UiT The Arctic University of Norway

Faculty of Law

The Duty to Consult Sámi People with Special Reference to Environmental Matters

Elodie Rudloff

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Supervisor: Heinämäki, Leena.

Abstract

The main aim of this paper is to analyze the duty to consult the Sámi people in relation with environmental issues. International standards of the duty to consult indigenous peoples are well established in International Law. International Law instruments provides a clear legal path the Nordic countries Finland, Norway, and Sweden, to follow with regards to the duty to consult indigenous peoples in decision-making processes. The duty to consult the Sámi people is a matter of great importance, as it ensures that they have an influence on decision-making in so far as it is relevant to them, and thus protect their basic rights of self-determination and land resources. The issue at stake is that according to the UN Special Rapporteur and International Human Rights Committee's reports the Sámi people still do not hold enough influence on environmental matters that affect them. The lack of participatory rights and their poor implementation have as a consequence that the protection of their indigenous rights is not yet adequate in the three Nordic countries. None of these States fulfill their international obligations towards the Sámi. Various mechanisms are progressively being put in place in their legal system to comply with their duty to consult the Sámi people. However, these measures are not always sufficient to secure the full participation of the Sámi people to the adoption of decisions that impact their livelihood, way of life or culture. In this thesis I will study how specific rules related to indigenous rights have emerged in those countries with regards to international standards, and how such rules are implemented in different manners by each State.

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Abbreviations

AP	Assessment programme
CBD	Convention on Biological diversity
CEACR	Committee of Experts on the Application of Conventions and recommendations
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
EC	Environmental Code
EIA	Environmental Impact Assessment
EU	European Union
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewarship Council
HRIA	Human Rights Impact Assessment
IA	Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO 169	International Labour Organization Convention number 169
NDA	Nature Diversity Act
NSC	Nordic Sámi Convention
TK	Traditional Knowledge
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
SIA	Social Impact Assessment

1 INTRODUCTION

1.1 Identification of Indigenous Peoples

When trying to understand who indigenous peoples are, one stumbles upon the fact that one legal definition accepted internationally does not, as yet, exist. The International Labor Organization Convention number 169 (ILO Convention No 169) in its Article 1 provides a description rather than a definition of indigenous peoples where self-identification appears to be the fundamental criterion.[1] This means that someone can be considered an indigenous person when he/she identified him/herself as one and is accepted as such by the community.[2] It is interesting to note that indigenous peoples did not wish for a definition of what an indigenous people might be, as they are so heterogeneous from one society to another. And they believed that "historically, indigenous peoples have suffered from definitions imposed by others." [3]

Practitioners of International Law, however, have tried to determine whether a society could be identified as an indigenous people. They found several criteria that could be used to identify and rather than define indigenous peoples. Those criteria can be, for instance, deep ties to territory, traditional nature-based livelihood, distinct language, own customs or traditions, special laws, non-dominant group of society, etc.[4]

Confusion often arises between the indigenous and minorities' rights as they share several characteristics. The difference between indigenous peoples and minorities goes back to the 16th century when the Reformation and the Thirty Years War put an end to the monopoly of the Catholic Church and taught the States that a plurality of religions was now inescapable. The question of minorities then arose in the European space.[5] One crucial difference between the two is that the purpose of indigenous peoples is to continue their development in parallel

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[1] Article 1.2 of the ILO convention No 169

[2] Cher Weixia Chen, 2017, p.4

[3] Daes, 2005, p.75-93

[4] UN Permanent Forum on Indigenous Issues, Factsheet, Who are indigenous peoples? http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf,

[5] Akgönül, 2004, p.9

with the globalized community. Indigenous peoples do not seek to integrate themselves into mainstream society, but to preserve their own culture, language, traditions, lifestyle, whereas minority societies tend to develop within mainstream society, while at the same time, holding on to their own identity.[6] Regarding the latter, an excellent representative definition could be "a group numerically smaller than the rest of the population of the State to which it belongs and possessing cultural, physical or historical characteristics, a religion or a language different from those of the rest of the population."[7] In addition, contrary to minorities, Indigenous peoples have a unique link to the land, which is spiritual bond.[8] Their livelihood is based chiefly on traditional use of nature. Reindeer herding, fishing, hunting, and gathering were considered the basis of the of the Sámi people's lifestyle, even if it has evolved over time. Different factors could lead to the identification of indigenous peoples, such as the "occupation of ancestral lands, common ancestry with original occupants of those lands, specific manifestation of culture, language, etc."[9] The description which has been the most cited is from Jose R. Martinez Cobo. He avers that "indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a state structure which incorporates mainly national, social and cultural characteristics of other segments of the population which are predominant."[10] Nevertheless, this definition could be seen as reductive, as it does not correspond to all indigenous peoples. Furthermore, it does not include the notion of self-identification, which is prevalent in the identification of what indigeneity is.

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[6] prop. 2009/10:80 p. 189-190
[7] Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979).

[8]Daes, 1996, p.16.

[9] http://indigenouspeoples.nl/indigenous-peoples/definition-indigenous, accessed June 8, 2015.
[10] Martínez Cobo J. 1986, para. 379.

1.2 Sámi Identification as Indigenous People

According to ILO convention No 169, two criteria can satisfy the application of peoples to the Status of Indigenous people. One of them is the "affiliation of a population with a specific region at the moment of the formation of the state boundaries where the traditions still perpetuate today."[11] The identification of Sámi as Indigenous people would correspond to this criterion as the Sámi were the first inhabitants of Scandinavia and their territory extend over several countries. Traces of their presence date back more than two thousand years. Their lands expand from Norway to Sweden, Finland and the Kola peninsula in the Russian Federation. There are approximately 80,000 to 100,000 Sámi individuals in the geographical area. However, it is difficult to establish the actual number of Sámi people.[12] The Sámi people were present prior to the establishment of State boundaries between Nordic countries, with ancestral traditions that still endure today. Thus, they can be identified as Indigenous peoples, according to International Law, and it is admitted, for instance, that the Sami and the Norwegians are two distinct peoples[13] sharing the same territory, but such has not always been the case.

Before the settlement of the Norwegian and Swedish border in 1751, of the Swedish and Finnish one in 1809, and of the eastern Russian one in 1826, the Sámi were persecuted and forcibly Christianized. The Sámi do not live in complete separation from the Norwegian population due to a Norwegianization process that began during the 1850s. Such process was seen as necessary for Sámi people to adapt to economic and industrial development[14] through the enforcement of an assimilation policy[15].[16] Another aspect of the Sámi issue is that it is a community based initially on reindeer husbandry. Even if nowadays the reindeer breeders represent just a tiny part of the overall population, it is still anchored in Sámi

[11] Art 1.b ILO convention 169

[12] Baer L.A, 2005, p.247
[13] Allard 2017 p.332

[14] Axelsson and Skolt, 2006, p.115-132

[15] Allard, 2017, p.316
[16] Josefsen, et al. 2016, p.25

traditions. Thus, the use of the land and its natural resources is essential for the existence of Indigenous peoples. Most of the Sámi's land is considered as reindeer husbandry area where the reindeer husbanding is seen as an important part of the culture, on an equal footing with hunting and fishing.[17] Thus, the Sámi people rely more than mainstream Nordic societies on nature. The Sámi are using their land's natural resources for material purposes but also have a deep spiritual bond with it. With the beginning of industrialization, a gap formed with the expansion of the forestry, mine industry, railway network, construction of hydropower plants, and conflicts emerged. Sámi people are vulnerable to those developments since their culture, language and environment are at stake. The use of natural resources served another purpose than the traditional, functional, and spiritual one. Unfortunately, the relatively small number of Sámi people in demographic terms meant that their views were hardly taken into account.

There is no harmonized definition of the Sámi status in Nordic countries. Besides, Sámi status can be acquired differently depending on the country they are born in. However, the definitions adopted in the three countries are very similar and have for central criterion self-identification and the Sámi language.

For instance, in Norway, the status relies on the provisions of the ILO Convention No 169 that was ratified in 1990 and sets out self-identification as determining the affiliation of a Sámi. The objective language criterion was added to narrow down the definition[18] in Section 2-6 of the Sámi Act 1987, which delimits the Sámi status. The primary purpose of the definition is to identify voters allowed to be on the electoral register to elect the Samediggi (the Sámi Parliament). In Norway, whether a person may be considered as Sámi is based on the criterion of fluency in the domestic Sámi language, or if he/she has a parent, grandparent or great-grandparent who is, or was, fluent in the domestic Sami language.

In Sweden, the status of the Sámi as Indigenous people is recognized in the Constitution and is explicitly defined in the Sámi Parliament Act 1992. The only difference is that language

[17] Eide A. 2001, p.130

[18] Allard, 2017, p.319

ancestry needs to be traced back to great-grandparents, rather than just grandparents. It is thus more restrictive than the Norwegian one.[19] The primary function of definitions of Sámi status in national texts is the determination of the eligibility to vote at the Samediggi election.

In Finland, the status of Sámi people is governed by the Act on the Sámi Parliament[20]There are currently two kind of criteria. On the one hand, a person is considered a Sámi if he/she considers him/herself as Sámi. He/she is a descendant of a person who has been registered into a land, taxation, or population register as a mountain, fishing, or forest Lapp.[21] Contrary to Norway and Sweden, there is the additional criteria based on the historical connection to the land. On the other hand, a Sámi is a person whom himself/herself or one of his/her parents or grandparents, has learned the Sámi language as their first language and are the descendants of such a person.[22] However, a proposed reform of the Act seeks the removal of the Lapp definition. The proposed amendment to Section 3 would define as Sámi a person who regards themselves as one provided they satisfy the conditions of the language's criterion, as in Sweden and Norway, and if "one of the person's parents is or has been registered as eligible voter in elections to the Sámi Parliament." This reform of the Act also considers the draft Nordic Sámi Convention (NSC) and the ILO Convention No 169, even though both are yet to be ratified by Finland. In the draft NSC concerning the identification of the Sámi people, it is stated that "the Sámi Parliaments may cooperate in the implementation of the above provision according to national legislation."[23] The reform of the Finnish Sámi people's status would be in line with the status recognized by the NSC as it does not include the Lapp definition. The link between the duty to consult and the status of the Sámi people is that by identifying who is a Sámi people, they have the right to enter into the electoral roll for the Sámi Parliament. The Sámi people would vote for their representatives who would be consulted to defend the interests of the Sámi people in the decision-making process. However, the legal status of the Sámi in Norway, Sweden, and Finland is not the same, and the function of the Sámi Parliament in the three countries also

[19]Allard, 2017 p.344
[20] Section 3 of the Sámi Parliament Act
[21] Joona 2017 p.47
[22] Joona 2017 p 47
[23] Article 13 of the Nordic Sámi Convention

differs.[24] The Sámi are transnational Indigenous people as they are present in four countries. Though in this study, we will compare Norway, Sweden, and Finland without integrating Russian law concerning the duty to consult. There are then different laws that apply to the Sámi with regards to the State they are based in.

The expansion of International Law after World War II regarding the status of Indigenous peoples has allowed the recognition of the Sámi culture, traditions, language, and rights in those Nordic countries. The International Covenant for Civil and Political Rights (ICCPR), the International Covenant for Economic, Social, and Cultural Rights (ICESCR) from 1966 applies to Indigenous rights. In addition, the Declaration of Rights of Indigenous Peoples (UNDRIP) of 2007 refers to the status of Indigenous peoples. Even if their status is recognized, the ratification of the ILO Convention No 169 was adopted by Norway and not yet by Sweden and Finland which could have a significant impact. For instance, in Sweden, the Sámi rights are stated in the Minorities Act but they are not explicitly recognized as Indigenous peoples. However, they were recognized in the Swedish Constitution as a people.[25]

So, this means that even if there is an incorporation of the International Convention in the national law (and it is not always the case), there are special laws that need to be adopted in order to protect special Sámi interests so that they can enjoy all the rights granted to other people.

1.3 Purpose and Research Questions

The primary research question for this thesis will be how the duty to consult is handled concerning environmental issues when the matters at stake affect Sámi people in Finland, Norway, and Sweden.

To answer this question, I will focus on several sub-questions:
-How is the duty to consult Sámi people understood and implemented in the Nordic States?

[24] Allard, 2017, p.347
[25] Article 2 of the Swedish Constitution

-Are the Nordic States fulfilling their international obligations relating to the duty to consult the Sámi in the relevant decision-making processes?
-How does the International Law identify the principle of Free, Prior, and Informed Consent (FPIC) and how is it implemented in the Nordic States?
-What is the procedure for Environmental Impact Assessment (EIA) in the Nordic States, and how does it include the duty to consult Sámi people? What is the level of influence of Sámi people on the EIA process? How does the EIA take into account Social Impact Assessment (SIA)?
The main objective of this thesis is to have a global picture of the duty to consult the Sámi people in the Nordic States on environmental issues. As the duty to consult the Sámi people has its legal basis in international instruments, I will explain how such international provisions are implemented into national legislation.[26] The duty to consult of the Nordic States stems from international legal obligations, but they implement such obligations in different ways, and I will explain the different approaches Finland, Norway, and Sweden took encompassing the environmental impacts by analyzing the national legislation, case law, and the relevant treaties.

1.4 **Methodology**

In this master thesis, the legal doctrinal research methodology will be used. There will be a focus on the national laws of the relevant Countries. The research will encompass different articles, legislations, or case law. There will be a focus on the Nordic Sámi Convention or the development of the Nordic countries of future laws concerning the consultation of the Sámi people. Therefore, an internal analysis of law will be done. This means that I will not be critical of the primary legal material.[27] It is more a practical lawyer's approach rather than a theoretical analysis of the legal system.

[26]Allard 2018, p.39
[27] Litowitz, 1998, p.128

1.5 **Scope**

The purpose of this research is to review the ability of the Sámi people to have an impact on decision-making processes. The decisions at stake concern the use of land and natural resources within their territories that can directly affect the lives of the Sámi people. By influencing the decision, I mean how the International Law and national law of each state allow the Sámi people's opinion and interests to be taken into account during the adoption of decisions affecting them. Nowadays, for example, with the EIA, the Sámi people are part of the decision-making process because they must be consulted at different stages of a plan or a project when it could impact their culture or their environment. However, several conditions are set, with differences depending on the area, the environmental impacts, the population at stake, etc.

In order to analyze how the Sámi people can impact the decision-making process, I will review several legal instruments. To this end, I will study the different international instruments on Human Rights Law and Environmental Law. I will also focus on obligations on Finland, Norway, and Sweden stemming from such instruments, current national legislation, proposed new laws in those three countries, as well as on the Nordic Sámi Convention.

Even if the Sámi people are based in four countries, namely Sweden, Norway, Finland, and Russia, due to a lack of time, documents available in English, and space, the area of the research will entirely focus on Finland, Sweden, and Norway. The integration of the relevant aspects of the Russian law concerning the duty to consult the Sámi people will not be studied. The choice of those three countries and not Russia can be explained by the fact that this program relied on the law of Finland, Sweden, Norway, and not Russia. The Nordic Sámi Convention focuses only on the three prior Nordic countries, and integrating the studies of the Russian law would have complicated the task. Furthermore, the legal system and Indigenous rights in Russia are way different from the Nordic countries.

1.6 **Structure**

First of all, the focus will be on Sámi rights, and in particular the right of self-determination and the right of lands and resources. The purpose of studying Sámi rights is because the duty to consult stems from the fact that Sámi people have a right of self-determination and of land and resources. The direct and concrete application of the self-determination and land and resources right in a state concerning Indigenous people is through consultation in decision affecting their livelihood and environment.

Secondly, attention will be given to analyzing the concept of free prior and informed consent, its development in International Law through various international instruments, and its implementation in the Nordic countries.

Thirdly, I will focus on the duty to consult of the States. It will be based on the different enactments of the State's duty to consult the Sámi people in the three Nordic countries highlighting the differences between them.

Then, the study will focus on the duty to consult the Sámi people in the Environmental Impact Assessment process. The purpose of focusing on EIA is because it encompasses the duty to consult on environmental issues. As this thesis is based on the duty to consult in environmental matters, the consultation in the EIA is central to the subject. In the EIA process the impacts of an activity on the environment need to be considered. In addition, the interests of Indigenous peoples would also be taken into account as the environment is a part of their livelihood. The duty to consult in relations with environmental issues and the EIA are therefore inseparable.

2 SAMI RIGHTS

This chapter will focus mainly on the Sámi right to self-determination and the right to land and natural resources. Focusing on those rights is necessary because the duty to consult the Sámi people in national law depends partially on the land and self-determination rights. Depending on the extent to which each right is implemented in national legislation, the influence in decisions concerning Sámi issues will not be the same. In addition, those two rights are interlinked. In International Law, the right of self-determination encompasses the right to dispose of their natural wealth and resources freely and the right not to be deprived of their means of subsistence.[28] If the right of self-determination were fully applied to the land and resources rights of the Sámi people, they would have legal authority to control their lands.[29] UNDRIP does not grant Indigenous peoples the right for external aspect of self-determination, thus the right to create an independent State. However, Indigenous peoples' self-determination does not mean independence. According to Article 46 of the UNDRIP: "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[30] The self-determination right allows "self-government in internal and local matters." Article 4 of UNDRIP says that in exercising their right to self-determine, they have the right to autonomy .[31] The self-determination recognizes Indigenous peoples as peoples within the State, with the power to determine their political, social, cultural, economic status, and the right to have control over decision-making of their lands and resources. It allows them to be involved in the decision-making process but without detaching themselves from the country.[32]

[28] ICCPR and ICESR Article 1
[29] Daes 2004 p.8
[30] Article 46 of United Nations Declaration on the Rights of Indigenous Peoples

[31] Heinämäki L. and Kirchner S. 2017 P 230

[32] Ibid. p.230

For indigenous rights to be fully respected, the State needs to abide by the right of self-determination. However, this notion is interpreted in different manners in International law and even amongst indigenous peoples.[33] As the concept itself of indigenous peoples, the self-determination of its peoples varies from communities. The autonomy of its peoples can differ, as the independence from the State, the protection of its territory, and the level of influence in decision-making processes through consultation of the Sámi people.[34]
The link between the right of self-determination and the right to land and natural resources could also be viewed from the other way around. It could be considered that the right to self-determination arises from the right to land and natural resources. It is because Sámi people use the land for their livelihood that there is a need to protect their land rights, which can be done through the right of self-determination.

