task (Section 4, 57-62); discussion of some of the general issues related to the Convention (Section 5, 63-64); review of the legal and factual situation of Saami in Finland, Norway, Sweden and the Russian Federation (Section 6, 65-103); extensive analysis of the international treaties and other international instruments relevant from the viewpoint of Saami rights (Section 7, 104-147); and a discussion of the status of Saami in the Convention (Section 8, 148-150). The Annexes deal with a study of whether Saami could be parties to the proposed

the Committee's proposal for a text of the Nordic Saami Convention in the Finnish and Swedish languages (Section 1).⁹ The most important part of the Report from the perspective of this article is clearly the part that aims to clarify the content of each of the 51 individual provisions of the proposed Convention (Section 9) and which is called "the Commentary" in this article.

The Draft Convention text (hereinafter "the Draft Convention") is divided into seven parts after a preface: the general rights of the Saami people (I); Saami governance (II); Saami language and culture (III); Saami right to land and water (IV); Saami livelihoods (V); implementation and development of the Convention (VI); and final provisions (VII). The Commentary is meant to clarify the meaning of all of the 51 Articles of the Draft Convention and provides a good basis for interpreting the content of these draft provisions.¹⁰ In this article, the unofficial English translation of the Draft is used together with the Finnish Report and Commentary, the Finnish language being one of the authoritative languages of the Draft Convention.¹¹ However, since the work of the Expert Committee was done on the basis of the Norwegian and Swedish languages, the Expert Committee recommends that, at least in the initial stages, these two languages should be regarded as authoritative when interpreting the Draft Convention.¹² Hence, if the meaning of a certain provision remains uncertain, regard shall be paid to the Swedish language version contained in the Finnish Report.

Before proceeding to analyze the individual chapters and articles of the Draft Convention, it is useful to bear in mind that the Draft is the outcome of the work of an Expert Committee, with much expertise in international law, in particular, and legal issues, in general. The Saami representation in the making of the Draft Convention was intensive, since they had an equal number of seats on the Committee to the three Nordic states.¹³ With this composition, very innovative solutions were sought and resolved. The Expert Committee expresses in the preface to the Report that it aimed to reach a common position even on difficult issues and, thus, the Draft Convention does not contain any dissenting opinions or alternative formulations. Yet, in some questions, the preface provides, the representatives of the Finnish government had difficulties in accepting some solutions, especially those related to Saami self-determination, Saami

Convention (Annex I, 247-250); the legal status of the Russian Saami (Annex II, 251-262); an article by the three members of the Committee about the right to self-determination of the Saami (Annex III, 263-318); and the Draft United Nations Declaration on the Rights of Indigenous Peoples, together with suggestions from the Nordic countries, New Zealand and Switzerland (Annex IV, 319-340).

9 *Ibid.*, 9-43.

10 *Ibid.*, 151-244.

11 The unofficial English version of the Draft Convention can be found from the Saami Council website, at <[http://www.saamicouncil.net/includes/file_download.asp?deptid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?deptid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc)>.

12 See the Report, 47.

13 The chair of the Expert Committee, the former president of the Supreme Court of Norway, expressed in the first meeting of the Expert Committee that it is desirable that vice-members also take part in the drafting of the Draft Convention. See the Report, 60.

rights to land and water, and reindeer herding as a Saami livelihood. These concerns—and others expressed during the commenting period in the three states¹⁴—will remain to be resolved when the negotiations on the basis of the Draft Convention begin.

The core task of this article is to interpret and analyze the provisions of the Draft Convention with the help of the Commentary. This is done by examining all of the 51 articles through the chapters they are placed into. In order to interpret the individual provisions of the Draft Convention in light of the Draft Convention's object and purpose, as prescribed in the Vienna Convention, it is important to examine the more general normative vision fleshed out in the Draft Convention's preface and Chapter I. Since the Draft Convention provides the basis for actual treaty negotiations, it is useful to examine the likely obstacles the Draft Convention will encounter. This will be done by studying the comments made by authorities, bodies and associations in Finland to the Draft Convention, which will provide a good picture of the challenges ahead, as Finland has had most problems with the Draft Convention already during the Expert Committee stage. It will also be important, in the concluding remarks, to reflect on the general importance of the Draft Convention, in both the Nordic and international context. Before all of this, a brief overview of the process leading up to the submission of the Draft Convention to the consideration of the Nordic countries and their Saami parliaments is in order.

II. THE PROCESS

The process that led to the adoption of the Draft Convention manifests well the approach codified as Article 3 of the Draft: that Saami are a people, not only four indigenous/minority groups living in four states. This is, first of all, seen in the way the process was started, the Saami Council being the first to take up the idea of concluding an international convention that would tackle the legal status and rights of the Saami.¹⁵ After a few years of study on the issue—and especially through the work of the Nordic cooperation body on Saami and reindeer herding issues—the idea of a Saami Convention reached the Nordic Council in 1995. During this meeting, the three Nordic ministers who were responsible for Saami affairs decided that a working group should be established, whose task was to clarify the need for such a Convention and its basis. Their decision was based on the report from the above-mentioned Nordic cooperation body on Saami and reindeer herding issues, which called for concluding such a Convention. The ministers stated that the work should be organized together with the Saami parliaments and the Saami Council—a decision that was supported by both Saami organizations.¹⁶

Even though the ministers had recommended that the Saami Council should be involved in the work of the Working Group (WG), the final composition of the WG consisted of three representatives from the three Nordic states and one representative from each of the Saami parliaments. The WG was established in 1996 and it com-

14 See the summary (in Finnish) of the comments made to the Finnish Ministry of Justice and to the Saami parliament at the Ministry's website, at <<http://www.om.fi>>.

15 See the Report, 57.

16 *Ibid.*, 57-59.

pleted its work by 1998, with a recommendation that the work with the Nordic Saami Convention should be continued. As one possible route, the WG suggested the establishment of an Expert Committee, which would provide the actual negotiations with a draft text.¹⁷

A new institutional structure within the Nordic Council commenced its work in 2000—namely, the meetings between the responsible ministers for Saami affairs from the three Nordic states and the presidents of the Saami parliaments (the “Saami Cooperation Council”). It was this body, which now has its secretariat with the Nordic Council of Ministers and which took the next step and decided on 7 November 2001 that an Expert Committee should be established, that also set out the terms of reference for the Expert Committee, which will be studied further below.¹⁸ On 13 November 2002, the Saami Cooperation Council appointed the members of the Expert Committee. Interestingly, the composition of the Expert Committee was fully equal in representation, as each of the three Nordic states appointed one member for the Committee and each of the three Saami parliaments their own, the Committee thus having six members plus their vice-members, to attain the goal set out by the Saami Cooperation Council: to produce a draft text for a Nordic Saami Convention.

The process involved in drawing up the Draft Convention manifests clearly the idea of the equality between the Nordic states, on the one hand, and the Saami, on the other. It was the Saami who first took up the idea of drafting a Saami Convention and the Draft Convention was produced with as Saami-friendly a composition as possible. This composition of the Expert Committee clearly influenced the outcome of the work of the Expert Committee, as the Draft Convention certainly tries to advance the status and rights of the Saami as much as possible within the complex institutional framework in which they are presently located.

III. PRELIMINARY QUESTIONS

The Expert Committee needed to tackle certain fundamental issues before proceeding with its work. Some of these were the result of the terms of reference given to the Committee by the Saami Cooperation Council and some were raised during the initial stages of work by the Committee.

At the beginning of the work of the Expert Committee, the issue of whether the Draft Convention should be more of a framework convention than a convention according rights and duties was taken up. In the Report, it is stated that the Expert Committee quite soon decided to aim for a convention that would establish duties for states and concrete rights for Saami. The Committee soon found a consensus on the matter, arguing that analysis of what are the needs of the Saami revealed that the Draft Convention should be one that would remedy the difficult legal and factual situation facing the Saami—that is, a Convention according them concrete rights. According to the Committee, a framework convention, which would have laid out general goals, principles and vaguely worded obligations, would not have been able to tackle the seri-

¹⁷ *Ibid.*, 59.

¹⁸ *Ibid.*, 44–46.

ousness of the situation.¹⁹ Indeed, as both Finland and Sweden have openly declared their goal to ratify the ILO Convention, which Norway has already ratified, it would have seemed like an unnecessary exercise if the Draft Convention had been a framework convention. In addition, the Nordic countries voted in favour of adopting the UN Declaration on the Rights of Indigenous Peoples.

According to the Expert Committee, the legal basis for the Draft Convention is grounded in international conventions and other normative instruments that are binding on the Nordic states; these are extensively examined in Section 7 of the Report. The Committee notes that the specificity of the proposed norms in the Draft vary according to the needs in different areas of Saami life.²⁰ This is well manifested in the Draft Convention. For instance, Article 23 on Saami language rights accords very clearly defined rights and is complemented by Article 24, allocating the state's responsibility for the development of the Saami language. This is further realized by Article 46 (national implementation), which provides that: "[i]n 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", which will further concretize the rights and duties of the Draft.

During the work of the Expert Committee, the Saami Council, which represents all Saami, held its Conference in Honningsvåg in 2004. In the Conference Declaration, the Council took also a stance on the inclusion of Russian Saami in the normative instrument prepared by the Expert Committee:

Consider the ongoing work on a Nordic Saami Convention an important step in the effort to reduce the negative implications of state borders to the Saami society and likewise an important contribution in the acceptance of basic Saami rights regardless of the state border. In this context emphasize the importance that Finland, Norway and Sweden also make effort to incorporate Russia in the development of a Saami convention to ensure that the entire Saami nation acquires legal protection through a treaty of this character.²¹

The Saami Cooperation Council—by outlining the terms of reference for the Expert Committee—also asked it to take a stance on whether the Russian Saami could be included in the Draft Convention. The Committee, however, argued that the Draft is meant to be a Nordic one, and thus the Russian Saami are not included in the Draft Convention.²² On the other hand, the Committee made it clear that it would be desirable

19 *Ibid.*, 63.

