

Queen Mary Studies in
International Law

Edited by

Malgosia Fitzmaurice
Panos Merkouris
Phoebe Okowa

VOLUME 12

The Interpretation and Application
of the European Convention
of Human Rights

Legal and Practical Implications

Edited by

Malgosia Fitzmaurice and Panos Merkouris

MARTINUS
NIJHOFF
PUBLISHERS

The titles published in this series are listed at brill.com/qmil

LEIDEN · BOSTON
2013

JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING INDIGENOUS PEOPLES: RETROSPECT AND PROSPECTS

Timo Koivurova^{*1}

I. INTRODUCTION

The development of international law relating to indigenous peoples has been rapid, in particular if one considers advances at the universal level since the 1980s. In 1989 the International Labour Organization (ILO) adopted the Convention on Indigenous and Tribal Peoples in Independent Countries (No. 169, hereinafter 'the ILO Convention'),² which replaced its largely assimilationist predecessor, the 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.³ Although not granting indigenous peoples self-determination, the 1989 Convention guarantees them many rights related to political participation, land, and the like, and is built on the idea of the importance of indigenous cultures. Even more important has been the adoption by the UN General Assembly of the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter 'the UN Declaration') in September 2007, for this was the culmination of over 20 years of direct negotiations between states and indigenous

^{*} Research Professor/Director, Northern Institute for Environmental and Minority Law Arctic Centre, University of Lapland, Finland. I have had the great pleasure of receiving excellent comments from Professors Gudmundur Alfredsson, Nigel Banks and Lauri Hannikainen as well as the former judge in the European Court of Human Rights Matti Pellonpää, who currently serves as a judge in the Finnish Supreme Administrative Court. The present author is fully responsible for the views expressed in the article and any errors or omissions are his own.

¹ This article is reprinted from: Timo Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects', *International Journal on Minority and Group Rights* 18 (2011): 1–37, with the kind permission of the author and the publisher.

² 1989 ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, *ILM* 28 (1989): 1382. For a recent overview, see A. Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989–2009: An Overview', *Nordic Journal of International Law* 79 (3) (2010): 433–456.

³ 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, available at <www.ilo.org/ilolex/english/convdisp1.htm> (accessed on 8 September 2010).

peoples and identifies a comprehensive set of rights for improving their situation.

This brisk involvement has brought not only new standards, but also co-operative bodies between indigenous peoples and states, as well as monitoring mechanisms to ensure that standards are observed. Of prime importance is the UN Permanent Forum on Indigenous Issues (UNPFII), which has eight members from both indigenous and state constituencies, with the chair selected from the indigenous peoples.⁴ The UNPFII is complemented by the expert mechanism on indigenous peoples and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Funding bodies, such as the World Bank, have also adopted strong guidelines on how they give loans to development projects that have an impact on traditional indigenous lands.⁵

These universal developments have largely been reflected at the regional human rights level as well, in particular in the American and African human rights systems.⁶ Yet, this observation does not apply to the strongest of regional human rights systems, the European one, which consists of the European Convention on Human Rights (ECHR)⁷ and its Protocols and the complaints mechanism of the European Court of Human Rights (ECtHR, or 'the Court'). The ECtHR enjoys a strong normative influence on its 47 states parties, given that the Court's judgments are legally binding on those states. The Court can hear complaints concerning various northern indigenous peoples: the Inuit from Danish Greenland, the Saami in Norway, Finland, Sweden and Russia, as well as numerous other indigenous peoples in the Russian Federation.⁸

Probably because there have been no landmark cases decided by the ECtHR in favour of indigenous peoples, there is scant scholarly interest in studying the problems and possibilities of using the Court as an avenue to promote and protect their rights. This is clearly unjustified, given that the Court has jurisdiction over so many indigenous peoples and is in a strong position to protect their rights. Added to these reasons is the simple fact that indigenous peoples have had two institutions to turn to – the now terminated European Commission on Human Rights⁹ and the ECtHR – for almost 30 years, even if the outcomes of litigation regarding indigenous applicants in these Strasbourg forums have not in general been meritorious. Moreover, the Court has made some interesting pronouncements in relation to indigenous peoples, opening up some possibilities for the protection of their rights in the future.

This research aims, at least partially, to remedy this lack of scholarly attention. The article proceeds as follows. First, it is important to provide a short introduction to the most relevant articles of the Convention and its Protocol No. 1 that the indigenous peoples have resorted to when complaining to the European Commission and the ECtHR. It is also useful to identify who can make a complaint to the ECtHR and under what rules in order to show some of the possible limitations that indigenous peoples face when using this particular mechanism to protect their rights. The main focus of the article is on complaints manifesting the problems that northern indigenous peoples confront when dominant societies and modern economic activities penetrate deeper into their traditional territories and hamper the practice of indigenous traditional livelihoods – livelihoods that stand at the core of their culture. There are three broad categories under which the cases will be studied: disputes in which a modern economic activity has been permitted by a state in an area where members of an indigenous people practice their traditional livelihoods;

indigenous small-numbered peoples of the Russian North, Siberia and the Far East referring to the *Fifth Periodic Report of the Russian Federation to the Committee on Economic, Social and Cultural Rights* (UN Doc. E/C.12/RUS/5, 25 January 2010), available at <www2.ohchr.org/english/bodies/cescr/docs/ngos/RAIPON-IWGIA-RussianFederationWG44.pdf> (accessed on 8 September 2010); and the recent visit to the Russian Federation by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (5–16 October 2009), <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9529&LangID=E>, (accessed on 8 September 2010).

⁹ The Commission was terminated with the entry into force of Protocol No. 11, which included transitional rules for the Commission to function until it had been able to finalize its work (at the end of 1999). See Protocol No. 11, Article 5, <www.unm.edu/humanrights/euro/z30prot11.html>, (accessed on 8 September 2010).

⁴ See, at <www.un.org/esa/socdev/unpfii/>, (accessed on 1 October 2010).

⁵ See <web.worldbank.org/WEB/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/o_contentMDK20443667--menuPK906528--pagePK210058--piPK210062--theSitePK407802,00.html>, (accessed on 8 September 2010).

⁶ See e.g. F. Coomans, 'The Ogoni Case before the African Commission on Human and Peoples' Rights', *International and Comparative Law Quarterly* 52(3) (2003): 749–760; J. Welch et al., 'The Ogoni and Self-Determination: Increasing Violence in Nigeria', *The Journal of Modern African Studies* 33(4) (1995): 635–649; J. Anaya & C. Crossmann, 'The Case of Awas Tingni v. Nicaragua: A New Step in International Law of Indigenous peoples', *Arizona Journal of International and Comparative Law* 19(1) (2002): 1–15; and L. Brunner, 'The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights', *Chinese Journal of International Law* 7(3) (2008): 699–711.

⁷ See <www.hri.org/docs/ECHR50.html>, (accessed on 1 October 2010).

⁸ There are two recent overviews of the indigenous situation in Russia, the first submitted by the Russian Association of Indigenous Peoples of the North (RAIPON) together with the International Work Group of Indigenous Affairs (IWGIA) for Proposed questions to the Government of Russian Federation Regarding Economic Social and Cultural Rights of

disputes in which the indigenous complainants have primarily had to show or argue for their immemorial usage rights to traditional areas where the mainstream society has challenged these; and, lastly, disputes involving the most dramatic measure on the part of a state, namely, forced relocation of indigenous peoples. After each category, it is important to compare what the relevant international instruments other than the ECHR require of states as regards indigenous peoples to show how the ECtHR has interpreted the Convention and the Protocols in a specific case. The Court not only applies its own founding Convention and Protocols, but also seeks inspiration and interpretative guidance from valid rules of international law.¹⁰

In the field of indigenous law, there are two main international treaties that contain relevant legal rights for indigenous peoples: the International Covenant on Civil and Political Rights (ICCPR),¹¹ whose article on minorities (Article 27) has been interpreted in a way that affords strong protection to indigenous peoples;¹² and ILO Convention 169, which is the only modern international convention specifically focusing on the rights of indigenous peoples and is potentially open to global participation.¹³ In addition, even if the UN Declaration cited above is not legally binding *per se*, it has already been seen as codifying existing customary international law in many respects.¹⁴ Even the International Law Association (ILA) – a

prominent association of international lawyers – seems to assess the status of the UN Declaration in a progressive manner, at least in its 2010 draft interim report:

The adoption of the UNDRIP in 2007 by the GA represented a groundbreaking event in the struggle of indigenous peoples to obtain recognition of their collective dignity as well as of their right to be different. From the stereotyped cultural models of the dominant society and to transmit this diversity to future generations. Although by its nature UNDRIP, just like any other declaration of principles, cannot be considered as a binding legal instrument, the question arises as to whether and to what extent the text of the Declaration corresponds to established general international law as a whole. In this respect, even though it cannot be maintained that UNDRIP as a whole can be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to [sic] which States are *bound* to comply with. In fact, the overwhelming voting majority with which the UNDRIP has been approved, the subsequent endorsement of the Declaration by most of the few governments that had voted against it, [footnote omitted] the unequivocal judicial and para-judicial practice of treaty bodies, as well as the pertinent state practice at both the domestic and international level, unequivocally show that a general *opinio iuris* as well as *consuetudo* exists within the international community according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law.¹⁵

The three broad categories under which the indigenous cases of the European human rights regime will be studied will be dealt with in turn, after which an evaluation is in order in three stages. The first stage examines how the European Commission's and Court's jurisprudence have evolved over the years in respect of indigenous peoples. Given that the ECtHR has clearly faced some problems in responding to the concerns of

Declaration against the background of existing and established international law. The conclusion of such an exercise would probably be that, to a significant extent, the Declaration clarifies and confirms rights that are already formally legally binding and applicable to indigenous peoples. As explained above, national law already recognised robust indigenous peoples' rights to LTRs [lands, territories and resources] under the rubric of the right to culture and the right to non-discrimination'. M. Åhren, 'The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction', in *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples*, C. Charters and R. Stavenhagen (eds.) (Copenhagen: Eks-Skolens Trykkeri 2009), at 212–213.

¹⁵ See the draft interim report available at <www.ila-hq.org/en/committees/index.cfm/cid/1024> (accessed on 8 September 2010).

¹⁰ For an in-depth study, see M. Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press 2010).