The Nordic Sámi convention planned by Finland, Norway, and Sweden, with the respective Sámi Parliaments of these countries (without the Russian Federation) is granting the Sámi self-determination and land rights. The purpose of this international instrument is to "confirm and strengthen the rights of the Sámi so that the Sámi can preserve, practice and develop their culture, languages and social life» (Article 1). To do so and be implemented, this Convention needs to be ratified by the three signing states and to obtain the consent of Sámi Parliaments.

2.1 Sámi People's Right to Self-Determination

The right to land and resource is linked to the right to self-determination. Such right is a crucial tool for the preservation of land and resources used by the Sámi people. The right of self-governance is also linked to the duty to consult. Self-determination can be achieved

[33] Cher Weixia Chen, 2017, p.8

[34] Hendrix, B. A. 2008.

through genuine consultation with an influence on the outcome of the decision with the Sámi Parliament or the affected Sámi people.[35]

In International Law, the principle of the right to self-determination is stated in different instruments. It can be found in Article 1 of the International Covenant on Civil and Political Rights (ICCPR), as well as in Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It states that "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and International Law. In no case may a people be deprived of its own means of subsistence." These three aspects are all applicable to indigenous peoples, but it has to be applied within the context of the State.

The UNDRIP from 2007 recognizes this right too in its Article 3 "Indigenous peoples have the right to self-determination. Under that right, they freely determine their political status and freely pursue their economic, social and cultural development." However, those documents are not identifying self-determination in the same way and have a different interpretation of it.[36] According to the ICCPR and the ICESCR, it is the right to determine their political status freely and pursue their economic, social and cultural development, and the right to have control over decision-making of their lands and resources.[37] In contrast, the UNDRIP goes further by including the "right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[38] This means that indigenous peoples, have a right to self-determination. Self-determination is actualized within an existing State's political and legal system.[39] Article 4 does not limit Article 3. It recognizes that the right of self-determination

[35] International Labour Office (2016) Procedures for consultations with indigenous peoples: Experiences from Norway, Geneva, ILO p. 14

[36] Cher Weixia Chen, 2017 p.7
[37] International Covenant on Civil and Political Rights,
[38] Article 4 of United Nations Declaration on the Rights of Indigenous Peoples
[39]Mörkenstam et al. 2016 p.7

encompasses the right of autonomy or self-government. In other than local affaires, self-determination is also carried, but through consultation and the real possibility has to be there to influence the decision outcomes (FPIC). However, it often implies a greater autonomy on decisions from the indigenous representatives in geographic areas where the indigenous peoples are concentrated. However, applying the UNDRIP and the right to self-determination to the Sámi people cannot be done through geographical criteria. The Sámi people represent a minority on their traditional Sámi lands. Even if in some areas they represent a majority, they are divided into four countries. Thus, the self-determination right is based on non-territorial autonomy. The local governance relies on creating separate institutions to ensure the political representation of the Sámi through the Samediggis (Sámi Parliaments)[40] which were established in Norway (1989), Sweden (1993), and Finland (1995). However, the scope for Sámi Parliaments to take decisions autonomously is limited by the fact that their powers are granted by the States.[41]

The self-determination right of the Sámi would be best accomplished by giving more decision-making power to the Sámi Parliament. This demands significant changes to national legislation on the role of the Sámi Parliament.[42] For the right of self-determination to be fully applied, the Sámi Parliament should have jurisdiction on Sámi lands and legislative powers in matters that are important to them, instead of just a consultative role. It should be regarded as a governmental authority, or it could be considered apart from the State authorities and government.[43]

What could change the situation would be implementing an Act that would allow the cooperation of the States in which the Sámi population is present to allow autonomy. Nowadays, this Act is at the draft stage and is called the Nordic Sámi Convention (NSC). The origins of the NSC go back to 1953 where Finland, Norway, and Sweden exchanged on the concerns of the Sámi culture, which resulted in the creation of the Nordic Sámi council

[40]Mörkenstam U. et al 2016 p.9

[41]Broderstad, 2011 p.902

[42] International Labour Office (2016) Procedures for consultations with indigenous peoples: Experiences from Norway, Geneva, ILO . p.15

[43] Carstens 2016 p.104

in 1956.[44] In 1996 the work on the NSC from the Sámi council started, and the first draft of it was proposed in 2005.[45] Still, The Nordic Sámi Parliaments have not accepted it yet so it is not in force. The NSC's primary purpose is to develop the right to self-determination (Article 4) so that the Sámi can "preserve, practice, and develop their culture, language and social life" (Article 1). The definition of the right to self-determination in the NSC includes the right to determine "political status and freely pursue their economic, social and cultural development. It is exercised through autonomy in internal affairs and through consultation in matters which may prove to be of particular significance to the Sámi."[46]

The application of the right to self-determination is stated in chapter II from Articles 12 to 19. Self-determination can thus be seen as both a right allowing autonomy to the peoples and at the same time a right allowing participation in the decision-making process.[47] It could be considered contradictory, but it could also be seen as both sides of the same coin, as autonomy could be defined as the possibility of self-governance within a specific framework.[48] The opportunity to participate in decision-making can lead to the self-governance of indigenous peoples, depending on the extent to which their views are taken into account. This idea of autonomy and participation can also lead to the independence of a territory and freedom for a community to administer itself. However, to administer itself the participation in decision-making is required. Here, the purpose of the NSC is not to provide the right for the Sámi people to create their own independent State but to allow a degree of autonomy from the government. The wording of Article 4 limits the scope of the right to self-determination as it "is exercised through autonomy in internal affairs and through consultation in matters which may prove to be of particular significance to the Sámi."[49] However, since self-determination is also exercised via self-government in internal matters, this gives a possibility for each Nordic country to expand the authority of the Sámi Parliament, eg. their legislative powers on certain issues. For instance, in Norway, the Sámi Parliament has decision-making power concerning their cultural heritage.[50] In principle,

[44] Nettheim G. et al. 2004, p.210
[45] Ibid. p.210.

[46] Article 4 of the Nordic Sámi Convention
[47] Anaya, S. 2009 p193
[48] Le Trésor de la Langue Française informatisé https://www.cnrtl.fr/definition/autonomie

[49]Article 4.2 of the Nordic Sámi Convention
[50] Falch, T.et al, 2016, 125-143

even if it connects the right of determination and consultation, it does not consist just in the right to be consulted.[51] The right to negotiate or to be consulted is not sufficient when it comes to the right of self-determination. It must be a consultation with a fundamental level of influence. Self-determination is about participating as an actor, having a power of decision, and governance.

When talking about the content of the NSC concerning self-determination rights, Article 12 declares that Sámi Parliaments are necessary for each country to represent the Sámi and fulfil the Sámi right to self-determination.[52] What is lacking in the definition of the Sámi' self-determination rights in the NSC could be the safeguard of the rights to land and water, which is present in the land and water right chapter, but not in the self-determination right one. It is also absent from the UNDRIP. Even if the interconnection between the right to control the resource and the self-determination are implicit, it is not stated clearly in the NSC, nor in the UNDRIP. The autonomy of the decisions from the Sámi are not explicitly defined and are just meant to "effectively fulfil the Sámi right to self-determination" without encompassing the types of measures the Sámi Parliaments can have autonomous decision-making power over. Article 13 then enounces the electoral rolls for Sámi Parliaments and identifies who is entitled to elect the Sámi Parliament. Article 14 outlines the autonomy of the Parliament, leading to self-governance. This Article is quite similar to Article 4 of the UNDRIP, which also evocates the right of "self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." This means that the Sámi Parliament can take autonomous decisions, but it does not specify the autonomy of its decision. It leaves open the option for States to give autonomous decision-making power in some legislative areas. In Finland, in the Antiquities Act they now consider giving this power to the Finnish Sámi Parliament to decide issues concerning archeological cultural sites.[53] Articles 15 and 16 address joint organization and collaboration and tend towards a principle of autonomy of the Sámi Parliament. Articles 17 to 19 also encompass

[51] Åhrén 2017 p.7

[52] Article 12.3 of the Nordic Sámi Convention

[53] Harlin, EK 2019 p.255

the right of self-determination in their statements, and concern the duty to consult, which will be covered in the following chapter.

2.2 Sámi Rights in Relation to Environmental Issues

For centuries, the Sámi people are practicing their traditional rights of reindeer herding, fishing, and hunting on their lands area. However, their traditional lands are owned by private landowners, or forest industries. The Sámi are trying to obtain the recognition of ownership and use rights because of immemorial prescription.[54] The recognition of Sámi land rights or territorial rights is thus a cornerstone right for the Sámi as it allows the right to own or use traditional lands and natural resources.[55] The Sámi lands in Finland, Norway, and Sweden have gone through a loss of natural resources and lands over the last decades and even centuries.[56] The projects implemented in those areas, such as, for instance, forestry, mining, or wind power stations, are leading, among other things, to the diminution of available grazing area. It is putting at stake the reindeer herding activity and thus endangering the Sámi livelihood.

One of the main motives for the establishment of land rights for the Sámi people is to seek the protection of reindeer herding, fishing, and hunting activities, which are an essential part of the livelihood of the Sámi people. The rights concerning reindeer husbandry, though, depend on the rules of each country. In Norway and Sweden, it is an exclusive right that can only be obtained through Sámi heritage, whereas in Finland, there is no special recognition of Sámi rights concerning reindeer herding.[57] The differences in property law and the recognition of Sámi rights to land and resources are based upon immemorial use. However, it differs in the three countries because of the evolution of the notion of property and the construction of each State. The protection of those lands to allow the continuity of the activities, which are the main basis of the Sámi cultural identity, needs to satisfy certain

[54]Lindqvist, 2009, p.83

[55] Allard, 2011, p.161

[56] Carstens 2016 p.79

[57] Allard 2015 p.31

conditions such as intensive, continuous, and exclusive use. However, immemorial usage has a different interpretation in each State. Norway has a long tradition of using different property concepts. It is a custom of unwritten law with protracted uses developed by case law.[58] Nevertheless, in Sweden and Finland the immemorial prescription or customary law have been interpreted differently depending on the Country. The use of property concepts is much more prevalent in Norway than in Sweden or Finland. For instance, in Finland, Sámi reindeer herding right is everybody's right, immemorial usage is not directly recognized. The conflict that often arises concerning land and resources rights include reindeer herding, fishing, or hunting rights.[59]

1.1.1 International Law

The UNDRIP is of relevance when it comes to the recognition of territorial rights. It states in its Article 26 to 32 the land rights of indigenous peoples. Even if it is a declaration and thus not strictly legally binding, monitoring bodies of legally binding conventions as well as even national courts are referring to it as a legal source since it is often considered as not establishing new rights but confirming already existing rights and principles in International Law. Additionally, Nordic States have accepted the declaration and supported its implementation in international arenas.[60] In Article 26, there is a recognition of lands rights of indigenous peoples, with an obligation of recognition by the States.

In the Nordic Sámi Convention, the right to land and water is stated first in the preamble. It states that "Sámi livelihoods and Sámi use of resources refer to traditional Sámi livelihoods and traditional Sámi uses of resources which preserve and develop Sámi culture, language and social life and that the traditional use does not prevent the introduction of new appropriate forms of livelihoods, that reindeer husbandry, fishing and other traditional Sámi uses of natural resources are of particular significance for the preservation and development of Sámi culture, language and social life". The land and water rights are regulated in chapter IV, from Articles 27 to 33. Those Articles adress the land and water rights, the protection of

[58] Allard 2011, p.57

[59] Allard 2011, p.57

[60] Heinämäki L. and Kirchner S, 2017 p.265

the Sámi, the use of natural resources in Sámi areas, the management of the land and natural resources, the compensation for its potential incursion, and the protection of the environment.

Article 14 of the ILO Convention No 169 states that "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the people's right 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." This Article does not create any new land rights but using the word "shall" requires recognition and the respect of it. This means that it is up to national law to recognize land rights.[61] There is also the demand for respect of traditional activities, which for the Sámi people is the recognition of the Sámi reindeer husbandry right. However, if Sweden and Finland would ratify the ILO Convention No 169, they would have not only to recognize a right to consultation but also a right to stronger land rights and to implement such rights.

Even if the ILO Convention No 169 has been ratified by Norway alone, concerning the Nordic States, Article 14 of this Convention can be seen as the basis for Article 27 of the NSC: "The areas traditionally used by the Sámi constitute a basis for their ability to maintain, practice and develop their culture, languages and social life. The collective or individual property or usufruct rights of the Sámi in the States have developed through their long-term traditional use of land and water in the Sámi areas." It aims to protect the lands used by indigenous peoples. There is no definition of what could be considered as a traditional Sámi land. It could be seen as areas where the Sámi have traditionally owned or used and continue to do so, whether on their own or with some non-Sámi people. It could include areas which were occupied and claimed during the colonization.[62] Finland has defined the geographical boundaries of Sámi land contrary to Sweden. Norwegian Parliament has recognized Sámi specific areas in 1975. The participation of the Sámi in the land use planning or decisions can diverge in those three countries.

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[61] Allard, 2011 p.17

[62] Carstens 2016 p98

There are some international instruments that do not contain directly the protection of the land rights of the Sámi, but which can be interpreted as such. Article 27 of the ICCPR provides that ethnic, religious or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." The Sámi people could correspond to an ethnic group, and thus shall enjoy the right to enjoy their own culture. In its General Comment on Article 27, The Human Rights Committee has recognized that "[culture] manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples ... The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[63] As the three Nordic countries have ratified the ICCPR, this Article is applying to all of them. There is an obligation to ensure the right for the Sámi people to enjoy their own culture, and thus to use the land resources. The monitoring body of ICCPR, Human Rights Committee has stated that Article 27 has to be read together with Article 1 on peoples' self-determination.[64] HRC has stated that Article 27 requires that indigenous peoples not only have the right to use their land resources but also effectively participate in the decision-making concerning their traditional lands.[65] The International Convention on the Elimination of Racial Discrimination states in its Article 5.d.v that everyone has the "the right to own property alone as well as in association with others". This indirectly recognizes the collective property rights. As the ICCPR, it is binding on the three Nordic countries. There is just a new case against Sweden in the committee where Sámi won in Sweden. The CERD recognized that the relation of the Sámi people with the traditional land must be recognized as the basis of their culture, and is a prerequisite to the exercise of the right to life.[66] It also acknowledges the principle of proportionality in the Article 5(d)(v) with regards to the limitation from the State parties to the right to property.[67]

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[63] HRI General Comment 1 Rev.1 No. 23, 1994, para. 7.

[64] UN Human Rights Committee, 2015, UN Human Rights Committee2017
[65] UN Human Rights Committee, 2009
[66] UN Committee on the Elimination of Racial Discrimination 2020, Para 6.6.