20 The Report, 63.

21 See the preamble of the Honningsvåg Declaration from the website of the Saami Council, at <<http://www.saamicouncil.net/files/20041215142715.doc>>.

22 The Report, 63–64. The Committee also pondered the name of the Draft Convention from the perspective of the Russian Saami. The Nordic Saami Convention, as a name, conveys, according to the Committee, that Russian Saami are not covered by the Draft Convention. The Committee also discussed this issue from the viewpoint of whether the name is justified when it covers only three out of five Nordic states, but in the end decided that it is the most convenient name, as otherwise the title would have needed to be revised from that

for the three Nordic states to organize relations with Russia in such a way that it would be possible to cooperate with the Russian Saami.²³ The Committee also points out that if a Saami is a Russian national and resides in any of the three Nordic states, then he/she is covered by the Draft Convention. The stance of the Expert Committee can only be commended. With this approach, the Expert Committee tried to extend the Draft Convention's rights as much as possible to the Russian Saami, without involving the Russian state, whose involvement in the eventual negotiations on the basis of the Draft Convention would only seem difficult, given, for example, that the Russian government has been one of the most vocal countries opposing acceptance of the UN Declaration (and voted against its adoption in the Human Rights Council and abstained from the vote in the General Assembly). Another problem is that there are a vast number of indigenous peoples in Russia, who are treated alike in law, a fact that would have made it very difficult to give special recognition to Russian Saami by the Russian Federation becoming a party to an international convention focusing on the rights of Saami.²⁴

One issue that was taken up by the Working Group that studied the need and basis for a Nordic Saami Convention was whether the Saami could be parties to the Nordic Saami Convention. According to the Working Group, the Saami should be parties/party to the Nordic Saami Convention in order to guarantee equality, dignity and the respect for the rights of indigenous peoples when drafting and approving the eventual Convention. Many comments made on the report by the Working Group supported the idea of having the Saami as a party to the Convention. This idea was also backed up by scholars. Professor Alfredsson opined that Saami could indeed be a party to the Convention, and it would be for themselves to decide whether they would ratify the eventual Convention as one or three groups.²⁵

The issue was discussed in the Expert Committee, and they even commissioned a researcher, Annika Tahvanainen, to study the issue (Annex I).²⁶ Tahvanainen argued that it is primarily subjects of international law that have a right to conclude international treaties—that is, states and their institutions. In addition, some groups that have a decolonized past or are under alien occupation have been regarded as entities who may

used by the Saami Cooperation Council when it drafted the terms of reference and from the title used by the working group that studied the need and basis for a Nordic Saami Convention. See *ibid.*, 151-152.

- 23 The Expert Committee held a meeting with the representatives of the Russian Saami in January 2005 in Kiiruna Sweden. See *ibid.*, 64.
- 24 The legal status of the Russian Saami is studied in the Report. See *ibid.*, 99-103.
- 25 See Gudmundur Alfredsson, "Minimum Requirements for a New Nordic Sami Convention", 68 *Nordic Journal of International Law* (1999), 397-411. He argues that: "[t]he Sami should be a party to a new Sami convention. The traditional approach has it that States conclude treaties, but there is no rule without exception. Sovereign States may choose to make agreements with non-state entities; accordingly, it is easy and simple for the Nordic States, if they so decide for reasons of equality and justice, to conclude a new convention with and not only about the Sami. It would be for the representative organs of the Sami themselves to decide whether they were to ratify a new convention as one group or as three groups." *Ibid.*, 408.
- 26 Her argument is presented in Annex I to the Report.

conclude international treaties in certain circumstances.²⁷ However, indigenous peoples do not qualify as such peoples and they are at most, according to her, accorded the right to internal self-determination within existing states. Her interpretation is heavily influenced by interpreting the Human Rights Committee practice in such a way that it supports only internal self-determination, even though Article 1 of the Covenant on Civil and Political Rights seems to confer a full-blown right to self-determination (“[a]ll 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”). She also interprets Article 3²⁸ of the UN Draft Declaration, which it was at the time Tahvanainen studied the issue, as supporting only internal self-determination, since, according to her, it needs to be interpreted together with Article 4.²⁹

Another expert article that is contained in the Report as Annex III takes a very different perspective on the right to self-determination.³⁰ An article by the three members of the Expert Committee argues that indigenous peoples’ right to self-determination cannot be restricted to internal self-determination. In a report submitted in 2005, they interpret the Human Rights Committee (which monitors the implementation of the Covenant on Civil and Political Rights)³¹ practice with respect to Article 1 of the Covenant and the UN Draft Declaration (and the joint statements made by the five Nordic states in the preparatory process) as supporting the right to self-determination for well-established indigenous peoples such as Saami. As support for their argument, they provide that the Human Rights Committee has from 1999 onwards started to treat indigenous peoples as covered by Article 1 of the Covenant, without making any exclusion of external aspects of self-determination as enshrined in Article 1(1).³² In addition,

27 *Ibid.*, 247.

28 Art. 3 of the Draft Declaration as it was adopted by the Human Rights Council provides: “[i]ndigenous 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.”

29 It must be recalled that the Report was submitted before even the adoption of the UN Declaration by the Human Rights Council and thus Tahvanainen was commenting on a draft version. Art. 4 prescribes: “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”. See the Report, 247-250.

30 John Bernard Henriksen, Martin Scheinin and Mattias Åhren, “Saamelaisten itsemäärämisoikeus”, 5 September 2005, Annex III to the Report, 263-315.

31 International Covenant on Civil and Political Rights (CCPR), adopted 16 December 1966, entered into force 23 March 1976, at <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

32 See the following concluding observations by the HRC where explicit references to either the concept of self-determination of peoples or Art. 1 can be found: Canada (UN Doc. CCPR/C/79/Add.105 (1999)); Mexico (UN Doc. CCPR/C/79/Add.109 (1999)); Norway (UN Doc. CCPR/C/79/Add.112 (1999)); Australia (UN Doc. CCPR/CO/69/AUS (2000)); Denmark (UN Doc. CCPR/CO/70/DNK (2000)); Sweden (UN Doc. CCPR/CO/74/SWE (2002)); and USA (UN Doc. CCPR/C/USA/Q/3/CRP.4 (2006)). The recent concluding observations on Finland (UN Doc. CCPR/CO/82/FIN (2004)) leave no room for doubt: “[t]he Committee regrets that it has not received a clear answer concerning the

the article also argues that Article 3 of the UN Draft Declaration, as understood also by the Nordic states, also guarantees the right to self-determination with the restriction that it does not, currently, empower the people to secede from independent states, except in exceptional circumstances. However, they perceive that, currently, indigenous peoples are entitled to exercise their external self-determination via representation in international forums and in intergovernmental affairs.

Against this background, it may come as a surprise that the article written by the three members of the Expert Committee does not even ponder the treaty-making power of indigenous peoples in general and Saami in particular. They do argue that Saami and other indigenous peoples have an external self-determination right to international representation, but stop short of saying anything of whether they can conclude treaties.³³ To the present author, it is difficult to see any logical reason why the members of the Committee in their article did not go into this issue, since, according to their own premises, they have a hard time making such a distinction, for example, between the legal status of individual Saami parliaments and Inuit Greenland Home-Rule Government. Both, according to the ideas presented in the article, are indigenous peoples and people in the state they are living in, and both should therefore be considered to have similar rights of external self-determination in international law—and, at least for Greenland and the Faroe Islands, this has meant also treaty-making power in certain issues.³⁴ The article written by the three members of the Expert Committee perceive it as controversial to make distinctions between different peoples having different sets of self-determination rights, a view they see as discriminatory.³⁵

It would seem that the political factor behind the adoption of this stance by the Expert Committee—and the members who wrote the article—was heavily influenced by the statements from the Norwegian and Finnish foreign ministries, which both argued that only states have a right to conclude treaties.³⁶ The Expert Committee concluded that an agreement between a state and a group of people such as the Saami is not an agreement in the meaning of international law, and the same applies to Saami parliaments as representing the Saami. The Committee opined that if a treaty was concluded between states and the Saami parliaments, the respective convention would be confusing from a legal perspective. It could be treated as an international convention between the three Nordic states, inasmuch as they have made commitments among themselves, but it would be of a different kind as regards the legal relationship between the states and the Saami parliaments, or even towards individual Saami. The Committee opined that such a convention would create legal uncertainty and that its authority and influence would suffer, and it might not reach the level of importance expected by the Expert

rights of the Sami as an indigenous people (Constitution, sect. 17, subsect. 3), in the light of article 1 of the Covenant (paragraph 17, first sentence)”.

33 See the Report, 297-303.

34 Greenland has concluded fisheries and whaling agreements with states located geographically close to it. In addition, under the Greenland Home Rule Act, international conventions must be submitted to Greenland prior to ratification in Denmark. See more, at <<http://explorenorth.com/library/facts/greenland2000.html#16>>.

35 Report, 300-302.

36 *Ibid.*, 148.

Committee from a convention regulating the status of Saami. The Expert Committee considered it better to have the ratification and entry into force (as well as its amendment) than to require the approval from all the Saami parliaments.³⁷

It is evident that this question was a difficult one for the Expert Committee to decide. If the approach chosen by the working group to have the Saami as parties to the treaty had been followed, it would have established an important precedent in international law. In the final analysis, however, the Committee's stance must be regarded as the most convincing one, not only because of problems of legal uncertainty but because the Draft Convention will still need to enter the actual negotiation stage and, if successful, the ratification procedure, involving also the parliaments of the three states. It was clearly the least risky option to foresee a treaty made between the three Nordic states but giving the Saami parliaments great influence in its ratification, amendment, development and supervision, as will be examined below. Indeed, it is hard to see how the Saami parliaments could have gained a better position in the Draft Convention even if they had been parties.

