

The Proposed Nordic Saami Convention

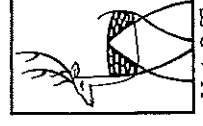
National and International Dimensions
of Indigenous Property Rights

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• HART •
PUBLISHING

OXFORD AND PORTLAND, OREGON

Can Saami Transnational Indigenous Peoples Exercise Their Self-determination in a World of Sovereign States?

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I. INTRODUCTION

THE SELF-DETERMINATION OF peoples is not easily accommodated within a system of law having as its constituency Nation States.

After the Second World War, the human rights movement gained strength and many argued that we should focus on humans, not States. At the outset, international human rights law could readily fit within the State structure of the international community. After all, the 1948 Human Rights Declaration¹ and the 1966 Covenants² were mostly about building better Nation States by enhancing the formal and substantive equality between the citizens of these States.

Yet the seeds of change were already planted with the common Article 1 to the 1966 Covenants, arguing that all peoples have the right to self-determination, with which they may freely determine their political status and freely pursue their economic, social and cultural development. This is revolutionary language, given that here we have a collective human right in the two primary legally-binding human rights treaties, a right that arguably underlies all other individual human rights. If read as it is written, it is a legally-binding obligation on States to honour the self-determining power

¹ Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A (III) (hereafter 'UDHR'), Art 5. Access at <www.un.org>.

² 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. International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and

of peoples; and here, peoples cannot be equated to States. States are not the beneficiaries of human rights treaties; peoples, and the individuals composing them, are.

Even though it is clear that the mainstream of international law upholds the Nation States as the primary subjects of international law, it is interesting to study how much space peoples (which are not States) have been able to carve out for themselves in international law. It is important to emphasise that I am not focusing on the self-determination of peoples who already form States. These peoples are evidently the clearest case of the accepted self-determination of peoples, but not the most interesting;³ it is the exceptional cases where peoples do not form States—especially those peoples who live in many countries—that are more challenging from the viewpoint of international law and are of interest here. Generally, it is interesting that peoples have indeed been able to have their self-determination accommodated with a highly institutionalised system of interdependent doctrines of international law, all revolving around the State as the centre of gravity.

This chapter focuses on the right to self-determination of transnational peoples, peoples whose component parts are divided by international borders, and in particular it examines how Saami transnational indigenous peoples have been able to advance their right to self-determination. If one reads common Article 1 of the two 1966 Human Rights Covenants literally, it speaks of self-determination residing in a people, not portions of a people. Section II. of the chapter aims to reflect on how the general law of self-determination of peoples relates to State sovereignty, and how it thereby influences the way we are able to think of the rights of transnational peoples in international law.

Thereafter, the focus in section III. will be on studying the evolving law relating to indigenous peoples. Does this body of law guarantee self-determination to indigenous peoples, in particular to transnational indigenous peoples? Here a brief analysis of the 2007 UN Declaration on the Rights of Indigenous Peoples is useful, as it was directly negotiated by States and indigenous peoples for over 20 years, and thus captures the essential normative consensus as to what direction the law regulating the relations between States and indigenous peoples should take.

With a solid background of general international law and law relating to indigenous peoples in mind, it is then possible in section IV. to analyse the draft for a Nordic Saami Convention, developed by the Nordic Saami parliaments together with the three States—Norway, Finland and Sweden. The draft is based on the idea that Saami have a right to self-determination.

³ See e.g. A. Cassese, *International Law*, 2nd edn (Oxford, Oxford University Press, 2005) 60–64. He argues that 'Art 1, common to the two 1966 UN Covenants on Human Rights ... essentially confers on the peoples of all the contracting parties the right to internal self-determination' (*ibid.*, 62).

It goes beyond what is politically required by the UN Declaration in that it envisages a gradually-increasing Saami unity in exercising self-determination, even if it is still the Saami parliaments that exercise that right. It is, hence, of interest to examine this pioneering process in depth and to analyse whether Saami people might actually achieve self-determination via this process within the States in which they live.

Section V. draws conclusions as to whether general international law and the law relating to indigenous peoples is equipped to accommodate or even support claims by transnational indigenous peoples to an ever-increasing unity via their right to self-determination. At the very least, the draft Nordic Saami Convention is built on the idea that the Saami, as actors, have self-determination as a transnational people, which must be accommodated by the three States where Saami live. Hence, the last section of this chapter explores whether the Saami and the Nordic States have gone further in advancing the rights of transnational indigenous peoples than general international law and the evolving law related to indigenous peoples. The answer to this question will then demonstrate whether the draft Nordic Saami Convention may be regarded as a pioneering attempt by the respective Saami parliaments and States, or as an endeavour that is already required by general international law and in particular the law relating to indigenous peoples.

II. DOES INTERNATIONAL LAW OF STATES GIVE A PLACE FOR PEOPLES AND THEIR CLAIM FOR SELF-DETERMINATION?

Let us first examine how the mainstream understanding of international law perceives who is a rightful power-holder in international law. First, it appears as though the ultimate end-state for any group wanting to exercise full rights in international society is to become a State. To achieve this goal, the candidate entity needs to possess an effective government, territory, population and the capability of establishing relations with other States. Moreover, the community of States must, at least to certain extent, recognise it as a State. In order for the group to become a State, it is of little relevance whether it might be considered to be a people in an ethnographic sense. What does matter is that an effective government controls a territory with a population, and that the community of States accepts this candidate into its club.