[67] Ibid. Para 6.11

1.1.2 National Legislations

In Nordic countries, the recognition of the land rights was effected through the acknowledgement of land ownership rights, but there is still a limited recognition of it.[68]
In Norway**,** the implementation of the Finnmark Act is about the transfer of ownership of land from the Norwegian State to an established body under the Finnmark Estate. In other words, it regulates the ownership of lands and natural resources of a private nature in the county of Finnmark in Norway.[69] The Finnmark commission held a role in determining the land rights and securing them. The status of Norway is different in comparison with Sweden and Finland, as it is the only one that ratified the ILO Convention No 169, and then which is forced to cope with Article 14. Though, the statements of the Finnmark Act could be seen as it does not fully endorse the Article 14 of the ILO Convention No 169.[70] This Finnmark Act is a compromise between the Sámi people and the State government[71] as it only applies to the Finnmark county, and the act manages the ownership of lands and natural resources of the Sámi people and the non- Sámi people.
There is an integral part of constructing the law in Norway based on case law. Two significant cases, the Svarskogen case and the Selbu case allowed the evolution of Sámi land rights. The Selbu case concerned a situation of a reindeer herding right on privately-owned land. The Court accepted the recognition of reindeer herding rights based on immemorial usage with lower intensive use in the outer zone of the Sámi land.[72]

Concerning the Svartskogen case, it is a major one in the Nordic countries as it recognizes the Sámi ownership directly. To do so, the Court assessed the intensity, collectiveness, exclusiveness, and duration of the use to conclude whether or not it could be considered immemorial usage. It concludes that the communal uses establish collective ownership even

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[68] Allard, 2011 p.39

[69] Baer, 2005. p.260

[70] Carstens 2016 p 85
[71] Baer,2005 p.260
[72] Allard, 2011 p 12

if the land use was not directly recognized as Sámi land.[73] The current issue at stake concerning the adequacy of how it is handled is not securing land rights for the Sámi even though it is already a great step that Norway took. What can be reproached to Norway is that there is no mechanism in place for the land and resource rights management outer of the Finnmark County,[74]with for instance the omission of the interest of the Sámi people outside the Finnmark in the Norwegian Mineral Act.[75]

Sweden does not share the Norwegians' global approach of the rights of Sami people. Their status and rights have to be pieced from numerous rules and legislation with a variety of subject-matters as well as from case law. The Supreme Court[76] has recognized on the potential ownership of land because of immemorial prescription. The difference between immemorial usage and immemorial prescription resides in the importance of the possession criterion. Immemorial prescription takes into account both use and possession[77], while the immemorial use is assessed by considering only the use of the land. The Taxed Lapp Mountain Case[78] related to the claim by Sámi villages in a part of Sámi traditional land for the right of ownership of its land.[79] Notwithstanding the fac that the Court did not recognize the ownership of its land to the Sámi villages, it did acknowledge the principle that regular exercise of reindeer herding, fishing, or hunting over a period of time can give rise to an usufruct right over such land.[80] The Swedish Supreme Court also recognized that the Sámi could have a right of ownership on its traditional lands justified by immemorial prescription. Furthermore, in 1971 the Reindeer Grazing Act was enacted. It recognizes the Sámi's rights to use the land and water and including for the reindeer herding.[81] It establishes the

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[73] Allard, 2011 p 14

[74] Anaya 2011Para 49

[75] Carstens 2016 p.85
[76] Skatefjäll case
[77] chapter 15 s. 4 of the Old Real Property Code
[78] Taxed Lapp Mountain Case, (Supreme Court Case NJA 1981 s.).

[79] Baer 2005 P 260
[80] Baer 2005 p.260

[81] Human rights Council (2011) Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, general assembly p.8

exclusiveness of the Reindeer herding rights for the Sámi. Forest owners cannot modify the forest in a way that would be damaging for reindeer herding,[82] and should consult the representatives of Sámi villages not to impede the exercise of customary rights of indigenous peoples in the reindeer herding area.[83] Nevertheless, there is no new legislation on the recognition of particular reindeer herding areas. Still, in 2011, the High Court of Sweden in the Nordmaling Case recognized that the Sámi reindeer herding right on winter pasture areas relies on customary law under certain conditions (section 3 of the Reindeer Husbandry Act).[84] However, concerning the year-around-areas, the application of immemorial prescription is unclear according to the Nordmaling Case.[85] A recent case in Sweden has made an evolution on the protection of the rights of the Sámi. The Swedish Supreme Court ruled that the Sámi village Girjas can decide who has the right to hunt or fish in the village's area. Those exclusive rights recognized to the Sámi do no rest on the Reindeer Husbandry Act, but on the historic and traditional customs.[86] The Supreme court also took into account Article 8.1 of the ILO Convention No169, and Article 26 of the UNDRIP on the indigenous peoples' customs relating to the use of lands. However, the protection of the reindeer culture now includes the right to sell hunting and fishing licenses. The issue at stake now is if the other Sámi villages are going to have the same rights as Girjas, and if those exclusive hunting and fishing rights are going to extend on the construction of mines or wind turbines.

The fact that the Sámi people do not have enforceable rights to their traditional land means that they have no degree of influence in the decision-making process over their lands, apart from the right to be consulted. The recognition of Sámi land and natural resources rights would change the weight of the Sámi people's views in the decision-making process concerning plans and projects having an impact on the environment. The Report of Special Rapporteur on the Rights of Indigenous Peoples encourages Sweden to strengthen its efforts to delimit Sámi Swedish territory as it has been done in Norway and Finland and to facilitate

[82] Directives 3.2.4 The FSC National Forest Stewardship Standard of Sweden
[83] 3.2.10 of The FSC National Forest Stewardship Standard of Sweden
[84] Nordmaling case

[85] Nordmaling case
[86] https://www.highnorthnews.com/en/girjas-sami-village-won-swedish-supreme-court-case-may-have-consequences-other-countries

the burden of proof concerning the recognition of Sámi territory.[87] It has also been recommended to "take effective measures to ensure that studies conducted in the area of Sámi rights result in concrete action, including the adoption of new legislation."[88]

In Finland, the situation in relation to land rights is closer to the Swedish one as it is based on immemorial prescription rather than immemorial usage. The legal situation is less clear than in Sweden because there is no case law on the subject and because reindeer herding is not a Sámi's exclusive right. The recognition of land ownership is complex, as the Sámi homeland areas represent just 10 percent of the Finnish territory which 90 percent of it is State-owned land.[89] There is no legal regime on the use of land by the Sámi. The right over land and natural resources is directly linked to the right of consultation.

In the Finnish Mining Act, several sections are relevant when it comes to land rights. Section 1, for instance, that states the purpose of the Act must be mentioned. Particular attention is paid to the legal status of landowners and private parties sustaining damage, and the impacts of the activities on the environment and land use, and the economic use of natural resources.[90] Section 50 lists the obstacles to granting of a permit in the Sámi Homeland, the Skolt area or a special reindeer herding area. This means that if there is significant harm to Sámi, permit is not allowed. It is also recognized that the decision for a mining permit may be challenged by way of an appeal by the Sámi Parliaments. The grounds for the Sámi Parliament for the right of appeal is that the activity would undermine the rights of the Sámi as an indigenous people to maintain and develop their own language and culture. A new Mining act would protect the Sámi culture, and would ensure that the effects on the Sámi culture are taken into account when assessing the impacts before the issuance of the permit. This Mining act is now in revision, and the proposed new Act is still at the stage of draft at the moment.

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[87] Anaya 2011 Para 82
[88] CERD/C/SWE/CO/18, para. 19; see also CCPR/C/SWE/CO/6, para. 20.

[89] Allard, 2018, p.32
[90] https://www.saamicouncil.net/news-archive/finland-violates-the-rights-of-the-smi-people-by-allowing-mining-companies-in-smi-homeland?fbclid=IwAR3tEa2iUzalCSjsM9mzGyuyYT3uTAU8lUirGorZZm7a1rCxdpwIqhqpjLk

Section 4 of Metsähallitus Act in its Subsection 2 makes reference to the Sámi Homeland has to be mentioned. It states that the management, use and protection of natural resources governed by Metsähallitus should refer to the Sámi Parliament Act and the Reindeer Husbandry Act. It was the first Act to take into account the Akwé: Kon Guidelines into account concerning indigenous peoples.

The Nature Conservation Act also warrants certain rights to the Sámi people in relation to environmental issues. In its section 14, it does not provide special rights to the Sámi people, but it allows in a nature reserve or national parks the possibility to pick berries and mushrooms, to fish, and to practice reindeer herding,[91] with the possibility for the State to restrict the grazing of reindeer. Section 15, in line with the Sámi people's interests, provides permission to fish[92] and to construct buildings or other fixed installations for the purpose of reindeer herding.[93] Section 16's purpose is to secure certain rights by imposing several conditions concerning the maintenance and development of Sámi culture. It shall "be secured in national parks and strict nature reserves located in the Sámi homeland referred to in section 4 of the Act on the Sámi Parliament. When an area is being established, the specific objectives of its protection and, if the area to be established is a national park, the interests of visitors to the area shall be taken into account in an appropriate manner."

Section 49 of the Environmental Protection Act lays down the conditions for granting a environmental permit. Subsection 6 sets out the condition that no activity should cause "substantial deterioration in the conditions under which the Saami people practice their traditional livelihoods in the Saami homeland or otherwise maintain and develop their culture, or substantial deterioration in the living conditions of the Skolt or reduced opportunities to engage in nature-based livelihoods in the Skolt area referred to in the Skolt Act." It has been recommended to Finland by the UN Report of Special Rapporteur on indigenous rights that it should make more efforts to protect Sámi rights in relation to land and resources. Special rights concerning Sámi reindeer husbandry should be implemented.[94]

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[91] the Reindeer Husbandry Act
[92] Section 15.5 of the nature conservation Act
[93] Section 15.6 of the nature conservation Act
[94] Anaya 2011 Para 84

The UN Report of Special Rapporteur specifies that despite the efforts made by the three countries to recognize and implement the land rights, it is not yet in line with Article 14.2 of the ILO Convention No 169.[95]Article 32 of the NSC also affirms that the States should consult the Sámi people on Sámi issues which "relate to the management of natural resources relevant for the Sámi." As a transition with the next chapter, I will use a statement from Anaya's report stating that "when it comes to activities that interfere with their land rights, obtaining the (free, prior and informed) consent of the indigenous landowners should be required."[96]

[95] Anaya 2011 para. 81
[96] Carstens 2016 p.104

3 THE CONSULTATION DUTY AND THE RIGHT TO FREE PRIOR AND INFORMED CONSENT

3.1 The Principle of Free, Prior and Informed Consent

The Free, Prior and Informed Consent principle (FPIC) may be interpreted as an implementation of the right to self-determination of the indigenous peoples.[97]
One of the implications of the right to self-determination, and FPIC is the implementation of the State duty to consult indigenous peoples in decisions that affect them. It supposes the respect of the culture and allows a dialogue between both sides. It aims to strengthen the rights of Sámi people by giving them a voice.[98] It can be seen as an alternative to the total autonomy of the indigenous peoples from the State, and involves the right to self-governance, autonomy, or self-determination.[99] The application of the right to self-determination happens through the FPIC when it comes to the establishment of projects, the extraction of resources, the use of natural resources, and also in the law making when Sámi rights are involved.[100] FPIC can be represented through the economic self-determination encompassing their involvement, and their consent in decisions concerning their lands, and natural resources.[101] It consists of the right of indigenous peoples to make free and informed choices about the development of their lands and resources.[102]

This means that prior to the development of any activities that may have a direct impact on indigenous peoples' interests, they have to be consulted and information on the development project must be fully disclosed. However, Sami people's prior consent is not a mandatory condition precedent to a development project. Putting into practice FPIC means that indigenous peoples have some rights in terms of participation, consultation, or negotiation in the decision-making process. The FPIC would allow indigenous peoples to make their own choices concerning their social, environmental, or cultural development, by having the

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[97] Ward, 2011 p.55

[98] Heinämäki 2016 p.217
[99] United Nations Final Report of the Special Rapporteur, United Nations (2004) p17
[100] Tara Ward, 2011 p.54
[101] International Covenant on Civil and Political Rights

[102] Tara Ward, 2011 p54

opportunity to withhold consent on projects potentially harmful to them, but for the fact that withheld consent does not, in this instance, equate to a veto right.[103] The opposition of indigenous peoples to an activity will not be sufficient to prevent its development. The process of consultation is compulsory, and the opinion of the indigenous peoples needs to be taken into account. However, it not mandatory, for the authorities granting or withholding permits, to comply with such opinion in the final decision.

Depending on the ways FPIC is implemented and applied in each country, it may constitute a consultation process rather than a consent process. The consultation process, if well-handed, can lead to a consensus between the parties. It aims at "avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision- making."[104] FPIC as a process means that there is the will during the consultation to seek consent in good faith and in non-discriminatory manner.[105]

3.2 International Law

3.2.1 Human Rights Law

With the development of FPIC in International Law, indigenous peoples are no longer considered as "objects of protection" but as actors, or even partners of the nation states.[106] Nowadays, a real dialogue has to be established between State and indigenous people. Since the 1970s, the human rights of indigenous people have been more and more recognized and acknowledged by different UN human rights bodies.

The ICCPR was the first international instrument adopted concerning the principle of FPIC. Its Article 1 states the concept of self-determination. It can be linked to Article 27 which is creating the FPIC: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the

[103] Heinämäki 2016 p221
[104] United Nations (2009) Human Rights Committee Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' UN Doc A/HRC/12/34para 49
[105] Cariño, J.,2005, p.24

[106] Heinämäki 2016 p.209

other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." This Article, where the initial purpose was for minority cultures to be allowed to thrive by the State, creates the insurance of indigenous peoples to have special rights to their traditional lands .[107] The States have thus an obligation not to deny those rights and to protect them. It is a positive obligation imposed on the State.[108] The State's positive obligation is to implement legal measures of protection of the rights of indigenous peoples, and measures to ensure the effective participation of members of minority communities when decisions affect them.[109] The Human Rights Committee (HRC) considered that Article 27 encompasses a protection of indigenous people's way of life in line with the defense of their lands and territories.[110] The protection of their way of life may be accomplished through mandatory consent of indigenous peoples during the consultation process according to the HRC[111] and to the Committee on Economic Social and Cultural Rights (CESCR).[112] As already discussed in section 2.1, Article 1 of the ICCPR and Article 1 of the ICESCR also recognize the right to self-determination: "All peoples have the right of self-determination. Under that right they freely determine their political status and freely pursue their economic, social and cultural development." Thus, the proper implementation of the self-determination right to the indigenous people's economic, social and cultural interests leads to their control over their traditional lands. The control over land can arise through the compulsory consent of interested groups to development projects on their lands.[113] Article 15 of the ICESCR recognizes the right for everyone to participate in cultural life. The CESCR concludes that this right refers to the right for indigenous peoples to restitution of their lands and resources that were taken without their FPIC.[114] Therefore, CESCR does admit the existence of collective rights of indigenous peoples over their land,

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[107] Heinämäki 2016 p.212

[108] UN. High Committee. for Human Rights, 1994 para 6.1

[109] UN. High Committee. for Human Rights, 1994 para 7

[110] UN. High Committee. for Human Rights, 1994 para 3.2

[111] UN Human Rights Committee, 2009 para 7.6

[112] U.N. Committee on Economic, Social and Cultural Rights 2007 para 12, and UN Committee CESCR 2004 para 12 and 35

[113] Tara Ward, 2011 p.55

[114] U.N. Committee on the Elimination of Racial Discrimination,,2009 para 36.

and the right to be consulted and to participate in decision making.[115] Their consultation right is encompassed in the right of FPIC according to the Committee on the Elimination of Racial Discrimination (CERD).[116] Like the CESCR, the CERD is calling for the restitution of the lands of indigenous peoples through the retroactive application of the FPIC principle.[117]

The ILO Convention No 169 is of importance for the status of indigenous peoples and their rights, as it refers to the FPIC principle in Articles 6, 7, 15, 16 and 22. The government "shall consult the peoples concerned through appropriate procedures (Article 6.1.a), in particular through their representative institutions; establish means by which these peoples can freely participate to at least the same extent as other sectors of the population (Article 6.1b) and assist these peoples' institutions and initiatives and in appropriate cases provide the resources for these purposes (Article 6.1.c)." In Articles 6, 7 and 15, the purpose is to make sure that the States will consult indigenous peoples when it comes to the development of land and resources.[118] The Committee of Experts on the Application of Conventions and Recommendations (CEACR) calls on the countries to take legislative measures to respect the ILO Convention No 169, and to put in place and facilitate the duty to consult.[119]According to Article 7, indigenous peoples have the "right to decide their own priorities for the process of development and to exercise control, to the extent possible, over their own economic social and cultural development." The ILO 169 also seeks a common understanding of FPIC by proposing mechanisms and procedural steps to be applied by the States. The Convention specifies that "consultation should take place specifically in the following circumstances: When considering legislative or administrative measures that are likely to affect indigenous and tribal peoples[120]; Prior to exploration or exploitation of sub-surface resources; [121] When any consideration is being given to indigenous and tribal peoples' capacity to alienate their lands or to transmit them outside their own

[115] U.N. Committee on the Elimination of Racial Discrimination,, 2009 para 37.
[116] U.N. Committee on the Elimination of Racial Discrimination, 1997 para 4.
[117] Ibid. para 5.
[118] United Nations (2005) An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices PFII/2004/WS.2/8 p4
[119] United Nations (2010) CEACR. Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ecuador, ILO Doc. 062010ECU169; United Nations (2006) CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala, ILO Doc. 062006GTM169

[120] Article 6.1 (a) fo the ILO Convention 169
[121] Article 15.2 of the ILO Convention 169

communities;[122] Prior to relocation, which should take place only with the FPIC of indigenous peoples;[123] On the organization and operation of special vocational training programmes (Article 22).”[124] The issue at stake concerning the Sámi people and the ILO Convention No 169 is that only Norway has ratified it thus far.