IV. THE FUNDAMENTAL IDEAS IN THE DRAFT

Before proceeding to analyze the individual chapters and articles of the Draft Convention, it is useful to examine the underlying normative ideas of the Draft Convention that weave the individual articles of the Draft together. These normative ideas are presented in the preface, which, for the sake of equality, has been divided into two sections: first, the three Nordic governments and then, the three Saami parliaments expressing their relationship to the Draft Convention.

One fundamental idea behind the Draft Convention is that the Saami are one indivisible people, even though spread across the areas of four individual states. As stated by the governments: "the Saami is one people residing across national borders" and "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". From this it follows that "the Saami people has a particular need to develop its society across national borders". In their turn, in the preface the Saami parliaments express that they "want that the Saami shall live as one people within the three states" and "hold the vision that the national boundaries of the states shall not obstruct the community of the Saami people and Saami individuals". The objective of the Draft Convention is formulated in its Article 1:

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.

The individual articles of the Draft Convention advance this objective in many respects. First, in Chapter I, for example, that the states "shall, in cooperation with the Saami parliaments, strive to ensure continued harmonization of legislation and other regulation

37 *Ibid.*, 148-150.

of significance for Saami activities across national borders”,³⁸ to solidify Saami cooperation on cultural and commercial arrangements³⁹ and to strengthen Saami cooperation on education and welfare arrangements.⁴⁰ States are also required to make efforts to ensure that Saami symbols are made visible in a manner signifying the Saami status as a distinct people in the three countries. These generally worded provisions of Chapter I are specified in the individual chapters and articles of the Draft Convention, as will be examined below.

The idea of Saami being one indivisible people finds its legal basis in the acknowledgement that Saami form a people who have a right to self-determination. If Saami were not a people but simply indigenous or minority groups within the four states in which they reside, it would be difficult to perceive them as one people, having as its goal the further integration of the whole Saami people. The governments acknowledge this in the preface by stating that, in addition to affirming that they are indigenous people in the three countries,⁴¹ the Saami people have the right of self-determination. The Saami parliaments, in their turn in the preface, “emphasize the importance of respecting the right of self-determination that the Saami enjoy as a people” and “emphasize the Saami people’s aspiration, wish and right to take responsibility for the development of their own future”. Article 3 of the Draft Convention, entitled “The Right of Self-determination”, formulates this right in the following way:

As a people, the Saami have 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 have the right to determine their own economic, social and cultural development and to dispose, to their own benefit, over their own natural resources.

This fundamental right manifested itself in the way the Draft Convention was drafted, by equal number of representatives from the three Saami parliaments and the three Nordic states. It also manifests itself by having both the Nordic governments and the Saami parliaments express their relationship to the Convention in the preface, and especially with the unique status that the Saami parliaments are given in an international treaty in Chapters VI (“Implementation and Development of the Convention”) and VII (“Final Provisions”).

Another important emphasis in the preface deals with the environment or territory—land, water and sea areas—of the Saami people. The governments acknowledge “that lands and waters constitute the foundation for the Saami culture and that hence, the Saami must have access to such”, which is even more strongly taken up in the preface by the Saami parliaments, since they “particularly emphasize that the Saami have rights to the land and water areas that constitute the Saami people’s historical homeland, as well as to natural resources in those”. The idea of a Saami region is taken up

38 Art. 10, Draft Convention.

39 Art. 11, *ibid.*

40 Art. 12, *ibid.*

41 Art. 2, *ibid.*

in, for example, Article 22 of the Draft Convention: “[t]he 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”, in determining the rules related to “Saami Governance” (Chapter II), outlining the “Saami Right to Land and Water” in Chapter IV (which also includes rights over sea areas for Norwegian Sea Saami in Art. 38) and in the chapter on “Saami Livelihoods” (Chapter V). It can also be seen in the way that the Draft Convention regulates the Saami living outside of Saami regions, they being given some rights but far less extensive ones than those who live in the Saami region.⁴²

The underlying vision of the Draft Convention is to pursue a path to a joint Nordic Saami nation.⁴³ At the core of the Draft Convention is a vision of Saami that will in time develop their joint Saami parliament, with further attempts made to include Russian Saami in one way or another, which would be empowered to make decisions and represent the Saami in state and international settings; that their rights to their traditional lands, waters and sea areas are secured, making it possible to see a common homeland for the Saami people; and to have their crossborder rights guaranteed, in order for the Saami presently separated by state borders to develop their cooperation in maintaining into the future their unique culture in its totality.

V. EXAMINATION OF INDIVIDUAL CHAPTERS OF THE DRAFT CONVENTION

A. The General Rights of the Saami People

Chapter I regulates the general rights of the Saami people, consisting first of the objective of the Convention and the status of the Saami as an indigenous people⁴⁴ but also as a people with a right to self-determination on the basis of Article 3. Since the Convention aims to accord concrete rights to the Saami with corresponding obliga-

42 See, for example, Art. 6: “[s]tate measures with respect to the Saami people [...] 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”; or Art. 26(2), which reads: “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.” It is interesting to note that the terms of reference given by the Saami Cooperation Committee to the Expert Committee enumerated quite a number of aspects of Saami life, but not Saami rights to land and water. The Expert Committee readily acknowledges this but rightly argues that the terms of reference just take up some issues that should be studied as to their regulation, i.e., it is not an exhaustive list of issues. The Expert Committee states that it has decided to deal with this topic because of its importance. See the Report, 60.

43 Evidently, such a vision is also manifested in the work of the Saami Council, since they represent all Saami, not only the Nordic Saami. However, the Saami Council is a non-governmental organization, representing unelected Saami associations from the four states, and has no public powers. See the structure of the Council, at <<http://www.saamicouncil.net/?deptid=2181>>.

44 Art. 2, Draft Convention.

tions on the Nordic states, it includes a provision of persons to whom the Convention applies⁴⁵ and the scope of the states' responsibility.⁴⁶ The states' responsibilities are fleshed out in a general manner in Articles 6 and 7, providing that the states shall effectively establish conditions enabling the Saami to secure and develop its language, its culture, its livelihoods and society and to ensure that the Saami people and Saami individuals are ensured protection against all discrimination. It is also made clear in Article 8 that the rights guaranteed in the Convention are minimum rights, which do not prevent any state party from taking additional measures of protection.

Article 9 requires states to show due respect for the Saami people's conceptions of law, legal traditions and customs and take these into account when preparing legislation in areas where these can be relevant. Articles 10, 11 and 12 relate to legal protections for Saami crossborder activities. First of all, it is required that states shall, in cooperation with the Saami parliaments, strive to ensure continued harmonization of legislation and other regulations of significance for Saami activities across national borders.⁴⁷ This is then complemented by obligations on states to take measures and remove obstacles from the Saami in their pursuit of economic activities and satisfaction of their cultural needs across national borders,⁴⁸ and to take measures to provide Saami individuals residing in any of the three countries with the possibility of obtaining education, medical services and social provisions in another of these countries when this appears more convenient. Finally, Article 13 requires the states to respect the right of the Saami to decide over the use of the Saami flag and other Saami national symbols.

Some of the Articles in Chapter I raise difficult issues, especially the right to self-determination of the Saami and indigenous peoples in general. Before proceeding to analyze this controversial issue, it is worth quoting Article 3 again:

As a people, the Saami have 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 have the right to determine their own economic, social and cultural development and to dispose, to their own benefit, over their own natural resources.

The Commentary to Article 3 starts by citing the common Article 1 to the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. It further emphasizes that all three Nordic states have become parties to these two Covenants, and two of them (Norway and Finland) have incorporated the Covenants as part of their national legal system. In addition—and importantly—the Commentary refers to the practice that has developed in the Human Rights Committee, which has, from 1999 onwards, applied Article 1 to certain indigenous peoples, including the concluding observations it has made to Finland, Sweden and Norway (see above). The Commentary also refers to the process of having the General Assembly of the UN

45 Art. 4, *ibid.*

46 Art. 5, *ibid.*

47 Art. 10, *ibid.*

48 Art. 10, *ibid.*

adopt the UN Declaration, which contains an almost identical provision to that of Article 1(1) of the Covenant, with the difference that the beneficiaries of the right to self-determination in the UN Declaration are indigenous peoples. The Commentary points out that, during the process of drafting the UN Declaration, the Nordic states have supported the provisions on the right to self-determination for indigenous peoples. With this, the Committee concludes that Saami are not only an indigenous people but a people as enshrined in Article 1 of the Covenant. However, the Commentary also makes clear that this self-determination does not contain a right to secession except in extreme circumstances and that the Saami are not in a position to demand the right to establish their own state on the basis of international law as it currently stands. Interestingly, the Commentary makes it clear that the reference to international law in the context of Saami self-determination means that the content of the right to self-determination of Saami develops in accordance with the development of international law.⁴⁹ As background material, the Commentary contains an article by the three members of the Committee, as examined above, which more fully elaborates the internal and external aspects of the right to self-determination of indigenous peoples in general and Saami in particular.

The Committee's view, which is more fully explained in the Commentary, is fully in line with general international law. Under general international law, the external aspects of self-determination—in particular, the prospect of a group seceding from an existing state—are seen as a matter that international law delegates to national legal systems, except in the case of grave human rights abuses or alien or military domination.⁵⁰ International law thus does not grant a right to external self-determination to any groups within existing states but leaves it to the national politico-legal process. If the domestic system deems that a group within the state has the right to self-determination, then that group is entitled to exercise it.⁵¹ In a similar vein, nothing prohibits Nordic states together from recognizing the Saami as a people with a concomitant right to self-determination, as they have jointly done in the process of drawing up the UN Declaration. However, the Expert Committee relies rather heavily on Article 1 of the two Covenants and, especially, on recent practice by the Human Rights Committee in applying Article 1 to well-established indigenous peoples.⁵² Here, the contrast to

49 See the Report, 155-157.

50 James Crawford, "The Right of Self-Determination in International Law: its Development and Future", in Philip Alston (ed.), *Peoples' Rights* (Oxford University Press, Oxford, 2005), 7-67, at 47-67.