¹¹ 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

¹² The main cases include: HRC, *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (1990), Application No. 167/1984, UN Doc. CCPR/C/38/D/167/1984; HRC, *Ilmari Lämsmäen et al. v. Finland* (1994), Application No. 51/1992, UN Doc. CCPR/C/52/D/51/1992; HRC, *Jouini E. Lamsman et al. v. Finland* (1996), Application No. 671/1995, UN Doc. CCPR/C/58/D/671/1995; HRC, *Mahuika et al. v. New Zealand* (2000), Application No. 547/1993, UN Doc. CCPR/C/70/D/547/1993; HRC, *Äärelä and Näikkiläjävi v. Finland* (2001), Application No. 779/1997, UN Doc. CCPR/C/73/D/779/1997. 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); Finland, UN Doc. CCPR/CO/82/FIN (2004); USA, UN Doc. CCPR/C/USA/Q/3/CRP4 (2006).

¹³ It should also be noted that the monitoring bodies of the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of Child have made important pronouncements on indigenous law.

¹⁴ As Mattias Åhren points out: 'Following the adoption of the Declaration, some states have been quick to downplay its importance by pointing to the Declaration's non-legally binding character. That, however, oversimplifies things. To determine the legal status of the rights enshrined in the Declaration, one must analyze every single provision of the

indigenous peoples, the second stage explores why the indigenous peoples have not been able to protect their rights via the Court. The third stage assesses whether there are better prospects for the future.

II. INTRODUCTION TO THE MOST RELEVANT ARTICLES OF THE EUROPEAN CONVENTION AND THE PROTOCOLS

Indigenous complainants have mostly relied on Articles 6 and 8 of the ECHR and its Protocol No. 1 (1). Article 6(1) reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

From the perspective of indigenous complainants, one interesting aspect of this article is that the Commission and the Court have interpreted it as requiring 'equality of arms', that is, a fair balance between the parties to a dispute. The Court expects the national legal proceedings to afford the parties a reasonable opportunity to present their case, including evidence, under conditions that do not place them at a substantial disadvantage.¹⁶ Article 8 provides for a right to respect for private and family life in the following terms:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of

disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court has confirmed in its case-law that a measure authorized or permitted by the state (for instance, the refusal in the *Buckley* case of a planning permission to enable a gypsy to live in a caravan on her own land) may interfere with a minority individual's cultural identity.¹⁷ Yet, while admitting that encroachment on a minority individual's cultural identity may be unlawful interference with his/her respect for private and family life, the Court has also given a fair amount of room for the state to show that the measure was necessary in a democratic society, as occurred in *Buckley*.¹⁸ Article 1 of Protocol No. 1 to the ECHR reads:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

From the indigenous perspective, it is interesting that the Court, as it has expressed in its case-law, ascertains carefully that there is a fair balance between the general interests of the community and the protection of individuals' fundamental rights when there is interference with the peaceful enjoyment of possession.¹⁹

From the procedural perspective, it is of importance to note that – as is common in international human rights complaint mechanisms – an applicant needs to exhaust local remedies before s/he takes the dispute to the ECtHR.²⁰ More importantly, the Convention provides in its Article 34 that: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

¹⁷ See *Buckley v. the United Kingdom* (1996), Application No. 20348/92.

¹⁸ *Ibid.*

¹⁹ *Brzozowski v. Poland* (2005), Application No. 34443/96, para. 150.

²⁰ As is provided in Article 35(1) of the ECHR: "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

¹⁶ As the Court states in *Steel and Morris* (para. 59): "The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial [...] It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court (*ibid.*) and that he or she is able to enjoy equality of arms with the opposing side [...]" *Steel and Morris v. the United Kingdom* (2005), Application No. 68416/01.

What is relevant from the indigenous perspective is that in order to be a victim of a rights violation under the Convention a complainant needs to show that his/hers or an organization's rights have been violated. This is, as will be shown below, an important and difficult question for indigenous peoples, for there exist no general possibility to file a collective complaint; the complainant always needs to show that s/he has been a victim of a violation of a particular fundamental right.

For instance, in *Könkämä and 38 other Sámi villages v. Sweden*,²¹ the European Commission refused to accept Sweden's argument that the Sámi village did not fulfil the victim requirement as a merely non-governmental organization: the villages possessed authority in reindeer herding under the Swedish Reindeer Herding Act, were responsible for the herding in their respective areas and could represent their members in such matters; and the rights designated in the Reindeer Herding Act could be exercised by a Sámi only as a member of a Sámi village.²² In contrast, in *Johetti Sappmelaccat Ry. and others against Finland*,²³ where a Sámi association was one of the applicants in a case concerning fishing rights in upper Lapland, the Court rejected the association's standing because it was not responsible for fishing within its respective area and did not represent its members in such matters; hence, the Commission took the view that the rights designated in the Fishing Act can be exercised by Sámi only as private individuals.²⁴ The Court's very strict stance on standing can well be criticized from the indigenous perspective. How can private individuals, like those in *Johetti Sappmelaccat Ry. and others against Finland*, be the appropriate complainants in a dispute related to indigenous property rights, which by definition belong to the community?

III. JURISPRUDENCE OF THE EUROPEAN COURT (AND COMMISSION) OF HUMAN RIGHTS ON INDIGENOUS PEOPLES

There are, in effect, quite many indigenous complaints that have been heard by the European Commission and the Court of Human Rights, although only rarely have these survived to the merits stage. Given the article's focus – the gradual penetration of mainstream societies and

modernized activities into the traditional lands and territories of northern indigenous peoples – there is no need to review all the cases here. The complaints excluded contain those dealing with membership in the Swedish Sámi villages²⁵ and one involving the possibility of a larger association of peoples, who at least call themselves indigenous, to represent its regional branch.²⁶

A. Modern Economic Activities versus the Traditional Livelihoods of Indigenous Peoples

The first dispute ever taken to the European Commission on Human Rights by Sámi individuals (*G. and E. v. Norway*, hereinafter 'the Alta case')²⁷ involved the famous Alta dam, which took on vast symbolic importance for the struggle of indigenous Sámi, and heightened indigenous awareness not only in Norway but in other Sámi areas as well.

The dispute arose from the Norwegian government permitting – after consent from the Parliament – the construction of a dam in the Alta valley which inundated parts of the valley and brought other changes due to the infrastructure built to operate the dam (roads, etc.). The Sámi applicants

²⁵ In the case *Tage Östergren and Others v. Sweden* before the admissibility stage of the European Commission, the applicants had been refused membership in Vapsten Sámi village; however, they have continued their hunting and fishing rights on the basis of their own conviction that they have immemorial rights to such activities. *Muonio Sámi village v. Sweden* proceeded to the merits stage, and it also concerned disputed membership in a Sámi village. The case was finally stricken out from the docket because the Muonio Sámi village and Swedish government found a friendly settlement to their dispute, in particular regarding the allegations by the Sámi village that it had not been secured a determination of its rights in respect of reindeer herding by an independent tribunal. See *Tage Östergren and Others v. Sweden* (1991), Application No. 13572/88; *Muonio Sámi village v. Sweden* (2001), Application No. 28222/95.

²⁶ The Vatan people's Democratic Party complained that a Russian court decision to suspend the activities of its regional branch violated its freedom to hold opinions and to impart information and ideas, its freedom of association and the party members' right to manifest their religion. The Vatan Party was established to support the Tartar Nation. The regional branch of the indigenous population of the Volga Region made a statement, including the words: "tartars, chuvash, erzya, moksha, mari, Bashkir [...] 4. Indigenous peoples *idel-urav-seber-tyum iort*, and in particular semberle and even American Indians – you are the heirs of the great Islamic culture. Come back to Islam. There will be more than a thousand million of us [...] on the basis of which the Ulyanovsk regional court suspended the regional branch's activities. The case proceeded partly to the merits and turned especially on whether Vatan could represent the regional branch. See *Vatan (People's Democratic Party) v. Russia* (2002), Partial Decision as to Admissibility, Application No. 47978/99; *Vatan (People's Democratic Party) v. Russia* (2003), Final Decision as to Admissibility, Application No. 47978/99; *Vatan (People's Democratic Party) v. Russia* (2004), Judgment, Application No. 47978/99.

²⁷ *G. and E. v. Norway* (1983), Application Nos. 9278/81 and 9415/81 (joined).

²¹ *Könkämä and 38 Other Sámi Villages v. Sweden* (1996), Application No. 27033/95; *Johetti Sappmelaccat ry and Others v. Finland* (2005), Application No. 42969/98.

²² *Ibid.*, the law, 1.

²³ *Johetti Sappmelaccat ry and Others v. Finland*, *supra* note 21.

²⁴ *Ibid.*, the law, 1.

G. and E. had been practicing reindeer herding, hunting and fishing in the valley. They protested against the decision to build the dam by erecting a tent outside the main entrance to the Parliament, even after the permission from the police for this had expired, and were sentenced to a fine for their illegal behaviour.

On these bases, the Saami applicants argued that several of their rights had been breached: their right to freedom of expression (Article 10) was denied as they could not continue their demonstrations in a tent; and their right to enjoy their possessions, as granted in Article 1 of Protocol No. 1, was violated, because they were the original owners of these lands, even if they did not have formal title to them. The applicants explained that since the work on constructing the dam had already started, it would have been impossible for them to institute court proceedings to claim "that they were the legal possessors of this particular part of Norway". And even if they had instituted such proceedings, the construction work would already have been completed, which would mean that their effective remedy guaranteed under Article 13 would be lacking. They further maintained that with the loss of the land, they would lose their identity and that overall they were being discriminated against contrary to Article 14.

Even with all these complaints alleging violations of various articles of the Convention and the Protocol, the Commission was not convinced that any violations had occurred. In fact, it reframed the application as a violation of Article 8, which guarantees the right to respect for private life, family life and home. The Commission asserted that it was "of the opinion that, under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being 'private life', 'family life' or 'home'".²⁸ It was also prepared to accept that the consequences of building the hydroelectric plant in Alta could constitute interference with Article 8 rights for the Saami applicants, who move "their herds and deer around over a considerable distance".²⁹

Yet, after these positive findings for the Saami, the Commission engaged in a comparison. For the Commission, the 2.8 square kilometres to be flooded by the dam was a "comparatively small area which will be lost to the applicants"³⁰ if one examined the whole area where they may herd reindeer and fish. In other words, even if the construction of the dam could in the abstract be seen as interference with a guaranteed right for

the Saami applicants, the interference was too small to qualify as a violation of Article 8. Moreover, the Commission held that in any case the "interference could reasonably be considered as justified under [Article 8 (2)], as being in accordance with law, and necessary in a democratic society in the interests of the economic well-being of the country"³¹ and thus declared the applications inadmissible.

