

The Draft Nordic Saami Convention: Nations Working Together

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Abstract

The article examines the rationale underlying the Draft Nordic Saami Convention submitted by an expert committee to the Nordic governments and the Saami Parliaments in October 2005. The Draft Convention represents an innovative possibility to grow beyond the state-centred paradigm in international relations in a realistic way and thus deserves to be studied even before negotiations on the Convention proper commence. The particular focus of the article is on how the Draft tries to ensure a position that is as equitable as possible for the Saami in relation to the Nordic states.

Keywords

Indigenous peoples; self-determination; human rights; Saami; Nordic countries

I. Introduction

During the time of first encounters between indigenous peoples and settler populations, some of the European states concluded international treaties between themselves and the respective indigenous peoples. During this era, some of these treaties were clearly regulating the legal relations between states and indigenous peoples on an international plane, via international law as it stood at the time. Unfortunately, many of these international treaties soon became “domesticated” by the settlers, that is, the treaties were not seen as regulating the legal relation on the international plane, but domestic laws took over and subjected indigenous peoples to the rule of the settlers.¹

Even though such treaties were not concluded between the Nordic states and their Saami people, two Nordic states did conclude the so-called Lapp Codicil in

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¹) See Pablo Gutiérrez Vega, “The Municipalization of the Legal Status of Indigenous Nations by Modern (European) International Law” in *Law & Anthropology*, Volume 12, pp. 17–54 (special editors Kuppe, R. and Potz R.). Martinus Nijhoff Publishers 2005.

1751, namely the Additional protocol to the border agreement between Denmark-Norway and Sweden-Finland over the Lapps (later named “The preservation of the Lappish nation”). This was a treaty between these Nordic states as they stood at the time, but its effects were far-reaching e.g. the cross-border reindeer herding, recognized that Lapps are neutral, and acknowledged that they have their own legal system.² Interestingly, the present Draft Nordic Saami Convention establishes a link between itself and the Lapp Codicil in the following terms in its preamble, whereby the Saami parliaments perceive the Draft Convention “... as a renewal and development of Saami rights, established through historical use of land, that were codified in the Lapp Codicil of 1751.”³

Especially during the course of the 20th Century, the Saami along with many other indigenous peoples were subjected to assimilationist practices, a development that was reversed in some parts of the Nordic states as recently as the 1970s.⁴ Particularly important in this turn was the rise of both the Saami movement and 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 to mainstream societies, especially with the establishment of the Nordic Saami Council (now the Saami Council) already 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 inspiration, since it advances the Saami as a people that has 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 the Russian Federation with its smallest number of Saami (2,000).⁵ Currently, the Constitutions of Finland and Norway recognise the Saami as indigenous people, not only a minority group. In Sweden, there is no constitutional recognition of the Saami and they are treated

² See the term “Lapp Codicil” in *The Saami: a Cultural Encyclopedia* (eds. Kulonen U.M., Seurujärvi-Kari, I. and Pulkkinen, R.), p. 185. *Suomalaisen Kirjallisuuden Seuran toimituksia* 925. Vammalan kirjapaino Oy 2005.

³ Preface, the Draft Convention. 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?depid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?depid=2195&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc)> (22 Nov. 2007). This Lapp Codicil is, in fact, still relevant today, since in the absence of cross-border reindeer herding agreement between Norway and Sweden, the Swedish side argues that the Lapp Codicil continues to be in force during this interim period (see p. 234 of the Report, *infra* note 9).

⁴ See the keyword assimilation from *The Saami: A Cultural Encyclopedia*, pp. 24–25 and the accompanying sources.

⁵ These figures cannot be but rough estimates as there is no clear definition of who constitute the Saami. See the Report, at p. 65, *infra* note 9. See also the introduction to *The Saami: A Cultural Encyclopedia*, p. 5.

as an ethnic minority and/or as indigenous people.⁶ In the Constitution of the Russian Federation, the Saami constitute one of the many indigenous small peoples of the north. Of all the four states in which the Saami live only Norway 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.⁷

Even though parallels are drawn between the Lapp Codicil and the Draft Nordic Saami Convention, it is fair to say that significant differences exist. The draft goes much farther than its early predecessor, as it regulates comprehensively almost all areas of life relevant for the Saami and, quite uniquely, enables the Saami to participate in an international treaty on an almost equal footing with the Nordic states. Even though the analysis is focussed on a draft Convention, which still awaits a decision to start the actual negotiations, it establishes a pioneering example of how the states and the transnational indigenous peoples could negotiate on their legal relation in a very constructive way.