51 The other side of the coin is that international law does not prohibit a state repressing a sub-unit trying to gain independence but allows it to the extent that human rights law and humanitarian law are observed. The state of international law is well manifested in the opinion of the Canadian Supreme Court on Quebec Secession. Canadian Supreme Court, *Reference re Secession of Quebec from Canada*, judgment of 20 August 1998, 2 *Supreme Court Reports* (1998), 217.

52 The background article also takes a stance on what the legal significance of these pronouncements by human rights treaty monitoring bodies is, perceiving them as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", especially in those cases where the states have not rejected or opposed these pronouncements. See the Report, 288-289. For more on this, see Interna-

the mainstream view in international law becomes apparent. As argued by the leading author in the field, Antonio Cassese, Article 1 “essentially confers on the peoples of all the Contracting parties the right to internal self-determination”.⁵³ Hence, Article 1 only confers the right to self-determination to peoples of existing states since they are the contracting parties.

Perhaps the most controversial issue in the actual negotiations may be the way the self-determination of Saami is formulated. In the present version, there is no reference to autonomy or internal/local self-determination, which may be an issue that will be opened in the negotiation stage to further make it clear that what is at issue is internal self-determination. Apart from being a delicate and controversial issue in international law, the question of Saami self-determination may also be problematic from the perspective of the constitutional laws of the three Nordic states, as they are unitary states (in contrast to federal states, which have more room to accommodate different arrangements for various groups) and their constitutional frameworks have been based upon the idea of one people governing themselves through parliamentary democracy. For instance, in Finland, Saami are guaranteed the right to self-governance in cultural and linguistic issues, which is altogether different from, for example, Finland accepting the Saami as another people inhabiting the same territory.

An interesting provision in the general part is Article 9, which relates to the customary laws of the Saami:

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.

Even though this obligation for the Nordic states does not place a mandatory obligation on them to take these conceptions of law, legal traditions and customs into account—but only consider this possibility—it is an interesting example of how the Saami legal tradition could be brought to bear in the drafting of Nordic states’ general legislation and, when applying it, in their northern areas. The Commentary to this article places heavy emphasis on Saami legal customs—for instance, the Siida system used by Saami reindeer herders, the law of inheritance and copyrights related to Joik singing.⁵⁴ As an example, the Commentary takes the Siida reindeer herding system in Norway, which officials have had a hard time accommodating with their own conceptions, simply

tional Human Rights Law and Practice – ILA Committee, “Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies”, at <http://www.ila-hq.org/html/layout_committee.htm>.

53 Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2nd ed. 2005), 62.

54 See the Report, 167-169.

because they do not know how it functions.⁵⁵ However, these kinds of problems—the problems of state officials not understanding the Saami culture—are also addressed in the Draft Convention, since Article 28 provides that “[t]he 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”.

One can wonder why the general part does not contain anything on traditional knowledge or traditional ecological knowledge (TEK) of indigenous peoples, in this case the Saami. TEK can be defined as “a cumulative body of knowledge and beliefs, handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment”⁵⁶ and is increasingly acknowledged as a body of knowledge equal to that of western science. It might have been wise for the Expert Committee to place traditional knowledge in the general chapter, which would have further made clear its cross-cutting nature in many areas of Saami life. Currently, traditional knowledge is included in the Draft Convention—in Chapter III on Saami Language and Culture, Article 31(3)⁵⁷—but it would have been useful to place it in a general chapter in order for it to form a cross-cutting issue, in the same way as the legal traditions and customs. Unfortunately, traditional knowledge is now not mentioned in Article 27 (“Research”), nor in Articles 39 (“Land and Resource Management”) or 40 (“Environmental Protection and Environmental Management”). This is, of course, a matter of drafting, and it would be highly advisable to insert the present formulation of Article 31(3) into the general Chapter I to signal that it applies to different areas of decision-making.

B. Saami Governance

Chapter II covers issues related to Saami governance, especially the rights of the Saami parliaments. It first of all confirms the status of the Saami parliament as the highest representative body of the Saami people and that it, as a body elected by way of general elections among the Saami people, is empowered to act on behalf of the Saami in each of the three Nordic states. The rights of the Saami parliaments in the Draft Convention can be divided into three areas: they can take independent decisions on all matters where they have the mandate to do so under national or international law;⁵⁸ they have the right to negotiations on matters of major importance to the Saami, and the states are prevented—unless consented to by the Saami parliament—from adopting or permitting measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society;⁵⁹ they have the right to be represented in public councils

55 *Ibid.*, 168.

56 Fikret Berkes, “Traditional Ecological Knowledge in Perspective”, in Julian T. Inglis (ed.), *Traditional Ecological Knowledge: Concepts and Cases* (International Program on Traditional Ecological Knowledge and International Development Research Centre, Ottawa, 1993), 1-10, at 3, at <<http://www.idrc.ca/openebooks/683-6/>>.

57 Art. 31(3) of the Draft Convention reads: “[t]he states shall make efforts to ensure that regard is paid to Saami traditional knowledge in decisions concerning Saami matters”.

58 Art. 15, *ibid.*

59 Art. 16, *ibid.*

and committees⁶⁰ and in intergovernmental meetings when these deal with matters that concern the interests of the Saami.⁶¹

The Saami parliaments shall also be given the opportunity to be heard during the consideration by national assemblies of matters that particularly concern the Saami people and they must, upon request, receive representatives from the Saami parliaments in order to enable them to report on matters of importance to the Saami.⁶² The Draft Convention's vision of having a joint body representing the Nordic Saami in their own area is reflected in Articles 20 and 22, whereby the Saami parliaments are permitted to form joint organizations, to which states are encouraged to transfer public authority. The states are prompted, on the basis of Article 22, to actively seek to identify and develop the Saami homeland area within which the Saami people can manage its particular rights. Finally, Article 21 requires states to respect and when necessary consult competent Saami organizations or local Saami representatives other than the Saami parliament—for instance, Saami villages, *siidas*, reindeer herders' communities and the village assemblies of the Skolt Saami.

As is provided in the Commentary to Article 3 on Saami self-determination, its content is determined in accordance with the rules and provisions of international law and of the Draft Convention, the latter meaning especially the provisions regulating the relationship between the Saami parliaments and the public authorities of the Nordic states. In the current institutional environment, the Saami right to self-determination is thus channelled via the three separate Nordic Saami parliaments, each functioning within the state they are part of, which cannot be seen as an ideal state of affairs (especially when the Russian Saami are not represented at all). However, the vision of the Draft Convention is further elaborated in the Commentary to Article 20, where the already commenced cooperation between the three Nordic Saami parliaments is strongly encouraged to aim for a Nordic Saami parliament. If such a development were to take place, states are encouraged, under Article 20, to transfer public powers to such a body.

The Draft Convention accords extensive rights to the Saami parliaments. They can take independent decisions on all matters where they have the mandate to do so under national or international law. The reference to international law in this context means, according to the Commentary, that if international law comes to accord more independent decision-making power to indigenous peoples in general and the Saami in particular, this would automatically enlarge their decision-making power. The Saami parliaments are guaranteed also broad rights to negotiate, starting from "matters of major importance to the Saami" to "measures that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society", the former giving them the right to negotiations and the latter a veto power. The Commentary to Article 16 makes it clear that even though it is the public authorities that will determine whether a certain decision or plan is a matter of major importance to the Saami—and thus subject to negotiations—much emphasis in this evaluation must be placed on how the Saami

60 Art. 17, *ibid.*

61 Art. 19, *ibid.*

62 Art. 18, *ibid.*

parliament perceives the seriousness of planned measures. This certainly guarantees that all the measures perceived by the Saami parliament as threatening them, reach fairly easily the level of negotiations, where the Saami can influence the way decisions are made. According to the Commentary, the goal of negotiations is a joint unanimous decision between the public authorities and the Saami, which, if not reached, the public authorities are obligated to give grounds as to why the consensus decision was not possible. The Commentary provides that these negotiations must be commenced as early as possible, in order for the Saami parliament to influence decision-making, and they must be given both financial and other resources (e.g., expertise assistance) to carry out these negotiations effectively. Importantly, because the threshold to trigger the right to negotiations of the Saami parliament is not high, it exposes all kinds of governmental decisions to review by the Saami parliament. This is crucial because, even though the authority might have subjected the measure in question as a matter for negotiations only, the Saami parliament might consider the matter one that may significantly damage the basic conditions for Saami culture, Saami livelihoods or society—and thus subject to its veto power. According to the Commentary, even minor measures may require the consent of the Saami parliament if they have a damaging impact on vulnerable Saami areas.⁶³

The Commentary does not use the analytical distinction between internal and external self-determination of Saami. However, in the background article by the members of the Expert Committee, Article 19 is argued to express the external part of self-determination of Saami as a milder form of external self-determination than secession. Article 19 reads: “[t]he Saami parliaments shall represent the Saami in intergovernmental matters. The states shall promote Saami representation in international institutions and Saami participation in international meetings.” Even though it is not stated specifically, the Commentary makes it clear, by reference to Article 17, that Saami have the right to be represented in intergovernmental matters when these deal with matters that concern the interests of the Saami. The wording of the Article seems to suggest that Saami parliaments have an exclusive right to represent the Saami in intergovernmental matters, but this is not the case. According to the Commentary to Article 19, it is explicitly provided that Saami parliaments do not have an exclusive right to representation and that, in some contexts, other Saami bodies can represent the Saami in international forums.⁶⁴ The obligation for the states to promote Saami representation in international institutions is also closely linked with the long-standing goal of the Saami to have rep-