It is striking that the Commission studied the Saami reindeer herding not so much in cultural terms, even though it referred to herding as being part of a minority lifestyle under Article 8, but as a business activity. In response to the Saami argument that the dam was being built on their traditional lands, the Commission summarized its response in the following terms: "[...] Traditional use of vast territories for grazing, hunting and fishing, not a property right. Possible claims for compensation for reduction of business interests".³²

1. *International Standards*

The Alta case is the only instance in which two Saami individuals have made a complaint to the European human rights system regarding the damaging consequences of modern economic activities – activities that are increasingly entering the warming Arctic regions – for the traditional livelihoods of indigenous peoples. As observed by Thornberry, "the Commission's assessment of the effects of the projects on the Saami is measured primarily in spatial and economic rather than cultural terms".³³ This contrasts starkly with the ICCPR regime as monitored by the Human Rights Committee. The Committee considers traditional livelihoods as part of indigenous culture and thus enjoying minority protections under Article 27.³⁴ The Committee has also stated that there is no margin of appreciation for the state when it permits economic activities to operate in the traditional territories of indigenous peoples – in other words it is a right for the members of the indigenous minority and an obligation for the state – although measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a

³¹ Ibid.

³² Ibid.

³³ P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002), at 298.

³⁴ CCPR, *General Comment No. 23: The Rights of Minorities* (Art. 27) (1994), UN Doc. CCPR/C/21/Rev1/Add.5, in particular para. 7 available at <www.unhcr.ch/tbs/doc.nsf/o/fb7fb2czfb8bb2a1c2563ed004df.m?Opendocument> (accessed on 1 October 2010).

²⁸ Ibid., the law, 2.

²⁹ Ibid.

³⁰ Ibid.

denial of the right under Article 27.³⁵ In addition, cumulative impacts of development activities may amount to a denial of the right to culture if their overall impact threatens the sustainability of a traditional livelihood of an indigenous group. The Committee also expects meaningful consultation on the part of the state in which the indigenous group lives before permitting any development activities.³⁶ It is thus no surprise that the Arctic indigenous peoples have taken these types of disputes to the Human Rights Committee rather than to the ECtHR.³⁷

International standards understandably draw a distinction as to whether or not the indigenous peoples already have ownership – or a self-determination arrangement – over a region. If they do, then the question is how the indigenous peoples govern it – alone and/or together with state institutions.³⁸ However, there are many areas where indigenous peoples

³⁵ This was clarified by the Committee in the so-called first *Länsman* case in the following words (para. 9.4): "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27." HRC, *Imari Länsman* et al. v. Finland (1994), Application No. 531/1992, UN Doc. CCPR/C/52/D/531/1992.

³⁶ *Ibid.*, paras. 9.6–9.8.

³⁷ See Forowicz, *supra* note 10.

³⁸ Relevant articles of the global instruments are to be found in the UN Declaration, e.g.: Article 18: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 20: "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." Article 23: "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions." Relevant articles of the ILO Convention are, e.g., Article 6: "In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them; (c) establish means for the full

have lesser rights, an example being the Saami rights to use land for reindeer herding in areas where it has not yet been clarified who owns the lands or has usufruct rights over them. There are also areas, for example in Finland, where the Saami have a large homeland area but only for the purposes of cultural and linguistic self-government as exercised by the Saami Parliament, which needs to be consulted when the government plans development activities in the area.

The ILO Convention contains two relevant parts regarding modern economic activities that pose potential harm to the traditional livelihoods of indigenous peoples. Article 6(1) stipulates that while applying the provisions of the Convention, "governments shall [...] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly". In addition, the consultations must be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. Article 15(1) affirms that on 'their lands', indigenous peoples' rights to their natural resources are specially safeguarded. These rights are, among others, the right of indigenous peoples "to participate in the use, management and conservation of these resources".³⁹ Yet, in cases where "the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands",⁴⁰ governments are obligated to establish or maintain procedures "through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands".⁴¹ However, in these cases, it is expected that the government 'shall wherever possible' share the benefits of such activities with indigenous peoples in question, and grant them fair compensation for any damages which they may sustain as a result of these activities.

development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose. 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."

³⁹ ILO Convention No. 169, Article 15(1).

⁴⁰ *Ibid.*, Article 15(2).

⁴¹ *Ibid.*

The UN Declaration may even be read as granting indigenous peoples a right of veto in the case of development activities that affect their lands, territories or other resources. Article 32(2) stipulates the following: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".⁴² With a careful reading of the UN Declaration, it seems that governments are expected to thoroughly consult the representative institutions of indigenous peoples 'in order to obtain their free and informed consent'. Much depends on how one interprets the phrase 'in order to obtain their free and informed consent', in particular whether it can be argued that it establishes an obligation to negotiate seriously or even requires consent by indigenous peoples. In addition, the UN Declaration expects states to provide for effective mechanisms "for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact".⁴³

B. Protection of Traditional Territories

There are quite a few cases in which Saami in Scandinavia have taken disputes concerning immemorial usage rights to the European Commission and the ECtHR. Only the most relevant cases are taken up below, although the rivalry between the Skolt Saami and another Saami group in Norway regarding their overlapping immemorial usage rights merits mention.⁴⁴

⁴² The UN Declaration, Article 32(2).

⁴³ *Ibid.*, Article 32(3).

⁴⁴ The Skolt Saami of Norway also took a case to the Court, claiming that other Saami groups had invaded their old reindeer grazing areas. On 10 May 1977 and again on 22 September 1978 the Skolt Saami requested the County Governor to grant them an exclusive right to reindeer husbandry in their old area (*sida*) and to expel other Saami groups from that area. On 7 March 1979 another Saami group in the area whose means of livelihood was reindeer husbandry submitted their observations. Soon these efforts led the Skolt Saami to take their case to the ordinary court system, to the district court of Tana and Varanger; there, on the basis of principles of immemorial usage, they claimed that they have an exclusive right to grazing in their old area in a court proceeding directed against another Saami group grazing in the area as well as the government. The District Court found – on the basis of a study of historical sources and evaluation of the evidence submitted – that the applicants had no exclusive right to reindeer herding in the area, a decision which was upheld by the High Court and which could not survive to the Supreme Court, as no leave to appeal was granted. In the main, the Skolt Saami's application to the European Commission

1. The Case-Law of the European Commission and the Court of Human Rights

Two cases brought by Saami in Finland and Sweden, respectively, are very similar: *Könkämä and 38 other Saami villages against Sweden* and *Johtti Sappmelaccat ry. and others against Finland*.⁴⁵ Both concern the respective governments' legislative action aimed to extend the general public's hunting and fishing rights (in the Finnish case only the latter) in a particular area, a measure which for the Saami complainants meant an unacceptable and illegal diminution of their immemorial usage rights.⁴⁶

In *Könkämä and 38 other Saami villages against Sweden* (the *Könkämä* case), the Swedish Parliament introduced a new Act whereby licensing for small game hunting and fishing on the state property above the cultivation line and in the reindeer grazing mountains was extended to give the general public wider access to hunting and fishing. According to the applicants, the Saami

have immemorial rights including not only rights of reindeer herding, hunting and fishing on certain land, as confirmed by a 1993 amendment to the Reindeer Herding Act (*Reinäringslagen*, 1971:437), but also ownership to the land and waters above the cultivation line and in the reindeer grazing mountains. In any event, they claim exclusive hunting and fishing rights in these areas. Under the new licensing system they have allegedly no control of where and to what extent hunting and fishing take place. Under the

consists of two complaints. The first is that they did not receive a fair hearing by an independent and impartial tribunal within a reasonable time, a violation of Article 6 of the Convention. The second is that their right to keep reindeer in the Neiden district is not respected by the Norwegian authorities, and that others now have the right to keep reindeer in the area where they had an exclusive right for centuries. The Commission could – on the basis of the criteria established in its case-law – decide that the court proceedings had by and large been independent and impartial. As to the complaint that Norwegian authorities do not respect the Skolts' exclusive rights, the Commission responded that: "In so far as the applicants complain that they have been deprived of their exclusive right to reindeer husbandry in the area in question the Commission recalls that the courts found that they had no such right. Furthermore, the Commission recalls that the applicants do indeed have a right – although not an exclusive one – to reindeer husbandry and it does not appear that this right has been interfered with or controlled in a way not acceptable under Article 1 para. 2 of Protocol No. 1 (P1-1-2) to the Convention." For all these reasons, the Commission declared the application inadmissible. *O.B. and Others v. Norway* (1993), Application No. 15997/90.

⁴⁵ *Könkämä and 38 Other Sámi Villages v. Sweden*, *supra* note 21; *Johtti Sappmelaccat ry and Others v. Finland*, *supra* note 21.

⁴⁶ Both cases involved a complaint by Saami against the state-enacted legislation infringing their immemorial usage rights. In both cases, the respective states challenged the possibility of the Saami villages and the Saami association to be deemed victims in the sense required by Article 25 of the Convention, as discussed above.

previous system, hunting and fishing licences were granted by the County Administrative Boards after consultation with the Sámi villages concerned. There was no obligation to grant licences even in cases where the requirements under Section 32 of the Reindeer Herding Act were met, as this Section only stated that licences "may" be granted. Section 3 of the new Reindeer Herding Ordinance, however, provides that licences "shall" be granted if these requirements are met.⁴⁷

On these bases, the Sámi claim that the new system violates their property rights guaranteed under Article 1 of Protocol No. 1. Moreover, they also consider that they are being discriminated against in light of Article 14, since the ordinary property owners are allowed to license hunting and fishing on their property, whereas Sámi are not. They also allege that they have not been able to obtain a court determination of their rights as required by Article 6.