The UNDRIP adopted in 2007 is a major cornerstone of the development of the FPIC in international instruments. It recalls the recognition of the right to self-determination (Article 3) but it also refers to the FPIC in the decision-making process. Several Articles mention the FPIC principle. Article 10 in addressing the issue of relocation of indigenous communities, and Article 29 with regards to the disposal of hazardous materials in the lands of indigenous peoples. Both Articles provide for the prohibition of certain activities when they have not obtained FPIC.[125] Two other Articles also refer to FPIC. Article 19 about the obligation to consult and cooperate in good faith in order to obtain the FPIC before adopting legislative or administrative measures. Furthermore, Article 32 is stating the need of FPIC before “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.” The main requirement in those Articles is the principle of good faith throughout the FPIC process. The Declaration on the Rights of Indigenous Peoples, recognizes the FPIC as “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”[126] To be effective, the FPIC should be concerned with matters of importance to indigenous peoples. Then, the relevant priorities should be taken into consideration when applying the FPIC. Furthermore, the FPIC should apply to activities depending on their

[122] Ibid. Article 17
[123] Ibid. Article 16

[124] United Nations (2005) An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices PFII/2004/WS.2/8 p4
[125] Heinämäki, 2017 p240

[126] Article 43 of the UNDRIP

potential impact on nature, on the historical background or on the cumulative effects with that of other activities previously carried out on such territory.[127]

The main subjects of the draft of the NSC are the FPIC, and the duty to consult Sámi people (Article 4). They are interlinked and represent the embodiment of the right to self-determination. The NSC addresses the duty to consult in Articles 17, 18, and19. Article 17 provides that: "the State shall negotiate with the Sámi Parliament when enacting laws, making decisions and taking other actions which may be of particular significance for the Sámi. The negotiations shall be conducted in good faith to reach consensus with the Sámi Parliament or to obtain consent from the Sámi Parliament prior to making a decision. The States shall notify the Sámi Parliaments as soon as possible that they are starting to deal with such matters." Such Article underlines the necessity for indigenous peoples to be part of the decision-making process in all matters that concern them. The State's authorities and Sami Parliament should seek a mutually agreeable compromise through negotiation. As is the case under Finnish law, the NSC does not talk about consultations but about negotiations. The concept of negotiation holds more substantial power as it implies somewhat of an equal footing for all parties involved in the decision-making process. This Article is quite complex, as it does not just encompass the obligation to consult the Sámi Parliament but also the obligation to reach consensus. Thus, the State government's notification to the Sámi Parliament when it comes to decision-making process is not sufficient to achieve the negotiation on measures that affect them. This Article is in line with Articles 19 and 32 of the UNDRIP. They state that consultation needs to be carried out in good faith prior to the adoption of any legislative measure.[128]Article 18 adds that the negotiations may involve other than representatives of the Sámi if the subject matter is of particular significance. Article 19 allows Sámi people to be represented in international contexts that affect them.

What can be learned from International Law is that all these instruments have allowed the creation of customary International Law. FPIC is now a principle of International Law in the

[127] United Nation (2011) Final report of the study on indigenous peoples and the right to participate in decision-making HRC A/HRC/18/42Para 22.

[128] Heinämäki, L., and Cambou, D. C. 2018 p. 10

human rights area and environmental domains.[129] Even if certain countries have not ratified some of the instruments cited (ex: ILO Convention No 169), or even if some of the provisions of those instruments are not legally binding, their very existence has participated to the development of norms that are accepted at the international level.[130] Nowadays, the obligation to consult indigenous peoples when establishing plans or projects is considered an international custom, notwithstanding variations in its national application. However, it never reached the level of a veto-right, except actually in Articles 10 and 29. Other Articles of UNDRIP provide that while the consent of indigenous people needs to be sought, it is not mandatory to obtain it to carry out activities that impact them.[131] However, human rights monitoring bodies have stated that in large-scale impact projects relating to land, the consent of indigenous peoples must be obtained.[132]

3.2.2 Environmental Law

The Convention on Biological Diversity (CBD) is an international instrument signed by 192 parties. It is the first Convention to recognize indigenous rights and the first to provide binding protection of culture heritage. Indigenous peoples are considered in the CBD as special rights holders. Its Article 8(j) states that "Each Contracting Party shall, as far as possible and as appropriate Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices". Such provisions directly protect the traditional knowledge of indigenous peoples in relation to the preservation of the environment.[133] They interlink the conservation of biodiversity with the traditional lifestyle of indigenous peoples. However, even if this Convention is legally

[129] Hughes Layla, 2018 p.15

[130] Ibid. p.15
[131] Heinämäki, L., and Cambou, D. C. 2018 p 11
[132] A/HRC/EMRIP/2018/CRP.1 OHCHR Para 35

[133] Heinämäki 2017 p.258

binding, Article 8(j) is "subject to national legislation." So, even if the CBD offers guidelines, States may adopt different measures with respect to the requirements. It is an obligation that require the States to ensure that a result is achieved by any means.[134] The standards of national legislation relating to cultural heritage or traditional knowledge and how it should be interpreted differ from country to country, including the Nordic States under study herein. In relation to human rights and Environmental Law, Article 10(c) is also relevant. It states that "Each Contracting Party shall, as far as possible and as appropriate protect and encourage customary use of biological resources per traditional cultural practices that are compatible with conservation or sustainable use requirements". It could be interpreted as proposing, thereby protecting their interests. [135] It could lead to co-management systems where governments and indigenous peoples seek a consensus on the use of biological resources. Nevertheless, one of the drawbacks is that a lack of institutional capacity of indigenous peoples often obstructs their participation in law and rule-making. [136]

Another international legal instrument can be of relevance when it comes to the interconnection between the protection of the Sámi rights and the environment which is the Akwé: Kon guidelines[137] from 2004. These are guidelines for the implementation of the CBD. Their purpose is to preserve the traditional knowledge of indigenous peoples in line with the preservation of biodiversity.[138] The first reference to FPIC in those guidelines is stated in Article 8(e). It proposes steps to be taken when carrying out an EIA. One of them is the consideration of the "establishment of a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community." In its chapter V paragraph 52 it expresses that "prior informed consent of the affected indigenous and local communities should also be taken into account when carrying out an impact assessment for a development proposed to take place on, or which is likely to impact on sacred sites and on lands and waters traditionally occupied by

[134] Wolfrum 2011 p.364

[135] U.N. Environment Programme 2009 Para 12
[136] Ibid. Para 16.b

[137] The Akwé: Kon Guidelines

[138] Juntunen and Stolt, 2013 p.21

indigenous and local communities". Here FPIC from the representatives of indigenous peoples is explicitly required when developing an Impact Assessment (IA). The paragraph 53 goes further by asserting that "where the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained. Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information. Modifications to the initial development proposal will require the additional prior informed consent of the affected indigenous and local communities." This paragraph adds that the traditional knowledge of the indigenous peoples should be taken into account during the EIA process. This paragraph covers the participation and consultation of indigenous peoples in land use planning decision-making.

The Bonn Guidelines[139] are also of interest when it comes to FPIC. Those guidelines aim to facilitate the implementation of the CBD with regards to provisions relating to access to genetic resources and benefit-sharing. In its Articles 24 to 40, the Bonn Guidelines assist the parties in establishing a system of FPIC with procedural guidance with reference to Article 15 of the CBD, which requires that access to genetic resources shall be subject to prior, informed consent. It comprises guidance as what are the basic principles of the FPIC system (Article 26), the elements that it may include (Article 27), the procedures (Article 36, 37), and the process to be followed (Article 38 to 40).

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD was established in 2010. The purpose of this Protocol is to promote the use of genetic resources in relation to traditional knowledge. It enhances the protection of the cultural heritage of indigenous peoples. It expresses that conservation of biological diversity and traditional knowledge is essential and leads to the recognition of the right to fair and equitable sharing of the benefits.[140] The concept of FPIC

[139] Bonn Guidelines

[140] Article 5.2 of the Nagoya Protocol on Access and Benefit-sharing

is included in the Nagoya Protocol. It recognizes that States must take measures to ensure that access to genetic resources must be subject to the FPIC of indigenous peoples.[141] The Nagoya Protocol is thus more referring to the FPIC as it repeatedly uses the "prior and informed consent or approval and involvement."[142] It is important in the Nagoya Protocol that indigenous peoples be involved, consent to, or approve the use of genetic resources. Indigenous peoples' FPIC is thus placed at the heart of indigenous peoples' protection. The interpretation of the Nagoya Protocol, however, varies from country to country in the national implementation of those normative directives.[143] Article 6.3.f calls to contracting parties to set out criteria for imposing mandatory FPIC. It seeks the involvement of indigenous peoples but with the use of expression such as "as appropriate," "where applicable," and "subject to national legislation." It leaves a lot of room for States to limit their application of FPIC,[144] which tends to defeat the purpose.[145]

Moreover, the Nagoya Protocol requires that States "take into account indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources."[146] Article 12.2 also states that the countries should establish "full and effective participation". This is not sufficient regarding International Law, as the protocol prefers to use the term "involvement" rather than participation in several Articles such as 6, 7, 11, 13,16, 23 and 26. The purpose of those documents in International Environmental Law instruments is to advise on the uniform interpretation and implementation of FPIC in the States parties but their effect is somewhat limited as their provisions are not binding on their signatories.

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[141] Article 6.2 of the Nagoya Protocol on Access and Benefit-sharing

[142] Human Rights Expert Mechanism on the Rights of Indigenous Peoples Nagoya Protocol,Fourth session, Geneva11-15 July 2011 Para 103

[143] Heinämäki 2017 p 259

[144] Human Rights Expert Mechanism on the Rights of Indigenous Peoples Nagoya Protocol,Fourth session, Geneva11-15 July 2011 Para 141

[145] Ibid. para.140

[146] Article 12 of the Nagoya protocol on Acces and Benefit-sharing

4 THE LEGAL DUTY TO CONSULT IN THE THREE NORDIC COUNTRIES

The right of self-determination necessarily involves the consultation and the participation of the Sámi in all decisions that have an impact on them. Such consultation is essential to establish a dialogue between the government, and the Sámi people. It is done through the Sámi Parliament that represents the interests of its people. However, the definition of what consultation is can differ as well as the level of Sámi's participation depending on the country. The national law of each Nordic States offers opportunities for the Sámi to participate in the decision-making process without an EIA procedure, by including the duty to consult Sámi people in the legal system.

4.1 Description of the Legal Duty of Consultation of the Sámi People in the Nordic Countries

4.1.1 Consultation with Sámi People under Norwegian Law

In Norway, there have been many changes with regards to the Sámi rights since the 1980s.[147] The Alta Case in Norway of 1978 was the first time the Sámi could negotiate in relation to the development of a project affecting them.[148] In 1987, the Sámi Parliament was established.[149] It has for objective to represent the interests of the Sámi people. The Constitution from 1814 integrated a new Sámi clause in 1988 in the section 108 for the preservation and the development of their language, culture, and way of life. It is not until 2005, that an agreement between the Sámi Parliament and the government concerning the consultation of Sámi was reached.[150] The development of Norwegian law concerning Sámi rights is based on adopted legislation, and also on case law from the Supreme Court of Norway.[151] However, concerning the consultation of the Sámi people, there is no legislation

[147]Allard 2017 p.311

[148] Svensson, 2002, p.8
[149] Allard, 2018, p.28.

[150]Allard, 2017 p.311
[151] Ibid.

imposing the duty to consult on the State. Nevertheless, the rights of participation are stated in consultation agreements between the State government and the Sámi Parliament (Samediggi).

The Consultation Agreements

The Norwegian government and the Samediggi have drafted and executed consultation agreements. The enactment of those agreements has emerged from the ratification of the ILO Convention No 169 in 1990 and the political will to implement it in Norway. Those consultation agreements are the consequence of such implementation of Norwegian's international obligations into national law.[152] Norway has applied the provisions of Article 6.1 of the ILO Convention No 169 on the consultation rights with regards to the enactment of the agreements. The first consultation agreement was created because the Finnmark Act was negotiated at the same time. There was a need in Norway for specific legislation relating to indigenous rights, and the State duty to consult the Sámi.[153] In 2005, the Consultation Agreements, otherwise known as Procedures for consultations between State authorities and the Sámi Parliament, were signed.[154] This instrument include nine sections. The scope of those agreements encompass the consultation on "all material and immaterial forms of Sámi culture."[155] Yet, the consultation is done between the Norwegian Government and the Sámi Parliament,[156] and is limited to traditional Sámi areas.[157] Specific Sámi entities other than the Sámi Parliament may nevertheless be consulted when their interests are directly affected by the measures at stake.[158] Although, the fact that the Samediggi, rather than the people directly concerned, is consulted to represent Sámi's interests[159] may not always be sufficient where specific Sámi organizations are involved. This document is the cornerstone of the consultation from the State towards the Sámi in Norway. It is the basis for several

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[152] Section 1 of the Procedures for consultations between state authorities and the Sámi Parliament
[153] Oyvind, 2014, p.244

[154] https://www.regjeringen.no/en/ topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/

[155] Section 2 of the Procedures for consultations between state authorities and the Sámi Parliament
[156]Ibid. Section 6
[157] Ibid. Section 2
[158]Ibid. Section 9
[159] Article 6.1.a of the ILO Convention 169

sectoral legislation such as the Mineral Act, the Reindeer Husbandry Act, the Nature Diversity Act, the Finnmark Act, the Planning and Building Act.[160]

The second consultation agreement was enacted in 2007, and is called the Consultation agreement on Conservation. This one is more specific than the initial one. It focuses on consultation with regards to the nature conservation areas in the traditional Sámi areas,[161] and the plan processes. In relation to consultation concerning nature conservation plan processes and protected areas, the Nature Diversity Act (as mentioned in the chapter 3.2.2) imposes a duty on the Norwegian government to consult the Sámi people. Section 43 sets out that "the proposal shall be submitted to the municipal authorities, the county authorities and central government agencies concerned for comment, and to the Sámi Parliament if the protection proposal affects Sámi interests." One of the issues at stake when it comes to the implementation of the ILO Convention No 169 in Norway is that there is no legislation on the consultation's duty from the State. Even if the Consultation Agreement has increased the Samediggi's decision-making powers, it is not a legislative Act and therefore is unenforceable.[162] In addition, there is no section in the Agreements on the violation of the consultation duty or potential consequences.

The Finnmark *Act*

As already mentioned above, negotiations on the Finnmark Act were carried out between 2004 and 2005. They resulted in the adoption of the Finnmark Act in 2005. Such Act establishes a new management system for land and natural resources in part of the Norwegian territory. It comprises the north of the country, which is considered as a Sámi area of importance and is known as the Finnmark Estate.[163] There are several purposes to the Finnmark Act. First, it facilitates the management of land and natural resources in this Estate, and it recognizes the ownership of this region which is privately owned. The owner of the land is a regional body. It is composed of six board members, which three of them are

[160] Oyvind, 2014, p.245
[161] Allard, 2018, p.28.
[162] Allard 2017 p.328
[163] Allard, 2018, p.29

appointed by the Sámi Parliament.[164] The will of the Finnmark Act is also to include participation on all the decisions concerning the Sámi on every project or plan.[165] However, the Article 14 of the ILO Convention No 169 needed to be implemented in the Act, with the recognition of the rights of ownership. At the beginning, the government did not seem to see it as essential for the enactment of the Act. However, section 5 was included in the Finnmark Act with the recognition of collective and individual rights to land in Finnmark. It represents the direct incorporation of the Article 14 of the ILO convention No 169 into Norwegian National Law. This Act also allows the creation of two different bodies to ensure that the law is correctly applied and that the traditional Sámi lands are well protected. Those bodies are the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark.[166] The function of those bodies is to consider the disputes concerning who has acquired the ownership rights and the use of the lands.[167] The implementation of the requirements from the ILO Convention No 169 with the addition of bodies to take care of the indigenous rights is in line with the ambition to allow more participation from the Sámi people when it comes to participation in decisions based on their lands. In the Finnmark Estate, the government has been taken out of hands the decision-making power to let it to these bodies.[168]However what needs to be remembered is that the investigation of the Finnmark Commission seems superficial when evaluating the ownership over traditional lands of the Sámi people.[169] With two bodies ensuring the protection of the rights of the Sámi people on their land, their interests, in theory would be better protected. Though, the issue at stake with the Finnmark Act and those bodies is that they defend the ownership rights of the Sámi people and the residents.[170] It is not the interest of indigenous peoples which is taken into account but the interest of the inhabitants.

In comparison with the Finland and Sweden, the recognition of the Sámi people rights to land and resources has taken more into account their voice in the participation process. Even

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[164] Section 7 of the Finnmark Act

[165] Øyvind, 2014, p.310
[166] Section 36 of the Finnmark Act
[167] Section 36 of the Finnmark Act
[168] Øyvind, 2014, p.310
[169] Ibid p 328
[170] Ibid p 311

if the enactment of the Finnmark Act is a real progress when it comes to the recognition of their rights, in practice the impact on their rights is shaded.

4.1.2 Consultation with Sámi *People in Swedish Law*

In comparison with Finland and Norway, in Sweden the right for Sámi to be consulted is recognized only in sectoral legislation. The fact that their rights are only protected in sectoral legislation could be seen as insufficient. The main issue facing this fragmentation of legislation concerning the consultation of the Sámi is that it does not encompass the cumulative effects of a plan or a project in relation with other projects. There is not a homogenous or an explicit consultation duty at the Swedish State level.

Forestry

The consultation concerning forestry can be a real dilemma as both the forest companies and the Sámi people (at a larger extend the reindeer herders) are using the land. The Sámi people have immemorial rights on the use of the land; however, the land owner is private and is often the forest company.[171] In the sector of forestry, there is no environmental impact assessment procedure. Even so, compared to other areas of law there are special provisions on the consultation of the Sámi people.

In the section 20 of the Forest Act: "before felling takes place in an area where reindeer husbandry is permitted throughout the entire year (year-round grazing areas) in accordance with the Reindeer Husbandry Act, the Sámi village concerned shall be given the opportunity to participate in joint consultations, as stipulated in regulations issued by the Government, or public authority designated by the Government." Here, there is a duty for the owners of the property to consult the Sámi villages in areas used for reindeer husbandry. The consultation of the Sámi people is stated as an obligation in the Forest Act, yet it is limited to the reindeer grazing areas. In Sweden, contrary to Finland, reindeer herding is an exclusive right to the Sámi people. It is allowed in a special area in the north of Sweden.[172] In fact,

[171] Widmark, 2019, p.339–349.