63 See the Report, 179-185.

64 A good example is the Arctic Council, a high-level intergovernmental forum between the eight Arctic states (the five Nordic states, the Russian Federation, the USA and Canada), in which the Saami are represented by the Saami Council. In the Council, the indigenous peoples' organizations have been given a unique status as permanent participants, the Declaration establishing the Arctic Council even requiring that the permanent participants must be fully consulted before the consensus decision-making by the states. See Timo Koivurova and Leena Heinämäki, “The Participation of Indigenous Peoples in International Norm-Making in the Arctic”, 221 *Polar Record* (2006), 101-109. For a study on the role of the Saami Council in the UN Permanent Forum on Indigenous Issues, see Marjo Lindroth, “Indigenous-State Relations in the UN: Establishing the Indigenous Forum”, 222 *Polar Record* (2006), 239-248.

resentation in the Nordic Council, which is yet to be realized, even though, for example, Greenland and the Faroe Home-Rule governments have been accepted as members.⁶⁵

In addition to the Saami parliaments having a broad right to be represented in public committees, national assemblies and intergovernmental matters, they possess a sweeping right to influence public policy by issuing statements and opinions. According to Article 14(4): “[t]he Saami parliaments take initiatives and state their views on all matters where they find reason to do so”. In practical terms, it is hard to see any obstacles to the Saami taking a stance on almost any matter that comes to be seen as relevant by the Saami parliaments.

C. Saami Language and Culture

The last Article of Chapter III, Article 33 (“The Cultural Basis”) emphasizes the fact that the Saami culture and its material basis are closely interlinked—for instance, reindeer herding is an importance source of livelihood, while at the same it constitutes a core cultural activity. For this purpose, states are required to support the necessary commercial and economic conditions of the Saami as part of securing and developing their culture.

The chapter starts with Saami language rights complemented by the Nordic states’ responsibilities in this regard. The Saami must have, according to the Draft Convention, for example, the right to use, develop and pass on to future generations its language and its traditions and have the right to decide and retain their personal names and geographical names, as well as to have these publicly acknowledged.⁶⁶ The corresponding duties for states are to preserve, develop and disseminate the Saami language and guarantee the use of the Saami language effectively in courts of law and in relation to public authorities in the Saami areas.⁶⁷ According to Article 29, the states are required to ensure—together with the Saami parliaments—that health and social services are organized in the Saami settlement areas to conform to their linguistic and cultural background.

In order for the Saami to pass on to future generations its language and its traditions, it is evidently very important to focus on how the educational system functions. Article 26 of the Draft Convention guarantees that the Saami population residing in the Saami areas shall have access to education both in and through the medium of the Saami language, with the article containing detailed rules on how this can be achieved in respect of finances, their way of life, etc. In order to preserve the Saami cultural traditions, the Draft Convention prescribes that “[t]he 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”.⁶⁸ Of considerable importance is to educate the mainstream society about Saami culture and society, including especially per-

65 See the Report, 188-190. In addition to the five Nordic states, the Åland islands, Faroe Islands and Greenland are represented in the Nordic Council of Ministers. See <<http://www.norden.org/web/3-1-raad/3-1-5-nmr/uk/ministerrad.asp?lang=>>.

66 Art. 23, Draft Convention.

67 Art. 24, *ibid.*

68 Art. 26(3), *ibid.*

sons who are going to work in Saami areas, as prescribed in Article 28. The states are also obligated to create good conditions for research based on the knowledge needs of the Saami society, to promote recruitment of Saami researchers and encourage research cooperation across Saami areas.⁶⁹

The mass media today is of major importance in maintaining the language, traditions and, in general, the worldview of the Saami into the future. For this purpose, the Nordic states are required to create conditions for an independent Saami media policy that would enable the Saami media to control its own development. In order to create conditions for the further integration of the Saami area, the states are obligated to promote cooperation across national borders between media institutions that provide programmes or articles in the Saami language in cooperation with the Saami parliaments.⁷⁰ The proper functioning of the day-care, educational and media systems is at the core of preserving the Saami culture, to make it a living tradition for Saami children and adolescents, who are expressly guaranteed the right to practise their culture and to preserve and develop their Saami identity.⁷¹

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”.⁷² Traditional knowledge, which in the Finnish Commentary has been oddly translated as ‘traditional skills’ (but in the Swedish version as ‘traditional knowledge’), has been defined to mean the skills and knowledge of flora, fauna and other natural resources and the ways to manage these. Cultural expressions include, for example, *joik* singing, traditional costumes, Saami handiwork (*duodji*), and Saami stories, legends and myths. Since many companies have made and continue to make commercial use of Saami culture—and have gained protection for this commercial use via legislation on immaterial property rights—the Draft Convention needed to take a stance on this issue too. The Nordic states were not only required to ensure that the Saami regain influence over their own cultural expression and traditional knowledge but also to ensure that they also receive a reasonable share of the financial revenues if they are employed and benefited from by companies. As was already stated above, the only reference to traditional knowledge in the Draft Convention is in this Article 31, the states being required to “make efforts to ensure that regard is paid to Saami traditional knowledge in decisions concerning Saami matters”.⁷³

Saami cultural heritage is protected via Article 32. According to the Commentary, the diversity of material objects found from the Saami area (*Sápmi*) is firm evidence of the long history of Saami usage of the area. For the Saami, the cultural landscape has a special meaning, since they have used the environment—which is still relatively untouched by modern technology—for generations and thus have created strong connections with their environment. It is this cultural environment which the Saami,

69 Art. 27, *ibid.*

70 Art. 25, *ibid.*

71 Art. 30, *ibid.*

72 Art. 31, *ibid.*

73 Art. 31(3), *ibid.*

according to the Commentary, have grown into and thus perceive as theirs, and which also consolidates their identity as Saami.⁷⁴ This broad understanding of cultural heritage, including cultural landscape, “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”.⁷⁵ The states are obligated to ensure that any cultural items that have been removed from the Saami areas will be handed to suitable museums or cultural institutions “as further agreed with the countries’ Saami parliaments”.⁷⁶

The chapter on “Saami Language and Culture” is very much based on the idea of preserving the language and culture within the Saami homeland area, not outside it. This is seen, for example, in the states’ responsibility to ensure that the Saami language can be used effectively in courts of law and in relation to public authorities in the Saami areas. The only cases where the Saami language is guaranteed to be used outside of these areas relate to marginal cases of “in disputes and cases first dealt with in the Saami areas or which in any other manner have a particular association with these areas”.⁷⁷ The same approach is reflected in Article 26(2), whereby the “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”. According to Article 29(2), “health and social services outside the Saami settlement areas shall pay regard to the linguistic and cultural background of Saami patients and clients”. From the Finnish viewpoint, this approach seems problematic, as over half of the Saami live outside of the Saami homeland area. On the other hand, the practical problems in organizing Saami language use across all three Nordic states would be difficult and would certainly have become too problematic in the later stages of negotiating the Convention.

One commendable aspect of this chapter is that it aims also to promote the use of Saami dialects other than Northern Saami, the most widespread of Saami dialects. States’ responsibilities for Saami language rights in Article 24(4) apply also to the less prevalent Saami dialects. The obligations of the Nordic states in promoting the Saami media in Article 25(2) apply also “to a reasonable extent”⁷⁸ to the other Saami dialects.

As mentioned above, the concept of traditional knowledge is not taken up in the first general chapter but in this third chapter on “Saami Language and Culture”, which can be seen as problematic given that traditional knowledge is likely to impact most areas of Saami life. On the other hand, Article 31(3) is worded in such a way that it generalizes the states’ obligations regarding also all other areas of Saami life beyond culture and language: “[t]he states shall make efforts to ensure that regard is paid to Saami traditional knowledge in decisions concerning Saami matters”. If this Article is not replaced during the negotiations to Chapter I, it should be interpreted broadly to mean that traditional knowledge gains the influence it deserves.

74 See the Report, 207-211.

75 Art. 32(1), Draft Convention.

76 Art. 32(3), *ibid.*

77 Art. 24(2), *ibid.*

78 Art. 25(3), *ibid.*

D. Saami Right to Land and Water

According to the terms of reference of the Expert Committee, the Saami Cooperation Council did not specifically identify the Saami right to land and water as an issue to be addressed by the Expert Committee; the Committee, however, perceived that there was a need to take this up, since it touches closely upon the issue of self-determination, a matter that the Expert Committee was asked to address in its terms of reference.⁷⁹ Evidently, the Saami rights to land and water are closely connected to the ILO Convention, which regulates the land and water rights of indigenous peoples, presently applicable only to Norway of the three Nordic states.

The opening articles of the chapter—34 (“Traditional Use of Land and Water”) and 35 (“Protection of Saami Rights to Land and Water”)—accord Saami rights to their land and water areas, which apply also to the sea areas;⁸⁰ these articles also address the issue of how these rights are to be realized and protected. The first paragraph of Article 34 is worth quoting: “[p]rotracted traditional use of land or water areas constitutes the basis for individual or collective ownership right to these areas for the Saami in accordance with national or international norms concerning protracted usage”. The second paragraph confirms that if the Saami, while practising their livelihoods, have traditionally occupied or otherwise used their lands and waters—without being owners—they have the right to continue to exercise these usufruct rights to the same extent as before. On the other hand, “[t]he 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”,⁸¹ drawing inspiration here from the established case practice by the Human Rights Committee.⁸² However, if these are multiple-use areas, the exercise of the usufruct rights of Saami and other users of the areas are required to pay “due regard to each other and to the nature of the competing rights”.⁸³ Yet not all of the uses and users of the area are on an equal level, since the Draft Convention requires the parties to pay particular regard to the interests of reindeer-herding Saami.⁸⁴ It is also important from the Saami viewpoint that when examining whether traditional use exists, regard must be paid to the fact that Saami

79 See the Report, 60-61.

80 Art. 38(1), Draft Convention.

81 Art. 38(2), *ibid.*

82 See, especially, HRC, Communication No. 511/1992, *Ilmari Lämsman et al. v. Finland*, views of 26 October 1994, CCPR/C/52/D/511/1992, para. 9.3: “[t]he right to enjoy one’s culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party’s submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practise it with the help of modern technology does not prevent them from invoking article 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.”