However, the international law of States has been able to carve out a place for peoples. When European colonialism in Africa and Asia lost its political legitimacy, this development quickly manifested itself in international law. The community of States had to come to terms with the normative development that colonised peoples have a right to self-determination in international law. This could have signified a real challenge of even revolutionary potential as to how political authority and power are organised in international society.

In theoretical terms, at least, if colonial peoples have a right to self-determination, there is no final political status, referred to as a 'State', to be achieved. If people have other ideas for organising their polity, they would appear to be entitled to execute them.⁴ More importantly, self-determination inheres in people, not States. The act of being a State would be only one of the choices for which persons might opt in exercising their right freely to determine their political status. If self-determination inheres in peoples, it is always the people who will dictate their political status to the future.

Naturally, things did not evolve in this way. The colonial peoples' right to self-determination was implemented in such a way that it could be accommodated within the system of international law. First, the process as a whole, conducted primarily under the auspices of the UN, accorded self-determination to territories rather than peoples, even though decolonisation was many times described as the exercise of the self-determination of colonised peoples. It was the trusteeship territories and non self-governing territories (and in some cases even mandated territories) whose people were eventually accorded the right to self-determination. It was the territory—not a process designed to identify who the authentic colonised peoples were—that determined who had the right to self-determination. This 'territorial approach' to self-determination was manifested by newly-independent States gaining their self-determination to territories the boundaries of which had been drawn by the colonists long before they became independent and which were given legal recognition in international law (*uti possidetis*).⁵

Furthermore, the whole process operated on the assumption that the peoples of these territories sought to establish new States, not that they would establish some new forms of self-determination that would not fit

within the system of international law. International law also quickly closed the door on self-determination when overseas territories (and the people living within these borders) gained their independence and became proper States. To make it clear that self-determination applied only to colonies overseas, the salt-water criterion emerged, which required geographical distance between the colonised peoples wanting to exercise their right to self-determination and the State of which they were a part. The right to self-determination of peoples—understood in that way—thus did not pose a threat to the metropolitan territories of States.

However, the self-determination of peoples always had the potential to reach further. When the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights were negotiated during the 1960s, common Article 1 was perhaps the most controversial provision. Some States perceived the article as limited to colonial situations, while the majority felt that it should apply to the people of any territory but should not accord minorities any right to secede (for whom Article 27 was thus tailored).⁶ The two relevant paragraphs of Article 1 are as follows:

1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

It would seem fairly clear that, in any ordinary treaty interpretation, Article 1 applies to all peoples, not only to colonial peoples, even if there is no authoritative definition of who constitutes a people in international law. As stated above, these rights do not inhere in States or governments but in peoples—common Article 1 being part of a human rights treaty. Lastly, and presumptively, if 'people' were given any meaning, it would seem to refer to people in an ethnographic sense, not to a component part of the people.⁷

Hence, there was always the potential for the self-determination of peoples to reach further than colonial peoples. It was difficult to justify why other kinds of alien domination were different from European colonialism. Surely the basic rationale for why colonialism lost its legitimacy was that foreign powers should not control the fate of African and Asian peoples, and that the same legitimacy deficit would come to haunt any power wanting

⁴ As is provided in the UN's Friendly Relations Declaration, the emergence into any other political status freely determined by a people constitutes one mode of implementing the right of self-determination by that people. See the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (adopted 24 October 1970), UNGA Res 2526 (XXV), available at <www.un.org>.

⁵ As the International Court of Justice put it in *The Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* [1986] ICJ Rep 554, 567: 'At first sight this principle [*uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples ... Thus the principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*. This remains an undeniable fact ...'

⁶ D McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford, Oxford University Press, 1991) 14-15.

⁷ J Crawford, 'The Right of Self-Determination in International Law: its Development and Future' in P Alston (ed), *Developing States in International Law* (Oxford, 1997) 101-12.

to invade and dominate another people anywhere in the world, including outside of colonial context. If the goal of decolonisation was to liberate these people to govern themselves, and determine their common destiny, would that not also imply that if a people cannot do that in an existing State, they should do it somewhere else? After all, if they cannot participate in the political life of a State, is that not also a form of alien domination, another people in control of a State and dominating the other(s).

These types of considerations gained strength, and found their way into various kinds of State-negotiated instruments. This development is well reviewed in perhaps the most famous modern case dealing with the meaning of the 'self-determination of peoples' in international law, the Reference decision of the Canadian Supreme Court in response to the question: '[D]oes international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?'⁸ What made this Advisory Opinion so influential—even though an opinion of a national court and not an international court—was that the Supreme Court made use of the writing of leading scholars of international law on this topic.⁹ The most interesting aspect of the Opinion—from the perspective of this chapter—is how the Supreme Court advances a general view of what the 'self-determination of peoples' means in current international law, namely, who are the holders of what type of self-determination, aspects that clearly capture the essence of the modern law of self-determination.