[172] Larsen and Raitio, 2019, p.10.

logging can be carried out without any permission required, but the Swedish Forest Agency receives a notification of it. The consultation from the property owner will be required only if the logging is located in an area used for reindeer husbandry all year long.[173] The owner will have to notify the county forestry board on "how it is intended to satisfy nature conservation and cultural heritage preservation interests in connection with the planned felling."[174] The consultation will concern the logging and the management measures of the forest depending on the size of the area. Actually, in small areas the consultation is not compulsory. Those small areas are forest areas less than 500-hectare productive forest land and where the logging area is less than 20 hectares, or 10 hectares in forests close to a mountain. Anyway, in the rest of the larger year-round-areas there is a need to consult the Sámi villages.[175] There are thus several conditions to be fulfilled to require the consultation of Sámi people. It must concern a large forest company in an area where reindeer husbandry is permitted. Several conditions applying to reindeer herding interests are listed in section 21: "When applying for felling permission pursuant to section 16 above, the forest owner shall describe planned measures to satisfy reindeer husbandry interests. In year-round grazing areas, felling is not permitted, if it:
(i) causes such a significant loss of reindeer grazing land that the possibility to maintain the permitted number of reindeer is limited; or (ii) precludes the customary grouping and migration of reindeer herds.
When felling permission is granted, the Regional Forestry Board shall decide what consideration shall be taken to reindeer husbandry interests as regards, inter alia, the size and location of the felling site, and permissible felling method.
These conditions may only apply to what is clearly required with regards to the rights applicable to reindeer husbandry." An obligation of information is also required from the developer of the project to the Sámi people in the section 31 of the Forest Act: "Forest management measures which concern the form and size of felling areas, the establishment of new stands, the retention of tree groups, and the routing of forest roads, are to take account of essential reindeer husbandry requirements. When planning and implementing forest management measures, it is desirable that the Sámi village concerned be given annual access

[173] Allard, 2006, p.476
[174] Section 14 of the Forestry Act

[175] Section 20 of the Forestry Act

to both a sufficiently large and cohesive grazing area, and an ample amount of vegetation in those areas used for reindeer corralling, migration and resting."

Furthermore, the Forest Stewardship Council (FSC) has developed indigenous rights in relation with forestry, and the consultation of Sámi people when they are affected by forestry activities.[176] These guidelines have developed a participatory planning for reindeer herding and forest management activities.[177] The purpose of this participatory planning is to develop a dialogue between both parties where the proposed management activities, the Sámi village's opinions, and the need for considerations for each activity are methodically reviewed. If a proposed management activity has a negative impact on the grazing conditions in the area, the parties shall jointly develop measures that can reduce the negative impact and that can allow the management activity to be carried out. One of the drawbacks of this legislative Act could be that all the aspects of the Sámi people's culture are not integrated in the consultation of forestry projects. As stated before, Section 20 requires consultation for forestry activities just in reindeer-herding areas. However, as stated in the Chapter 12 Section 6 of the Environmental Code the activities and measures that "may damage the natural environment" should lead to the consultation from the supervisory authority. There are different activities that lead to the consultation such as the construction of forest roads, the cut of habitats, the fertilization of forests, etc.[178] Nevertheless, Sámi villages are consulted only if those measures happen on a year-round-reindeer husbandry area.

Consultation in the Mineral Act

The Mineral Act from 1991 has different consultation procedures depending on the need for an EIA or not. When there are significant impacts on the environment and a need for an EIA, the Mineral Act is referring to the chapter 6 of the Environmental Code on the duty to consult.[179] Before there is any exploration with significant impacts on the environment, the

[176] the FSC National Forest Stewardship Standard of Sweden 3

[177] the FSC National Forest Stewardship Standard of Sweden 3.2.3

[178] Wallin, 2017, p.48

[179] Mineral Act ch. 8 s. 1

developer needs to consult the County Administrative Board.[180] However, when there is no EIA, for the issuance of an exploration permit in the Mineral Act, there are no specific consultation of stakeholders or of the Sámi people. In relation to chapter 8 section 1 of the EC, The Chief Mining Inspector may determine the application for the granting of an exploration permit. There is the opportunity for the applicants to express their opinions, but without the possibility for any concerned party to express their own. The developer does not need to consult the affected public. The only duty for the developer since the amendments in 2014 of the Mineral Act is to inform the affected stakeholders. This duty is imposed on the developer because the plan of operations shall contain "an assessment regarding how the scope of the work is estimated to affect public interests and private rights."[181] Accordingly, when a reindeer herding community is affected by a certain project, they must be informed of the plan.[182] The Sámi people are considered as all the other stakeholders and they have no special rights.[183] In the mineral legislation, the Sámi have no influence on the projects, which let the reindeer herding communities aside from the decisions-making process, with no real possibility to defend their interests and their culture.

Suggestions for Improvement

There are several ways of improving the Sámi people's consultation process in Sweden. On the one hand, one of the tracks to enhance the legislation concerning consultation would be the amendment of sectoral legislation such as the Mineral Act, the Forestry Act, the Reindeer Husbandry Act, or the Environmental Code. These amendments would encompass the duty from the State toward the Sámi people to consult them when developing activities that can affect them.[184] On the other hand, another way would be to adopt a new bill on the consultation duty from the State toward the Sámi people. This path seems as the most suitable as different proposals, one from 2009 and one from 2017, were made to allow a special consultation duty when it comes to the Sámi. The purpose of those bills would be to

[180] Environmental Code Ch. 12 S. 6
[181] Mineral Act C.3 S.5-5 d

[182] Ibid.
[183] Allard, 2018, p.35
[184] Larsen, and Raitio, 2019, p.9

shed light on the way State agencies should achieve those duties. However, the one from 2009 was rejected because of heavy critics from the Sámi Parliament and legal scholars.[185] A second bill was proposed in September 2017 to answer the international critics about the lack of State's duty to consult the indigenous peoples such as from the United Nations Committee on the Elimination of Racial Discrimination[186] or the Council of Europe.[187] According to them, the enactment of a new Bill would allow Sweden to meet its international obligations.[188] This bill would fill the gap of the sectoral legislation that does not emphasize the duty to consult the Sámi.

However, the duty to consult from the State is already rooted in minority law in the Act on National Minorities and Minority Language from 2009. The section 5 of this legislative Act states that "Administrative authorities shall give the national minorities the possibility of influencing questions that affect them and consult, as far as possible, with the minorities in such questions."[189] The issue at stake is that the obligation to be taken into account is not given consideration when it applies to sectoral legislation. The enactment of a bill based on this duty would make compulsory the consultation of the Sámi people. However, it was differently accepted by distinct actors. The Sámi organizations, or indigenous rights lawyers rejected it because of the lack of influence given to the Sámi people during the consultation, while corporations and organizations found that it was giving more voice to the Sámi interests.[190] The HRC recommended to Sweden to take measures concerning the review of existing legislations, policies and practices to regulate the activities that can have an impact on Sámi people's rights to ensure meaningful consultation.[191] At a larger extend it would be the first legislation to be in line with international obligations concerning the Sámi people in

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[185] Allard, 2018, p.32

[186] United Nations (2008) CERD, Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden para16-17

[187] Resolution CM/Res (2018)9

[188] Larsen, and Raitio, 2019, p.6

[189] Act on National Minorities and Minority Languages (2009)

[190] Larsen, and Raitio, 2019, p.6

[191] U.N Human Rights Committee 2016 para 39.c.

Sweden.[192] The enactment of the Bill would also serve Sweden in the compliance of the Nordic Sámi Convention.

4.1.3 Consultation with Sámi people in Finnish law

The Constitution of Finland mentions the Sámi people. Section 17.3 states that: "the Sámi, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sámi to use the Sámi language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act." In the Constitution, there is the recognition of the Sámi people as an indigenous people, with linguistic and self-government. However, there is no track of a duty to consult them. Article 17.3 is connected to Article 121.4 which declares that "Provisions on self-government in administrative areas larger than a municipality are laid down by an Act. In their native region, the Sámi have linguistic and cultural self-government, as provided by an Act." This Section makes a reference to the self-government of the Sámi people and mentions the Sámi Parliament Act.[193] By referring to the Sámi Act, this means that the Sámi Act is based on the Constitution. Indirectly the statement of the Sámi Act on the State's duty to negotiate is a constitutional right. The obligation to negotiate can be found in a central piece of legislation contrary to Sweden with regards to the Sámi's cultural autonomy, which could be qualified as a constitutional right.

In the Section 9 of the Sámi Parliament Act, the obligation to negotiate is asserted. The word negotiate has been used instead of consult, or cooperate. The obligation to negotiate could be seen as a way of implementing FPIC, but it is not sufficient for the rights to be in line with international instruments. The section 9 states that "the authorities shall negotiate with the Sámi Parliament in all far reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people. It shall provide the Sámi Parliament with the opportunity to be heard and discuss matters." These terms both refer to collective decision-making processes, but each refers to different situations, objectives and

[192] Larsen R.K. and Raitio K. 2019 p.6
[193] Sámi Parliament Act 1995

processes. Nevertheless, the main difference between the two notions of consultation and negotiation is that negotiation in the way it is formulated in the Sámi Act is strengthening the influence of indigenous peoples in decision-making. When defining those two notions, negotiation refers to a situation where the actors of it seek through discussion to put an end to a dispute, a conflict of interest, or even an open conflict, by developing a solution acceptable to all. Unlike consultation, conflict is at the source of negotiation and the power of the actors is an integral part of the process involved in the elaboration of a solution.[194] The objective of consultation is to gather, prior to a collective decision, the opinions, views and attitudes of a certain number of stakeholders. It is therefore a procedure that is put in place before the adoption of a project for which a provisional draft already exists or is being prepared.[195] The consultation can be in the range of providing information on decisions that are made, whereas the negotiation will happen before any decision is taken.[196] Thus, negotiation could be seen as a stronger term than consultation, but in practice the negotiation refers to "an opportunity to be heard and discuss matters." The section 9 recognizes the duty to consult the Sámi people in decisions affecting their culture, but sets several limitations to it. First, the consultation of the Sámi people is not based on the negotiation with local Sámi people who are affected by the measures or the projects at stake, but only with the Sámi Parliament. This is stated in the section 9 and also in the section 6 on Sámi representation: "In matters pertaining to its tasks, the Sámi Parliament shall represent the Sámi in national and international connections." The interested groups cannot directly be consulted but it needs to be done through the Sámi Parliament. As Christina Allard is stating, this could be due to the fact that there is in Finland no exclusiveness of reindeer herding rights on the part of the Sámi people.[197] As this right can be "practiced in the reindeer herding area irrespective of land ownership or possession rights,"[198] the Sámi Parliament has the responsibility to defend the interests of the Sámi reindeer herders. However, the representation of interested groups by the Sámi Parliament also has its limits, as its powers are geographically limited to a small area of Finland. The "consultation obligation" Section 53 of the Reindeer Husbandry

[194] Touzard, 2010, p.10
[195] Ibid. p.10
[196] Cepinskyte 2018 p.6

[197] Allard, 2018, p.32
[198] Reindeer Husbandry Act s.3

Act[199] establishes that "when planning measures concerning State land that will have a substantial effect on the practice of reindeer herding, the State authorities must consult the representatives of the reindeer herding co-operative in question."

Another restriction on the consultation of the Sámi Parliament appears in the Mining Act of Finland. Its section 38 enunciates that "in the Sami Homeland, the permit authority shall in co-operation with the Sami Parliament, the local reindeer owners' associations, the authority or institution responsible for management of the area, and the applicant – establish the impacts caused by activity in accordance with the exploration permit, mining permit, or gold panning permit on the rights of the Sami as an indigenous people to maintain and develop their own language and culture and shall consider measures required for decreasing and preventing damage." Impacts have to be assessed together with those mentioned groups. Additionally, in mining issues, the section 9 of Sámi Parliament Act applies, so the Sámi Parliament is always consulted in the Sami homeland area. With regards to Section 38, the consultation depends on the area. In the Skolt area the consultation is done with a Skolt village,[200] or in special reindeer herding area the "permit authority shall in co-operation with the local reindeer owners' associations assess the damage caused to reindeer herding." There is a differentiation in the stakeholders to consult, based on the area of the mining area. In the Skolt area a village meeting of the Skolt people will be held. Skolt area is within Sámi homeland area so Sámi Parliament is consulted additionally to Skolt Sámi. In a special reindeer herding area the appropriate local reindeer owners' associations are consulted if they want.[201] Authorities must, together with Sámi Parliament and other mentioned groups assess the impacts of the mining. This is why all these groups need to be consulted to get their views.[202]

Another limitation to the State's obligation to consult the Sámi people is that the consultation from the State concerns certain matters according to section 9 of the Sámi Act. Measures concerning community planning, land management and protected areas, exploration,

[199] Reindeer Husbandry Act (848/1990; amendments up to 54/2000 included)
[200] Mining Act s.38
[201] Mining Act S. 27, 38 and 146

[202] Mining Act s.38

extraction of minerals on state owned lands, amendments in legislation or public policy related to Sámi livelihoods and Sámi education, social and health care, any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people can be the object of consultation.[203] The negotiation's obligations from the "Authorities" which refer to the Ministries and State Authorities responsible for administration tasks[204] are in fact geographically limited. In the Sámi Parliament Act, the obligation to negotiate is limited to matters in the Sámi Homeland. The Sámi homeland delimitation is stated in section 4 and includes "the municipalities of Enontekiö, Inari and Utsjoki, as well as the area of the reindeer owners' association of Lapland in Sodankylä." This area encompasses just a limited area in the northernmost Finland, and represents only 10% of the Finnish territory.[205] The consultation is limited to a geographic area and thus does not include the consultation of the Sámi people's major part who are outside the old borders in the southern region.[206]The legislation concerning the consultation duty in Finland is restricted to certain areas and to the homeland of Sámi people. Therefore, the legislation of Finland is geographically more restrictive than the one of Norway and Sweden. However, the Sámi have the strongest statutory rights as the government has an obligation to negotiate in comparison with Norway or Sweden.[207]

There is also a will from the government to reform the Sámi Parliament Act. In 2013-2014 the renewal of the Sámi Act by the ministry of Justice was on the agenda of the Finnish government.[208] In 2017 the Ministry of Justice designated a Committee for the Act to be reviewed. This Committee has been developing from 2017 to 2018 a reform proposal for Sections 3 and 9. However, the Sámi Parliament rejected the proposal because it considered that the government did not fulfil its duty to consult the Sámi people.[209]

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[203] Sámi Parliament Act s.9

[204] Allard, 2018, p.32

[205]Ibid. p.32

[206] Joona, 2015, p.165–66.
[207] Josefsen 2010 p.7
[208]Joona, 2015, p.155
[209] Cepinskyte, 2018, p.6.

In May 2021, a new proposed government bill was made by the government with a renewal of Section 9. The purpose of improving Section 9 of the Sámi Act is to allow the Sámi Parliament to influence the decision-making process when it concerns Sámi's interests in an effective way.[210]The proposed section 9 is more precise than the previous one concerning the measures to which the duty to consult applies to. It includes the authorities' tasks for the good conduct of its duty (section 9 a), and the procedure for cooperation and negotiation (section 9 b). The extension of the duty to negotiate with the Sámi people outside Sámi homeland has also been improved. As in Finland 10 percent of the territory is Sámi homeland, nowadays when there is a duty to negotiate with the Sámi people, it only applies to the specific designated Sámi areas drawn by the State authorities. The duty to consult expands to matters concerning land use which is still not the case in Finland. Rather than just stating the obligation to negotiate with the Sámi people on issues of matter to them, the section 9.a also announces the obligation to take the Sámi into account in the activities of the authorities. I could make a link between the statements of section 9.a.1 and Article 27 of ICCPR where both protect the culture and the livelihood of indigenous peoples. The current section 9.2 would be replaced by the section 9.b, which would be more accurate on the procedures for cooperation and negotiation with the Sámi Parliament. Instead of just stating the obligation for the Sámi Parliament to be heard, it includes the obligation to notify in good time, to obtain a written account of the matter, and to prepare for negotiations within a reasonable time. It does not oblige negotiation with the Sámi Parliament, but also at which moment of the decision-making process those obligations apply by insisting on the timely manner. If these proposals become accepted, it would be a significant improvement related to the consultation rights in Finland and also self-determination.

4.2 Examples of Consultation Duty of the Nordic Countries towards Free, Prior and Informed Consent

4.2.1 Finland

In Finland the CBD requirements from Article 8(j) are integrated in the legislation with the application of the Akwé: Kon guidelines. It can be seen as the implementation of the Article

[210] ACFC/OP/V(2019)001 p.26 para 175

8(j) of the Convention. The purpose of the implementation of the guidelines in Finland is to integrate Sámi people in the EIA procedure and defend the interests of the Sámi Homeland which can affect the Sámi culture.[211] The application of it has been developed in the Land Use and Management Plan of Hammastunturi Wilderness Area,[212] and is now considered as a planning tool of the Finnish forest administration Metsahallitus in the Land Use planning of the Sámi homeland situated in the northern part of Finland.[213] This plan describes the status of the area (including the municipalities of Inari, Sodankyla, and Kittila). Their status rest on values such as natural or cultural ones, and in identifying what are the threats to those values, and are then dispatched into zones.