83 Art. 38(2), Draft Convention.

84 *Ibid.*

land and water usage “often does not leave permanent traces in the environment”.⁸⁵ Another rule that places Saami uses of land and water areas in an advantageous position in comparison with other users is Article 36(1), according to which “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”.

The states are required to “take adequate measures for effective protection of Saami rights pursuant to Article 34”.⁸⁶ For that purpose, they shall “particularly identify the land and water areas that the Saami traditionally use”,⁸⁷ very much coining Article 14(2) of the ILO Convention. To realize their ownership and usufruct rights, the states are required to make available procedures for examination of questions concerning Saami rights to land and water, together with financial resources to take their claims into legal proceedings.⁸⁸

Articles 36 and 37 concern the potential conflict between the state’s right to initiate development activities in the areas owned or used by the Saami, for instance, by granting a permit for prospecting or extraction of minerals, other sub-surface resources, other natural resource utilization and other forms of intervention.⁸⁹ In the case of activities that are planned to take place in areas 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”.⁹⁰ In other words, if the utilization is a matter of “major importance to the Saami”, the developer is required to negotiate both with the affected Saami (for instance, a reindeer herding cooperative) and the Saami parliament or, if it is not a matter of major importance, only with the affected Saami. Yet, if the Saami parliament deems that the planned development activity “may significantly damage the basic conditions for Saami culture, Saami livelihoods or society”, it would trigger Article 16(2) and require the consent of the Saami parliament, which, according to the Commentary, would restrict the expropriation right of the state. Paragraph 3 defines the more serious cases from the Saami viewpoint:

Permit 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.⁹¹

85 Art. 34(3), *ibid.* It is also confirmed in paragraph 4 that “[t]he 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”.

86 Art. 35(1), *ibid.*

87 *Ibid.*

88 Art. 35(2), *ibid.*

89 These are enumerated, not exhaustively, in Art. 36(4): “[t]he above provisions of this article also apply to other forms of natural resource utilization and to other forms of intervention in the 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”.

90 Art. 36(2), *ibid.*

91 Art. 36(3), *ibid.*

The difference here is that in these cases it is not enough that consent must be given by the Saami parliament, but the developer needs to obtain the consent of the affected Saami as well. The affected Saami are given the right to compensation for damages caused by development activities in their areas of ownership and traditional use in accordance with Article 37.⁹² These above-mentioned provisions, Articles 34 to 37, apply correspondingly to Saami fishing and other uses of fjords and coastal seas in Norway. Since fishing is a highly regulated economic activity in Norway, there is a special rule requiring the authorities, when allocating catch quotas for fish and marine resources, to pay due regard to “Saami use of these resources and its importance to local Saami communities”.⁹³ Extraordinarily, this obligation applies even if the Saami “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”.⁹⁴ The same shall apply if the use is reduced or has ceased owing to a reduction of marine resources in these areas.⁹⁵

The Saami parliaments’ broad rights studied above extend, according to Articles 39 and 40, also to land and resource management, environmental protection and environmental management in the form of co-determination with the state authorities. This co-determination right for the Saami parliaments derives from the fact that such management procedures, according to the Commentary, are bound to be either of major importance to the Saami or may significantly damage the basic conditions for Saami culture, Saami livelihoods or society.⁹⁶ Accordingly, in Article 40 it is provided that “[t]he 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”.

An interesting question is whether these Articles relating to Saami rights to land and water are in line with the similar types of provisions in the ILO Convention, (especially Art. 14) given also that the two remaining Nordic states, Finland and Sweden, who are not yet parties to the Convention, are actively studying the possibility of ratifying it. There seems to be one basic difference between the Draft Convention and the ILO Convention in this respect. The Draft Convention accords ownership and use rights not only to the collective of indigenous peoples, as does the ILO Convention, but also to individual members of an indigenous people. This may become problematic in some cases, since granting ownership may also lead particular Saami to ‘abuse’ their rights from the perspective of the collective (e.g., by selling them to outsiders).

92 *Ibid.* Moreover, according to the same paragraph: “[i]f national law obliges persons granted permit 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”.

93 Art. 38(2), *ibid.*

94 Furthermore, the next sentence of Art. 38(2) provides that “[t]he same shall apply if the use is reduced or has ceased owing to a reduction of marine resources in these areas”.

95 *Ibid.*

96 Art. 16, *ibid.* See also the Report, 229-230.

E. Saami Livelihoods

Chapter V aims to protect the Saami culture by protecting Saami livelihoods, the material basis of their culture. According to Article 41, “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”. What then are these activities which enjoy special protection? Paragraph 2 of the same Article provides that they are those activities that “are essential for the maintenance and development of the local Saami communities”. As is well known, the Human Rights Committee has in its general comments and its case practice determined that only traditional livelihoods of indigenous peoples are protected as part of protecting the culture of indigenous minorities in accordance with Article 27 of the Covenant on Civil and Political Rights.⁹⁷ On the other hand, the Committee has also made it clear that the fact that these traditional livelihoods are nowadays practised via modern methods (e.g., reindeer herding done by using snowmobiles) does not change their status as traditional activities.⁹⁸

The Commentary to Article 41 takes a more relaxed view on what constitutes the Saami livelihoods and Saami use of natural resources that enjoy special protection under Article 41. According to the Commentary, this Article is not confined to traditional livelihoods and use of natural resources by the Saami but also includes new ways of exploiting natural resources, such as fish farming and the harvesting of new fish and crab species.⁹⁹ This can be interpreted in two ways. Since the Commentary opens the protection also to new means of natural resource exploitation, this would mean that any economic activities—e.g., mining or oil and gas drilling—practised by the Saami would come under the protection of Article 41. Indeed, the Commentary explicitly states that the Article also covers new ways of exploiting natural resources and provides only a few examples of such new activities.¹⁰⁰ On the other hand, the Commentary also strongly emphasizes the nature of Saami livelihoods as small-scale combination livelihoods, providing examples that all relate to more or less traditional activities of the Saami.¹⁰¹ The relevant criterion in determining whether a particular Saami livelihood is protected under Article 41 is whether the activity is essential for the maintenance and development of the local Saami communities. Even this criterion leaves it very much open what constitutes Saami livelihood since a good argument can be made that

97 HRC, General Comment No. 23 on Art. 27, UN Doc. HRI/GEN/1/Rev.1 at 38 (1994), para. 7: “[w]ith regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”

98 See HRC, Communication No. 511/1992, *op.cit.* note 83.

99 See the Report, 232.

100 *Ibid.*

101 *Ibid.*

also modern industries may be essential for the maintenance and development of local Saami communities, as they may generate financial resources, for example, to establish Saami schools and other institutions, which certainly develop the Saami communities (and perhaps even accord them with more actual power for self-determination).

The emphasis of the Draft Convention is in protecting the traditional livelihoods of the Saami, as is clear from the Commentary to Article 41 (which lists mainly traditional activities as examples of Saami livelihoods) and especially from Articles 42 and 43, which accord special legal protection to reindeer husbandry and rules for making it easier to exercise this livelihood across national borders. Article 42 emphasizes the importance of reindeer husbandry “as a particular and traditional Saami livelihood and a form of culture”, and a livelihood that must enjoy special legal protection. For this purpose, “Norway and Sweden shall maintain and develop reindeer husbandry as a sole right of the Saami in the Saami reindeer grazing areas” and Finland is required to commit itself to strengthening the position of Saami reindeer husbandry in accordance with Protocol No. 3 of its Affiliation Agreement with the European Union.¹⁰² In that Protocol, Finland, Sweden and Norway (the latter of which did not become a member of the Union) and the EU have agreed that Saami can be given exclusive rights to exercise reindeer husbandry in the traditional Saami areas. At present in Finland, as provided in the Commentary, reindeer herding is still regarded as a general right, which belongs to all the citizens of the European Economic Area (not only EU), who live permanently in the reindeer herding area, even though reindeer herding is protected by the Finnish Constitution as part of the Saami culture.¹⁰³ According to the Commentary, 85% of all the reindeer in the Saami homeland area are owned by the Saami and of the 13 reindeer-herding cooperatives in the Saami area, 11 have a Saami majority.¹⁰⁴

Article 43 confirms that the right of the Saami to practice reindeer grazing across national borders is based on custom. It also outlines the conflict of norms provision in case there exist local agreements, customary rights or international treaties between states on crossborder reindeer grazing, and how to resolve disputes related to these activities. Agreements between Saami villages (*samebyar*), *siidas* or reindeer-grazing communities (*renbeteslag*) concerning the right to reindeer grazing across national borders prevail over other sources of law.¹⁰⁵ In case there is a dispute over interpretation or application of such an agreement, a party shall have the opportunity to bring the dispute before an arbitration committee, for which rules and composition are decided

102 See Art. 42(2-3).

103 See the Report, 72. Section 17(3) of the Finnish Constitution provides: “[t]he Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture”. In the government bill to this section of the Constitution there is a reference to the pronouncements of the Constitutional Committee of the Finnish parliament, which states that Saami can be given an exclusive right to practise reindeer herding in their homeland area because of international agreements and the importance of reindeer herding for Saami culture.