This article will only focus on studying the underlying ideas of the Draft, especially on how the Draft tries to ensure a position as equal as possible for the Saami in relation to the Nordic states. The basis for this analysis is 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.⁸ This extensive document (hereinafter “the Report”) consists of nine Sections and four annexes – altogether 340 pages.⁹ The Finnish version of

⁶ See pp. 90–96 of the Report, see *infra* note 9.

⁷ The Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted by the General Conference of the International Labour Organisation 27 June 1989, entered into force on 5 September 1991, 28 I.L.M. 1382 (1989).

⁸ 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, in 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>> (22 Nov. 2005).

⁹ See pp. 151–246. The other parts of the Report consist of the following: how the Committee was appointed and its terms of reference (Section 2, pp. 44–46), summary of the content of the proposed text for a Convention (Section 3, pp. 47–56), explanation of the process leading to the appointment of the Committee and how the Committee has fulfilled its task (Section 4, pp. 57–62), discussion of some of the general issues related to the Convention (Section 5, pp. 63–64), review of the legal and factual situation of the Saami in Finland, Norway, Sweden, and the Russian Federation (Section 6, pp. 65–103), extensive analysis of the international treaties and other international instruments relevant from the viewpoint of Saami rights (Section 7, pp. 104–147), the discussion of the status of the Saami in the Convention (Section 8, pp. 148–150). The Annexes deal with a study of whether the Saami could be parties to the proposed Convention (Annex I, pp. 247–250), the legal status of the Russian Saami (Annex II, pp. 251–262), an article by the three members of the Committee about the right to self-determination of the Saami (Annex III, pp. 263–318 and the Draft United Nations Declaration on the Rights of Indigenous Peoples, together with suggestions from Nordic countries, New Zealand, and Switzerland (Annex IV, pp. 319–340).

the Report consists of the Committee's proposal for a text of the Nordic Saami Convention in the Finnish and Swedish languages (Section 1).¹⁰

The draft Convention text (hereinafter “the Draft Convention”) has been 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).¹¹ In this article, the unofficial English translation of the Draft is used together with the Report, the Finnish language being one of the authoritative languages of the Draft Convention. First, before moving to study the Draft Convention, it is important to have a look at the events leading to the draft.

II. History of the Draft Convention

The process, which led to the adoption of the Draft Convention, manifests well the approach codified as Article 3 of the Draft: that the 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 commenced, the Saami Council being the first to take up the idea of concluding an international convention, which would tackle the legal status and rights of the Saami.¹² After a few years of studies on the issue, and especially after the work of the Nordic co-operation body on Saami issues and reindeer herding, the idea of a Saami Convention reached the Nordic Council in 1995. During this meeting, the three Nordic ministers that were responsible for Saami affairs decided that a working group should be established, whose task was to clarify the need and basis for such a Convention. Their decision was based on a report from the above-mentioned Nordic co-operation body on Saami and reindeer herding issues, which called for concluding such a Convention. The ministers stated that

the three countries commence the co-operation having as its goal the Nordic Saami Convention... The aim is to set up a working group, whose task it is to examine whether there is need for such a Convention and its basis. The work will be done together with the Saami parliaments and Saami Council...¹³

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 nine representatives from the three Nordic states and one representative from each of the Saami Parliaments. The WG was established in 1996

¹⁰ *Ibid.*, pp. 9–43.

¹¹ *Ibid.*, pp. 151–244.

¹² See p. 57 of the Report.

¹³ *Ibid.*, p. 58. Translation by the author from Finnish.

and it completed 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.¹⁴

A new institutional structure within the Nordic Council commenced its work in 2000, comprising the meetings between the responsible ministers for Saami affairs from the three Nordic states and the presidents of the Saami Parliaments (“Saami Co-operation Council”). It was this body – which now has its secretariat with the Nordic Council of Ministers – that took the next step and decided on 7 November 2001 that an Expert Committee should be established; it also set out the terms of reference for the Expert Committee.¹⁵ On 13 November 2002, the Saami Co-operation 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 to 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 Co-operation Council: to produce a draft text for a Nordic Saami Convention.