By applying the Guidelines to Land Use planning, the situation of Finland is unique in the world.[214] The purpose of the Guidelines is also for each country to legislate in different ways, by interpreting the Guidelines and adapt it to the country' situation. The implementation of those guidelines includes the integration of traditional and local knowledge. Akwé: Kon Guidelines have so far been only used by Metsähallitus not for EIA and land use planning. The Sámi Parliament has proposed that it could be used for those two as well. They are used in wilderness and nature park planning as well as planning concerning natural resources (where logging is happening).[215] The consultation of the Sámi people happens at different moments of the EIA. The Akwé: Kon Guidelines were requiring participation at all stages of the decision-making process. During all the process, the procedure followed by the ministries are approved or not by the Sámi with regards to aspects concerning environmental, cultural, or social domains. Before the implementation of the Akwé: Kon Guidelines the Sámi Parliament was consulted after the plan was established.[216] Now the Sámi Parliament appoints an Akwé: Kon working group at the beginning of the process. This Group is charged to represent the people, their interests, and assess the impacts of the project on the Sámi culture. The Akwé: Kon Group has for mission to coordinate the traditional knowledge of the Sámi people, and to promote the cooperation between the representatives of the Sámi

[211] Markkula et al, 2019, p.1

[212] Ibid. p.2
[213] Ibid. p.2
[214] Juntunen and Skolt, 2013, p.25
[215] Markkula et al, 2019, p.2
[216] Markkula 2019, p.27

and the ministries. Its purpose is to enhance the implementation of the CBD in Finland.[217] The Akwé: Kon Group is totally involved in the decision-making process, and are holders of traditional knowledge. By its involvement, the different tasks of the working group are to drew up baseline reports on the Sámi resources and customary use, and on the importance of the area to the Sámi. When it comes to the plan, there are two zones, the tourism zone and the remote one. The working group is consulted on the division of the zone. The remote zone is the one of importance for the Sámi, and the group's purpose is thus to search the values and culture of the Sámi and in which way it is in line with the plan. Contrary to Finland, Norway and Sweden did not integrated the Akwé: Kon Guidelines in their national legislation.

The implementation of the FPIC in Finland, is also in majority due to the UNDRIP application. Finland is using Article 32 and 19 of the UNDRIP as a basis of the FPIC.[218] Furthermore, national legislation in Finland has also strengthen the FPIC with the new Mining Act from 2011.[219] In its section 38 it is stated the "procedure to be applied in the Sámi Homeland Skolt area and special reindeer herding area". It recognizes the Sámi as indigenous people.

4.2.2 Norway

The FPIC's implementation in Norway was mainly done through the enactment of two consultation agreements, the basic Consultation Agreement, and the Consultation Agreement on Nature Conservation. It is the translation in national law of several international legal instruments such as Articles 6, 7 and 15 of the ILO Convention No 169, and Article 27 of the ICCPR in Norway. The implementation of the principle of FPIC in those instruments has allowed consultation with the Sámi Parliament concerning different legislative Acts such as the Reindeer Act 2007, the Plan and Building Act 2008, and the Nature Diversity Act 2009.[220]

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[217] Juntunen and Stolt, 2013 p.21

[218] Heinämäki 2015 p200

[219] Koivurova T. and Petrétei A., 2014 p.53

[220] Allard 2017 p.328

Actually, when having a look at the Nature Diversity Act (NDA), its main purpose is to implement Articles 8(j) and 10(c) of the CBD.[221] This Act is based on the protection of nature, and allows consultation with the Sámi Parliament. The measures concerned by the need for consultation are on the protection of an area,[222] and on the management of it.[223] The preservation of the Sámi culture is of great importance in this Act. Section 1 gives the purpose of this Act. Its aim is to provide "a basis for human activity, culture, health and well-being, now and in the future, including a basis for Sámi culture." The Section 8.2 of the Nature Diversity Act states that "the authorities shall attach importance to knowledge that is based on many generations of experience acquired through the use of and interaction with the natural environment, including traditional Sámi use, and that can promote the conservation and sustainable use of biological, geological and landscape diversity." A reference is also made to the Sámi people in the section 14 of the NDA: "When decisions are made under the Act that directly affect Sámi interests, due importance shall be attached, within the framework that applies for the individual provision, to the natural resource base for Sámi culture." This Section states the importance of taking into account the public interest in the decision making, and the Sámi people interest in decision when it affects their culture. This participates in the protection of the Sámi people's natural resources which is essential to their lifestyle. In this Section, we could see a reference to the Article 27 of the ICCPR.[224] It stresses the right for indigenous peoples to enjoy their own culture. The translation of the enjoyment of the Sámi people's culture is done through the section 14 by consulting them in the decision-making process. The FPIC of the Sámi people in this Act is done through negotiation during the decision making with the possibility of creating national parks[225], protected landscapes[226] and nature reserves.[227]

[221] Allard 2017 p.331
[222] The nature diversity act s.43
[223] The nature diversity act s.47
[224] Allard 2017 p.331
[225] Nature diversity act s.35
[226] nature diverstiy act s.36
[227] Nature diversity act s.37

4.2.3 Sweden

With regards to the Swedish Law and the implementation of international standards to protect and respect Sámi rights, we can find that the recognition of it is quite low. Sweden has just incorporated the European Convention on Human Rights, and the UNDRIP but they are not legally binding. Furthermore, Sweden is not a party to the ILO Convention No 169, and did not incorporated the ICCPR into national law.[228]However, the international standard that speak the most to Sweden would be Article 27 of the ICCPR: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." By securing the right to enjoy their own culture, the consequences of this encompass the consultation of the Sámi people and setting up of legislative measures to protect their rights.[229]

In Sweden, since 2010, in the Swedish Constitution is stating special requirements concerning the Sámi people.[230] The Chapter 1 Section 2 is defending "the opportunities of the Sámi people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted." With this amendment, the Sámi people are not anymore considered only as an ethnic minority but as an indigenous people.[231] The interpretation of this sentence from the Constitution could lead to the implicit recognition of a duty to consult the Sámi people. The preservation of their cultural and social life could also be done through the conservation of the traditional lands and the natural resources. Since the development of the idea that traditional land is considered as a part of the culture, the preservation of the culture is done through the preservation of the Sámi homeland. To preserve the lands, and thus the culture, the participation of the Sámi people in the decision-making process is necessary. The duty to consult the Sámi in environmental matters could be encompassed in the requirement from the Constitution. However, even if the duty to consult is implicitly required by the Constitution it does not exist yet a special

[228] Raitio, 2020 p.5
[229] Raitio, 2020 p.5

[230] Constitution act ch.1 s.2
[231] Raitio, 2020 p.5

piece of legislation for the duty to consult the Sámi people as in Finland, or any consultation agreement like Norway.[232]The only general document in Sweden which encompasses the right of consultation the Sámi people is the Act on National Minorities and Minority Language 2009. Yet, it is not even considered as consultation, as the concept of "samråd" is rather based on consultation, rather than finding a consensus.[233] The Section 5 imposes the samråd with national minorities where the public authorities shall "give the national minorities opportunity to influence matters that concerns them, and, as far as appropriate, consul with representatives for the minorities in such matters". Though, there no specific reference to the Sámi people.

[232] Allard 2018, p.32

[233] Allard Actualizing Sámi Rights: International Comparative Research Publications of the Government´s analysis, assessment and research activities 4/2017 p 351

5 ENVIRONMENTAL IMPACT ASSESSMENT LAWS IN THE NORDIC COUNTRIES

5.1 General Principles and Social Impact Assessment

In the best case, the IA process can enhance the self-determination of indigenous peoples. It allows the recognition of their group rights. The active participation of the indigenous peoples during the decision-making ensures them opportunities to influence the outcome of the decision. The IA allows the identification and the prevention of impacts from the exploitation of natural resource.[234] It is a process evaluating the impacts of a plan or a project. It examines the alternatives of the project and find solutions to mitigate the negative impacts of it.[235] In the Nordic countries, when it comes to the development of a project, the evaluation of the impact level is in majority based on the environmental criterion, rather than the social or community one.[236] It is called the Environmental Impact Assessment (EIA). However, the social or community-based impact assessment could be integrated in the EIA process,[237] but it is not always required in the EIA. The purpose of the conduct of an EIA, is among other things to allow the public to participate on the benefits and drawbacks of the project.[238] In this thesis, I will analyze how the local communities of indigenous peoples can be involved in the EIA process and can prevent the risks of the proposed project on the environment.[239] By integrating indigenous peoples in the impact assessment process, their participation can represent their interest. It is nowadays seen more as a privilege than a right, and is often leading to conflicts of interests.[240] As said before, the international instruments are now recognizing rights to self-determination of indigenous peoples. This has led to the decision of several jurisdictions to integrate indigenous peoples in the IAs, when the projects have significant impacts which are legitimate to them. [241]

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[234] Larsen 2017, p.1
[235] Hossain and Petrétei 2017, p.317
[236] Nenasheva, 2015 p15

[237] Nenasheva, 2015 p15
[238] Hossain and Petrétei 2017, p.317
[239]Nenasheva, 2015 p15
[240] Larsen 2017 p.2
[241] Larsen, 2017 p.2

5.2 **Environmental Impact Assessment**

With regards to International Law instruments, the right of the public to participate in the environmental decision making can be recognized in different legal instruments such as the EIA directive, the Convention on Environmental Impact Assessment in a Transboundary Context; Rio Declaration on Environment and Development; Convention on Access to information, public participation in decision-making and access to justice in environmental matters; Protocol on Strategic Environmental Assessment; the United Nations Declaration on the Rights of Indigenous Peoples;[242] and in the ILO Convention No 169[243].[244] With regards to International Environmental Law, the EIA is mentioned in the CBD in Article 14. Each party should "Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate. allow for public participation in such procedures." The process of how the IA is conducted is based on those legal instruments but depends on the regimes of the countries, and on how it is transposed and applied. However, it is always based on the public participation in project discussions during the different stages of the preparation of the EIA.[245] It can be different in the degree of influence which is left to indigenous peoples[246] and in which phase of the IA the consultation is conducted. I will, later on, compare and analyze the differences and similarities between the Nordic countries in the way the IA process is conducted.

There is a general way to differentiate the influence's level during consultation. It goes from no influence (notification), to limited influence (consultation), shared influences (co-management), and total influence (community-owned). Those degrees of influence can occur at different stages of the IA. It can happen during the scoping phase, the evidence generation, significance determination, and follow-up.[247] It is recognized that in the Nordic countries, the level of influence is rather low and limited to the consultation and the

[242] Article 32.3 of the UNDRIP
[243] Article 7.3 of the ILO Convention No 169
[244] Nenasheva, 2015 p 16
[245] Ibid. p15
[246] Larsen 2017 p.210
[247] Ibid. p.211

notification of indigenous peoples during the EIA process. it can be compared to other countries such as Australia, or New-Zealand where the public participation is community-owned or co-managed between indigenous peoples and the State.[248] Here, I will study the consultation of Sámi people during the EIA process. Even though the consultation is compulsory in all those States, there are still lacking the consideration of those public hearings in the project execution.

5.3 **Norway**

The EIA procedure in Norway is based on different instruments than the one of Finland and the one of Sweden. However, even if Norway is not in the European Union it is linked to the EIA directive as it is part of the European Free Trade Association (EFTA).[249]Norway is a member of the European Economic Area (EEA), and has its national legislation lead by the EIA Directive principles.[250]Yet, there are still some differences between the Norwegian legislation and the EIA directive. One of the major differences from the EIA directive is that in the Norwegian legislation there is separate legislations for the offshore projects, the Svalbard projects, and the other ones. The large-scale onshore projects are legislated in the Planning and Building Act.[251] Less projects are listed in the Norwegian legislation. One important difference when it comes to the accountancies of indigenous peoples in the EIA process is that the appendix B of the Norwegian EIA legislation is adding social impacts to the environmental ones.[252] In Norway, the EIA legislation is based on the Regulation on Environmental Impact Assessment for Plans pursuant to the Planning and Building Act (PBA). When it comes to the Sámi people and the EIA procedure, the PBA states that the Plans pursuant to this Act shall 'protect the natural basis for Sámi culture, economic activity, and social life."[253]

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[248]Larsen 2017

[249] Nenasheva, 2015, p.21

[250] Hossain and Petrétei, 2017 p.324

[251] The Planning and Building Act

[252] Vammen Larsen et al. 2019 p 15

[253] the Planning and Building Act s.3.1.

5.3.1 Environmental Impact Assessment Participation Procedure

As in Finland and contrary to Sweden, the first consultation opportunity in the Norwegian EIA procedure happens during the **scoping stage**. There are two times in the assessment program during the scoping stage where consultation can be done. This consultation needs to be prior to the development of the project. First, the competent authority opens a preconsultation with the different concerned authorities to examine the application of the EIA. Then if the EIA is needed, the developer will have to prepare an assessment programme, or a proposal for a planning. This will require the approvement of the competent authority. This proposed assessment programme will then circulate for comments after the announcement of the competent authority.[254] The competent authority will decide on the necessity or not to hold a public meeting.[255] Based on the comments on the proposal, the competent authority will then let down an assessment programme. Another consultation happens during the draft of the EIA report.[256] Here, the competent authority will circulate the EIA document of the proposed plan to the affected authorities, parties and groups.[257] Following the outcome of the consultation, further assessment can be needed. If it is needed, the supplement assessment should be circulated for comments again.[258] After the acceptance of the EIA documentation, during the decision-making process the need for an environmental follow up program can be decided.

5.3.2 Consultation of the Sámi people

The consultation of the people affected by such a project is required when the IA is ongoing.[259] The section 3-1.C of the PBA states that the plans of this Act shall "protect the natural basis for Sámi culture, economic activity and social life." This applies to plans which require an EIA or not. In the Regulations on Environmental Impact Assessment for plans pursuant to the Norwegian PBA it is stated that an EIA is required when a plan may have significant effects. In relation with the Sámi people, a plan will have significant effects if it

[254] Regulations on Environmental Impact Assessment s.15
[255] Ibid.
[256] Ibid. s.25
[257] Ibid .
[258] Ibid. s.26.27
[259] Ibid. s.15

"may lead to or come in conflict with endangered species or natural habitats, valuable landscape, valuable cultural monuments and environments, nationally or regionally important mineral resources, areas of great importance to Sámi outfield industries or reindeer husbandry and areas of particular importance for outdoor life."[260] The EIA shall provide a description and assessment that the plan's effects may have on the environment and community, including "Sámi nature and cultural foundation."[261] The Sámi People are granted a right and obligation to participate in the planning process.[262] It "shall give the planning authorities any information that might be of significance for the planning."[263] This could mean, that the traditional knowledge (TK) of the Sámi in the EIA process is relevant, and can be use in the assessment of the impact on the development of the project. In the Akwé: Kon Guidelines the traditional knowledge refers to "innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[264]

The section 8 of the Nature Diversity Act (NDA) also gives a definition of knowledge base. It states that the decisions should be based on scientific knowledge but that the authorities should "attach importance to knowledge that is based on many generations of experience acquired through the use of and interaction with the natural environment, including traditional Sámi use, and that can promote the conservation and sustainable use of biological, geological and landscape diversity."[265] Thus, the Sámi knowledge is taken into account when elaborating an EIA. However, the concept of the traditional knowledge is not defined in the NDA. The knowledge of cultural heritage is now a part of the Norwegian legislation but its application is not sufficiently specified.[266] The NDA doesn't describe how the TK should be included in the planning process of projects. Section 21 of the PBA provides the assessment of the impacts by taking into account the cultural heritage. It can refer to the

[260] Section 10 of the Regulations on impact assessments Established by Royal Decree of 21 June 2017
[261] Section 21 of the Regulations on impact assessments Established by Royal Decree of 21 June 2017

[262] Plan and Building Act s.3.2
[263] Ibid.
[264] Akwé: Kon Guidelines s.6.h
[265] Nature Diversity Act s.8

[266] Eythorsson and Thuestad, 2015 p.134.

traditional knowledge of the Sámi people. However, even if there are references to the TK in further documents, it is not stated in the EIA process that the use of TK is a part of it.[267] However, the integration of TK would allow the IA to be fairer with regards to the Sámi people. The Sámi knowledge of the environment would bring another perspective on the ecosystems, and on how their culture interacts with the environment. Furthermore, Section 5-4 of the PBA provides that institutions that are affected by the proposal of the plan should be consulted.[268] Thus "the Sámi Parliament may make objections to such plans in respect of issues that are of significant importance to Sámi culture or the conduct of commercial activities."[269] If the EIA would have significant effects on the Sámi cultural heritage, their consultation shall be required when it comes to the assessment of the plan. In the section 8 of the regulation on EIA for plans pursuant to the Norwegian PBA, it is stated that proposed plans with an EIA shall be circulated to special interest organizations concerned.

5.3.3 Social Impact Assessment

In the IA process in Norway, the Sámi rights have gained more recognition than in Sweden and Finland. The inclusion of the social and cultural impacts is taken into account when elaborating the projects and plans' IA. Section 14-1 of the PBA ensures that "environment and society are taken into consideration during the preparation of the project or plan". This refers to the already mentioned section 3-1 of the PBA. There is then an indirect social impact assessment. Thus, what will be given consideration when evaluating the impacts of the project will not just refers to environmentally hazardous activities but also to the social effects of the plan. The legislation sets different aspects that can be on the level of social aspects such as transportation, cultural heritage, environment, population, health etc. However, the SIA is not defined in the Norwegian legislation, and can be considered more like a tool.[270] The addition of the definition and the application of the SIA in the IA process in an explicit manner could enhance the will to allow more participation of Sámi people when they are concerned by a project. To protect the Sámi rights the integration of the SIA would add benefits to it. However, it seems that the public participation is limited in the SIA.