104 *Ibid.*

105 Art. 43(2), Draft Convention.

by the three Saami parliaments.¹⁰⁶ If there is no local agreement on crossborder reindeer herding, an international treaty between states shall apply.¹⁰⁷ However, the regulations of this treaty can be challenged on the basis of a customary right to exercise crossborder reindeer grazing in a court of law in the state on which territory the grazing area is located.¹⁰⁸

F. Implementation and Development of the Convention

The high-level forum for the development of the Convention is the Saami Cooperation Council (consisting of the ministers responsible for Saami affairs and the presidents of the Saami parliaments), a form of cooperation that had already started in 2000, with institutional rules adopted in 2001. The Council was merged into the structure of the Nordic Council of Ministers via a secretariat, which enables continuous contact between officials (at least annually), who, for example, prepare the meetings of the Saami Cooperation Council. According to Article 44, this Council, which already existed, will convene regularly and shall promote the objectives of the Draft Convention.

A more difficult question for the Expert Committee was to decide whether there should be a body to receive complaints and/or supervise the observance of the Convention, an issue that its terms of reference required the Committee to take a stance on.¹⁰⁹ In the Commentary to Article 45 it is provided that the Committee will not allow the Convention Committee to be an official complaint body.¹¹⁰ The reasons for making such a decision are understandable, since the Expert Committee chose to focus on having the Convention incorporated into the national legal systems: “[i]n 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”.¹¹¹ Hence, the Saami can invoke their rights accorded by the Draft Convention in the national judicial systems, which also means that the Convention Committee does not have a monopoly on interpreting the content of the provisions of the Convention. Article 45 does outline some other important tasks for the Convention Committee:

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

106 *Ibid.* The decision of this arbitration committee can be appealed according to the same paragraph: “[a] party who is dissatisfied with the arbitration committee’s decision of 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”.

107 Art. 43(3), *ibid.*

108 *Ibid.*

109 The Commentary to Art. 45 also discusses the issue of a Nordic ombudsman, which might have played a role in general in consolidating the status of all conventions concluded under the auspices of the Nordic Council, but provides that this idea has not made further progress. See the Report, 238.

110 See *ibid.*, 239-240.

111 Art. 46, Draft Convention.

three Saami parliaments. The committee may also deliver opinions in response to questions from individuals and groups.

In the Commentary, it is suggested that the reporting could be organized in such a way that the report would tackle the situation of each Nordic country in three-year intervals. The basic information for making these reports would come from the Nordic governments, the Saami parliaments, the public and such investigations that the Committee perceives as necessary to commence itself or by others. Special emphasis, according to the Commentary, should be placed on those issues that are at the core of the Convention, such as the crossborder cooperation by the Saami, and for this purpose the proposals by the Committee would be useful. The Commentary provides in an ambiguous manner that even though the Convention Committee will not be a legal body to resolve complaints from the public, it should have the ability to receive information from the public and use this as part of the material with which it prepares the reports.¹¹² However, the Draft Convention's text provides that "[t]he Committee may also deliver opinions in response to questions from individuals and groups".¹¹³ It seems a bit strange that the Commentary does not say anything about the power of the Convention Committee to deliver opinions in response to questions from individuals and groups, other than that this information can be used in preparing reports.¹¹⁴ This issue should be further clarified in the negotiation stage, as the power to issue opinions is evidently an important task for the Committee, which, even if non-judicial, would provide important publicity for certain issues through reasoned opinions to specific questions from individuals and groups.

The composition of the Convention Committee would not be, according to the Commentary, based on representing the interests of the states and the Saami parliaments, even though it would be they that appoint the six members of the Committee. The Committee is meant to be composed of independent experts, with an equal number of men and women, and representing expertise in Saami law, international law and cultural issues.¹¹⁵

Important financial obligations to implement the provisions of the Convention are contained in Article 47. States are obliged to provide the necessary financial resources, which are to be divided between them in relation to the number of Saami living in each of the countries. Paragraph 2 echoes Article 35(2), which provides that states shall provide necessary financial resources for Saami to have their land and water rights tried in the courts of law, but expands it to their other rights as well: "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".¹¹⁶

112 See the Report, 237-240.

113 Art. 45(2), Draft Convention.

114 See the Report, 240.

115 *Ibid.*, 239.

116 Art. 47(2), Draft Convention.

G. Final Provisions

The final provisions confirm the Saami parliaments' strong role in the Draft Convention, even though not formally being parties to it, as was studied above. In Article 48, it is required that, after being signed, the Convention must be submitted for the approval of all three Saami parliaments, and it cannot be ratified until the three Saami parliaments have approved it.¹¹⁷ These Articles will further make sure that if the outcome of the actual negotiations on the basis of this Draft Convention text does not satisfy the Saami parliaments, they have a veto right to not have the Convention ratified and enter into force (according to Art. 50, 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"). It is possible that the Draft Convention will be substantially revised in the actual negotiation stage and thus the Saami parliaments have an important veto power to halt the process if they perceive that the negotiated version of the Convention would undermine their already existing rights in international and national law. According to Article 51 of the Draft Convention, if the Convention enters into force, amendments to the Convention shall be made in cooperation with the three Saami parliaments, and only after approval from all them.

VI. THE WAY FORWARD

As was mentioned above, only Finland expressed doubts during the drafting process in the Expert Committee on certain issues contained in the Draft Convention. Thus, in all likelihood, it is exactly Finland that will experience the most difficulties in accepting the Draft Convention as it stands, and thus it will be useful to examine the comments made to the Draft Convention in Finland to illustrate some of the problems that may stand in the way of the ratification of the Draft Convention as it now stands.

The Ministry of Justice, the ministry responsible for Saami affairs in Finland (together with the Finnish Saami Parliament), requested comments from altogether 88 authorities, bodies and associations to the draft Nordic Saami Convention on 2 March 2006. The commenting period, which was the same for all three Nordic countries, lasted till 15 June 2006. The Ministry of Justice and the Saami parliament received 63 statements to the Draft Convention plus four non-requested ones, which are all compiled in a Summary Report.¹¹⁸ In reading the published Summary Report, it seems fairly clear that many obstacles exist in Finland to at least signing and ratifying the Draft Convention as it presently stands. In this part of the article, some of these statements will be examined, especially those that carry special importance: those of the ministries and regional level authorities, which exercise important public powers in respect of the rights accorded to the Saami in the Draft Convention.

117 Art. 49, *ibid.*

118 See the Summary Report of the Statements in Finnish, "Lausuntoja ja selvityksiä 2007:6, Luonnos pohjoismaiseksi saamelaisopimukseksi (lausuntotiivistelmä)", introductory page, which can be downloaded from the Ministry of Justice's homepage, at <<http://www.om.fi/Etusivu/Julkaisut/Lausuntojajaselvityksia/Lausuntojenjaselvitystynarkisto/Lausuntojajaselvityksia2007/1172045482900>>.

In general, the associations or bodies that represented the Saami perceived that the Draft Convention could be ratified as it is or with slight modifications.¹¹⁹ In addition, the Ombudsman for Minorities has taken a very positive stance towards the Draft Convention in all of its aspects. The strongest resistance to the Draft Convention has come from two authorities: the Ministry of Agriculture and Forestry (which is in charge of reindeer herding); and the Metsähallitus (a state enterprise that administers state-owned lands and waters that constitute approximately 90% of the land and water areas in the Saami homeland area). Even though other authorities have also expressed certain reservations to the Draft Convention, only these authorities are clear on their stance towards the Draft Convention, arguing that it should not be accepted as it now stands and that Finland should continue its traditional path of examining the possibilities of ratifying the ILO Convention. In addition, the municipalities in the Saami homeland region—Enontekiö, Inari, Sodankylä and even the strong Saami municipality Utsjoki (with half of the residents Saami)—have expressed serious concerns regarding the Draft Convention, especially from the perspective of its relationship and influence in regard to the self-government of municipalities guaranteed in the Finnish Constitution.¹²⁰ In the following, the main bones of contention are examined, especially those relating to the right to self-determination of Saami, the Saami right to land and water, reindeer husbandry as a Saami livelihood and the possible problems caused by the Draft Convention in terms of the self-government of municipalities.¹²¹

The Ministry of the Environment considers that attention should be paid to how Article 3 on Saami self-determination is worded and how it relates to the general structure of the system of government in Finland. There is an apparent contradiction between Section 2(1) of the Constitution (on the basis of which the powers of the state in Finland are vested in the people, who are represented by the parliament) and Section 121(4), which provides that “[i]n their native region, the Saami have linguistic and cultural self-government, as provided by an Act”. Essentially, the Ministry is concerned by how the question of Saami self-determination as a people relates to the linguistic and cultural self-government rights guaranteed by the Constitution.¹²² The municipality of Enontekiö has even suggested that the proposed self-determination for Saami would terminate the self-government of municipalities in the Saami homeland region, since it would be stronger than the other forms of self-government within the state.¹²³

119 *Ibid.*, 4-5.

120 Section 121(1-2) of the Finnish Constitution provides: “Finland is divided into municipalities, whose administration shall be based on the self-government of their residents. Provisions on the general principles governing municipal administration and the duties of the municipalities are laid down by an Act. The municipalities have the right to levy municipal tax. Provisions on the general principles governing tax liability and the grounds for the tax as well as on the legal remedies available to the persons or entities liable to taxation are laid down by an Act.”

121 It is still good to keep in mind that almost all of the 51 Articles were commented upon, criticized and praised.

122 Summary Report, *op.cit.* note 121, 36. The Faculty of Law of the University of Lapland sees this as problematic from the point of view of constitutional law viewpoint. *Ibid.*, 37.