The Expert Committee convened altogether 15 times from the start of its work in January 2003 till the submission of the Report with a Draft text for a Nordic Saami Convention on 27 October 2005. During this time, the Expert Committee needed to tackle many difficult issues, one of which was the status of the Russian Saami in the Draft Convention. 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 the 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 character¹⁶

The Saami Co-operation Council – via 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 Expert Committee, however, argued that the Draft is meant to be a Nordic one, and thus the Russian Saami

¹⁴ *Ibid.*, p. 59.

¹⁵ *Ibid.* pp. 44–46.

¹⁶ See the preamble of the Honningsvåg Declaration from the website of the Saami Council, at <<http://www.saamicouncil.net/files/20041215142715.doc>> (22.11.2007).

are not included in the Draft Convention.¹⁷ On the other hand, the Committee makes it clear that it would be desirable for the three Nordic states to organise the relations with Russia in such a way that it would be possible to co-operate with the Russian Saami.¹⁸ The Committee also points out that a Saami, who is a Russian national and resides in any of the three Nordic states, is covered by the Draft Convention. The stance of the Expert Committee can only be commended. With this approach, the Expert Committee tries to extend the Draft Convention's rights as much as possible toward 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, e.g. that the Russian government has been one of the most vocal countries opposing the acceptance of the UN Declaration (and abstained from voting in the UN General Assembly over the UN Declaration on the Rights of Indigenous Peoples). Another problem is that there is a vast number of indigenous peoples in Russia who are treated legally alike, a fact that would have made it very difficult to give special recognition to the Russian Saami by the Russian Federation becoming a party to an international convention focusing on the rights of the Saami.¹⁹

III. The Draft as a Manifestation of Equality of Nations

The idea of the Saami being one indivisible people (at least in the Nordic states) finds its legal basis from the acknowledgement that the Saami form a people with a right to self-determination. If the Saami were seen a set of 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.²⁰ The governments acknowledge this in the preface by stat-

¹⁷ See the Report, pp. 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, an idea that the 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 used by the Saami Co-operation 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 (*ibid.*, pp. 151–152).

¹⁸ The Expert Committee held a meeting with representatives of the Russian Saami in January 2005 in Kiiiruna, Sweden (*ibid.*, p. 64).

¹⁹ The legal status of the Russian Saami is studied in the Report, see *ibid.*, pp. 99–103.

²⁰ The underlying vision of the Draft Convention can be seen to be to pursue a path to a joint Nordic Saami nation. 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 the Russian Saami in one way or the other, 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 cross-border rights guaranteed, in order for the Saami presently separated by the state borders to develop their co-operation especially in carrying to the future their unique culture in its totality. Evidently, such a vision is also manifested in the work of the

ing that, in addition to affirming that they are indigenous people in the three countries,²¹ the Saami people have the right to self-determination. The Saami Parliaments, in their part of the preface, emphasize “the importance of respecting the right to self-determination that the Saami enjoy as a people” and “the Saami people’s aspiration, wish and right to take responsibility for the development of their own future.” Article 3 of the Draft Convention, titled “The right to self-determination” formulates this right in the following way:

As a people, the Saami have the right to 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 that the Draft Convention was drafted by an 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 separate segments of the preamble.

With this in mind, it is possible to envisage a different terminology to describe the legal relationships between the Nordic states and the Saami. In international law and politics, it has been commonplace to use the concept of nation-state to depict the idea of one organic people inhabiting one state, an idea which rarely corresponds to the reality. If we study closely the Draft Nordic Saami Convention, it is more inclined to regulate the legal relation between four peoples (Norwegian, Swedish, Finnish and Saami) inhabiting the territories of three states (Norway, Sweden and Finland). Of these four peoples, the Norwegians, Swedes and Finns have a full-blown self-determination within their own states, whereas the Saami have a limited one, not providing them the option (currently) to establish their own independent state. Yet, as enshrined in the Draft Convention, the Saami do not only possess internal self-determination, but their self-determination also has an external dimension, as formulated in Article 19:²²

The Saami parliaments shall represent the Saami in intergovernmental matters. The states shall promote Saami representation in international institutions and Saami participation in international meetings

Saami Council since they represent all the Saamis, not only the Nordic ones. Yet, the Saami Council is a non-governmental organisation, representing unelected Saami associations from the four states, and having no public powers. See the structure of the Council at <<http://www.saamicouncil.net/?deptid=2181>> (22.11.2007).