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[267] Eythorsson and Thuestad, 2015 p.145
[268] Plan and Building Act s.5.4
[269] Ibid.
[270] Svensson Jonas 2011 p.56

It seems to be more implicate the Sámi in a consultative way rather than a participatory one, and is based on an expert oriented proceeding.[271]

5.3.4 The Finnmark County situation

The Finnmark county has a special status since the enactment of the 2005 Finnmark Act. In this county, the Sámi people have been recognized to have property rights on the territory through the customary use. [272] Those customary property rights are managed by the Finnmark Estate Agency (FeFo). It is an independent legal entity managing the land and natural resources of the Finnmark County.[273]

In the traditional Sámi areas recognized by the government of Norway, the consultation of the Sámi Parliament is compulsory for subjects concerning Sámi culture such as land administration, competing land utilization, and land rights.[274] This means that when a project can affect the Sámi heritage in those territories, the environmental impact assessment is required, and consultation of the Sámi Parliament is needed.

5.4 Finland

5.4.1 Environmental Impact Assessment Participation Procedure

The EIA process in Finland is based on the Act on Environmental Impact Assessment Procedure (468/1994) which was reformed in 2006 (Act 468/2006). There are different stages during the EIA process where public participation can happen.

First, the developer of the project will prepare an EIA programme. The first consultation happens during the scoping phase of the Assessment programme. The assessment

[271] Svensson Jonas 2011 p.59

[272] Larsen 2017 p.6

[273] Eythorsson and Thuestad, 2015, p34

[274]https://www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/

programme purpose is stated in section 9 of the Decree on Environmental Impact Assessment Procedure. It contains all the information about the plans, permits for the implementation of the projects, alternatives to carry out the determination of the area of impact of the project.[275]According to section 8.a and 9 of the Act on EIA Procedure, the public participation concerning the assessment programme happens after all the information are gathered. Then the coordinating authority can announce the opportunity for opinions to be expressed, and for the public to comment. The public which can participate are the municipalities in the project area of the impact, and the interests which may be affected by the project (section 8.a). The opinions and statements of the stakeholders such as indigenous peoples can go from 30 to 60 days after the official announcement of the EIA programme.[276]

The second consultation phase is during the release of the EIA draft report.[277] It contains the revised informations of the assessment programme, and the main informations in the assessment. It also includes an assessment of the project's impacts and of the plans' different alternatives. The preparation of the EIA report allows place for public participation. It is stated in Sections 11 and 12 of the Act on EIA Procedure. The draft of the EIA Report is prepared. Once it is done the coordinating authority announces the possibility for public comments on it (section 11) during the same length as the first consultation. At this part of the consultation, there are no more opportunities for the public to participate on the EIA report.

5.4.2 Sámi *Consultation*

The consultation of the Sámi people in the EIA is defined in the Act of the Sámi Parliament. Section 9 on the obligation to negotiate stipulates that "the authorities shall negotiate with the Sámi Parliament in all far reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people." In the Act on Environmental Impact Assessment Procedure, there is a definition of what is considered as participation in the EIA process: "participation means interaction in environmental impact

[275] Decree on Environmental Impact Assessment Procedure s.9

[276] Act on Environmental Impact Assessment Procedure

[277] Decree on Environmental Impact Assessment Procedure s.10

assessment between the developer and the coordinating authority, other authorities and those parties whose circumstances or interests may be affected by the project and corporations and foundations whose sector of operations may be affected by the project."[278] The "public concerned" by the impacts of the project, or plan is not define, and there are no references to the Sámi people in the EIA Act. They are considered on an equal footing with all the other stakeholders.

5.4.3 Social Impact Assessment Procedure

The social impact assessment is a part of the EIA process in Finland. The EIA is based on the Environmental Impact Assessment Act and on the Land Use and Building Act. As outlined in the Land Use and Building Act there is a requirement of undertaking impact assessment when drawing up a plan: "the environmental impact of implementing the plan, including socio-economic, social, cultural and other impacts, must be assessed to the necessary extent."[279] In the EIA Act, there are requirements to go through an EIA for projects that can cause significant impacts to the environment, and it includes several social aspects to take into consideration such as living conditions, cultural heritage, or community structure.[280]

However, the Act does not contain the word social, and does not define what is SIA. The assessment is based on "direct and indirect effects inside and outside Finnish territory of a project or operations on human health, living conditions and amenity; soil, water, air, climate, organisms and biological diversity; the community structure, buildings, landscape, townscape and cultural heritage; the utilization of natural resources."[281] From the definition of what the assessment procedure is based on we could deduce that the SIA concerns the impacts on the culture heritage. In a broader way, SIA has been defined in Finland as 'impacts on the people,

[278] Act on Environmental Impact Assessment Procedure s.2.7

[279] Land Use and Building Act Ch.1 s.9

[280] Act on Environmental Impact Assessment Procedure s.2.1.c

[281] Act on Environmental Impact Assessment Procedure Section 2.1

community and society that cause changes in people's living conditions, amenity, well-being and the distribution of well-being."[282] In the EIA, it often represents an appendix to the EIA. It is just a part of the EIA.[283] The process of the SIA starts at the same time as the EIA programme. Although, even if there is no definition of social impact in the Land Use and Building Act.[284] The definition of the environmental impact encompasses different aspects which can be of social dimension.[285] However the participatory SIA is limited to public hearings.[286] The Land Use and Building Act states that the "planning procedures must be organized and the principles, objectives and goals and possible alternatives of planning publicized so that the landowners in the area and those on whose living, working or other conditions the plan may have a substantial impact, and the authorities and corporations whose sphere of activity the planning involves, have the opportunity to participate in preparing the plan, estimate its impact and state their opinion on it."[287] This plan is called the participation and assessment plan (PAP). It states the impacts to assess, including procedures on the participation and assessment of the plan's impact. However, even if there is a need to develop the PAP it does not mean that participation is central in the SIA process.[288] The participation is integrated in the SIA process, but depends to case to case and is based on public hearings.[289] A qualitative EIA process includes engagement of indigenous peoples and of their traditional knowledge. This would allow the Sámi people not just to be considered as stakeholders but right holders, for their self-determination and land rights to be recognized and applied.[290]

Another issue at stake concerning Finland is to take into consideration the cumulative, social and cultural impacts on the Sámi people livelihood when it comes to the course of the EIA process. The use of the Akwé: Kon Guidelines for the conduct of cultural, environmental,

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[282] Suopajärvi Leena, 2013 p.27

[283] Ibid p. 26

[284] Chapter 1 of the land use and building Act
[285] Svensson Jonas2011 p.41
[286] Ibid. p.42
[287] Land Use and Building Act Ch.8 s. 62
[288] Svensson Jonas 2011 p.59
[289] Ibid. p.59
[290] https://oaarchive.arctic-council.org/bitstream/handle/11374/2503/Nordic_Workshop_Summary.pdf?sequence=1&isAllowed=y

and social impact assessment which can impact the Sámi homeland area is effective, but more is required to allow a better consultation of the Sámi people during the EIA process.

5.5 Sweden

Like Finland, Sweden is part of the EU, and is thus relying on the EIA directive concerning the legislation concerning the EIA. In the implementation of the EIA directive, the IA process in Sweden rests essentially on the Environmental Code (EC). The steps of the EIA are stated in chapter 6 of the EC. The EIA was introduced under the EC through amendments, which took effects on January 1 2018. The EIA goal was to integrate the consideration of environmental aspects in the decision-making process.[291] Contrary to Norway, in the environmental impact assessment only the environmental criterion is considered and not the cultural nor the social one.[292] The consultation procedure in the EC is restricted to environmental aspects and does not include other aspects which can be of interest for the Sámi people.[293] The EIA can be divided in two categories. There is the strategic environmental impact assessment which relates to the plans and programmes, and the specific impact assessment which relate to the activities and measures.[294]

5.5.1 EIA Consultation Procedure

As in the other Nordic countries, there are several steps during the EIA process. It contains screening, scoping, description of alternatives, identification, consultation, review, and decision making. The opportunity for consultation during the EIA happens at two different stages, the screening stage and the draft EIA stage. The consultation process of the EIA in Sweden is less involving the Sámi people in comparison with Norway or Finland. The developer must first of all notify the planned activity to the County Administrative Board (CAB) and to the additional stakeholders. At the screening stage when conducting a project, the developer must consult the CAB. Then, it can follow with a consultation with private

[291] Forsgren A. 2019 p.41
[292] Larsen 2017 p4

[293] Nanna Holmgren 2019 p.42
[294] prop. 2016/17:200 p71-72

individuals affected by the project at stake.[295]After the screening stage, the CAB decides whether or not the project may have a significant effect on the environment and conduct an EIA. If it does, another consultation will be held.[296] The section 5 holds that the developer has an obligation to consult the "government agencies, the municipalities, the citizens and the organizations that are likely to be affected." However, this consultation is strictly limited as the person who intends the project has full authority on the outcome of the consultation. There is in reality no real influence from the stakeholders affected in the consultation.[297]

5.5.2 Sámi Consultation in the Environmental Impact Assessment Procedure

In Sweden the Community based impact assessment is not taking into account when undertaking the EIA.[298] The SIA and CBIA developed itself in the western countries during the 1960s and represented a symbol of social justice for indigenous peoples.[299]However nowadays the cultural heritage of the Sámi people is not taken into account. Concerning the way the Sámi are involved in the EIA decision-making process, according to Chapter 6 section 4, the Sámi villages will be consulted if they "are likely to be affected", or if the activity has a "significant environmental impact."[300] However, the level of influence of the Sámi during the consultation is not sufficient for them to really be taken into consideration. There is no special provision on the Sámi land, and the need to protect the rights of the Sámi people in relation with the environment. There is just one mandatory consultation meeting during the EIA.[301] The opportunities for the Sámi people to be heard is small, and can just apply to the environmental impacts, and not on the culture, social, or reindeer herding ones.[302]

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[295] Environmental Code s.4
[296] Environmental Code s. 5
[297] Larsen 2017 p.5

[298]Lawrence and Larsen, 2017, p1166
[299] Lawrence Rebecca and Larsen Rasmus Kløcker, 2017, p.1167

[300] Environmental Code, ch. 6 s. 4
[301] Environmental Code, ch. 6 s. 3

[302]Lindqvist Johanna 2009 p.83

5.5.3 Social Impact Assessment

As in Finland, and Norway, there is not definition of SIA in the Swedish legislation.[303] Though, in the Environmental Code it is stated that "the purpose of an environmental impact assessment is to establish and describe the direct and indirect impact of a planned activity or measure on peoples, animals, plants, land, water, air, the climate, the landscape and the cultural environment [...]. Another purpose is to enable an overall assessment to be made of this impact on human health and the environment."[304] By reading the purpose of the EIA process, it clearly includes social aspects because the impacts on peoples and their health shall be assessed when conducting an EIA. The plan should encompass "a description of the significant impact on the environment regarding biodiversity, population, people's health, wild life..."[305] Concerning the participation in the SIA, it differs from projects. Large scale matters plans have participation limited to hearings, while the smaller projects led to an easier participation of the affected population.[306] As there is the requirement to "undertake some kind of hearings for environmental impact assessments, and that private individuals who are likely to be affected shall be consulted at an early stage." This could mean that the participatory aspect is more present than in the other Nordic countries.[307]

[303] Svensson Jonas 2011 p.50
[304] Environmental Code, ch. 6 s. 3
[305] Environmental Code, ch. 6 s. 12
[306] Svensson Jonas 2011p 52
[307] Environmental Code, ch. 6 s. 4

6 CONCLUSIONS

As the last remaining indigenous peoples in the European Union, Sami people's interests, whether economic, cultural or spiritual are worthy of careful safeguard. It is crucial to their survival on all levels that their indigenous rights be recognized and taken into account. The consultation on environmental matters by the Nordic States is essential to such recognition.

This thesis showed that under the three legal systems analyzed, the duty to consult is based on obligations stemming from International Law and implemented, to some extent, in the States' legal system.

The Free, Prior, and Informed Consent of indigenous peoples is set out in several International Environmental Law and Human Rights Law instruments. The FPIC is interpreted in International Law as the recognition of self-determination to control traditional lands. There is an obligation upon the States to consult indigenous peoples to comply with the FPIC principle. As International Law is, for the most part, not legally binding, States have a best effort obligation, meaning that they should try to respect their international obligations, but will not be in breach of agreement or suffer any legal consequence if they do not.

Finland, Norway and Sweden have interpreted the duty to consult the Sami people narrowly and to varying degrees. The duty to consult the Sami people includes the aim of seeking their consent, but as such consent is not a mandatory condition precedent for any development project to forge ahead, it seems to constitute a "soft" duty for the State and a weak sort of right for the Sami. There is no co-management, or community-owned management even with regards to decisions altering the Sami people's interests in environmental matters.

One added difficulty in the harmonized protection of Sami peoples' rights is that they are present in different countries and thus operate under different legal systems. The three States have established Sámi Parliaments to represent the interests of Sámi people within their jurisdiction. Sweden still offers the weakest protection to Sami's rights as the duty to consult them is not enacted in any specific provisions of national law, and as compulsory consultation of the Sámi exists only in piecemeal sectoral legislation. In Finland the issue at

stake is that reindeer herding is not recognized as a special right for the Sámi, and that there is a geographic limitation on the duty to consult since it is restricted to the Sámi homeland area (which represents 10 percent of the Finnish territory). In Norway the duty to consult is better implemented compared to the other two countries, as it is entrenched in consultation agreements between the Sámi Parliament and the State authorities. However, it is still not anchored in national legislation.[308]

In the three States' EIA procedure, Sámi people are taken into account during the process, but in different ways. For instance, in Sweden, the environmental impacts on Sámi people are taken into account rather than the social, or cultural ones. With regards to Norway and Finland social and cultural impacts on the Sámi people are better taken into consideration in the EIA.

I have explained the link between Environmental Law and Human Rights Law. When we talk about the Sámi people, and more generally about indigenous peoples, the two fields of law are interdependent. Concerning the EIA, possibilities have been developed about the integration of human rights impact assessment (HRIA) in the environmental impact assessment (EIA).[309] The incorporation of the HRIA answers the issue of integration of the Sámi people in the EIA process. After reviewing the EIA consultation procedure of the Nordic countries, a global conclusion could be that the Sámi people, when affected by a project have no real influence on the outcome. To counteract the poor level of influence of indigenous people, the HRIA would improve the representation of their point of view within an EIA. Since the HRIA originates in binding legal frameworks protecting human rights such as the UNDRIP, the ICCPR and the ICESCR, its incorporation in the EIA process could mean real progress for indigenous peoples and the issues at stake. [310]

The Nordic States are partially fulfilling their international obligations, with gaps yet to fil in order to reach a comprehensive protection of the rights of the Sámi people. All three legal

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[308] Allard, 2018 p.40,41

[309] Hossain Kamrul and Petrétei Anna, 2017, p.304.

[310] Hossain Kamrul and Petrétei Anna, 2017, p.304.

systems are lacking substantive or mandatory requirements when it comes to the Sámi. Hopefully, the enactment of the NSC will lead to legislative improvement in all three countries that will bring them closer to satisfying their international obligations. The enactment of NSC could even have an impact on Russia. The Nordic States have made efforts to incorporate Russia in the development of the NSC. However, the Draft Convention was considered by the Expert Committee of the Sámi Council as just including the Nordic States, and not the Russian Sámi.[311] The Sámi in Russia are thus not integrated in the NSC, but there is a will of the Nordic countries to be in connection with Russia with regards to the rights of Sámi. This could be done without the need to incorporate Russia in the NSC, but by extending the rights of the Sámi to those who are Russian. If a Russian Sami resides in one of the Nordic countries, he/she is protected by the NSC.[312]

[311] Koivurova T. 2006 p 108

[312] Ibid. p.109

7 BIBLIOGRAPHY

International Instruments

- The Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Commu- nities (hereinafter: Akwé: Kon Guidelines) were adopted by the Seventh COP in 2004. CBD COP VII (2004)
- Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, 2002, Montreal, Secretariat of CBD 2002
- Convention on Biological Diversity (adopted 5 June 1992) 1760 UNTS 79; 31 ILM 818
- Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 197), UNTS 1989
- International Covenant on Economic, Social and Cultural Rights (1966).
- International Covenant on Civil and Political Rights, (1966)
- International Labour Organization (ILO), Indigenous and Tribal Peoples Convention (1989)
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity: text and annex / Secretariat of the Convention on Biological Diversity (2011)
- United Nations Declaration on the Rights of Indigenous Peoples (2007).