The main question for the European Commission of Human Rights was whether the "Sámi villages were holders of exclusive hunting and fishing rights, and [...] whether they had any remedy in this respect before the Swedish courts".⁴⁸ The problem for the Commission was that there was a dispute between parties as to whether the Sámi villages have exclusive rights in these areas. The Commission pointed out that there seem to be national remedies that have not been exhausted in this case, as shown by the *Taxed Mountain* case, where the ordinary court system – in the last resort the Supreme Court – decided "on the claims of five Sámi villages to have a 'better right' than the state to certain areas in Jämtland".⁴⁹ Hence, for the Commission, nothing would seem to have prevented the Sámi villages from taking their case to the ordinary court system and seeking a declaratory judgment that Sámi villages are holders of exclusive fishing and hunting rights in the areas at issue in the case.⁵⁰ Principally for this reason the application was declared inadmissible by the European Commission of Human Rights on 25 November 1996.

⁴⁷ *Körkämä and 38 Other Sámi Villages v. Sweden*, *supra* note 21, the facts, A.

⁴⁸ *Ibid.*, complaints, the law, 1.

⁴⁹ *Ibid.*

⁵⁰ Since some of the Sámi villages had been parties to the Taxed Mountain Case, the Commission notes that: "It is true that five of the applicants, i.e. the Sámi villages Froströken Norra, Froströken Mellersta, Rättvare, Hotagen and Offerdal, were also parties to the Taxed Mountains Case and that the Supreme Court's judgment in that case deals to some extent with their hunting and fishing rights. However, in so far as that judgment could be considered to have determined the claim of those five applicant villages to exclusive hunting and fishing rights, the Commission notes that the present application has not been brought before the Commission within six months from that judgment as required by Article 26 (Art. 26) of the Convention."

Very similar issues arose in a later case (*Johtti Sappmelaccat Ry and others against Finland*)⁵¹ heard by the ECtHR sitting in chamber on 18 January 2005. The bone of contention was an amendment to the Finnish Fishing Act, which was enacted on 19 December 1997 and which entered into force on 1 January 1998. According to the Act, public fishing rights were extended to apply also in the municipalities of Enontekiö, Inari and Utsjoki – all municipalities belonging to the Sámi homeland area. The amendment guaranteed that the people living permanently in the municipality were entitled to enjoy public fishing rights within the state-owned water areas. The main problem is set out in the following:

The applicants complained under Article 1 of Protocol No. 1 to the Convention that the 1997 amendment of the Fishing Act violated their right to the peaceful enjoyment of their possessions as the property rights of Sámi people who were not landowners were not taken into account in the relevant legislation even though their right to fish had earlier been clearly established by the Committee for Constitutional Law. Moreover, the Fishing Act extended the fishing rights of the local people, weakening the legal position of the less Sámi people with the result that their fishing rights no longer enjoyed the constitutional protection of property. Also fees charged for a fishing licence in the area had changed from being on a household basis to a personal basis, adding to the applicants' fishing expenses.⁵²

The Sámi thus relied on their custom based on immemorial usage as generally endorsed in the Fishing Act and its amendments. The Finnish government questioned whether the applicants had exhausted all the local legal remedies, given that, as was pointed out in the *Körkämä* case, a declaratory judgment obtained from the ordinary court system would be enough to show their exclusive immemorial fishing rights. Yet, the Court was not convinced. It opined that there was "neither statutory law nor any established constitutional tradition making it possible for the Finnish courts of law to review the constitutionality of ordinary legislation or to supersede parliamentary acts on the ground that they were in conflict with constitutional provisions or international human rights law".⁵³ Hence, in the Court's view, the government had failed to show the existence of an adequate and effective remedy under Finnish law⁵⁴ and it could move on to the main question, that is, whether the 1997 amendment

⁵¹ *Johtti Sappmelaccat ry and Others v. Finland*, *supra* note 21.

⁵² *Ibid.*, complaints, 1.

⁵³ *Ibid.*, (b,ii) the Court's assessment.

⁵⁴ *Ibid.*

unjustifiably extends public fishing rights to local residents other than those of Saami origin.

The Court noted that the 1997 amendment did not introduce any change to earlier regulations on fishing rights apart from them now being regulated at the level of parliamentary act rather than governmental decree. The Saami applicants responded that the relevant fishing rights were in fact established back in 1982 via an illegal decree implementing the 1951 Fishing Act. Yet, the ECtHR failed to see how this could have been a weakening of the applicants' legal status, because it only broadened others' fishing rights in the region. To the Court it seemed that the amendment did not really change the earlier situation, but rather clarified the law, which led it to conclude that there was no interference with the applicants' property rights.⁵⁵ The application was thus manifestly ill-founded within the meaning of Article 35(3) of the ECHR. Moreover, since the applicants based their claim on an 'illegal decree implementing the 1951 Fishing Act', this part of the application was temporally outside the Court's jurisdiction, as Finland did not become a party to the European Convention on Human Rights until 1990.

In *Handölsdalen Sami village and others against Sweden* (decision),⁵⁶ it was private landowners that first took the Saami villages to a national court.⁵⁷ The land-owners sought a declaratory judgment from the national court that the Saami villages had no right to graze reindeer on the claimants' land without a valid contract between the two parties. The Saami villages contested the landowners' action and argued that they had the right to winter grazing within their respective areas on the basis of four sources: "(1) prescription from time immemorial (*urminnes hävd*), (2) the provisions of the Reindeer Grazing and Reindeer Husbandry Acts of 1886, 1898, 1928 and 1971, (3) custom, or (4) public international law, more specifically Article 27 of the UN Convention on Civil and Political Rights, as compared with Chapter 1, section 2, of the Instrument of Government

(*Regeringsformen*)."⁵⁸ After over a decade of domestic court proceedings culminating on 29 April 2004 in the Supreme Court's refusal to grant the applicants leave of appeal, the Saami took the case to the ECtHR. Since it was the Saami villages that had lost the case, it was they that brought the case against the State of Sweden. Their complaint was primarily based on two arguments:

The Saami villages complain that their right to use land for winter grazing, constituting a possession within the meaning of Article 1 of Protocol No. 1 to the Convention, was violated, as the limitations resulting from the Court of Appeal judgment were not prescribed by sufficiently clear and precise domestic law, as the grazing areas remain undefined, and did not strike a fair balance between the demands of the public and the rights of the Saami villages [...]

They also claim that they were faced with an insurmountable burden and standard of proof, as the Court of Appeal's judgment shows that very specific evidence on the frequency and location of the reindeer grazing during several hundred years was required. As the burden of proof was virtually impossible to meet, the applicants were placed at a substantial disadvantage *vis-à-vis* the opponent landowners and cannot be considered therefore to have had a fair hearing within the meaning of Article 6 § 1 of the Convention.⁵⁹

In respect of the claim that the Saami villages' immemorial usage rights were violated, the Court drew a distinction between existing possessions and assets, with the latter, in its view, justifying claims allowing the applicant to argue that there is a legitimate expectation of obtaining effective enjoyment of a property right. According to the Court, its case-law testifies that "no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicants' submissions are subsequently rejected by the national courts".⁶⁰ For the Court, this is what had happened in this case; that is, there was a dispute as to whether the Saami villages had immemorial winter grazing rights in the area, the domestic judiciary answering in the negative after an exhaustive examination of the dispute. With regard to the complaint that the Saami villages faced an insurmountable burden of proof, the Court reminded the parties of its role as an international human rights court:

⁵⁸ *Handölsdalen Sami Village and Others v. Sweden*, *supra* note 56, para. 6.

⁵⁹ *Ibid.*, paras. 40–41.

⁶⁰ *Ibid.*, para. 52.

⁵⁵ *Ibid.*, (c.ii) the Court's assessment.

⁵⁶ *Handölsdalen Sami Village and Others v. Sweden* (2009), Application No. 3903/04.

⁵⁷ There is also another, similar case, where a private property owner challenged the Saami village's right to hunt elk on his property. The Commission could have declared the application inadmissible, as Swedish law grants such a right to the Saami village. Yet, interestingly, the Commission stated that: "The Commission finds it to be in the general interest that the special culture and way of life of the Sami be respected, and it is clear that reindeer herding and hunting are important parts of that culture and way of life. The Commission is therefore of the opinion that the challenged decision was taken in the general interest." See *Halvar FROM v. Sweden* (1998), Application No. 34776/97.

The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention. It is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, while Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, including its probative value or the burden of proof. These matters are therefore primarily for regulation by national law and the national courts.⁶¹

The Court then made an overall assessment of how the Swedish courts had handled the case, finding that they had shown thoroughness in their work. Even though the Court rejected most of the applicants' complaints, two survived. According to the Court, the application was partly admissible because of the length of the proceedings. The proceedings in this case began on 20 September 1990 and ended on 29 April 2004, and the Court opined that it had to examine in more detail in the merits phase whether this could be considered a reasonable time.

Before the case proceeded to the merits, the Committee on the Elimination of Racial Discrimination (CERD)⁶² took a strong stance on the case when providing its concluding observations on Sweden:

While noting the State party's assumption that no further legal actions by Swedish landholders against Sami reindeer herders are to be expected, the Committee reiterates its concern regarding such land disputes. It is particularly concerned about past court rulings which have deprived Sami communities of winter grazing lands. It is also concerned about de facto discrimination against the Sami in legal disputes, as the burden of proof for land ownership rests exclusively with the Sami, and about the lack of legal aid provided to Sami villages as litigants.

(art. 5(a), 5(d)(v), 5(e)(vi), and 6) *The Committee recommends that the State party grant necessary legal aid to Sami villages in court disputes concerning land and grazing rights and invites the State party to introduce legislation providing for a shared burden of proof in cases regarding Sami land and grazing rights. It also encourages the State party to consider other means of settling land disputes, such as mediation.*⁶³

⁶¹ Ibid., para. 61.

⁶² The CERD is a monitoring body of the Convention on the Elimination of Racial Discrimination.

⁶³ See Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Seventy-third Session, Consideration of Reports Submitted by States Parties under Article 9 of the Convention* (28 July–15 August 2008), (Sweden), para. 20 (emphasis added).

Even though the ECtHR found in the merits stage⁶⁴ that the case was of considerable complexity, it stated that the overall duration – 13 years and 7 months – indicated that the proceedings were not sufficiently expeditious. For this reason, the Court held unanimously that there was a violation of Article 6(1) of the Convention in regard to the length of the proceedings, and ordered the respondent state to pay damages to the applicants. Another issue declared admissible by the Court was the Sami villages' claim that they lacked effective access to court due to legal costs. The villages submitted that

a lack of resources affected the quality of their defence in that the main responsibility for their litigation rested with the legal council [sic] of the Swedish Sami Association (*Svenska samernas riksförbund*), a lawyer with little experience of litigation. They further assert that the reason for the allegedly enormous legal costs for both sides in the proceedings was the legislation, which was defective in not defining the winter grazing areas and which necessitated the pursuit of deep and time-consuming historical research. The applicants thus did not have any reason to blame the landowners for making the proceedings complex, as that responsibility rested with the State. With this in mind, and having regard to the vital values at stake, the applicants submit that their right to an effective access to court and a fair hearing necessitated the grant of legal aid. The loans received from the Sami Fund will have to be repaid and are of no relevance in this respect.⁶⁵

After weighing the parties' arguments, the Court found that this complaint raised serious issues of fact and law under the Convention and warranted examination on its merits. Even though the Court did admit that the applicants had fewer financial resources than the landowners and the complexity of the case involved extra burdens, it took the view that overall the equality of arms was maintained and thus that the right to effective access to the court had not been violated.

However, in a very interesting partial dissent, Judge Ziemele took a different stance. She concurred with the majority on the length of the proceedings being a violation of Article 6(1), but differed as to whether there was a violation on the part of the Swedish government when it came to giving effective access to court to the Sami villages. In her words:

The Court has explained its approach, as cited in paragraph 51, as concerns effective access to court. The standard is that parties are afforded a reasonable opportunity to present their case under conditions that do not place

⁶⁴ Case of *Handölsdalen Sami Village and Others v. Sweden* (2010), Application No. 39033/04.

⁶⁵ Ibid., para. 49.

them at a substantial disadvantage with respect to the adversary. In cases where one party by definition is disadvantaged, proper access to court is ensured by adopting such procedures and safeguards as indeed enable that party to enjoy the same opportunities. This is what the CERD meant when criticising the fact that the burden of proving the right rests *exclusively* with the Sami, because the whole system presumes that the landowners have the right and they do not have to prove anything. There is therefore no doubt in my mind that the applicants' access to court was not effective. It could not be effective until and unless the entire approach to land disputes of this kind is revised to take account of the rights and particular circumstances of indigenous peoples. The excessive legal costs and the fact that the applicants had to borrow money from their own Fund are elements of the overall unfairness.⁶⁶

Of interest is also the way Judge Ziemele points to the rapidly evolving law related to indigenous peoples, citing the indigenous-specific instruments (the ILO Convention and the UN Declaration, together with many other international legal developments) which have, in her opinion, had already a clear impact on how various human rights monitoring bodies interpret their respective international human rights treaties. She concluded that "special rights and special measures have been introduced in an attempt to overcome discrimination against indigenous peoples and thus to achieve equal rights".⁶⁷

2. *Protection of Traditional Territories from the Perspective of International Standards*

The universal standards enshrined in the UN Declaration⁶⁸ and the ILO Convention provide general rules on protecting the traditional territories of indigenous peoples. The UN Declaration requires states not only to recognize the right to the lands, territories and resources which the indigenous peoples have traditionally owned, occupied or otherwise used or acquired,⁶⁹ but also to grant them ownership and administrative powers over these areas,⁷⁰ and while recognizing these areas pay "due respect to

the customs, traditions and land tenure systems of the indigenous peoples concerned".⁷¹ The ILO Convention, for its part, requires states to recognize "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy"⁷² and "take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession".⁷³ Moreover, in Article 7(1) the Convention provides that:

[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development [...].

Both instruments also prescribe a process by which land rights are to be settled.⁷⁴ The ILO Convention stipulates that "[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned",⁷⁵ while the UN Declaration envisages a joint endeavour to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources. In addition, this mechanism, which the Declaration urges states to establish together with indigenous peoples, has to be "fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems".⁷⁶

3. *Evaluation*

Particularly in the two Swedish cases studied above – *Könkämä and 38 other Saami villages against Sweden* and *Hardöisdalen Sami village and others against Sweden* – it becomes clear that the ECHR expects the Saami to establish their immemorial usage rights and their extent via the country's domestic judiciary and on the basis of the procedural rules applicable

⁷¹ *Ibid.*, Article 26(3).

⁷² ILO Convention No. 169, Article 14(1). It reads: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."

⁷³ *Ibid.*, Article 14(2).

⁷⁴ Article 27 of the UN Declaration; and Article 14(3) of the ILO Convention No. 169.

⁷⁵ Article 14(3) of the ILO Convention No. 169.

⁷⁶ Article 27 of the UN Declaration.

⁶⁶ *Ibid.*, partly dissenting opinion of Judge Ziemele, para. 10 (underlining in the original).

⁶⁷ *Ibid.*, para. 2.

⁶⁸ See <www.un.org/esa/socdev/unpfii/en/declaration.html> (accessed on 8 September 2010).

⁶⁹ Article 26(1).

⁷⁰ Article 26(2): "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

to such domestic proceedings. As an international human rights court, the ECtHR relies very much on the way the country's domestic judiciary deals with disputes. As the Court stated in the *Handölsdalen* case, it is not its "function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention".⁷⁷

This approach is very far from what is expected by the international standards pertaining to indigenous peoples. The ideal to be found in the relevant instruments is that there should be a special process, one separate from regular domestic court proceedings, for settling disputes between states and indigenous peoples over the peoples' traditional territories and what they are entitled to exercise there.

C. Relocation

The most dramatic measure that a state can implement in the case of an indigenous group is to uproot it from the place in which it has lived from time immemorial and relocate it – a measure that was the basis of the Inuit action against Denmark in *Hinqitaaq 53 and others against Denmark*.⁷⁸ This dispute between the Thule Tribe and Denmark had its origins in the establishment of an American air base in the traditional hunting areas of the tribe in the north-west of Greenland in 1951 with the conclusion of an agreement between Denmark and the US. The air base was at first established amidst the applicants' hunting areas and close to their native village of Uummannaq, called Thule at the time. Already in the spring of 1953 the US wanted to establish an anti-aircraft artillery unit and expand the base to cover the whole Dundas Peninsula. The request to this effect by the US was granted by the Danish authorities and the Thule tribe was evicted within a few days beginning 25 May 1953.

The domestic court proceedings started in full in 1996, with the applicants lodging a case against the Prime Minister's Office before the High Court of Eastern Denmark seeking a declaration on four counts: "1) that they had the right to live in and use their native settlement in Uummannaq/Dundas in the Thule District; (2) that they had the right to move, stay and hunt in the entire Thule District; (3) that the Thule Tribe was entitled to compensation in the amount of DKK 25,000,000 (equivalent to approximately EUR 3,333,333); and (4) that each individual was entitled to

compensation in the amount of DKK 250,000 (equivalent to approximately EUR 33,333)". After exhaustive proceedings – the Court examining numerous ethnographical, geographical, historical, political and autobiographical reports, books and minutes – the High Court delivered its 502-page judgment on 20 August 1999. In general, the High Court found that claims no. 1 and 2 could not be allowed because it had come to the understanding that the air base had been legally established. Yet, it was willing to entertain compensation claims no. 3 and 4, granting the collective compensation to the Thule Tribe (not to the individuals). One part of the proceedings was the interpretation of ILO Convention No. 169, binding at the time on Denmark, according to which the High Court found that the Thule Tribe could be seen as a tribal people as this concept was defined in Article 1(1)(a) of the Convention. Yet, on appeal to the Supreme Court of Denmark, the applicants argued that they are to be considered as a distinct indigenous people, in the sense of Article 1(1)(b) of the ILO Convention, a submission which the Supreme Court did not accept. The Court was of the opinion that the Thule Tribe was part of the overall indigenous people inhabiting Greenland and it did not take a position on claims no. 1 and 2.

The Thule Tribe's complaint to the ECtHR consisted of various alleged violations of rights, but the Court paid most attention to possible violations of Article 1 of Protocol No. 1 to the ECHR, which safeguards peaceful enjoyment of possessions. The Court recalled its case-law and provided that "deprivation of ownership or of another right in rem is in principle an instantaneous act and does not produce a continuing situation of deprivation of a right".⁷⁹ With this, it could brush aside the applicants' complaint that they had been deprived on a continuous basis of their homeland and hunting territories in breach of Article 1 of Protocol 1: since the establishment of the Thule air base and the relocation of the population had taken place in 1951 and in May 1953, respectively, these were factual events that were outside of the temporal jurisdiction of the Court, given that the Convention entered into force for Denmark on 3 September 1953 and Protocol No. 1 on 18 May 1954. Since the Court also opined that overall the national court proceedings had been conducted in an appropriate manner and not in violation of Article 6 of the Convention, the case was deemed inadmissible. Asbjørn Eide finds room for criticism in this decision:

⁷⁹ Ibid., the law, A.

⁷⁷ See *Handölsdalen Sami village and Others v. Sweden*, *supra* note 56, para. 61.

⁷⁸ *HINQITAAQ 53 v. Denmark* (2006), Application No. 18584/04.

While obviously the European Court must base its decisions on the European Convention, the evolution of indigenous rights should imply that traditional users' rights may be equated with property rights. A continuation of the restrictions of such users' rights after the entry into force of Protocol No. 1 could be seen to fall under its Article 1. In deference to the Danish courts, the European Court did not draw that conclusion.⁸⁰

Current international standards provide very strict regulation in cases such as the forced relocation of the Thule Tribe. The UN Declaration takes a very strong stance on forced relocation, plainly stating in its Article 10 that "Indigenous peoples shall not be forcibly removed from their lands or territories". If this is to occur, it is only possible after the government obtains the free, prior and informed consent of the respective indigenous peoples together with an agreement on just and fair compensation and the option of returning to their home territory.⁸¹ If the relocation has already taken place in the past, Article 28 provides some further regulation.⁸² The ILO Convention also proceeds, in its Article 16, from the principle that the indigenous peoples "shall not be removed from the lands which they occupy" but subjects this to further conditions. The state can remove them – as an exceptional measure – with their free and informed consent. If indigenous peoples do not grant this consent, "such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned".⁸³ In that case, "whenever possible, the concerned peoples have the right to return to their traditional lands when the grounds for relocation cease to exist".⁸⁴ Where returning is impossible, such peoples "shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable

⁸⁰ A. Eide, *Rights of Indigenous Peoples – Achievements in International Law During the last Quarter of a Century*, *Netherlands Yearbook of International Law* 37 (2006) 355–22, at 179.