²¹ Article 2 of the Draft Convention.

²² The Saami right to external self-determination is more fully fleshed out in an article attached to the Report as Annex III, Henriksen, J.B., Scheinin, M., Åhren M., ‘Saamelaiusten itsemäärittämis-oikeus’, pp. 263–315 of the Report.

Even though it is not stated specifically, the Commentary makes it clear, by reference to Article 17, that the Saami have the right to be represented in inter-governmental matters dealing with matters that concern the interests of the Saami.²³

The idea of nations regulating their mutual legal relations is manifested also in other parts of the Draft Convention, and especially by the unique status the Saami Parliaments are given in an international treaty in Chapters VI (Implementation and Development of the Convention) and VII (Final Provisions).

Article 44 provides that the already existing high-level forum for the development of the Draft Convention is the Saami Co-operation Council (consisting of the ministers responsible for Saami affairs and the presidents of the Saami Parliaments). According to Article 44, this already existing Council will convene regularly and shall promote the objectives of the Draft Convention. As provided below, it will also determine whether and in what way the actual negotiations on the basis of the Draft will commence.

A more difficult question for the Expert Committee was to decide whether there should be a body receiving complaints and/or supervising the observance of the Convention, an issue that the Committee's terms of reference required it to take a stance on.²⁴ In the Report it is provided that the Committee will not allow the Convention Committee to be an official complaint body.²⁵ 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: "In order to ensure as uniform an application of this Convention as possible, the states shall make the provisions of the Convention directly applicable as national law".²⁶ 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 in interpreting the content of the provi-

²³ The wording of the Article seems to suggest that the 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 the 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. A good example is the Arctic Council, a high-level inter-governmental 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 Arctic Council, the indigenous peoples' organisations have been given a unique status as permanent participants, the charter of foundation of the Arctic Council even requiring that the permanent participants be fully consulted before a joint decision is made by the states. See Timo Koivurova and Leena Heinämäki, "The Participation of Indigenous Peoples in International Norm-Making in the Arctic" in 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" in 222 *Polar Record* (2006), 239–248.

²⁴ The Commentary to Article 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. P. 238.

²⁵ See pp. 239–240.

²⁶ Article 46 of the Draft Convention.

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

It is also suggested that the reporting could be organised in such a way that the report would tackle the situation of each Nordic country at three-year intervals. The basic information for these reports would come from the Nordic governments, the Saami Parliaments, the public, and from any investigations that the Committee deems necessary to be carried out by it or other parties. Special emphasis, according to the Expert Committee, should be placed on those issues which are at the core of the Convention, such as the cross-border cooperation by the Saami, and for this purpose the proposals by the Committee would be useful.²⁷ The Expert Committee 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 possibility to receive information from the public to be used as part of the material with which it prepares the reports.²⁸ However, the Draft Convention's text provides that "The Committee may also deliver opinions in response to questions from individuals and groups".²⁹

The composition of the Convention Committee would not be, according to the Expert Committee, based on representing the interests of the states and the Saami Parliaments, even though they would appoint the six members of the Committee. The Committee is to be composed of an equal number of independent men and women representing expertise in Saami law, international law, and cultural issues.³⁰ Yet, it is important that the Saami parliaments and the three Nordic states can nominate an equal number of members to the Convention Committee.

The final provisions confirm the Saami Parliaments' strong role in the Draft Convention. In Article 48, it is required that after being signed, the Convention must be submitted for the approval of all the three Saami Parliaments, and it cannot be ratified until the three Saami Parliaments have approved it.³¹ These Articles will further make sure that if the outcome of the actual negotiations on the basis of this Draft Convention text will not satisfy the Saami Parliaments, they have a veto right to prevent the ratification of the Convention (according to Article 50, "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

²⁷ See pp. 237–240 of the Report.

²⁸ *Ibid.*

²⁹ Article 45 (2).

³⁰ Report, p. 239.