The Supreme Court begins by outlining the basics; it first endorses the view that international law, in some specific circumstances, recognises the right of a people to self-determination.¹⁰ The Court is also of the view that this is not only a conventional right but also a general principle of

international law.¹¹ But who are these people? The Supreme Court provides a very interesting answer:

International law grants the right to self-determination to 'peoples'. Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of 'peoples', the result has been that the precise meaning of the term 'people' remains somewhat uncertain.¹²

Yet even though it was not able to provide a clear-cut definition of 'people' (such a definition does not exist in international law), the Court advances the following view:

It is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.¹³

Even though the Court contemplates, in passing, that the Quebec population appears to share many characteristics (such as a common language and culture) that are relevant in determining whether a group is a people, it did not have to make this determination, given that in any case it came to the conclusion that Quebec has no grounds for unilateral secession.¹⁴ Yet what is interesting is that it did conclude that there may be many self-determining peoples in a State. These peoples normally exercise their right to self-determination within existing States (internal self-determination), but if they cannot do so, their right to external self-determination is, in exceptional cases, triggered—perhaps even leading to secession from an existing State.¹⁵ The Court even seems to accept, in addition to colonial situations and alien domination, that the external self-determination of people may be

⁸ *Reference re Secession of Quebec from Canada* [1998] 2 SCR 217. Three questions were referred to the Supreme Court: '1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally? 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?'

⁹ Since Quebec declined to take part in the proceedings, an *amicus curiae* was appointed on behalf of the Supreme Court to represent the interests of Quebec. Both the Minister of Justice and the *amicus curiae* commissioned leading international law experts on the issue to provide their opinion on the international law aspects raised by question 2.

¹⁰ See Reference, above n 8, para 113.

¹¹ *Ibid.*, para 114.

¹² *Ibid.*, para 123.

¹³ *Ibid.*, para 124.

¹⁴ *Ibid.*, para 125.

¹⁵ *Ibid.*, para 176.

exercised as a remedy if the people cannot meaningfully participate in the political life of a State, even though it does say this cautiously.¹⁶

Now, the question arises as to how the Court's treatment of 'people' might be interpreted. It certainly provided that the 'people' does not have to be the same as the whole population of an existing State. Consequently, there may be many peoples in one State. It also quickly contemplated the general criteria of what is a 'people' (common language and culture), but as the Court did not have to determine this, it left it at that. It may be presumed, however, that the Court's liberal treatment of the effectivity principle—that if the entity is able to gain independence in the streets and even receives recognition from other States, it can become a State—testifies to the effect that, for the Court, any entity that would go as far as Quebec did, organising referendums to declare independence unilaterally from the mother State, qualifies presumptively as a people.¹⁷

It is important to realise that, from the perspective of this chapter, the Supreme Court places vast importance on the territorial integrity of States.¹⁸ The question of who has a right to self-determination must be seen against the background of territorial integrity of each and every State in the world. In normal circumstances, if there are many peoples in a State, they exercise these rights internally within the sovereign State. As the Court notes, international law does not prohibit or permit secession in these circumstances, but it certainly lays a heavy burden for such a group to secede. However, and most importantly, the peoples' right to self-determination always takes place within the context of a Nation State. If there is a people living in four States, such as the Saami people, each of these 'segments' enjoys its self-determination within each of the States. If one or all of them have grounds for external self-determination, they have to break free from their home State, on legal grounds (they have been oppressed) or illegally (by being successful in the streets).

¹⁶ This cautious attitude may be seen *ibid*, paras 134–35: 'A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration and Programme of Action, UNGA Res 48/121, A/CONF.157/23 requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. ... Clearly, such a circumstance parallels the other two recognised situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination ...'

¹⁷ *Ibid*, paras 141–42.

¹⁸ *Ibid*, para 112: '[I]nternational law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part ...'

The International Court of Justice (ICJ) confronted similar issues when giving an Advisory Opinion to the UN General Assembly over whether the unilateral declaration of independence by the Provisional Institutions of self-government of Kosovo was in accordance with international law.¹⁹ Before the ICJ gave its Opinion, it was argued that if Kosovo gained independence, it might come to mean that international law makes it legal for segments of people, in an ethnographic sense, to possess self-determination and possibly secede from existing States.²⁰ As Kosovars are only a component part of a larger Albanian people, it was argued that it is important to ask to whom the right of self-determination belongs.²¹ Borgen comments that if the ICJ were to make the point of Kosovo as a special case, as it had been under international administration for so long, the ICJ's Opinion might still create a dangerous precedent, since for him, the right to self-determination has traditionally rested on the whole people understood in an ethnographic sense. At the time, he foresaw the following dangers in this Opinion:

If that is the case, then the international community may be creating precedent that we will see cited by other ethnic enclaves seeking separation, be they Russians in Abkhazia or Krajina Serbs. Previously, neither of these groups was viewed as having a strong claim for the privilege of secession, as neither of these groups is a 'nation' in the ethnographic sense, but rather fragments of Russian or Serb ethnic groups.²²

Yet the ICJ was, arguably, able to circumvent all politically-charged issues involved in creating any kind of precedent with its Advisory Opinion by declining to deal with difficult issues related to the self-determination of peoples.²³ The Court focused on the very narrow question of whether the

¹⁹ *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion)*, General List No 141 [2010] ICJ, available at <www.icj-cij.org>.

²⁰ CJ Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' (2008) 12 *American Society of International Law ASIL Insights*, available at www.asil.org.

²¹ *Ibid*. As Borgen states: '[O]ne may argue that the Kosovars are a "people", having inhabited Kosovo for centuries. However, the Kosovar Albanians are more generally perceived as an Albanian ethnic enclave, rather than a nation unto themselves.'

²² *Ibid*.

²³ As the Court stated in para 56: 'The question put to the Supreme Court of Canada inquired whether there was a right to "effect secession", and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was "in accordance with" international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task, which the Court is called upon to perform, is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement ...'

declaration of independence, as such, is prohibited in the practice of States, a question which it could easily answer in the negative. Yet this has not prevented international law commentary on possible precedential aspects of the Advisory Opinion.²⁴

Nevertheless, the modern law of self-determination makes it very difficult for transnational peoples to exercise their right to self-determination. In the case of the Saami, these four segments of a people would need to make their case against their Nation States, a fact that would make it very difficult for such a people to unite, exercise their self-determination and form a State.

III. HAVE (TRANSNATIONAL) INDIGENOUS PEOPLES BEEN ABLE TO GAIN SELF-DETERMINATION IN INTERNATIONAL LAW?

A. Introduction

During the decolonisation period, the peoples of the African and Asian continents were able to exercise their right to self-determination. However, once the process was over, the international law of States closed off quickly and made it clear that self-determination primarily applies to overseas colonies; the so-called salt-water criterion emerged, requiring geographical distance between the colonised peoples wanting to exercise their right to

confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.²⁵ In paras 82 and 83 the ICJ makes clear that it will not touch upon issues related to self-determination: 'The Court has already noted ... that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo. ... The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law ...'

²⁴ For instance, Ralph Wilde perceives that the implication of the Court's finding that the prohibition on violating territorial integrity is applicable only to States, and not to non-State actors, may lead to the situation where the non-State actors become aware that no international law rule bars independence declarations. See R. Wilde, 'Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo' (2011) 105 *American Journal of International Law* 301. See also R. Falk, 'The Kosovo Advisory Opinion: Conflict Resolution and Precedent' (2011) 105 *American Journal of International Law* 50.

self-determination and the State of which they were a part. Metropolitan States were not threatened as colonies were geographically distant.

This may be contrasted with the challenge which indigenous peoples pose to the system of international law. They too were colonised, in some cases much earlier than African and Asian peoples, but they live within the metropolitan territories of established States, making it difficult to apply any 'territorial approach' to the self-determination of indigenous peoples. Depending on the way in which indigenous peoples are defined, it is estimated that there are 300–500 million indigenous peoples globally. This means that granting them self-determination would pose a direct challenge to the way in which the States of the world have organised their internal governance structures.²⁵ Hence, at first sight, it would seem very difficult for indigenous peoples to exercise any kind of self-determination in the world of States. Yet, as will be shown below, the process to adopt a UN Declaration on the rights of indigenous peoples has made some important openings.

B. The Process to Adopt the UN Declaration

The work to produce the UN Declaration began as early as 1985 within the Working Group on Indigenous Populations (WGIP), consisting of five expert members (who, from the beginning, allowed broad access for indigenous peoples, irrespective of whether they had gained status with the Economic and Social Council).²⁶ For almost a decade, the WGIP devoted a large part of its time to drafting the text of a UN Declaration. Representatives of indigenous peoples, government delegations and experts on the subject all took part in this process. In 1994, the then Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted the draft Declaration prepared by the WGIP and sent it to its parent body, the Commission on Human Rights (now replaced by the Human Rights

²⁵ See, eg, L. Malezer, 'Permanent Forum on Indigenous Issues: Welcome to the Family of the UN' in J. Castellino and N. Walsh (eds), *International Law and Indigenous Peoples* (Leiden, Martinus Nijhoff Publishers, 2005) 67.

²⁶ In 1982 the WGIP was established as a subsidiary organ to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights), endorsed by ECOSOC on 7 May 1982, UN Doc E/Res/1982/34. It comprises five members of the Sub-Commission, one representing each of the five geographical regions designated by the UN for electoral purposes. As a subsidiary organ of the Sub-Commission, the Working Group is located at the lowest level of the hierarchy of UN human rights bodies. Its recommendations have to be considered and accepted first by its superior body, the Sub-Commission, then by the Commission on Human Rights (now the Human Rights Council) and the Economic and Social Council (ECOSOC), before moving on to the UN General Assembly.