⁸¹ Article 10 of the UN Declaration.

⁸² *Ibid.*, Article 28 reads: "1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

⁸³ Article 16(2) of the ILO Convention No. 169.

⁸⁴ *Ibid.*, Article 16(3).

to provide for their present needs and future development".⁸⁵ Moreover, if they express a preference for compensation in money or in kind, this will be the preferred way of compensation and the persons are to be fully compensated for any resulting loss or injury.⁸⁶

IV. CONCLUSIONS

When examining the ability of the European regional human rights system to protect the rights of indigenous peoples, three aspects of that system seem to merit closer consideration. The first is whether the European Commission and the Court of Human Rights have evolved in their recognition and protection of indigenous rights. Second, in light of the fact that indigenous peoples have not really gained protection for their collective rights from the Commission and the Court, one ought to ask what the reasons are for this. And, finally, it is interesting to ponder whether any changes are likely to occur in the future jurisprudence of the ECtHR as regards indigenous peoples, given the increasing frequency of arguments that many of the rights of indigenous peoples have become part of general international law and thus would have to be taken into account by the Court.

A. *Has the Indigenous Jurisprudence of the European Commission and the Court of Human Rights Evolved over the Years?*

Already on 3 October 1983, the Commission on Human Rights, in examining the admissibility of the *Alta* case, summarized the basic rules of the ECHR applicable to "indigenous minorities" as follows:

Article 1 of the Convention: In guaranteeing certain rights to 'everyone' within the jurisdiction of the High Contracting Parties, the Convention does not recognise specific rights for minorities.

Article 8 of the Convention: A minority's life style may, in principle, fall under the protection of private life, family life or the home. The submersion of a very small area of land because of the construction of a hydroelectric plant, in a vast region populated by shepherds, hunters and fishermen, does not constitute an interference with the population's private life. Even if there were an interference, it would be justified as being necessary, particularly for the economic well-being of the country [...]

⁸⁵ *Ibid.*, Article 16(4).

⁸⁶ *Ibid.*, Article 16(5).

*Article 1 of the First Protocol: Traditional use of vast territories for grazing, hunting and fishing, not a property right. Possible claims for compensation for reduction of business interests. No appearance of a violation of Article 1*⁸⁷

The Commission in the *Alta* case admitted that the traditional lifestyle of indigenous minorities comes under the protection of Article 8, even if this protection is fairly weak, given that the state can justify the development activities with its large margin of appreciation based on, among other considerations, economic benefits to the society as a whole. The Commission viewed the interference with the traditional lifestyle of the Saami caused by the building of a dam in spatial and economic terms, rather than in terms of the project's effect on Saami culture, as would be the practice in the Human Rights Committee. The Commission also stated in this case that reindeer herding in large areas of land cannot be seen as property and is thus not protected by Article 1 of Protocol No. 1. Can any changes be detected in case-law of the Commission and the Court over the past 27 years?

First of all, in the *Halvar From against Sweden* case (decided in 1998 by the European Commission on Human Rights; hereinafter 'the *Halvar case*'),⁸⁸ the Commission was faced with a dispute between a Swedish property owner and the state authorities over the latter's decision to give the Saami village a right to hunt on Halvar From's property. The Commission found that the complaint was manifestly ill-founded and thus inadmissible since the authorities had acted on the basis of the law, but it provided some important pronouncements related to indigenous rights. According to the Commission, Protocol 1 (1(2)) gives a basis to argue that it is in the "general interest" that the special culture and way of life of the Sami be respected, and it is clear that reindeer herding and hunting are important parts of that culture and way of life. The Commission is therefore of the opinion that the challenged decision was taken in the general interest.⁸⁹ From this it can be inferred that the Commission has come to see reindeer herding and other traditional livelihoods more in line with how the Human Rights Committee sees them – as part of the Saami culture and way of life. This view was clarified by the Commission in *Könkämä*, where it stated that "the exclusive hunting and fishing rights claimed by the applicant Saami villages in the present case can be regarded

as possessions within the meaning of Article 1 of Protocol No. 1,"⁹⁰ even though it was of the opinion that these rights needed to be determined via the domestic court proceedings.

These two decisions by the Commission can be interpreted as redefining the position taken by the Commission in the *Alta* case. *Könkämä* made it clear that the immemorial usage rights may fall within the ambit of Article 1 of Protocol No. 1, contrary to what the Commission argued in the *Alta* case. Nevertheless, it is for the domestic court proceedings to determine the existence and extent of such immemorial rights. Moreover, it seems that the traditional lifestyle protections of indigenous minorities under Article 8 are beginning to resemble those accorded by the ICCPR. Even though the Commission's stance in *Halvar* was related to the interpretation of Article 1 of Protocol No. 1, the general import of this decision will affect how the Court evaluates the protection of indigenous individuals' traditional lifestyle under Article 8. The *Halvar* decision would have the Court evaluate interference with the traditional lifestyle of minorities, not only from an economic and spatial perspective, but also in terms of the impacts of modern economic activities on indigenous cultures. Yet, it has to be borne in mind that the margin of appreciation for the state is still fairly large when it comes to permitting modern economic activities if these are seen as furthering the economic well-being of the country.

Clearly, the most dramatic interference in a group's collective life is forced relocation, the measure which was the core issue in *Noack and others v. Germany*,⁹¹ a decision that can be seen as relevant from the perspective of indigenous peoples. The Sorbian minority in Germany have their own language and culture, as well as their own customs, "which are kept alive by groups performing Sorbian songs or wearing traditional costumes and by drama societies, literary circles and drawing classes". The applicants complained to the Court because they were evicted from their village following the extension of lignite mining in the area. The Sorbs alleged several violations of the Convention by Germany, but the Court chose to focus most of its attention on Article 8, which protects private and family life. The main question for the Court was whether the reasons for interfering with the applicants' private and family life are "relevant and sufficient for the purposes of Article 8 (2)" and whether the interference was proportionate to the legitimate aim pursued". The Court found the interference

⁸⁷ *G. and E. v. Norway* (1983), Application Nos. 9278/81 and 9415/81 (joined).

⁸⁸ See *Halvar From v. Sweden* (1998), Application No. 34776/97.

⁸⁹ *Ibid.*, the law.

⁹⁰ *Könkämä and 38 Other Sámi Villages v. Sweden*, *supra* note 21, the law.

⁹¹ *Noack and Others v. Germany* (2000), Application No. 46346/99.

proportionate and the reasons given relevant and sufficient for the purposes of Article 8(2), but only after placing heavy emphasis on the fact that officials had organized public consultations and that the public had legal avenues at its disposal to complain about the decision. Most interestingly the Court added:

A further decisive factor for the Court is that the inhabitants of Horno will be transferred together to a town approximately twenty kilometres from their village of origin and within the area where the Sorbs originally settled. A majority of the inhabitants opted for that town after being consulted on their choice of destination. Even though the transfer means a move and reorganising life in the resettlement area, the inhabitants will continue to live in the same region and the same cultural environment, where the protection of the rights of the Sorbs is guaranteed by Article 25 of the Constitution of the Land of Brandenburg...where their language is taught in the schools and used by the administrative authorities, and where they will be able to carry on their customs and in particular to attend religious services in the Sorbian language.⁹²

One might ask whether the response from the Court would have been different if the relocated group had been an indigenous people into whose traditional territory the economic activity had encroached. After all, indigenous peoples have extremely long and deep roots in their traditional regions.

It can be concluded that the 1983 inadmissibility decision in the *Alta* case by the now terminated Commission on Human Rights no longer represents the way in which the ECtHR interprets the Convention and the Protocols as regards indigenous peoples. The Court has become much more nuanced in how it interprets the provisions of the Convention and the Protocols in the disputes between indigenous peoples and their home states. First of all, even though the Convention rights are guaranteed to everyone, as was affirmed in the *Alta* case, the ECtHR is less categorical when it comes to determining or denying the existence of specific rights for minorities, and its minority case-law has grown in size in recent years. Second, in the *Alta* case the Court evaluated the interference with the private and family life of a cultural minority mainly in economic and spatial terms, whereas it now seems to place more emphasis on the harmful effects on culture, much as the Human Rights Committee does. Third, the Commission argued in *Alta* case that traditional use of vast territories for

grazing, hunting and fishing cannot be a property right under Article 1 of Protocol No. 1, a view which the ECtHR now seems to have abandoned.

There are further signs that indigenous law is making inroads to the deliberation by the judges of the ECtHR. As was discussed above, one judge took up the evolving law related to indigenous peoples in her recent partial dissent in the *Handölsdalen* case. In the *Chagos Islanders* case, which has proceeded to the stage where the ECtHR has presented questions to the parties,⁹³ the Court will likely face the developing law of indigenous peoples. The case resembles in some aspects the *Hinetaq* 53 case examined above, since in this pending case the United Kingdom agreed with the United States on 20 December 1966 that the latter should have use of the islands for defence purposes for an indefinite period and that the indigenous population should be evacuated, which took place from 1967 to 1973. Two of the interveners in the case, Human Rights Watch and Minority Rights Group International, made a joint submission to the Court arguing that the law relating to indigenous peoples needs to be taken into account when deciding this case.⁹⁴

Still, even if there are promising signs, it is useful to keep in mind that indigenous peoples have received only scant protection for their rights from the European Commission and the Court of Human Rights. It is primarily the *Handölsdalen* case where indigenous peoples have received protection for their rights, albeit very limited protection; otherwise, the disputes have ended with inadmissibility decisions, with the ECtHR clearly relying on how the domestic courts have resolved the disputes.

B. Why does the European Court of Human Rights Have Problems in Protecting the Special Rights of Indigenous Peoples?

As can be inferred from above, indigenous peoples have not found much protection from the European Court (or Commission) of Human Rights. What are the reasons for this? This section examines why indigenous peoples seem to find only limited understanding from the ECtHR, even though many other courts and quasi-judicial bodies provide them with strong protection.

⁹³ *Chagos Islanders v. the United Kingdom* (2009), Application No. 35622/04.

⁹⁴ *Chagos Islanders v. the United Kingdom* (2009), Application No. 35622/04, Human Rights Watch and Minority Rights Group Intervention. Submission on behalf of the interveners, leave for which was granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court, <www.hrw.org/en/news/2009/10/02/chagos-islanders-v-united-kingdom>, (accessed on 8 September 2010).

⁹² *Ibid.*, the law.

It seems obvious that groups being protected as minorities are more recognizable to Europeans than indigenous peoples. Why? The collective memory of Europeans is attuned to the existence of minorities, whereas indigenous peoples are more closely related to the historical experience of Anglo-American and Latin American countries.⁹⁵ The minority treaties after the First World War laid the ground for framing majority/minority collectives in very particular ways. The evolving liberal-democratic states of Europe came to gradually accept minorities, albeit grudgingly and mainly as collectives of individuals rather than as groups which might threaten the territorial integrity of nation-states. Even though indigenous or tribal groups existed – the Inuit of Greenland and the Saami of Scandinavia – their numbers were too small and their location on the outskirts of Europe too remote for them to enter the popular European awareness. The indigenous groups of the Soviet Union/Russian Federation were hardly understood as Europeans, given the problems many in Europe have even recognizing Russia as 'European'.

All this is reflected in the European Convention on Human Rights, which was adopted immediately after the Second World War, an era when minority rights were not in fashion. The human rights thinking of the time saw ideal human societies as composed of formally and substantively equal citizens. The Convention mentions national minorities only in passing, citing membership of a minority as one unacceptable ground for discrimination in Article 14. And, as is well known, Article 14 is not an independent article providing for non-discrimination; it prohibits discrimination only with regard to the enjoyment of the rights and freedoms set forth in the Convention. However, Protocol No. 12 to the Convention, which entered into force on 1 April 2005, provides for a general prohibition against discrimination, irrespective of whether other Convention rights have been violated.⁹⁶ The Protocol has not been widely ratified, and of the

⁹⁵ As put by Rainer Grote: "In the past, the rights of indigenous peoples have received scant attention in European legal debate, which has focused instead on individual human rights and, after the end of communism, on the protection of national minorities". One needs also to remember that there was an elaborate scheme of minority protection established in Europe after the First World War." R. Grote, 'On the Fringes of Europe: Europe's Largely Forgotten Indigenous Peoples', *American Indian Law Review* 31(2) (2006–2007): 425–443, at 425.

⁹⁶ As provided in Article 1 of Protocol No. 12: "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1,"

European states that are home to indigenous peoples only Finland has become a party to it.

Hence, the ECHR and its Protocols do not protect minorities as such, in contrast, for example, to Article 27 of the International Covenant on Civil and Political Rights.⁹⁷ There was an attempt in 1993 to have a special minority Protocol added to the Convention, but this proved too difficult in practice.⁹⁸ There are two Council of Europe treaties focusing on the protection of national minorities and regional minority languages, both of which also deal with issues related to indigenous peoples.⁹⁹ Yet, both are framework treaties, which afford the states parties a wide margin of discretion and contain only weak international monitoring mechanisms.

It is important to distinguish evolving indigenous peoples' law from minority protection. Even if there are commonalities between indigenous peoples and minorities, it is the former that have a deeply rooted historical connection to their traditional territories. Consequently, the rapidly evolving specific standards for indigenous peoples are built mostly on collective

⁹⁷ conventions.coe.int/treaty/en/treaties/html/177.htm, (accessed on 8 September 2010). In addition, with the Lisbon Treaty, the EU will become a party to the European Convention on Human Rights and the Charter on Fundamental Rights of the European Union becomes legally binding. The Charter of Fundamental Rights of the European Union contains two interesting articles: "Article 21. Non-discrimination 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited. Article 22 Cultural, religious and linguistic diversity The Union shall respect cultural, religious and linguistic diversity", eur-lex.europa.eu/JJOHtml.do?uri=OJ:C:2010:083: SOMEN:HTML-, (accessed on 8 September 2010).

⁹⁸ Pentassuglia captures the essence of the difference between the ICCPR with its minority article monitored by the Committee and the European Convention on Human Rights, supervised by the ECtHR, where such a provision is lacking: "Instead of the triangular relation which de facto underlies most Article 27 disputes...those cases [ECtHR decided cases] reflect a classic binary relation in which individual applicants challenge state measures which directly target their basic liberties. In other words, there is no determination of the specific minority position and claims of relevant groups...let alone their multiple ramifications". See G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2009), at 63.

⁹⁹ The Council of Europe's Parliamentary Assembly proposed not only this, but also a possibility for the ECtHR to deliver advisory opinions on matters relating to the Framework Convention for the Protection of National Minorities. See Pentassuglia, *supra* note 97, at 6. ⁹⁹ 1992 European Charter for Regional or Minority Languages, conventions.coe.int/treaty/en/Treaties/Html/148.htm, (accessed on 8 September 2010); and the 1995 Framework Convention for the Protection of National Minorities, conventions.coe.int/Treaty/en/Treaties/Html/157.htm, (accessed on 8 September 2010).

human rights (such as land rights) – rights that in international law can be upheld only by the community. These collective human rights can be contrasted with minority rights, which can be described aptly as individual human rights even though most of them can be exercised only in community with other minority members. It is this gradual involvement of specific international law relating to indigenous peoples that may well push the Court to study indigenous complaints afresh.

C. *Are there Signs of Hope that the European Court of Human Rights Will Protect the Rights of Indigenous Peoples Better?*

If one examines the jurisprudence of the ECtHR with regard to indigenous peoples, as was done in section 3.1., some interesting developments surface. In the most recent case, *Handölsdalen Sami village and others against Sweden*, decided by the ECtHR on 30 March 2010, one judge takes up the evolving standards related to indigenous peoples. The pending *Chagos Islanders* case may also well provide us with a landmark case on how the Court faces the challenge of indigenous law, given that developing indigenous standards form the core of the complaint by the islanders. The more the rights of indigenous peoples become accepted as part of general international law – and this may still take some time – the better their chances will be before the ECtHR in the future. It is good to remember that the Court is known to update its views as the European societies and their laws change. The ECtHR sees the Convention as a living instrument (the so-called ‘evolutive interpretation’), which must be ‘dynamically’ interpreted to meet the developments in social and political attitudes.¹⁰⁰

The Court also takes into account customary international law and international treaties where these are relevant to the case at hand.¹⁰¹ Even though there has been a vast amount of normative activity in the field of indigenous international law, there is only one modern international treaty providing for specific rights for indigenous peoples, the ILO Convention No. 169, and it has received only a limited number of ratifications (20) worldwide. Moreover, the Convention applies to only four

European States, two of which do not have indigenous peoples living in their territories but only wish to promote the Convention in general. Hence, only two states, Norway and Denmark, are legally bound by the ILO Convention No. 169 (Denmark has recently affirmed that the Greenlandic Inuit are a people, and that they have the option to secede from Denmark and establish their own state).¹⁰² A more relevant international convention, even though it does not even mention indigenous peoples, is the ICCPR, given that all the states parties to the European Convention on Human Rights are also parties to the ICCPR.

Yet, perhaps the most promise can be seen in the emerging global consensus on indigenous rights, stemming from the non-binding UN Declaration on the Rights of Indigenous Peoples. It is useful to remember that the Declaration was directly and arduously negotiated between indigenous groups and state representatives for over a 20-year period. Even though it was not adopted by consensus, it has already induced significant legal developments all over the world. In fact, the process of making the Declaration started to influence the evolving law related to indigenous peoples some time ago: the Draft Declaration was adopted by the Working Group on Indigenous Populations in 1993 and a year later by the UN Human Rights Commission sub-body. It is thus not surprising that the relevant human rights treaty monitoring bodies have interpreted their respective global human rights treaties in a way prescribed by the UN Declaration when they deal with issues related to indigenous peoples, even though the Declaration itself is non-legally binding. Taken together – that the Declaration is a carefully negotiated compromise between indigenous peoples and states regarding the extent of rights of indigenous peoples and that it has already started to impact legal developments at both international and national levels – it can be predicted that at some point in time many rights it identifies for indigenous peoples will mature into customary international law. Many argue that this has happened already. Moreover, nearly all European states voted in favour of the UN Declaration (except Russia, Ukraine, Azerbaijan and Georgia), both in the Human Rights Council and in the UN General Assembly.¹⁰³

It seems to be a fair assessment at this writing that the jurisprudence of the ECtHR is gradually becoming sensitive to the concerns and rights of

¹⁰⁰ In the early *Tyler* case the Court already expounded this view (para. 31): ‘The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.’ See e.g. *Tyler v. United Kingdom* (1978), Application No. 5856/72. For a general treatment, see R.C.A. White and C. Ovey, *The European Convention on Human Rights* (New York: Oxford University Press, 2010), at 64–83.

¹⁰¹ See e.g. *Saadi v. United Kingdom* (2008), Application No. 13229/03, para. 62.

¹⁰² See the Act on Greenland Self-Government, <uk.nanoq.gl/-/media/f74bab3559074b29aab-8ce2aaecefce.ashx>, (accessed on 8 September 2010).

¹⁰³ An excellent overview of the history, negotiation process, current status and implementation challenges is provided in Charters and Stavenhagen, *supra* note 14.

indigenous peoples. This is due to both internal and external factors. From the internal perspective, the Court has been able to recognize to some extent the distinct nature of indigenous societies. Private and family life or property rights are evidently different for indigenous peoples than for the mainstream population, and to a certain extent the Court has been able to recognize this. From the external viewpoint, the Court will face the full force of the United Nations Declaration on the Rights of Indigenous Peoples in the coming years.¹⁰⁴ There is little doubt that this Declaration will have an impact on how the ECtHR interprets its founding documents, given the speed with which the instrument is becoming accepted as codifying customary international law. It can be predicted that overall these developments will sensitize the Court even more to examining the rights guaranteed in the European Convention and its Protocols from the perspective of indigenous peoples. But can the Court really take onboard the full normative influence flowing from these international developments?

There are problems and possibilities. First of all, there is no universally accepted definition of the term 'indigenous peoples', although the basic elements of the concept are captured in the so-called 'Cobo definition'.¹⁰⁵ As a result, the Court needs to rely on the definition of indigenous peoples by each of its states parties hosting indigenous peoples. One should not, however, overstate the problems in defining indigenous peoples in the European Convention context. The states parties of the Convention that host indigenous peoples possess fairly clear and authoritative definitions regarding who are indigenous peoples in their jurisdiction.

A second problem was pointed out by Judge Ziemele in the *Handölsdalen* case (and the CERD). No procedure can be fair which requires indigenous peoples to prove their ownership and use rights with letters and documents detailing the practice of their traditional livelihoods hundreds of years ago in cultures which did not even rely on written records. Judge Ziemele could not but criticize the chamber, which had declared inadmissible those parts of the complaint concerning the alleged violation of the

right to use land for winter grazing and the excessive burden of proof in so far as it related to equality of arms in the court proceedings, and thus she could only address the issue of effective access to court from the viewpoint of the high legal costs incurred by the Saami villages. Yet, she does point out the possible way forward for the Court. It is the ECtHR's task to make sure that equality of arms is maintained in each national legal system by ensuring that in cases involving land rights disputes indigenous peoples are not placed at a disadvantage in domestic legal proceedings. Inspiration could be drawn here from the work of the Expert Committee that drew up the Draft Nordic Saami Convention¹⁰⁶ – a Committee composed of an equal number of representatives from three Nordic states and the respective Saami Parliaments. The part of the Draft Convention outlining how protracted use of land can establish ownership and use rights provides that: "Assessment of whether traditional use exists pursuant to this provision shall be made on the basis of what constitutes traditional Saami use of land and water and bearing in mind that Saami land and water usage often does not leave permanent traces in the environment."¹⁰⁷

It will undoubtedly be a challenge for the ECtHR to take proper account of evolving indigenous law since that law is strongly based on the idea of collective human rights, not only individual human rights.¹⁰⁸ Even though non-governmental associations can be victims of rights violations under the European human rights regime, these associations will always need to show that they have been victims of violations of such rights where they exercise legally relevant powers. It seems difficult for indigenous peoples to have their collective land rights protected by the Court when Article 1 of Protocol No. 1 grants peaceful enjoyment of possessions to natural and legal persons only. This may work for Saami villages because of their special status in the Swedish legal system, but there are not many Saami associations with delegated legal authority over their traditional livelihoods.

¹⁰⁶ For an overview, see T. Koivurova, 'The Draft Nordic Saami Convention', *European Yearbook of Minority Issues* 6 (2006–2007): 103–136; and T. Koivurova, 'Draft for a Nordic Saami Convention: Nations Working Together', *International Community Law Review* 10 (2008): 279–293.

¹⁰⁷ See Article 34(3) of the draft, unofficial English version, available at <www.galdau.org/govai/doc/samekoneng_nett.pdf>, (accessed on 8 September 2010).

¹⁰⁸ As was shown by Sweden, country which wholeheartedly endorsed the UN Declaration but stated, among other things: "[w]hile the Swedish Government had no difficulty in recognizing such rights outside the framework of international law, it was of the firm opinion that individual human rights prevailed over the collective rights mentioned in the Declaration". <www.un.org/News/Press/docs/2007/gaio612.doc.htm> (accessed on 1 March 2012). For an analysis, see G. Alfredsson, 'Human Rights and the Arctic', *The Yearbook of Polar Law* 1 (2009): 233–243.

¹⁰⁴ And as Forowitz argues (*supra* note 10, at 377): "Another reason which had a dominant bearing on the Court's reception of international law was the need to improve and update the ECHR. The influence of this factor on the Strasbourg case law was comparable to that of pre-existing or technical reasons. The need to harmonize an ECHR provision with international law; the need to fill gaps in the ECHR, and the availability of more specific guidelines in international law have played an important role in the Strasbourg bodies' interactions with the outside regimes."

¹⁰⁵ J.M. Cobo, José, *Study of the Problem of Discrimination against Indigenous Populations* (1986/7), UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1–4, available at <http://www.un.org/esa/socdev/unpfi/en/second.html> (accessed on 8 September 2010).

In order to realize the problems that the Court may face with collective human rights, it is useful to imagine a rights violation by a state which as such has a well-functioning domestic legal system, but which fails to give any recognition to collective land rights of indigenous peoples and does not include any procedure whereby the state would consult the representative institutions of indigenous peoples where a modern economic activity intrudes into their territory or harms their traditional livelihood. For instance, the ECtHR would need to develop an autonomous interpretation of what property rights mean for indigenous peoples, not rely on what domestic law stipulates and how domestic courts have resolved such cases.¹⁰⁹ This is not impossible. For instance, the Inter-American Court of Human Rights is a good example of a regional human rights court that has developed strong protection for indigenous collective rights despite the fact that its founding document does not even mention indigenous peoples.¹¹⁰ What the ECtHR would have to do is revise its approach in

¹⁰⁹ Interesting judgment here is the *Case of DOĞAN and Others v. Turkey* where the Court seems to have moved to this direction. The Court states in para. 138 that "Article 1 of Protocol No. 1 in substance guarantees the right of property [...] However, the notion 'possessions' (in French: *biens*) in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights'; and thus as 'possessions' for the purposes of this provision", and in para. 139 that "[t]he Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted 'possessions' coming within the scope of the protection afforded by Article 1 of Protocol No. 1. In this regard, the Court notes that it is undisputed that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as 'possessions' for the purposes of Article 1." *Case of DOĞAN and Others v. Turkey* (2004), Application Nos. 8803-8811/02, 8813/02 and 8815-8819/02.

¹¹⁰ *The Mayagna (Sumo) Awas Tingni v. Nicaragua* case demonstrates that the Inter-American Court of Human Rights could recognize collective property rights of indigenous communities even if they lacked official title over their traditional territories under domestic law. The Court, for instance, has stated that: "The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions" (para. 146). *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), Inter-American Court of Human Rights, Series C, No. 79, available at <www.unhcr.org/refugees/iachr/AwasTingnicase.html>, (accessed on 8 September 2010).

assessing how states' domestic legal systems function in respect of their indigenous peoples' property rights, if these people take their complaint to the Court as 'natural or legal persons'. The Court would thus also need to revisit its interpretation of who can make a complaint to the Court in cases where the dispute in question concerns a community right.

The most promising avenue by which the Court could take proper account of the very specific disputes related to indigenous peoples would be to diminish the margin of appreciation afforded to states to interfere with the traditional lifestyle and livelihoods of northern indigenous minorities. As was shown above, the ECtHR's has gradually come to perceive that Article 8 does entail strong protection for indigenous cultures, a development that closely follows that of the Human Rights Committee.

The developments in the Human Rights Committee do carry a great deal of weight in the ICCPR as all the states parties to the ECHR are also parties to the ICCPR. Of pivotal importance is that the Human Rights Committee has not only interpreted Article 27 as protecting indigenous livelihoods, but also considered indigenous peoples as peoples and thus as entitled to dispose of their natural wealth and resources under Article 1(2). The Human Rights Committee has not only perceived well established indigenous peoples as peoples covered by Article 1 in its concluding observations, but it has even taken up Article 1 in its individual communications procedure. As is well known, the Human Rights Committee has interpreted the Optional Protocol procedure in a way that prevents collective complaints on the basis of Article 1. Yet, in the *Apuraina Mahuika* case, the Court stated that:

[t]he Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive [footnote omitted]. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.¹¹¹

The import of this normative development in regard to indigenous peoples within the context of the ICCPR is that not only is the sustainability of traditional livelihoods protected by Article 27, but as peoples they also have self-determination over their natural wealth and resources.

¹¹¹ HRC, *Apuraina Mahuika et al. v. New Zealand* (2000), UN Doc. CCPR/C/70/D/547/1999, para. 9.2.

Following this development, the future northern indigenous complainants – for instance a group of indigenous individuals invoking Article 8 – to the ECtHR will likely argue that modern economic activities are penetrating into their traditional territories, interfering with their traditional livelihoods and thereby threatening their cultural existence. This implies protection of not only their livelihoods but also of the vast land base that practicing these traditional livelihoods requires.

V. CONCLUDING REMARKS

The Court will undoubtedly face some tricky questions when dealing with the fast developing indigenous law, which in many ways challenges the very fundamentals the Court has upheld in its case-law. A restricted stance on the question of standing (who can be seen as a victim of a human rights violation) makes perfect sense when the disputes are within a mainstream modern society, but it leads to odd situations when the complaint must be lodged by indigenous individuals, even if ultimate 'ownership' lies with the community. Trust in the functioning of the domestic judiciary makes only common sense, given that it is the Court's task as an international human rights court to only see to it that the domestic legal proceedings meet the requirements of its founding instruments. Yet, when the national legal proceedings expect a small indigenous group to prove their immemorial usage rights over a given area, the Court must intervene and maintain equality of arms, that is, that the parties are afforded reasonable opportunity to present their case, including evidence, under conditions that do not place them at a substantial disadvantage.

At the centre of the northern indigenous complaints is the protection indigenous peoples seek from the Court for their traditional lands and livelihoods. The doctrine of margin of appreciation works well when an individual person perceives that his/her rights under the Convention are being violated, making it possible for the Court to take account the interests of the larger community. But it does not work well when the dispute is between a state and a distinct people, the latter having practiced traditional livelihoods from the time immemorial in a specific northern location. Even if property rights form the core of the functioning of the modern European societies, and are well protected by Article 1 of Protocol No. 1, these conceptions do not correspond with the community-based understanding of what 'property' means for indigenous peoples.

These are some of the challenges that the Court needs to overcome in order for it to deal with indigenous complaints appropriately. Even if these do pose difficult questions for the judges of the ECtHR, there is no reason to think that the Court cannot meet these challenges. The evolving law related to indigenous peoples has become recognized as a separate branch of law that can be distinguished from the general legal protection of minorities. The judges in the ECtHR have gradually paid more attention to this fairly new body of international law, which, importantly, can be treated in isolation from the very difficult issues raised by the protection of minority rights in Europe. After all, the small northern indigenous peoples in Greenland, Scandinavia and Russia can be protected by the Court if it interprets the founding instruments in a way that corresponds to their reality, not that of the mainstream society.