³¹ Article 49.

the Draft Convention will be substantially revised at 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. Symbolically important is also that the Finnish, Norwegian, Swedish and Saami languages are all equally authentic languages of the Draft Convention.³²

The role of the Saami parliaments in the Draft Convention is so strong that we might even ask whether they should have become parties to the Convention. This was, in effect, taken up already at the stage before the Expert Committee, by the working group that studied the need and basis for a 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 the Saami could indeed be a party to the Convention, and it would be for them to decide whether they would ratify the eventual Convention as one or three groups.³³

The issue was discussed in the Expert Committee, and they even commissioned a researcher, Annika Tahvanainen, to study the issue.³⁴ Tahvanainen argued that primarily subjects of international law, that is, states and international organizations established by them have a right to conclude international treaties. In addition, some groups that have a colonized past or are under alien occupation have been regarded as entities who may conclude international treaties in certain circumstances.³⁵ Yet, indigenous peoples do not qualify as such peoples; according to Tahvanainen, they are at most accorded the right to internal self-determination within the existing states. Her view 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 Polit-

³² Yet, 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. See p. 47 of the Report.

³³ See Gudmundur Alfredsson, "Minimum Requirements for a New Nordic Sami Convention" in 68 NJIL (1999) 397–411. He argues on page 408 that "The 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".

³⁴ Her argument is presented in Annex I to the Report (pp. 247–250).

³⁵ *Ibid.*, p. 247.

ical Rights seems to confer a full-blown right to self-determination (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”). She also interprets Article 3³⁶ of the UN draft (at the time) Declaration as supporting only internal self-determination, since, according to her, it needs to be read together with Article 4.³⁷

Another expert article that is contained in the Report as Annex III takes a very different perspective on the right to self-determination.³⁸ An article by three members of the Expert Committee argues that indigenous peoples’ right to self-determination cannot be restricted to internal self-determination. They interpret the Human Rights Committee (which monitors the implementation of the Covenant on Civil and Political Rights)³⁹ practise 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 like the Saami. As a support for their argument, they provide that from 1999 onwards the Human Rights Committee has started to treat indigenous peoples as covered by Article 1 of the Covenant, without making any exclusion of the external aspects of self-determination as enshrined in Article 1 (1).⁴⁰ In addition, the article 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 but in exceptional circumstances. Yet, they perceive that currently the indigenous peoples are entitled to exercise their external self-determination via representation in international forums and in inter-governmental affairs.

³⁶ Article 3 of the Draft Declaration as it was adopted by the Human Rights Council provides: “Indigenous 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.”

³⁷ Article 4 prescribes: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” See pages 247–250 of the Report

³⁸ Henriksen, J.B., Scheinin, M., Åhren M., ‘Saamelaisten itsemääräämisoikeus’, pp. 263–315 of the Report.

³⁹ The International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976, 999 UNTS 171.

⁴⁰ See the following concluding observations by the HRC where explicit references to either the concept of self-determination of peoples or Article 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)). The recent concluding observations on Finland (UN Doc. CCPR/CO/82/FIN (2004)) leave no room for doubt: “The Committee regrets that it has not received a clear answer concerning the 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). USA, CCPR/C/USA/Q/3/CRP.4 (2006).

Against this background, it may come as a surprise that the article done by the three members of the Expert Committee does not even ponder the treaty-making power of indigenous peoples in general and the Saami in particular. They do argue that the Saami and other indigenous peoples have external self-determination to international representation, but stop short of saying anything of whether they can conclude treaties.⁴¹ It is difficult for the present author 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 between the legal status of e.g. individual Saami Parliaments and the 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 kind 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.⁴² The article written by the three members of the Expert Committee perceives it as controversial to make distinctions between different peoples; they consider it to be discriminatory to have different sets of self-determination rights.⁴³

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 Norwegian and Finnish foreign ministries, which both argued that only states have a right to conclude treaties.⁴⁴ The Expert Committee concluded that an agreement between a state and a group of people like the Saami is not an agreement in the meaning of international law, and the same applies to the Saami Parliaments as representing the Saami. The Committee opines that if a treaty was concluded between the states and the Saami Parliaments, the respective convention would be confusing from the 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 different kind as regards the legal relationship between the states and the Saami Parliaments, or even the individual Saami. The Committee opines that such a convention would create legal uncertainty and that its authority and influence would suffer, and therefore it would fail to reach the level of importance expected by the Expert Committee from a convention regulating the status of the Saami. The Expert Committee considered it better to have the ratification and entry into

⁴¹ See pp. 297–303 of the Report.

⁴² 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>> (22.11.2007). See also Lauri Hannikainen, “Åland och rätten till självbestämmande – I går, i dag och i morgon” in *Vitbok för utveckling av Ålands självbestämmanderätt* (ed. Harry Jansson), p. 70, footnote 35.

⁴³ Report, pp. 300–302.

⁴⁴ *Ibid.*, p. 148.

force (as well as the amendment) to require the approval from all the Saami parliaments.⁴⁵

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 being made between the three Nordic states, nevertheless 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 other than the symbolic ones.

IV. Conclusion

The process of how the Draft Convention was made manifests clearly an attempt to establish an equal relation between the Nordic states on the one hand, and between 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 by an Expert Committee having a composition as Saami-friendly as possible. This composition clearly influenced the outcome of the work of the Expert Committee, as the Draft Convention certainly did its best to advance the status and rights of the Saami as a people within the complex institutional framework in which they are presently located, as has clearly been shown above. Symbolically important in the Draft Convention is also that the Nordic states express in the preamble that “in determining the legal status of the Saami people, particular regard shall be paid to the fact that during the course of history the Saami have not been treated as a people of equal value, and have thus been subjected to injustice.”

In many ways the Draft Convention is a pioneering attempt to implement what is being encouraged in the recently adopted UN Declaration on the Rights of Indigenous Peoples,⁴⁶ which stipulates as follows in 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,

⁴⁵ *Ibid.*, pp. 148–150.

⁴⁶ The matter came up for a final decision in the 61st session of the General Assembly, in September 2007, where the Declaration was adopted, with 143 states voting in favour, 4 against (New Zealand, Australia, the USA and Canada) and 11 abstaining (including Russia). For a general overview, see the information at <<http://www.iwgia.org/sw248.asp>> (22.11.2007).

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.⁴⁷

It remains to be seen whether the Draft Convention is too much ahead of its time, as at least in Finland the Draft Convention has experienced problems. During the commenting period, many authorities expressed serious reservations about the Draft Convention.⁴⁸ Based on 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.

At the time of writing, the way forward is still unclear, the original intention being that the Saami Co-operation Council (the responsible Saami ministers and the presidents of the Saami parliaments) would decide on further steps during November 2007. However, the meeting of this Co-operation Council on 14 November in Stockholm 2007 could not make a decision on the commencement of the negotiations. The reason for this was that Finland had not been able to finalise the studies it had commenced on the Draft Convention's impact on Finland's Constitution (currently prepared in the Ministry of Justice) and on its implications for treaty-making in general (being studied in the Ministry for Foreign Affairs). The Saami Co-operation Council decided, because of these reasons, to postpone the decision as to the commencement of the negotiations till November 2008.⁴⁹

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. It also provides very innovative regulatory arrangements and demonstrates the mutual willingness of the states and the Saami to jointly regulate their legal relationship. 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

⁴⁷ The Declaration can be downloaded at <<http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13ResolutiontextDeclaration.pdf>> (22.11.2007).

⁴⁸ The Ministry of Justice, the responsible ministry of 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 to a Summary Report. See the Summary Report of the statements in Finnish (introductory page), which can be downloaded from the Ministry of Justice's homepage at <<http://www.om.fi/Etusivu/Julkaisut/Lausuntojajaselvityksia/Lausuntojenjaselvitystenarkisto/Lausuntojajaselvityksia2007/1172045482900>> (22.11.2007). Lausuntoja ja selvityksiä 2007:6, Luonnos pohjoismaiseksi saamelaisopimukseksi (lausuntotiivistelmä).

⁴⁹ Telephone conversation with the responsible official from the Ministry of Justice Mirja Kurkinen 29 November 2007.

three states and the Saami people sharing the same region, pertaining also very much to the way their constitutions are understood and developed.⁵⁰ This is the real and lasting impact of the Draft Convention: it truly represents the possibility to grow beyond the state-centred paradigm, testing the boundaries of international law but in a realistic manner. From this perspective, even though it might suffer blows in the later stage, when the actual negotiations commence, it will likely have a lasting inspirational impact on indigenous peoples all over the world.

⁵⁰ See Martin Scheinin, 'Ihmisen ja Kansan oikeudet – kohti Pohjoismaista saamelaisopimusta' in I *Lakimies* (2006), 27–41. See also forthcoming Francesco Francioni and Martin Scheinin (eds.), *Cultural Human Rights* (Brill 2008).