Council), for consideration.²⁷ The article on self-determination drew heavily on common Article 1(1) of the Covenants:

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.²⁸

Another important provision of the 1994 draft, from the perspective of future framing of the right to self-determination of indigenous peoples, was Article 31, which outlined the following:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.²⁹

The draft Declaration's provision on self-determination was heavily influenced by the persistence of indigenous peoples,³⁰ who attached great importance to having the right expressed in the draft and who had rejected (1993) an earlier version which stated, much more modestly:

Indigenous peoples have the right of self-determination, in accordance with international law, subject to the same criteria and limitations as apply to other peoples in accordance with Charter of the United Nations. By virtue of this, they have the right, *inter alia*, to negotiate and agree upon their role in the conduct of public affairs, their distinct responsibilities and the means by which they manage their own interests. An integral part of this is the right to autonomy and self-government.³¹

In 1995, the Commission on Human Rights considered the text submitted by the Sub-Commission and decided to establish an inter-sessional working group³² with the mandate to draw up a draft Declaration for the consideration of the Commission for eventual adoption by the UN General Assembly within the framework of the International Decade of the World's Indigenous People (1995–2004). The inter-sessional working group consisted only of State representatives, although indigenous peoples were given access to the process as observers.

²⁷ Draft United Nations Declaration on the Rights of Indigenous Peoples, UNGA A/Res/61/295 (1994/5), available at <www.unhcr.ch>.

²⁸ Draft UN Declaration on the Rights of Indigenous Peoples, UNGA, E/CN.4/Sub.2/1993/29/Annex I, (1993), Art 3.

²⁹ *Ibid.*, Art 31.

³⁰ CE Foster, 'Articulating Self-determination in the Draft Declaration on the Rights of Indigenous Peoples' (2001) 12 *European Journal of International Law* 141, 142.

³¹ *Ibid.*, 156. *Discrimination Against Indigenous Peoples*, Report of the Working Group on Indigenous Populations on Its Tenth Session, UN ESCOR, 44th Sess, Agenda Item 15, operative para 27, UN Doc E/CN.4/Sub.2/1992/33.

³² Resolution of the Commission on Human Rights 1995/32, (1995).

Even though progress was slow in the inter-sessional working group, and the goal of having the UN General Assembly adopt the UN Declaration by the end of 2004 was never achieved, in June 2006, the newly-created UN Human Rights Council adopted the Declaration (but not without opposition—30 votes in favour, 2 against, 12 abstentions),³³ recommending that the UN General Assembly adopt it, with the following formulations of the right to self-determination:

Article 3

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.

Article 4

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.

Even though the original 1994 draft and the 2006 draft (adopted by the Human Rights Council) are identical in framing the right to self-determination of indigenous peoples, the decision to move Article 31 (on autonomy and self-government) immediately to follow Article 3 on self-determination, made it possible to read these two provisions together. It may now be argued that Article 4 specifies that indigenous peoples' right to self-determination is limited to a 'right to autonomy or self-government', or to what is often referred to as the right to internal self-determination within the confines of existing States. This interpretation is made even more pertinent when comparing the wording of the right to autonomy and self-governance in the original formulation of Article 31 with the later wording in Article 4. Article 31 sees it 'as a specific form of exercising their right to self-determination', while Article 4 provides 'in exercising their right to self-determination'. The first formulation, if read in the context of Article 3, appears to indicate that autonomy or self-governance are possible avenues for implementing the right to self-determination of indigenous peoples, whereas the new Article 4 gives more force to the argument that the right to autonomy or self-governance constitutes a way in which indigenous peoples' self-determination may be realised.

Even with this change in the ordering of the provisions, the process of finally adopting the UN Declaration came to a halt when a no-action resolution by the Namibian Delegation was supported by the majority in the

³³ See the version adopted by the Human Rights Council, A/HRC/1/L.1030 (2006), 56, available at <www.iwigia.org>. See the explanatory paper by Canada after voting against the Declaration, and also outlining the reasons why other countries abstained from the vote, many of them having problems with Art 3 on self-determination (Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples, 29 June 2006), at <http://www.aandc-aandc.gc.ca/eng/1100100014078>.

3rd Committee of the UN General Assembly.³⁴ One likely reason for this is Article 3. Despite the change in order, Article 3 was still there, stating that indigenous peoples have a right freely to determine their political status. It is not difficult to imagine that such a text would be troublesome for a State representative in the 3rd Committee, especially an African State.

The matter finally came before the General Assembly in September 2007, where the Declaration was adopted by 143 States voting in favour, four States against (New Zealand, Australia, the USA and Canada)³⁵ and 11 abstaining (including Russia).³⁶ There were some important changes to the text from the version adopted by the Human Rights Council, most importantly from the perspective of the right to self-determination of indigenous peoples in order to further limit the interpretation of Article 3. This was achieved by a significant amendment to Article 46(1). As adopted by the Human Rights Council the provision read as follows:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

This was changed to ensure that indigenous peoples' self-determination may encompass at the most internal self-determination within existing States:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.³⁷

The compromise, thus, consists of three moves. The right to self-determination of indigenous peoples is recognised in Article 3, but its practical content

is defined in Article 4 and its outermost scope is limited in Article 46. But this compromise cannot be the final word on the matter, since indigenous peoples may always rely on common Article 1 of the two Covenants and general international law as justifying their self-determination, which may even lead to secession in extreme cases.

It is also clear that the UN Declaration is very much based on self-determination of indigenous peoples within the established Nation States. It does not promise much for transnational indigenous peoples, even if it contains one article focusing on this particular issue, 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.

The provision upholds a view of indigenous communities living on various sides of the border, with a right to develop their contacts, relations and cooperation with communities on the other side of the border, and has not changed much from the 1994 UN draft Declaration.³⁸ It is also very much in line with International Labour Organisation Convention No 169, the only modern international convention focusing on the rights of indigenous peoples,³⁹ which provides that indigenous peoples' self-determination means the right to autonomy or self-governance in their internal or local affairs within the broader Nation State. In other words, neither document encourages the segments of transnational people to unite and find a common identity; instead, the primary point of reference is to each Nation State.

³⁸ Art 35 of the draft (1994) provided: '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 other peoples across borders. States shall take effective measures to ensure the exercise and implementation of this right.' See <www.unhcr.ch>.

³⁹ International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169 (1989), Art 32 provides: 'Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.' See the Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries, at <www.ilo.org>. Even the International Law Association's Indigenous Rights Committee perceives Art 36 in generally positive terms, as one element of 'external self-determination', see ILA 2010 Committee Report, *Rights of Indigenous Peoples*, at <www.ila-hq.org> (at 10 and, more generally, at 15).

³⁴ See the press release from the 3rd Committee at <http://www.un.org/News/Press/docs/2006/gashc3878.doc.htm>, noting that 'an initiative led by Namibia, co-sponsored by a number of African countries, resulted in the draft being amended. In its new form, the draft would have the Assembly decide "to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon" ... The amendments were adopted by a vote of 82 in favour to 67 against, with 25 abstentions (annex II) ... Prior to the vote, the representative of Peru—recalling that it had taken 24 years for the Declaration to be hammered out—said the original draft had been revised to address the concerns of many delegations, particularly regarding the principle of self-determination of peoples and respect for national sovereignty ... However, his counterpart from Namibia, explaining the proposed amendments, said that some provisions ran counter to the national constitutions of a number of African countries and that the Declaration was of such critical importance that it was only "fair and reasonable" to defer its adoption by the Assembly to allow for more consultations.'

³⁵ All four of these States have by now come to endorse the UN Declaration, albeit with some reservations.

³⁶ See generally <www.iwigia.org>.

³⁷ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295.

IV. SELF-DETERMINATION OF SAAMI TRANSNATIONAL PEOPLE

The Saami live in four States—in the northernmost parts of Scandinavia (in Norway, Sweden and Finland) and in Russia.⁴⁰ Despite this, the process leading to the draft Nordic Saami Convention did not seriously attempt to include Russia as one of the Contracting States.⁴¹ This was due to many factors, most importantly because Russia primarily wants to regulate the rights and status of its numerous indigenous peoples itself.⁴² The draft was developed under the auspices of the Nordic Council, the Nordic parliamentary cooperative body, the three States with Saami inhabitants—Norway, Sweden and Finland—as its members. After many stages, an Expert Group, with unique composition (three members from each State and each Saami parliament), was established and presented its proposal for a Nordic Saami Convention in November 2005.⁴³

⁴⁰ The Saami are an indigenous people living in the northern parts of three Nordic States—Norway, Sweden and Finland—and on the Kola Peninsula in the Russian Federation. They arrived in the region well before the present majority populations of those States, and are ethnically and linguistically distinct as a people from the mainstream societies. At present, there are approximately 90,000 Saami living in the northernmost regions of the North Calotte and the Kola Peninsula. Of these, the Norwegian Saami constitute the largest group, numbering approximately 50,000–65,000 persons, followed by the Saami in Sweden (20,000), Finland (8,000) and Russia (2,000). These figures are at best rough estimates, as there is no clear definition of who constitute the Saami. See U-M Kulonen, I Seurujärvi-Kari and R. Pulkkinen, 'Introduction to the Saami' in *The Saami: A Cultural Encyclopedia* (Helsinki: The Finnish Literary Society, 2005) 5.

⁴¹ This was despite the Saami Council calling for Russians to be included in their Honningsvåg conference: '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 emphasised 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.' See the Preamble to the Saami Council 'Honningsvåg Declaration' (adopted by the 19th Saami Conference in 2004), available at <www.saamicouncil.net>.

⁴² There are also many other considerations. Since the Saami are only one of the indigenous groups in its territory, it might be viewed as discriminatory if Russia were to enter into an international treaty over one very small indigenous group (approximately 2,000 members). In addition, the Nordic countries have very close contacts with each other, as have the three Saami communities. The Russian Saami, are, however, active participants in the Saami Council.

⁴³ See the Report on the Draft Saami Convention, 'Pohjoismaiden saamelaisopimus: Suomalais-norjalais-suomalais-saamelaisen asiantuntijaryörymän' 27. lokakuuta 2005 luottamuksellinen (Finnish Ministry of Justice Publication No. H-2183 E, 90-96. The extensive document (hereafter 'the Report') consists of nine sections and four annexes totalling 340 pages. See pp 151-246. The other parts of the Report consist of the following: how the Committee was appointed and its terms of reference (s 2, pp 44-46); an explanation of the content of the proposed text for a Convention (s 3, pp 47-56); a summary of the content leading to the appointment of the Committee and how the Committee has fulfilled its task (s 4, pp 57-62); a discussion of some of the general issues related to the Convention (s 5, pp 63-64); a review of the legal and factual situation of Sámi in Finland, Norway, Sweden and the Russian Federation (s 6, pp 65-103); an extensive analysis of the international treaties and other international instruments relevant from the viewpoint of Saami.

The draft advances a very ambitious formulation of the Saami right of self-determination, particularly in its Article 3:

As a people, the Saami has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Saami people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources.⁴⁴

There are two parts to this article. The first part provides that the Saami 'has a right to self-determination in accordance with the rules and provisions of international law'. This is further explained in the Commentary to the draft. The Expert Group clarifies that, even though Saami as a people have a right to self-determination, this does not mean that they have a right to secede from existing States. As the Commentary notes:

The Saami as a people and as the indigenous people of Scandinavia are not in such a position that they could claim the establishment of their own state on the basis of international law. The Saami and the contracting States must, on the basis of international law, develop such ways of organizing the exercising of Saami self-determination that the present borders of the States are not challenged.⁴⁵

However, the Commentary also clarifies that the reference to the rules of international law in Article 3 means that the content of Saami self-determination develops in accordance with the evolution of international law, thereby making it clear that the self-determination of indigenous peoples may come to have a broader content than it does today.

The legal status of the Saami is fleshed out in the draft in a very innovative manner. Even though the Saami parliaments are not envisaged as Contracting Parties to the Nordic Saami Convention, an issue that was discussed extensively by the Expert Group, they do have a very strong role in all aspects of the operation of the Convention (if adopted in its current form). They have a power to reject its ratification, as well as any amendment to the Convention, and have an equal representation in the Committee that steers the development of the Convention.

The second part of Article 3 provides that, as a people, the Saami 'has the right to self-determination in accordance with the rules and

discussion of the status of Saami in the Convention (s 8, pp 148-50). The Annexes consist of a review of a study of whether Saami could be parties to the proposed Convention (Annex I, pp 247-50), a discussion of the legal status of the Russian Saami (Annex II, pp 251-62), an article by three members of the Expert Committee on the right to self-determination of the Sámi (Annex III, pp 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, pp 319-40). The unofficial English version of the draft Convention may be found on the Sámi Council website, at <www.saamicouncil.net>.

⁴⁴ *Ibid.* Art 3.

provisions of ... this Convention'. This provision is further clarified in Article 14(3):

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

The second part of Article 3 expresses the goal of the Convention as being further to integrate the Saami communities in the three States through the existing democratically-elected Saami parliaments assuming more powers and cooperating further with each other. The vision of the draft is a joint Nordic Saami parliament, as expressed in the Report and, more cautiously, in Article 20:

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

The draft Convention also provides the Saami parliaments with extensive powers in relation to the participation in international affairs in Article 19:

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.

The draft Saami Convention has not progressed as envisaged. When it was handed down in October 2005, it was foreseen that negotiations would commence in November 2007. However, problems experienced in Finland—and to some extent in Sweden—have postponed the process. The negotiations finally commenced at the beginning of 2011, with each of the Saami parliaments nominating delegates to country negotiating teams. The Inter-Ministerial Committees in the Nordic States, which studied the draft, advanced various challenges in it, including to Article 3 of the draft, which all perceived as going beyond what is now required in international and national law.⁴⁶ In all three countries, the Inter-Ministerial Committees

⁴⁶ This comes across in all three reports, but most clearly from the Finnish Inter-Ministerial Committee Report. This is not a surprise since Finland expressed its reservations to Art 3 and some other articles during the Expert Group's work. These reservations were expressed in the Commentary to the draft Nordic Saami Convention. The Inter-ministerial Committee noted that while Art 2 deems Saami an indigenous people, draft Art 3 uses the much broader notion of people and their right to self-determination. According to the Committee, Art 3 thus does not follow the status given to the Saami under Art 2 and is also, from the viewpoint of its scope of application, broader than the indigenous status as recognised in the UN Declaration. For this reason, it is in contradiction to the Finnish Constitution (the Committee points to the Constitution's emphasis on s 2.1 (the powers of the State in Finland are vested in the people, who are represented by the Parliament)) and goes further than what Finland has committed itself to under international law and policy (because, according to the Committee, the UN

(with Saami representation) found Article 3 to be more ambitious than the present state of international law, while the Saami members of those committees were of a different opinion. It remains to be seen how Saami self-determination will be realised in the possible Nordic Saami Convention.

V. CONCLUDING OBSERVATIONS

The international law of States has been able to accommodate the right of peoples to self-determination in general, and of indigenous peoples in particular. Yet self-determination has clear limitations, which were clarified when decolonisation was implemented. It was not the African and Asian peoples, in any ethnographic sense, who were entitled to exercise their right to self-determination, but populations of the territories that happened to fall within the borders drawn by the colonists. The decolonisation created transnational peoples by erecting State borders, thereby placing peoples on both sides of those borders.

The same applies to the current law of self-determination. The self-determination of peoples always takes place within the frame of sovereign Nation States, which hinders possibilities for transnational peoples to exercise their 'joint' self-determination, given that each people must address its concerns toward the sovereign in whose territory it is located. The provision that addresses the special situation of transnational indigenous peoples, Article 36, is very much built on these premises. Indigenous peoples may have internal self-determination within existing States (and even external self-determination in very exceptional circumstances), but transnational indigenous peoples only have rights to maintain and develop contacts, relations and cooperation with each other across the border. The UN Declaration does not attempt to bridge the gap between these segments of people divided by State borders to encourage them to unite; there is only the encouragement to develop contacts between separate indigenous communities.

This contrasts with the attempts made by the Saami and the Nordic States to build a more ambitious approach based on the whole people's self-determination. Even though the draft—for political reasons—cannot ensure

Declaration's Art 3 is restricted by Art 4, which together mean that indigenous peoples are guaranteed self-governance and autonomy in their internal and local affairs). The Committee also complains that the article does not deal with how this article relates to the self-governance of municipalities, which is protected in s 121 of the Constitution (there are three municipalities and a segment of one additional municipality within the Saami homeland region, and these wield a wide range of self-governance powers in their regions, whereas the Saami have only cultural and linguistic self-governance under s 121(4) in their homeland). See Inter-Ministerial Committee statements in Finland, Sweden and Norway as translated in *ILJ* 37.

full rights to the Russian Saami, an attempt is made to include them as far as possible. If they live in any of the three Scandinavian States, they are entitled to all the rights in the draft, and the institutional cooperation provisions of the draft envisage involving Russian Saami even more. The self-determination of the whole people calls for their international standing to be developed. This is very clear in the draft, as the Saami parliaments may almost be regarded as parties to the envisaged Convention. They participate in the development of the Convention and its supervision (by appointing half of the members in the supervisory committee), and may block the ratification of the Convention and any amendments to it. Individual Saami parliaments are also guaranteed strong participation in inter-governmental affairs.

The draft Nordic Saami Convention does not refer to Article 36 of the UN Declaration, but the Draft may be seen as an ideal manner of implementing this provision. However, the draft goes further. It aims to create a gradual process whereby the Saami and the three Nordic nations may develop their relationship in such a manner that we might perceive four nations, coexisting in the same physical space, composed of the territories of three States. From this perspective, the draft Nordic Saami Convention should probably be regarded as a form of 'social contract' between the Saami and the three Nordic States, rather than as a typical international treaty.⁴⁷ Moreover, the goal is ultimately to unite the three Nordic Saami communities, rather than to have them cooperate more with each other.

Even though general international law does not give much politico-legal space for peoples divided by borders, particularly transnational indigenous peoples, it is possible for these peoples to exercise their right of self-determination if the political will for such action can be found. In the draft, the Saami exercise their right of self-determination together and against their home States. This does provide an inspiring example of the possibility of transnational indigenous peoples exercising self-determination in a very constructive and effective manner. This is not to say that it is certain that there will be a Nordic Saami Convention, but it does mean that the transnationality of these peoples has not died out, and that it will likely also serve as a future check on State action.

⁴⁷ This has been argued by one of the members of the Expert Committee producing the draft Nordic Saami Convention, M Scheinin, 'The Right of a People to Enjoy Its Culture: Towards a Nordic Sámi Declaration', in *Finland Yearbook of International Law*, vol. 11, 2001, p. 107.

The Nordic Saami Convention: The Right of a People to Control Issues of Importance to Them

LEENA HEINÄMÄKI

I. INTRODUCTION

THE AIM OF this chapter is to look at the right of the Saami to have control over the issues that are important to them as a people, including preservation of their culture and traditional way of life, in light of the draft Nordic Saami Convention. The chapter analyses key provisions relating to the self-determination of the Saami people, with the aim of examining the challenges that these provisions may pose to current Finnish legislation. The draft Convention has been developed with the idea that the level of self-determination and self-governing power accorded to the Saami people should depend on how important the question at hand is to the Saami people themselves. Thus, the more crucial an issue, the more influence Saami people should have over that issue. The right to control may vary from the right to engage in negotiations and consultation, to the requirement of consent.¹ The objective of this chapter is to identify possible gaps and contradictions between the draft Convention and the national and international commitments of Finland, and to discuss the necessary legislative changes suggested by Finnish legal authorities before Finland can accept the draft Convention.²

In November 2002, the Governments of Finland, Norway and Sweden—together with their respective Saami parliaments—appointed an Expert Group with the task of drafting a Nordic Saami Convention. The Expert

¹ M Åhren in M Åhren, M Scheinin and JB Henriksen, 'The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions' (2007) 3 *Gáldu Cálá—Journal of Indigenous Peoples Rights* 8, 16. Available at <www.galdu.org>.

² The Ministry of Justice of Finland nominated a Committee to evaluate the relationship between the draft and the Finnish Constitution.