123 *Ibid.*

Some authorities have pointed out that the provisions related to Saami rights to land and water, as enshrined in Articles 34 and 35 of the Draft Convention, are presently being studied by a research group commissioned by the Ministry of Justice,¹²⁴ and thus these studies must be completed before any international conventions can be adopted.¹²⁵ The Ministry of Agriculture and Forestry and the Metsähallitus have opined that before the land rights conflict in the Saami homeland region is resolved, the Draft Convention cannot be ratified—a state of affairs which, according to them, applies also to the possible ratification of the ILO Convention.¹²⁶ The Saami Council has emphasized that Articles 34–36 should not be interpreted in such a way that they would undermine pre-existing land rights. It also points out that often the rights belong to the Saami as a collective but has avoided taking a specific stance on the possible conflict between individual and collective rights of Saami over land and water rights.¹²⁷ The Saami parliament sees the Articles on Saami rights to land and water as acceptable but perceives that their factual recognition should commence in Finland by removing from the Metsähallitus the obligation to make profits when administering the land and water areas on behalf of the state in much of the Saami homeland region.¹²⁸

As will be recalled from above, Article 36 provides extensive negotiation and even veto power to Saami individuals and the Saami parliament against development activities in the areas owned or used by them. The Ministry of the Environment takes a strong stance on this provision, as well as on Article 16, which guarantees the Saami parliaments' negotiation and veto right in cases where the development activity "may significantly damage the basic conditions for Saami culture, Saami livelihoods or society".¹²⁹ According to the Ministry, both these articles should be modified to include the possibility of comparison of interests, since, according to the Ministry, even minor activities might require negotiations with the Saami parliament, even their consent. For this reason, the Ministry proposes that by inserting a comparison of interest clause to Articles 16 and 36, it would be possible to examine the permissibility of the effects of planned activities in a comprehensive way, also taking into account the effects on the Saami culture. According to the Ministry, this would enable consideration of the permissibility of development activities according to applicable legislation or other pro-

124 The research group consisted of three historians and one legal scholar from the universities of Oulu and Lappeenranta (and a research director), and it submitted its final assessment results to the Ministry of Justice on 24 October 2006—after the commenting period for making statements to the Draft Convention. See a Finnish press release from the Ministry of Justice's homepage, at <<http://www.om.fi/Etusivu/Ajankohtaista/Uutiset/Uutiset2006/1160733705316>>. The summary from the research results (both in Finnish and in Swedish) can be found at <<http://www.om.fi/1160733679126>>.

125 See Summary Report, *op.cit.* note 121, 7–8.

126 *Ibid.*, 7–8 and 57–59. Also, the Ministry of the Environment perceives that first the domestic preparations must be completed and after this it will be possible to evaluate the effect of this preparatory work to the contents of the Draft Convention. *Ibid.*, 7.

127 *Ibid.*, 57 and 64.

128 *Ibid.*, 57.

129 Art. 16(2), Draft Convention.

cedure—a suggestion that the Ministry of Agriculture and Forestry also favours.¹³⁰ In addition, the Ministry of Agriculture and Forestry, the Ministry of the Environment and the municipality of Enontekiö are of the opinion that the rights given to individual Saami are problematic since in practice, according to them, it would mean an unfettered right of veto even for individual Saami.¹³¹

One problematic issue was the future of reindeer herding in Finland, which is an exclusive livelihood of Saami in Sweden and Norway. As studied above, with the Protocol No. 3 of its Affiliation Agreement with the European Union, Finland is permitted—not obligated—to make reindeer herding an exclusive Saami livelihood. With the Draft Convention, Finland would commit itself to strengthening the position of Saami reindeer husbandry. The Ministry of Agriculture and Forestry, which is responsible for administering reindeer herding in Finland, argues that reindeer herding has traditionally been an occupation that has also been practised by groups other than the Saami in the Saami homeland region. The Ministry perceives that reindeer herding is currently practised in a beneficial manner, and to make it an exclusive livelihood in the Saami homeland region might violate Section 6 of the Finnish Constitution, which guarantees equality before the law.¹³² The Finnish Reindeer Herders Association points out that there is no need to change the current system, since in almost all the reindeer-herding cooperatives in the Saami homeland region the majority is formed by the Saami, which thus in practical terms means that Saami have decision-making power over reindeer herding in the Saami homeland area.¹³³ The Saami parliament provides a contrasting view, as it argues that the Draft Convention contains too low a level of requirements, and it refers to its proposals to make reindeer herding a special right for the Saami—via amendments to the Reindeer Herding Act—without touching upon the rights of other people to practise reindeer herding in the Saami homeland region.¹³⁴ Stronger comments are made by the Saami reindeer-herding cooperatives functioning in the Saami homeland region, who suggest that reindeer herding should be made an exclusive Saami livelihood in the homeland region, as it is in Sweden and Norway.¹³⁵

Some commentators have also seen problems in the way the Saami parliaments are involved in the ratification procedure of an international convention, since each of them has to give their consent before the Draft Convention can be ratified by the three Nordic states. The Ministry for Foreign Affairs of Finland perceives that the Saami parliaments' consent for ratification is a rather unique arrangement and thus requires closer examination before the negotiations on the basis of the Draft Convention can commence.¹³⁶ An even stronger stance is taken by the Faculty of Law of the University of Lapland, which provides that it is highly questionable whether Finland's treaty-making power can be constrained in the way it has been in the Draft Convention. According

130 See Summary Report, *op.cit.* note 121, 44–45 and 61–62.

131 *Ibid.*, 8.

132 *Ibid.*, 68.

133 *Ibid.*, 66.

134 *Ibid.*, 69.

135 *Ibid.*

136 *Ibid.*, 72.

to the statement by the Faculty, competence in the area of foreign policy is exhaustively prescribed in Section 93(1) of the Constitution. To restrict this decision-making power by giving the Saami parliaments the power in this issue is questionable both from the perspective of the Constitution and international law. The Faculty of Law suggests that one way to proceed would be to not mention the decision-making power of the Saami parliaments in the ratification process, but to include a provision to the Act on Saami Parliament to the effect that they would have a right to be heard before the ratification.¹³⁷

As can be seen from only some of the statements to the Draft Convention, moving from the Draft Convention to the negotiation stage will not be easy in Finland, as many of the authorities that are in charge of the issues regulated in the Draft Convention oppose or at least require modifications/further studies on the issues. At the moment, Finland is preparing its position to the Draft Convention via inter-ministerial meetings, the goal being to arrive at such a position by September 2007. According to the official responsible, the aim is to have the Finnish country position ready by September 2007. The final decision on whether and in what way the negotiations on the basis of the Draft Convention will proceed will be taken by the Saami Cooperation Council in November 2007.¹³⁸

VII. CONCLUDING REMARKS

Even though the Saami have suffered from the assimilationist practices of the nation-building era during much of the twentieth century,¹³⁹ there was a period in history when their legal relationship with the other bordering nations was well recognized. The additional protocol to the border agreement between the then Norway-Denmark and Sweden-Finland over the Lapps (later named “The Preservation of the Lappish Nation”, the Lapp Codicil) was concluded in 1751. It regulated, for example, crossborder reindeer herding, gave the Lapps neutrality in times of war and acknowledged that they have their own legal system. This Lapp Codicil is, in fact, still relevant today, since in the absence of a crossborder reindeer-herding agreement between Norway and Sweden, the Swedish side argues that the Lapp Codicil continues to be in force during this interim period.¹⁴⁰

The Draft Convention is a very ambitious effort to remedy some of the past injustices by correcting the legal relations between the peoples living in the area of the three Nordic states. The Nordic states, in their section of the preface, acknowledge that:

[I]n 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.

137 *Ibid.*, 73.

138 Telephone conversation with the Director of Legal Affairs of the Ministry of Justice Matti Niemivuo (who was also the Finnish representative to the Expert Committee), 21 May 2007.

139 See the keyword ‘assimilation’ in Kulonen, Seurujärvi-Kari and Pulkkinen, *op.cit.* note 1, and the accompanying sources.

140 See the Report, 234.

The Saami parliaments, on the other hand, perceive the Draft 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”.¹⁴¹

The Draft Convention contains specific articles to execute its goal and main principle, to comprehensively regulate the legal relations between the three Nordic states and the Saami people. As one of the members of the Expert Committee has argued, the Draft Convention can aptly be seen as a “social contract”—not a regular international treaty—between the three states and the Saami people sharing the same region, pertaining also very much to the way their constitutions are understood and developed.¹⁴²

As was also examined above, it is far from certain whether the Draft Convention will go ahead, at least with its present content. This is why it is also very important for the Saami parliaments to have a veto power to halt the process if the level of protection guaranteed by the negotiated Nordic Saami Convention does not even correspond to the level of protection they already enjoy in national and international law. Even though it may be possible that the Draft Convention will be modified from its present content, it has at least established a first modern precedent on how to organize the legal relations between transnational indigenous people and the states they are living in, an approach that is strongly encouraged by Article 36 of the UN Declaration on the Rights of Indigenous Peoples:

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

It should be kept in mind that the making of the Draft Convention has been, from the beginning, a joint process between the three Nordic states and the Saami. The Expert Committee’s Draft Convention will be important for the future status of transnational indigenous peoples, as it was drafted by the appointed members from both Saami parliaments and the three Nordic states, provides very innovative regulatory arrangements and shows the mutual willingness of the states and the Saami to jointly regulate their legal relationship. From this perspective, even though it might suffer blows in later stages, when the actual negotiations commence, it will have a lasting inspirational impact upon indigenous peoples all over the world.

141 Preface, Draft Convention.

142 See Martin Scheinin, “Ihmisen ja Kansan oikeudet – kohti Pohjoismaista saamelais-sopimusta”, 1 *Lakimies* (2006), 27-41. See also Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Brill, Leiden, 2008).