National Legislations

Finland:

Constitution (1999)

Forest Act 1093(1996)

Environmental Impact Assessment Procedure Act (1994)

Decree on Environmental Impact Assessment Procedure (2006)

Environmental Protection Act (2014)

Land Use and Building Act (1999)

Metsähallitus Act (2004)

Mining act (2011)

Nature Conservation Act (1996)

Sámi Parliament Act (1995)

Reindeer Husbandry Act (1990)

Norway:

Constitution (1814)

Consultation agreement on Conservation (2007)

Finnmark act (2005)

Mineral act (2010)

Nature Diversity Act (2009)

Planning and Building Act (2008)

Reindeer Herding Act (2007)

Procedures for consultations between state authorities and the Sámi Parliament (2005)

Sweden

Constitution (1974)

Environmental Code (1998)

Forestry Act (1979)

Mineral Act (1991)

National Minorities and Minority Language Act (2009)

Planning and Building Act 2010

Reindeer Husbandry Act (1971)

Proposition 2009/10:80

Proposition 2016/17:200

Cases and Jurisprudences

- Taxed Lapp Mountain Case, (Supreme Court Case NJA 1981 s.).
- Nordmaling case (Supreme Court Case 2011: Case No. T 4028–07)
- Erik Anderson v. The Norwegian State, No. 5B/2001 (5 Oct. 2001) ("Svartskogen" case)

- Girjas Reindeer Herding Community v. Sweden Swedish Supreme Court Case No.T 853-18, decided 23 January 2020
- Jon Inge Sirum v. Esslan Reindeer Pasturing District, No.4B/2001 (21 June 2001) (Selbu Case)
- UN Human Rights Committee, Tiina Sanila-Aikio v. Finland, 1.2.2019, CCPR/ C/124/D/2668/2015,
- UN Human Rights Committee, Klemetti Näkkäläjärvi et al. v. Finland, 1.2.2019, CCPR/ C/124/D/2950/2017
- UN Human Rights Committee, Poma Poma v. Peru, CCPR/C/95/D/1457/2006, 24 April 2009
- UN Committee on the Elimination of Racial Discrimination, Lars-Anders Ågren et al. v. Sweden, CERD/C/102/D/54/2013, 26 November 2020, Para 6.6.

Literature

Books

- Åhrén M, *Indigenous Peoples' Status in the International Legal System* Oxford University Press, 2017
- Allard Christina, and Skogvang F. S, *Indigenous Rights in Scandinavia - Autonomous Sami Law*, 1st Edition, Ashgate Publishing Company, 2015.
- Anaya, S. James. *Indigenous Peoples in International Law*. 2nd Edition, Oxford University Press, 2004.
- Anaya, S. James. *International Human Rights and Indigenous Peoples.* Aspen Publishers, 2009.
- Hendrix, B. A. "Ownership, authority, and self-determination: Moral principles and indigenous rights claims". *University Park: Pennsylvania State University Press* 2008
- Nettheim, G., Meyers, G. D., & Craig, D. (2002) "Indigenous peoples and governance structures: a comparative analysis of land and resource management rights" *Aboriginal Studies Press* 2002

Chapters in books

- Allard C. Some characteristic Features of Scandinavian Laws and their influence on Sami Matters in Indigenous Rights in Scandinavia – Autonomous Sami Law, in Allard Christina, and Skogvang F. S, *Indigenous Rights in Scandinavia - Autonomous Sami Law* , 1st Edition, Ashgate Publishing Company, 2015 49-65
- Chen, Cher Weixia. "Indigenous Rights in International Law" in Renée Marlin-Bennett *Oxford Research Encyclopedia of International Studies*. Oxford University Press, 2017
- Daes, E. I. "Indigenous peoples' rights to land and natural resources" In N. Ghanea & A. Xanthaki, *Minorities, peoples and self-determination*. Leiden and Boston: Martinus Nijhoff Publishers 2005 75-93
- Heinämäki L. "Global Context – Arctic Importance: Free, Prior and Informed Consent, a New Paradigm in International Law Related to Indigenous Peoples" in Indigenous Peoples' Governance of Land and Protected Territories in the Arctic, T.M. Herrmann, T. Martin, 2016 209-240
- Heinämäki L. "The Rapidly Evolving International Status of Indigenous Peoples: The Example of the Sami People in Finland" in Allard Christina, and Skogvang F. S, *Indigenous Rights in Scandinavia - Autonomous Sami Law* , 1st Edition, Ashgate Publishing Company, 2015 187-207
- Joona, T. "The Definition of a Sami Person in Finland and its Application" in Indigenous Rights in Scandinavia – Autonomous Sami Law, in Allard Christina, and Skogvang F. S, *Indigenous Rights in Scandinavia - Autonomous Sami Law* , 1st Edition, Ashgate Publishing Company, 2015 155-173
- Josefsen,E. Søreng S.U. and Per Selle "Regional Governance and Indigenous Rights in Norway: The Finnmark Estate Case" in *Indigenous Peoples' Governance of Land and Protected Territories in the Arctic*, T.M. Herrmann, T. Martin, 2015 23-41
- Wolfrum, R. Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations in *Looking to the Future: essays on International Law in Honor of W. Michael Reisman*, Leiden: Martinus Nijhoff 2011 363-383
- Åhren M, "Indigenous Peoples Culture, Customs and Traditions and Customary Law: The Saami People's Perspective" (2004) 21(1) *Arizona Journal of International and Comparative Law,* 63-112

- Samim Akgönül La naissance du concept de minorité en Europe Colloque : Minorités religieuses dans l'espace européen (2004) *Approches sociologiques et juridiques*

Articles

- Allard, C. . "The Nordic countries' law on Sámi territorial rights" (2011) 2(2) Arctic Review on Law and Politics 159–183
- Allard Christina, "The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts", (2018) 9 *Arctic Review on Law and Politics,* 25-43
- Axelsson P. Skold P. Indigenous Populations and Vulnerability. Characterizing Vulnerability in a Sami Context » (2006) 111(1) *Annales de démographie historique* 115-132
- Baer L.A. "The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi" (2005) 12(2/3) *International Journal on Minority and Group Rights* 245-267
- Broderstad E.G, "The promises and challenges of indigenous self-determination: The Sami case," (2011) 66(4) *International Journal* 893-907
- Cariño, J "Indigenous peoples' right to free, prior and informed consent: reflections on concepts and practice",(2005) 22(1) *Arizona Journal of International and Comparative Law* 19-39.
- Carstens Margret "Sami land rights: the Anaya Report and the Nordic Sami Convention" (2016) 15(1) *Journal on Ethnopolitics and Minority Issues in Europe* 75-116
- Cepinskyte Agne "The Arctic Railway and the Sami reconciling national interests with indigenous rights" (2018) *254 Finnish institute of international affairs briefing paper*
- Eide Asbjørn "Legal and Normative Bases for Saami Claims to Land," (2001) 8(2/3) *The Nordic International Journal on Minority and Group Rights Special Issue on Sami Rights in Finland, Norway, Russia and Sweden*, 127-149
- Eythorsson Einar and Thuestad Alma Elizabeth, "Incorporating Traditional Knowledge in Environmental Impact Assessment-How Can It Be Done", (2015) 6(2) *Arctic Review on Law and Politics*, 132-150

- Falch, T., Selle, P. & Strømsne, K. “The Sámi: 25 Years of Indigenous Authority in Norway”(2016) 15(1) *Ethnopolitics*, 125-143
- Harlin, EK. “Sámi Archaeology and the Fear of Political Involvement: Finnish Archaeologists’ Perspectives on Ethnicity and the Repatriation of Sámi Cultural Heritage” (2019) 15 *Archaeologies* 254–284
- Heinämäki, L., and Cambou, D. C. “New Proposal for the Nordic Sámi Convention: An Appraisal of the Sámi People’s Right to Self-determination” (2018) 41(2) *Retfærd : nordisk juridisk tidsskrift*, 3-18.
- Hendrix, B. A. (2008). “Ownership, authority, and self-determination” (2010) 36(2) *Social theory and practice* 341-348
- Hossain Kamrul and Petrétei Anna, Resource “Development and Sámi Rights in the Sápmi Region: Integrating Human Rights Impact Assessment in Licensing Processes”, (2017) 86(3) *Nordic Journal of International Law*, 302-340
- Hughes Layla, “Relationships with Arctic indigenous peoples: To what extent has prior informed consent become a norm?” (2018) 27(1) *Review of European, Comparative and International Environmental Law*, 15-27.
- Joona Juha “Recent developments in regard to the legal status of Sámi in Finland”, (2017) 5 *Current Developments in Arctic Law*, 46-49.
- Koivurova T. Petretei A. “Enacting a New Mining Act in Finland – How were Sámi Rights and Interests Taken into Account?” (2014) 1 *Nordic Environmental Law Journal*, 119–133
- Koivurova T. “The Draft of a Nordic Saami Convention” (2006) 6(7) *European Yearbook of Minority Issues* 103-136
- Larsen R.K “Impact assessment and indigenous self- determination: a scalar framework of participation options”, (2017) 36(3) *Impact Assessment and Project Appraisal* 208-219
- Larsen R.K, and Raitio K. “Implementing the State Duty to Consult in Land and Resource Decisions: Perspectives from Sami Communities and Swedish State Officials”, (2019) 10 *Arctic Review on Law and Politics*, 4-23.
- Lawrence R. and Larsen R.K.“The politics of planning: assessing the impacts of mining on Sami lands”, (2017) 38(5), *Third World Quarterly*, 1164-1180.

- Lindqvist, Johanna "Reindeer Herding: A Traditional Indigenous Livelihood" (2009) 6(1) *Macquarie Journal of International and Comparative Environmental Law* 83-127
- Litowitz D.E "Internal versus External Perspectives on Law: Toward Mediation", (1998) 26(1) *Florida State University of Law* 127-150
- Markkula, I., M. T. Turunen, and S. Kantola "Traditional and local knowledge in land use planning: insights into the use of the Akwé: Kon Guidelines in Eanodat, Finnish Sápmi" (2019) 24(1), *Ecology and Society*.
- Mörkenstam U. Eva Josefsen, Ragnhild Nilsson « The Nordic Sámediggis and the Limits of Indigenous Self-Determination Gáldu Čála". (2016) 1, *Journal of Indigenous Peoples Rights,* 4-46
- Nenasheva, Marina; Bickford, Sonja H.; Lesser, Pamela; Koivurova, Timo; Kankaanpää, Paula "Legal tools of public participation in the environmental impact assessment process and their application in the countries of the Barents euro-arctic region" (2015) 1(3) *Barents studies* 13-35
- Raitio K. Allard C. Lawrence R. "Mineral extraction in Swedish Sápmi: The regulatory gap between Sami rights and Sweden's mining permitting practices" (2020) 9© *Land Use Policy*
- Ravna Øyvind "The Fulfilment of Norway's International Legal Obligations to the Sámi – Assessed by the Protection of Rights to Lands, Waters and Natural Resources" (2014) 21(3) *international journal on minority and group rights* 297-329
- Suopajärvi Leena, "Social impact assessment in mining projects in Northern Finland: Comparing practice to theory", (2013) 42 *Environmental Impact Assessment Review*,25-30.
- Svensson T.G. "Indigenous Rights and Customary Law Discourse - Comparing the Nisga' a and the Sami," (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 1-35
- Taekema, Sanne, "Relative Autonomy, A Characterisation of the Discipline of Law" Erasmus School of Law 2010
- Tara Ward, "The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law", (2011) 10(2) *Northern Journal of Human Rights*, 54-84.

- Touzard H. “Consultation, concertation, négociation une courte note théorique” (2006) 5 Négociations
- Widmark, Camilla "Bargaining costs in a common pool resource situation — The case of reindeer husbandry and forestry in northern Sweden"(2019) 49 *Canadian Journal of Forest Research*. 339–349.

Reports

- Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities Fifth opinion on Finland ACFC/OP/V(2019)001
- International Labour Office (2016) Procedures for consultations with indigenous peoples: Experiences from Norway, Geneva, ILO
- Metsahallitus (2013) Juntunen S. Stolt E. “Application of Akwé: Kon Guidelines in the Management and Land Use Plan for the Hammastunturi Wilderness Area”
- Publications of the Government´s analysis, assessment and research activities (2017) Leena Heinämäki, Christina Allard, Stefan Kirchner, Alexandra Xanthaki, Sanna Valkonen, Ulf Mörkenstam & Nigel Bankes, Jacinta Ruru, Jéremie Gilbert, Per Selle, Audra Simpson, Laura Olsén Actualizing Sámi Rights: International Comparative Research
- Resolution CM/ResCMN(2018) 9 on the implementation of the Framework Convention for the Protection of National Minorities by Sweden
- United Nations (2005) An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices PFII/2004/WS.2/8
- United Nations (2004). Erica-Irene A. Daes, Special Rapporteur on the Rights of Indigenous Peoples, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources Final Report of the Special Rapporteur, U.N. Doc. E/CN.4/2004/30
- United Nations (2011) Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples’ Human Rights Expert Mechanism on the Rights of Indigenous Peoples Fourth session, Geneva11-15

- United Nations (1986) José Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination against Indigenous Populations (1986), U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4
- United Nations (1996), Mrs. Erica-Irene A. Daes, Working paper on the concept of "indigenous people" E/CN.4/Sub.2/AC.4/1996/2
- United Nations (1979) Francesco Capotorti, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc E/CN.4/Sub.2/384/Rev.1
- United Nations (2011) James Anaya Report of the Special Rapporteur on the rights of indigenous peoples the situation of the Sami people in the Sápmi region of Norway, Sweden and Finland Human Rights Council Eighteenth session A/HRC/18/35/Add.2 2011
- United Nations (1994) High Comm'r. for Human Rights, General Comment No. 23: The rights of minorities (Art. 27), U.N. Doc. CCPR/C/21/Rev.1/Add.5
- United Nations Doc (2007); E/C.12/1/Add.74
- United Nations (2004) CESCR, concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador, U.N. Doc. E/C.12/1/Add.100.
- United Nations (2008) CERD, Considerations of reports submitted by States under Article 9 of the Convention, CERD/C/SWE/CO/18
- United Nations (2008) CERD, Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden, CERD/C/SWE/CO/22-23
- United Nations (2009) CESCR, General comment No. 21 Right of everyone to take part in cultural life (art. 15, ¶ 1 (a), of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/21
- United Nations (1997) Comm'n. on the Elimination of Racial Discrimination, Report of the Committee on the Elimination of Racial Discrimination: Annex V - General Recommendation XXIII, ¶ 4(d), U.N. Doc. Supplement No. 18 (A/52/18)
- United Nations (2009) Environment Programme Ad Hoc open ended inter-sessional working group on article 8(j) and related provisions of the CBD UNEP/CBD/WG8J/6/1/Add.1/Rev.1

- United Nations (2009) Human Rights Committee Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' UN Doc A/HRC/12/34
- United Nations (2009) Human Rights Committee Consideration of Reports submitted by States parties under Article 40 of the covenant CCPR/C/SWE/CO/6
- United Nation (2011) Final report of the study on indigenous peoples and the right to participate in decision-making HRC A/HRC/18/42,
- United Nations (2016) Human Rights Committee – Concluding observations on the seventh periodic report of Sweden CCPR/C/SWE/CO/7.
- United Nations (2010) CEACR. Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Ecuador, ILO Doc. 062010ECU169
- United Nations (2006) CEACR, Individual Observation concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169) Guatemala, ILO Doc. 062006GTM169,
- United Nations (1979) Subcomission on Prevention of Discrimination and Protection of Minorities Francesco Capotorti Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities UN Doc E/CN.4/Sub.2/384/Rev.1

Other Sources

- United Nations (2010) development programme, Josefsen E. "the Saami and the national parliaments: channels for political influence" Case study
- Larsen S.V Hansen A.M. Dahl P.E. and Morales A.H "Guidance Note on Indigenous and Local Community Participation in Environmental Impact Assessment" (2019) *The European Arctic AAU Arctic & DCEA Department of Planning, Aalborg University*
- Wallin I. "Forest Management and Governance in Sweden" Doctoral Thesis Swedish University of Agricultural Sciences Alnarp 2017
- Allard, Christina, "Two Sides of the Coin: Rights and Duties. The Interface between Environmental Law and Saami Law Based on a Comparison with Aoteoaroa/New Zealand and Canada" (2006) doctoral thesis

- Forsgren A. “Sámi Influence in Decision-Making Processes” Master’s Thesis in Environmental Law , especially on Indigenous Participation Right (2019) Uppsala Universitet
- Holmgren N. “Sami Impact on Decision-making in Sweden – an analysis of present possibilities for participation and consultation in relation to international obligations” Graduate Thesis, (2019) Master of Laws program
- The Forest Stewardship Council National Forest Stewardship Standard of Sweden
- Svensson J. “Social impact assessment in Finland, Norway and Sweden: a descriptive and comparative study” Degree Program in Civil Engineering and Urban Management KTH, Royal Institute of Technology 2011
- https://www.highnorthnews.com/en/girjas-sami-village-won-swedish-supreme-court-case-may-have-consequences-other-countries
- http://indigenouspeoples.nl/indigenous-peoples/definition-indigenous
- https://www.cnrtl.fr/definition/autonomie
- https://www.saamicouncil.net/news-archive/finland-violates-the-rights-of-the-smi-people-by-allowing-mining-companies-in-smi-homeland?fbclid=IwAR3tEa2iUzalCSjsM9mzGyuyYT3uTAU8lUirGorZZm7a1rCxdpwIqhqpjLk
- https://www.regjeringen.no/en/topics/indigenous-peoples-and-minorities/Sami-people/midtspalte/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA/id450743/
- https://oaarchive.arctic-council.org/bitstream/handle/11374/2503/Nordic_Workshop_Summary.pdf?sequence=1&isAllowed=y
- UN Permanent Forum on Indigenous Issues, Factsheet, Who are indigenous peoples? http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf,