

Indigenous Peoples' Right to Land

*Geir Ulfstein**

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I. Introduction

The rights of indigenous peoples to the land they traditionally inhabit have been controversial ever since the time of the Spanish conquistadors. While such rights were acknowledged by what has been called the Spanish school of international law of the sixteenth century (*Francisco de Vitoria, Domingo de Soto, Francisco Suarez, Bartolomé de Las Casas*), the acceptance of these rights weakened in the nineteenth and early twentieth century.¹

In recent years, however, indigenous issues have gained considerable international attention. ECOSOC established the Working Group on Indigenous Populations (WGIP) in 1982, under the Sub-Commission on the Promotion and Protection of Human Rights (formerly Sub-Commission on the Prevention of Discrimination and Protection of Minorities). The Working Group elaborated a draft United Nations Declaration on the rights of indigenous peoples, which was adopted by the Sub-Commission in 1994.² The Commission on Human Rights established an open-ended inter-sessional working group to consider the text and work out a draft declaration to be adopted by the General Assembly during the International Decade of the World's Indigenous People (1995-2004). The Permanent Forum on Indigenous Issues was established by ECOSOC as an advisory body in 2002. The rights of indigenous peoples, including land issues, are also being addressed in several conferences, declarations and treaties, both at the global and regional level.³

¹ G.C. Marks, "Indigenous Peoples in international law: the significance of Francisco de Vitoria and Bartolome de Las Casas", *Austr. Yb. Int'l L.* 13 (1992), 1 et seq. (2-3 and 7-8). Also printed in S.J. Anaya (ed.), *International Law and Indigenous Peoples*, 2003, 3 et seq. (4-5, 9-10).

² 1994/45 Draft United Nations Declaration on the Rights of Indigenous Peoples. The draft declaration may be found at the web site of the UN High Commissioner for Human Rights <http://ap.ohchr.org/documents/E/SUBCOM/resolutions/E-CN_4-SUB_2-RES-1994-45.doc>.

³ See, *inter alia*, article 30 of the United Nations Convention on the Rights of the Child, 1989, UNTS Vol. 1577 No. 27531; Principle 22 of the Rio Declaration on Environment and Development, 1992 (*ILM* 31 (1992), 874 et seq.); Part I, para. 20 of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna, 1993 (*ILM* 32 (1993), 1661 et seq.); and para. 5 of the General Recommendation XXIII by the Committee on the Elimination of Racial Discrimination, under the International Convention on the Elimination of All Forms of Ra-

Indigenous peoples have applied two different approaches in their legal argumentation.⁴ First, they claim the status of “nations” predating existing states, thus trumping the sovereignty of states. Secondly, they accept the sovereignty of states, but argue for rights within the framework of international human rights. The arguments based on indigenous self-determination at the expense of state sovereignty have met strong resistance among states. But the two approaches are inter-related in the sense that references to historic rights of indigenous peoples predating the existing states may strengthen their human rights arguments.

This article will discuss the land rights of indigenous peoples based on relevant human rights conventions. The background is that the Justice Committee of the Norwegian Parliament in June 2003 asked the Ministry of Justice to “obtain an expert, independent international law assessment of the Bill proposing a new Finnmark Act”.⁵ This Bill was the Norwegian Government’s proposal to resolve the claims of the Sami people to land in the county of Finnmark. Professor *Hans Petter Graver* and the present author were commissioned by the Ministry to undertake the legal assessment. While having a more general purpose, the article will draw upon the analysis in our study.

The article is divided into three parts. First, articles 1 and 27 of the International Covenant on Civil and Political Rights⁶ will be discussed in relation to land rights of indigenous peoples. Then, land rights under the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries⁷ are examined, particularly its articles 14 and 15. Thirdly, the proposed Finnmark Act will be scrutinized with regard to these two Conventions. Finally, some conclusions are drawn.

cial Discrimination UNTS Vol. 660 No. 9464. See further R. Wolfrum, “The Protection of Indigenous Peoples in International Law”, *ZaöRV* 59 (1999), 369 et seq.

⁴ S.J. Anaya, “Introduction”, in: Anaya, see note 1, xii-xxi at xiii-xiv.

⁵ Proposition to the Odelsting No. 53 for 2002-2003 concerning an Act relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act).

⁶ International Covenant on Civil and Political Rights, 1966, UNTS Vol. 999 No. 14668.

⁷ ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989, UNTS Vol. 1650 No. 28383.

II. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) contains two articles of relevance for indigenous peoples' right to land, i.e. article 1 on self-determination and article 27 on minority rights.

1. Article 1

The right to "self-determination of peoples" is recognised in Article 1 para. 2, as well as Article 55 of the United Nations Charter. This right is also incorporated as article 1 of the ICCPR and article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which reads:

1. 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.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic 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.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The right of self-determination has been contentious in international law. First, it must be determined what should be considered "peoples": is it the whole population of a state or may a state consist of several peoples? Secondly, in the latter case, would such peoples have the right to decide their state affiliation (external self-determination)?⁸ In our

⁸ There is an extensive literature on self-determination in international law, among others, J. Crawford (ed.), *The rights of peoples*, 1998; C. Tomuschat (ed.), *Modern law of self-determination*, 1994; A. Cassese, *Self-determination of peoples. A legal appraisal*, 1995; M. Koskenniemi, "National self-determination today: problems of legal theory and practice", *ICLQ* 43 (1994), 241 et seq.; P. Aikio/ M. Scheinin (eds), *Operationalizing*

context it is, however, the right to decide over a people's economic, social and cultural future, in the form of control over lands and natural resources, as understood in the ICCPR, that is of relevance (internal self-determination).

The right of self-determination is regarded as a collective right of the people in question. This has the procedural effect that the individual right of appeal to the Human Rights Committee (HRC) under article 1 of the (first) Optional Protocol to the ICCPR, since it only covers individuals claiming to be victims of violations of any of the rights under the Covenant, does not encompass article 1.⁹ However, the Committee has in its General Comment No. 12 (1984)¹⁰ stated that the right of self-determination "is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights", (para. 1). Furthermore, in noting that only some state reports give detailed explanations regarding the implementation of article 1, the Committee "considers it highly desirable that States parties' reports should contain information on each paragraph of article 1", (para. 3).

The HRC, since 1999, commented on article 1 in connection with the mandatory country reporting under article 40 of the Covenant. In its report on Canada in 1999, the Committee stated:

“7. The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next periodic report.

8. The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains ‘the most pressing hu-

the right of indigenous peoples to self-determination, 2000; P. Alston (ed.), *Peoples' rights*, 2001; and G. Pentassuglia, "State sovereignty, minorities and self-determination: a comprehensive legal view", *International Journal on Minority and Group Rights* 9 (2002), 303 et seq.

⁹ See *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, Communication No. 167/1984: Canada, of 10 May 1990, Doc. CCPR/C/38/D/167/1984 (Jurisprudence), para. 13.3. The decisions of the HRC are available on the web site of the UN High Commissioner for Human Rights, <<http://www.unhchr.ch/tbs/doc.nsf>>.

¹⁰ General comments by the HRC are available under <<http://www.unhchr.ch/tbs/doc.nsf>>.

man rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."¹¹

Paragraph 7 only calls for reporting on the implementation of article 1. The statement in paragraph 8 indicates, however, that the Committee considers that article 1 para. 2 on the right to dispose over natural resources also applies to peoples of multi-ethnic states, i.e. that one state may consist of more than one people. The final sentence declares a substantive breach of article 1.¹²

When dealing with Norway's report from 1999, the Committee also called for reporting under article 1:

"17. As the Government and Parliament of Norway have addressed the situation of the Sami in the framework of the right to self-determination, the Committee expects Norway to report on the Sami people's right to self-determination under article 1 of the Covenant, including para. 2 of that article."¹³

In the Committee's observations on Mexico's report from 1999, it is stated that appropriate measures should be taken to increase the indigenous communities' "participation in the country's institutions and the exercise of the right to self-determination".¹⁴

The views of the Committee are further developed in the observations on Australia's report from 2000:

¹¹ Doc. CCPR/C/79/Add.105.

¹² See M. Scheinin, "The right to self-determination under the Covenant on Civil and Political Rights", in: Aikio/ Scheinin, see note 8, 179 et seq. (190).

¹³ Doc. CCPR/C/79/Add. 112 (1999).

¹⁴ Doc. CCPR/C/79/Add. 109 (1999), para. 19.

“The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).

The Committee is concerned, despite positive developments towards recognizing the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo, 1992; Wik, 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.”¹⁵

The Committee regards self-determination in relation to land rights first of all to cover procedural rights in the form of a “stronger role in decision-making” and “effective participation” in relevant land issues, but it seems also to express a more general concern about the limitations in land rights and interests.

Finally, the Committee makes the following observation on participation regarding decision-making when commenting on Sweden's report from 2002, although reference is made not only to article 1, but also to articles 25 and 27:

“The State Party should take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence.”¹⁶

The HRC's approach to article 1 has been cautious. It seems that the Committee is developing a practice, in dialogue with the states parties, on the content of self-determination as it should be understood under the Covenant. The requirement is first of all that indigenous peoples should participate in decision-making over land rights, but the Committee has also indicated that article 1 contains certain substantive requirements. At this stage, it is, however, difficult to determine in more detail the content of the procedural and substantive requirements.

¹⁵ Doc. CCPR A/55/40, para. 498-528 (2000).

¹⁶ Doc. CCPR/CO/74/SWE (2002), para. 15.

2. Article 27

Article 27 of the ICCPR is worded as follows:

“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 practise their own religion, or to use their own language.”

It should first be noted that this article gives minority protection to ethnic, religious and linguistic groups, and not only to indigenous peoples. Furthermore, it is not concerned with land rights as such, but with cultural, religious and linguistic rights. Finally, as opposed to article 1, individual and not collective rights are provided, although the rights shall be exercised “in community with the other members of their group.” This means that the individuals are entitled to use the complaints procedure under the (first) Optional Protocol.

In its General Comment No. 23 on article 27 from 1994,¹⁷ the HRC states that this provision entails an obligation to take positive action, and that where indigenous peoples are concerned such action includes protecting the material basis for their culture, as well as giving members of such groups a right to participate in relevant decision-making:

“7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”

These conclusions also build upon established and consistent practice on the part of the HRC. In the *Lubicon Lake Band* case, the Committee found a violation of article 27 due to interference by oil and gas drilling, and plans about a pulp plant and logging:

“33. Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the

¹⁷ CCPR General Comment 23. The rights of minorities (article 27) of 8 April 1994.

Lubicon Lake Band, and constitute a violation of Article 27 so long as they continue.”¹⁸

The Committee is, however, not very specific about the factors determining this conclusion.¹⁹

In the first *Länsman* case, where the Finnish state had granted a quarrying concession in a reindeer husbandry area, the Committee, referring to its General Comment No. 23, stated:

“9.4. A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.

9.5. The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on Article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken “to ensure the effective participation of members of minority communities in decisions which affect them.”²⁰

The Committee determines that the threshold for substantive interference is that “measures whose impact amounts to a denial of the right” to enjoy a certain culture are not allowed, whereas members of minority groups must accept “measures that have a certain limited impact.” It is worth noting that the Committee emphasises that the state has no margin of appreciation in this context and that article 27 sets an absolute barrier. The standard of “effective participation” is not developed further, but the Committee notes “in particular that the interests

¹⁸ *Lubicon Lake Band v. Canada*, see note 9.

¹⁹ Scheinin, see note 12, 194.

²⁰ *Ilmari Länsman et al. v. Finland*, Communication No. 511/1992: Finland, of 8 November 1994, Doc. CCPR/C/52/D/511/1992 (Jurisprudence).

of the Muotkatunturi Herdsmen's Committee and of the authors, were considered during the proceedings leading to the delivery of the quarrying permit, that the authors *were* consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred."²¹

The second *Länsman* case, concerning logging operations, confirmed the conclusions in the first case, and also pointed out that cumulative effects of activities must be taken into account:

"Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under Article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture."²²

The *Mabuika* case on fishing rights is also supportive of the conclusions in the earlier case law. It points out that not only traditional means of livelihood are protected:

"The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In particular, Article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology."²³

The Committee also refers to extensive consultation and the attention paid to the sustainability of the fishing activities:

"While it is a matter of concern that the settlement and its process have contributed to divisions amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settle-

²¹ Ibid., para. 9.6.

²² *Jouni E. Länsman et al. v. Finland*, Communication No. 671/1995: Finland, of 22 November 1996, Doc. CCPR/C/58/D/671/1995 (Jurisprudence), para. 10.7.

²³ *Apirana Mabuika et al. v. New Zealand*, Communication No. 547/1993: New Zealand, of 15 November 2000, Doc. CCPR/C/70/D/547/1992 (Jurisprudence), para. 9.4.

ment and its enactment through legislation, including the Quota Management System, are compatible with article 27.”²⁴

It may be concluded that indigenous peoples must accept measures with a limited impact, but that article 27 prevents measures denying them the use of land necessary to enjoy their culture. They also have a right of “effective participation” in decision-making which affects their use of land. It may be somewhat uncertain what the exact standard is regarding such participation. In the *Mabuika* case it is referred to as “broad consultation”, but a right of participation is, on the other hand, different from a right of veto. Although this case also opens up the possibility of using article 1 on the collective right to self-determination in the interpretation of the individual rights in article 27, nothing is said about what may be gained by such interpretation.²⁵

III. ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries

1. Introduction

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (the ILO Convention) aims to protect indigenous and tribal peoples' way of life and culture based on these peoples' own priorities.²⁶ This sets it apart from the previous ILO Convention of 1957²⁷ which aimed at assimilating these peoples into the national culture.

The use of the term “peoples” was highly contested at the negotiations because of its connotation of self-determination. The result of the negotiations was to include a provision to the effect that the use of this

²⁴ Ibid., para. 9.8.

²⁵ Ibid., para. 9.2.

²⁶ The ILO Convention No. 169 entered into force in 1991. Seventeen states are parties to the Convention, including several central Latin American countries, Norway and Denmark. But among the non-parties we find the United States, Canada, Sweden and Finland. The Convention encompasses no countries in Africa, and in Asia only Fiji. See <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

²⁷ ILO Convention No. 107 on Indigenous and Tribal Populations, 1957. The Convention may be found under <<http://www.ilo.org/ilolex/english/convdisp1.htm>>.

term should not “be construed as having any implications as regards the rights which may attach to the term under international law” (article 1 para. 3). While the use of “peoples” may have the effect of recognizing the special situation of the indigenous groups, it does not provide a basis for a right of external self-determination in the form of secession.²⁸ But, as we shall see, the Convention provides for extensive rights of participation in decision-making, which is an important part of internal self-determination. In addition, in the following discussion a particular emphasis will be placed on the substantive land rights contained in the Convention.

2. Methodological Issues

In accordance with article 31 para. 1 of the Vienna Convention on the Law of Treaties, the main task in treaty interpretation is to establish the meaning of the provisions of the treaty on the basis of their wording in the light of their object and purpose.²⁹ The provisions on land rights were highly contentious at the negotiations on the ILO Convention.³⁰ A large number of changes were proposed, and agreement was reached only after the chairman proposed that the provisions should be treated as a package solution, instead of the usual procedure of voting on each individual article.³¹ This suggests that there is even more reason that the wording should be assigned central significance when interpreting these provisions.

²⁸ See L. Swepston, “A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989”, *Oklahoma City University Law Review* 15 (1990), 677 et seq. (692-695).

²⁹ The Vienna Convention on the Law of Treaties, 1969, UNTS Vol. 1155 No. 18232.

³⁰ The negotiations on land rights have been described as “heated and protracted”; see M. Tomei/ L. Swepston, *Indigenous and Tribal Peoples: a Guide to ILO Convention No. 169*, ILO 1969 (“ILO Guide”). See also Swepston, see note 28, 696 and 699.

³¹ 101 changes were proposed in the provisions on land rights, see ILO Prov. Records 76th Sess. 1989 (25), 16-17. See also R. Barsh, “An Advocate’s Guide to the Convention on Indigenous and Tribal Peoples”, *Oklahoma City University Law Review* 15 (1990), 209 et seq. (210), and N. Lerner, “The 1989 ILO Convention of Indigenous Populations. New Standards?”, *Isr. Y. B. Hum. Rts.* 20 (1991), 223 et seq. (237).

Official preparatory works of the ILO Convention show proposals made by experts and states' reactions to these proposals. The disagreement between the states and the adoption of the provisions on land rights as a package solution meant that the provisions were formulated in the final negotiations and do not necessarily build on the original text proposals. Moreover, states may have had differing, and conflicting, grounds for accepting the various particulars of the provisions - grounds whose content cannot be ascertained after the event. Hence the text proposals in question and the grounds given for them should be assigned limited significance. This said, the competing text proposals show the gist of the disagreements, thereby giving guidance on why the final Convention text was chosen.

The parties to the ILO Constitution are, under articles 22 and 23, required to file regular reports with the ILO on their implementation of ILO conventions which are dealt with by the ILO's bodies. The reports are examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). Articles 24 and 25 of the Treaty on the establishment of the ILO open the way for private organisations (employers or employees) to complain against non-observance of ILO Conventions ("representations"). Such complaints are examined by a tripartite committee established by the Governing Body. Like statements from monitoring bodies established by other human rights conventions, statements from the ILO on parties' observance of ratified Conventions are not legally binding. They should, however, be assigned importance when interpreting the Conventions. Article 34 states that the Convention shall be applied in a flexible manner, having regard to the conditions characteristic of each country. This may limit the precedent effect of statements in relation to other states parties.³²

3. Right of Participation

The right of indigenous peoples to participate in decision-making is reflected in ILO Convention articles 6 and 7. These provisions have been emphasized by the ILO supervisory organs, often in connection with article 15, both in examining land reports and complaints. It has been stated that "the spirit of consultation and participation constitutes the

³² See Barsh, see note 31, 213.

cornerstone of Convention No. 169 on which all its provisions are based.”³³

Article 6 para. 1 (a) provides that the indigenous peoples shall be consulted with regard to measures which may affect them directly. The consultations shall be conducted in good faith and “with the objective of achieving agreement or consent to the proposed measures” (article 6 para. 2).

Any wording that could be interpreted as giving a right to veto to indigenous peoples was unacceptable to several countries.³⁴ Accordingly, the result was that, although being a strongly worded obligation to try to reach a mutually agreed result, the provision does not provide a right of veto. As has been stated in a case against Colombia:

“In the Committee’s view, although article 6 does not require that *consensus* be reached in the consultation process, it does envisage that the peoples concerned should have an opportunity to participate freely at all levels in the formulation, application and evaluation of measures and programmes that directly affect them.

...

The Committee considers that the concept of consultation with the indigenous communities that might be affected with a view to exploiting natural resources must encompass *genuine dialogue* between the parties, involving communication and understanding, mutual respect and good faith, and the sincere desire to reach a consensus. A meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention” (emphasis added).³⁵

³³ Representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), para. 31.

³⁴ Barsh, see note 31, 219.

³⁵ Representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT), paras. 78 and 90. See also Ecuador, see note 33, para. 39. Swepston says that what is required is a “true dialogue” (L. Swepston, “The ILO Indigenous and Tribal Peoples Convention (No. 169): eight Years after Adoption”, in: C. Price Cohen (ed.), *The Human Rights of Indigenous Peoples*, 1998, 17 et seq., 23).

Parallels may be drawn to obligations to negotiate between states, as in the judgement by the ICJ in the *Cameroon v. Nigeria* case:

“However, articles 74 and 83 of the United Nations Law of the Sea Convention do not require that delimitation negotiations should be successful; like all similar obligations to negotiate in international law, the negotiations have to be conducted in good faith.”³⁶

The right to consultation is a collective right, and article 6 para. 1 (a) provides that consultations shall take place particularly through the peoples' representative institutions. The principle of representation has been considered by the ILO as “a vital component of the obligation of consultation.”³⁷

The right of participation is stated in article 6 para. 1 (b), which requires governments to:

“Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.”

This provision does not, however, specify the participatory rights in more detail, and does not give special privileges to indigenous peoples.

Article 7 para. 1 expresses the general spirit of the Convention in protecting indigenous culture and ways of life, and in respecting their right to determine their own future:

“The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.”

Article 7 para. 3 requires studies to be carried out, in co-operation with the indigenous peoples, on the possible impacts of planned development activities. Such studies have also been requested from the ILO:

³⁶ *Case Concerning the Land and Maritime Boundary Between Cameroon And Nigeria*, ICJ Reports 2002, 303 et seq. (424, para. 244).

³⁷ Case against Ecuador, see note 33, para. 44.

“In these circumstances, the Committee considers it appropriate to re-recommend that the Governing Body request the Government to consider the possibility of establishing, in each particular case, especially in the case of large-scale exploitations such as those affecting large tracts of land, environmental, cultural, social and spiritual impact studies, jointly with the peoples concerned, before authorizing exploration and exploitation of natural resources in areas traditionally occupied by indigenous peoples.”³⁸

Articles 6 and 7 go a long way in requiring a meaningful cooperation with indigenous peoples through consultations with their representative institutions, but they fall short of granting full internal self-determination. The right of participation in decision-making in legislative and administrative bodies is not well-defined. This means that rights of ownership and control over land, and rights of participation in public management of land areas, are essential.

4. Land Rights

a. Article 13

The ILO Convention Part II articles 13 to 19 contains provisions on the land rights of indigenous peoples. As already mentioned, several of the provisions contained in this Part were highly controversial. This is easily understood by the importance of the land issue both for indigenous peoples and states.

Article 13 para. 1 recognizes the close relationship between indigenous peoples and the lands they inhabit or use:

“In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

³⁸ Report of the Committee set up to examine the representation alleging non-observance by Bolivia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Bolivian Central of Workers (COB) Submitted: 1998 Document: (GB.272/8/1), Document: (GB.274/16/7).

This provision points out the collective aspect of indigenous peoples' relationship to land. The ILO Committee has emphasized the importance of collective ownership and referred to the right of indigenous peoples to decide their own priorities. It has warned that "when communally owned indigenous lands are divided and assigned to individuals or third parties, this often weakens the exercise of their rights by the community or the indigenous peoples and in general they may end up losing all or most of the land, resulting in a general reduction of the resources that are available to indigenous peoples when they own their land communally."³⁹

A sensitive issue was the term "territories". On the one hand, indigenous peoples claimed rights to the total environment, and not only to the land. But states argued that "territory" is used in connection with the sovereignty of a state.⁴⁰ As such, the concept may have implications both for internal and external self-determination. The compromise was article 13 para. 2:

"The use of the term 'lands' in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."

b. Article 14

The most important provision on land rights is article 14:

"1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

³⁹ Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP) para. 32 (b), see also paras 30-31.

⁴⁰ See Swepston, see note 28, 698-699 and ILO Guide, see note 30.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.”

The wording of article 14 presents several problems of interpretation. In the following, the discussion will focus on article 14 para. 1. First, the expressions “traditionally occupy”, “the rights of ownership and possession”, and “shall be recognised” will be examined. Then the focus turns to the object and purpose of the provision. Finally, the significance of national adaptation under article 34 is addressed.

aa. “Traditionally occupy”

The distinction between the lands which the peoples “traditionally occupy” and lands “not exclusively occupied by them” is fundamental in article 14 para. 1.

The Oxford English Dictionary defines “occupy” as “to hold possession of; to have in one’s possession or power; to hold (a position, office, or privilege)” or “to live in and use (a place) as its tenant, or regular inhabitant; to inhabit; to stay or lodge in”.⁴¹ Black’s Law Dictionary gives the following definition of “occupancy”: “the act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, esp. of a dwelling or land”.⁴² There are three crucial elements in these definitions: the requirements of living in; using; and possessing an area of land. The Oxford English Dictionary defines possession as “the visible possibility of exercising over a thing such control as attaches to lawful ownership (but which may also exist apart from lawful ownership)”. Black’s defines “possession” as “the fact of having or holding property in one’s power; the exercise of dominion over property.”

Indigenous peoples would thus have the rights of ownership and possession of the land in which they live, use, and exercise control. In assessing these requirements, a parallel may be drawn to acquisition of territory by states. In the *Eastern Greenland* case, the PCIJ stated that less was required of effective control in remote areas, and that two ele-

⁴¹ *OED Online* <<http://dictionary.oed.com/>>.

⁴² *Black’s Law Dictionary*, 7th edition, 1999.

ments must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority.⁴³

In determining the required exercise of control under the ILO Convention, it is, however, also necessary to take into account the importance for indigenous peoples of the relationship to land (article 13), their practices in using the land (article 5), and respect for their customs or customary law (article 8). This means taking into account use of land which is not necessarily of an intensive character. Furthermore, acquisition of rights similar to ownership should not necessarily require exclusive control to the same extent as under ordinary national property law.

Finally, for occupancy to have been exclusive does not mean that others have not used the area on the basis of limited rights or tolerated use. Since the term "occupy" includes both living in, using and controlling a land area, the fact that others have used the area will not at the outset entail that the occupation has not been exclusive unless other parties have also occupied the land area by living there, using and controlling it. A crucial criterion for stating that it is a matter of areas coming under "land not exclusively occupied by them" must be that others have also practised a combination of settlement and use like the indigenous people in question.

bb. "The rights of ownership and possession"

The next terms that require interpretation are "ownership" and "possession." "Ownership" is defined in the Oxford English Dictionary as "the fact or state of being an owner; legal right of possession; property, proprietorship, dominion" and in Black's Law Dictionary as "the collection of rights allowing one to use and enjoy property, including the right to convey it to others." In other words, the wording refers not to various types of material rights, but to the right's formal status as the collection of rights in the owner. "Possession" has been defined above.

Another complex of issues attaches to the use of the plural form "rights of ownership and possession." One possible explanation for the plural form is that it refers to the two rights *right of ownership* and *right of possession*. Another is that it builds on a perception that right of ownership and right of possession are both generic terms for *rights of ownership* (owner's powers) and *rights of possession* and that it is the recognition of these types of powers which the provision requires.

⁴³ The *Eastern Greenland* case, PCIJ Ser. A/B, No. 53, 63.

Against the background of the perception of the terms “ownership” and “possession” explained above, a clarification of the text in the first-mentioned sense entails that governments are required to grant their indigenous peoples all rights that accrue to an owner in a legal and factual sense, in other words formal title, right of disposal in a legal and factual respect (ownership) and factual opportunity to exercise owner’s powers (possession). This understanding of the wording has not been taken as a basis in practice or in the literature. The ILO’s Committee of Experts has stated, with reference to the situation in Norway, that formal title is not necessary:

“The Committee does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention. The Committee awaits with interest the final determination of this question in Norway.”⁴⁴

It is also accepted in the literature that article 14 does not require recognition of formal ownership rights.⁴⁵ Implicit in this is the notion that the Convention does not require indigenous peoples to have formal title to the lands concerned. This means that recognition of ownership rights need not entail indigenous peoples being given the right to exercise legal powers that require formal title, such as conveyance, mortgaging and creation of limited rights. Indeed this follows to an extent from article 17 para. 2 of the Convention which opens the way for granting the peoples concerned competency to transmit their rights outside their own community. If the peoples concerned are not given title, it follows from article 17 para. 1 that the legal system must open the way for a system enabling rights to be transferred within the group in conformity with their own customs. Moreover, the non-transfer of title does not entail that the entity which retains title can use it to exercise legal powers in conflict with the indigenous peoples’ rights under article 14 para. 1 first sentence. If title and material rights are not assembled in a single entity, the underlying material rights must set limits to the formal competence to exploit the title. This follows directly from the

⁴⁴ CEACR 1995/65th Session. See also L. Hannikainen, “The Status of Minorities, Indigenous Peoples and Immigrant and Refugee Groups in Four Nordic States”, *Nord. J. Int’l L.* 65 (1996), 1 et seq. (54).

⁴⁵ Swepston, see note 28, referring to the preparatory works of the ILO Convention, 701.

fact that the indigenous peoples' rights of possession and ownership must be recognised.

In other words it must be assumed that what the provision requires is recognition of owner's powers in the legal and factual sense. An analysis of what this entails must start from the powers that accrue to an owner and possessor. Key elements of rights of ownership and possession both in systems of common law and civil law are an actual disposal over a particular area, i.e. the right to use and reap the fruits of a property and to prevent others from using it. Disposal is negatively defined, i.e. the owner and possessor can use and dispose over the property in all ways that are not prohibited by the legal system. In addition to actual disposal, owner powers include legal disposal, i.e. the right to let or sell the property and to create limited rights to it.⁴⁶

A particular question is whether "rights of ownership and possession" in the provision's first sentence can be interpreted in a narrow sense, such that awarding any power that accrues to an owner or possessor, including any right of use, would satisfy the Convention. An alternative is that a certain minimum level of powers has to be incorporated in order for there to be talk of recognition of rights of ownership and possession in the meaning of the Convention. This cannot be resolved on the basis of the concepts of "functional ownership right" or "substantive ownership right"; it must be resolved on the basis of a concrete interpretation of the Convention.

The wording, the use of the terms "ownership" and "possession," argues in its own right against recognition of a pure right to use a land area being considered sufficient. Where someone is given a right to do something within a land area that otherwise accrues to an owner or possessor - for example a right to cross cultivated land - it would, according to general language norms, be somewhat contrived to characterise this as granting owner's powers. The central aspect of an owner's right is that it is negatively defined, in contrast to a right of use which is positively defined. A right of use is limited to what expressly follows from the right in question and is not in itself dynamic. An ownership or possessory right on the other hand is a right to everything that is not ex-

⁴⁶ The ILO's Committee of Experts has the following view of the definition of "ownership" in the ILO Convention of 1957: "While the Committee of Experts had not found an exact equivalence between 'possession' and 'ownership', it had not found the firm assurance of possession and use to be in violation of the requirement for 'ownership'" (ILO Prov. Record 76th Sess. 1989 (25), 23).

pressly restricted, and is subject to development by the owner. Hence an owner's right to exploit woodlands within a land area or to move his livestock to grazing land is significantly different from the right held by someone with usage rights or grazing rights. Moreover, rights to use a land area are, as a rule, subject to the owner's instructions. The fact that the provision refers to rights of ownership and possession is an argument in favour of the notion that the rights to be recognised should bear the stamp of exclusiveness, and not be derived from any other party's right of ownership or possession and should permit development by the owner in step with the latter's changing wishes and needs. Moreover, the use of "(the) rights" in the definite plural argues that the indigenous people in question should be able to exercise all powers accruing to an owner or possessor.

Article 14 para. 1 distinguishes between lands indigenous peoples "traditionally occupy" in the first sentence and "lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities" in the second sentence. The distinction between the first sentence where indigenous peoples shall be granted "rights of ownership and possession", and the second where measures shall be designed to "safeguard the rights of the peoples concerned to use lands" is pertinent. This must be interpreted in such a way that while the second sentence gives a right of use, the first sentence gives a right to something more than use, namely "(t)he rights of ownership and possession". This also implies that within lands coming under the first sentence indigenous peoples shall be able to exercise a form of control or right of disposal, and not just to practise traditional use or use which changes in step with the evolution of their culture.

The background to article 14 also indicates that something more than rights of use is needed to satisfy the provision. The previous Convention on indigenous peoples' rights, the Indigenous and Tribal Populations Convention from 1957, which ILO Convention No. 169 was intended to replace, states in article 11:

"The rights of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised."

The introduction of "possession" alongside "ownership" in ILO Convention No. 169 was not intended to weaken an indigenous peo-

ple's land rights.⁴⁷ It is important here, in the first place, that the alternative text proposal "rights of ownership *or* possession" was rejected.⁴⁸ This indicates that the inclusion of the word "possession" was not intended to weaken rights of ownership.⁴⁹

cc. "Shall be recognised"

The use of the term "recognised" in connection with indigenous peoples' rights underpins this interpretation. It could be taken to mean that states parties are not obliged to allocate new rights to these peoples, only to recognize existing rights under national law. Article 14 contains, however, a legal norm requiring an "autonomous interpretation" independent of who is entitled to ownership rights under national law. The content of this international legal norm has been developed above.

⁴⁷ See the ILO's comment during the negotiations: "As concerns the use of the terms 'ownership', 'possession' and 'use', the Governments of Canada and Norway have made identical proposals based on a proposal submitted during the first discussion. In view of other observations received, the Office considers that to assimilate the term 'use' to ownership and possession would weaken the revised Convention by comparison with Convention No. 107, which recognises the right to ownership; it has therefore dealt with this question separately. The Government of India considers that the concept of possession is unacceptable, and proposes its deletion. This wording would, however, correspond to cases in which the rights which indigenous or tribal peoples have acquired through occupation should be recognised, but it is not appropriate to recognise them through ownership. Several respondents, and the Meeting of Experts convened on this question in 1986, have put forward effective arguments in favour of including the concept, and representatives of indigenous and tribal peoples themselves have indicated that they often attach more importance to possession than to ownership." (Report IV (2 A) ILO 76th Sess. 1989, 36).

⁴⁸ Swepston, see note 28, 700. He also refers to the fact that the introduction of "use" alongside "ownership and possession" was rejected. See also Barsh, see note 31, 224-25.

⁴⁹ Swepston, see note 28, asserts: "No consensus appeared to exist among the members of the Committee on either the meaning or the implications of the wording that it adopted in this sentence. It would seem, however, that the Committee's intent was not to weaken the right of ownership which existed in Convention No. 107, but rather to make the new convention more broadly applicable to a wide range of circumstances", (700). See also Barsh, see note 31, 224-25 on protection of "the highest form of ownership or tenure accorded to others in the country."

An alternative and more convincing meaning of the term “recognized” is that it suggests that indigenous peoples’ rights are not something “allocated” by the state, but are rights they already hold by virtue of being indigenous peoples who have traditionally occupied an area. This is consistent with a view of these peoples as the original population or the population inhabiting the country before establishment of its present borders (article 1 para. 1 (b)).

The term “recognized” is also in harmony with the assertions in the official ILO Guide and in the legal literature that the Convention does not require the transfer of formal ownership rights to the indigenous people. It is sufficient that they obtain rights equivalent to rights of ownership.⁵⁰

dd. “Object and purpose”

A particular question is whether the provision has, based on considerations of object and purpose, a somewhat weaker content than is suggested by its wording.⁵¹ The purpose of the provisions on land rights is to provide indigenous peoples with a stable basis for their culture and future development. It is difficult to see what considerations of purpose should be cited to render a limiting interpretation *necessary*. A limiting interpretation could alternatively be supported by a general principle of international law requiring a restrictive interpretation of treaties. As a general principle of interpretation, this principle is, however, of little significance in contemporary international law. Hence the issue is not whether considerations of object and purpose render it necessary to in-

⁵⁰ The ILO Guide, see note 30, asks the following: “Does this mean that indigenous and tribal peoples always have the right to title over their traditional lands? Not necessarily – the Convention talks of ‘rights’ in the plural. There are many cases in which indigenous and tribal peoples do not have full title to their traditional lands. After a long discussion in the Conference, it was concluded that in some circumstances the right to possession and use of the land would satisfy the conditions laid down in the Convention, as long as there was a firm assurance that these rights would continue ... It should be made very clear that this sentence is not meant to deprive these peoples of the greatest degree of land rights attainable. It had to be drafted in a way that would take into account different situations, and the fact that not all indigenous and tribal peoples are in a position to exercise the full rights of ownership.”

⁵¹ This was adduced by a majority of the Sami Rights Committee’s working group on legal matters, NOU (*Norway’s Official Reports*) 1993: 34, 56.

interpret the provision along limiting lines, but whether such considerations *call for* a limiting interpretation.

When proposing the Finnmark Bill, the Norwegian Government claimed that considerations of purpose will guide the establishment of what rights are to be recognised in the particular case, and that “the salient point (must) be that the indigenous people’s right of disposal over their lands is such that the aim of the ILO Convention’s provisions is achieved”.⁵²

In connection with this statement, reference can be made to article 13 para. 1, requiring that governments shall, when interpreting the provisions of the Convention concerning land rights, respect the importance for indigenous peoples’ culture and spiritual values of their relationship with the lands. Furthermore, indigenous peoples’ “social, cultural, religious and spiritual values and practices” shall be recognised and protected (article 5 (a)).

An issue in this connection is whether the purpose goes further than providing for recognition and protection of the actual enjoyment of a property or, put it another way, whether the exclusivity, control and right of “residual use” inherent in rights of ownership and possession “over-fulfil” the purpose. If the purpose is understood to be merely to provide indigenous peoples with a stable basis for their culture and future development, these aspects of the right of ownership and possession could appear to be superfluous. However, the provision must also be interpreted in light of article 7 para. 1, which gives the indigenous peoples the right to decide over the development of their lands and to exercise control over their economic, social and cultural development. Article 8 para. 2 assures the right to maintain the indigenous peoples’ customs. This does not, however, provide a basis for limiting the indigenous peoples’ rights to what is necessary for the preservation and development of their culture and influence on land management.

Accordingly, when the introductory provisions are viewed as a whole, the purpose makes no allowance for any clarifying interpretation of the provision in relation to what is implied by its wording and background. Hence considerations of purpose cannot provide grounds for recognition of anything less than rights which afford the indigenous peoples such control and disposal as accrues to the holder of rights of ownership and possession. How rights of ownership and disposal are to

⁵² Proposition to the Odelsting No. 53, see note 5, 88-89.

be formulated in detail and how the issue of title is to be formally dealt with, on the other hand, is not established by the provision.

Based on the above, the point of departure should be that indigenous peoples are entitled to all rights usually held by an owner in the national legal system in question, insofar as this does not result in significantly poorer protection than that which follows from the dominant legal cultures of continental legal systems and common law. However, the Convention sets no absolute requirement to the effect that the indigenous peoples should be allocated a legal right of disposal over the lands in question (that which distinguishes ownership rights from possessory rights) or formal title to the lands in question. Where other parties are accorded such title and legal right of disposal, this does not entail any right to dispose over the property by sale, lease or creation of limited rights to the neglect of the indigenous peoples' rights under article 14.

ee. "Article 34"

Another basis for a limiting interpretation could be article 34:

"The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country."

This entails that rights, *inter alia*, under article 14 para. 1 first sentence, can be adapted to national conditions. However, article 34 cannot provide a basis for undermining the rights following from article 14. This indicates that article 34 should make allowance for rights whose content differs somewhat from those customarily held by an owner, but not for rights that are poorer or significantly different from those following from article 14.

c. Article 15

Article 15 deals with natural resources pertaining to lands to which indigenous peoples have rights under article 14. Article 15 establishes that these rights, including the right to participate in the use, management and conservation of the resources in question, shall be specially safeguarded. A distinction is drawn between mineral or subsurface resources of which the state retains ownership, and other resources of which the state retains rights. Where natural resources in respect of which the state retains ownership and other rights are concerned, provi-

sions are laid down to protect the indigenous peoples in connection with the utilisation of such resources, to assure them influence over decisions on utilisation and to ensure that the indigenous peoples receive a share of the financial proceeds and compensation for any curtailment of their rights resulting from such utilisation.

The article reads:

“1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

This article was the subject of substantial disagreement during the negotiations. On the one hand many states maintained that the government generally has ownership rights to natural resources and that there was no question of departing from this in respect of indigenous peoples.⁵³ In indigenous peoples' quarters, on the other hand, it was asserted that ownership rights to lands are of no interest without control over the natural resources to be found there.⁵⁴

The provision raises several questions. The first question is what is implied by the notion that an indigenous people shall be assured rights of participation and management of natural resources pertaining to their lands, cf. para. 1. The next question is what rights accrue to an in-

⁵³ See ILO Report VI (1) 75th Sess. 1988, 72: “During the Meeting of Experts it was noted that in many countries those who hold title to land do not have rights to the subsoil and other resources; even though indigenous and tribal peoples have special needs and special claims in regard to such resources, a stronger provision which simply extends ownership of these resources to these peoples would prove incompatible with the legal systems of a number of countries.”

⁵⁴ See Swepston, see note 28, 703.

indigenous people in terms of exploitation of natural resources of which the state retains ownership, cf. para. 2.

As regards the question of what natural resources the state can retain ownership of, the starting point is the general rules governing an owner's right to exploit natural resources pertaining to the land he owns and the right of the state or anyone empowered by the state to exploit natural resources on other parties' property. Since these rules vary from country to country, the provision is worded in general terms and does not establish what resources accrue to the owner and what do not.⁵⁵ Discriminating against indigenous peoples by excepting their right of disposal over natural resources from their land ownership rights to a greater degree than in the case of real property in general is not permitted.⁵⁶ The provision in question applies to all lands which indigenous peoples occupy or otherwise use; see article 13 para. 2. Hence a distinction needs to be drawn between lands coming under article 14 para. 1 first sentence and second sentence, respectively. Only in connection with lands coming under the first sentence of the provision is it necessary to draw a line between the indigenous people's ownership rights and the state's right to natural resources. In the case of other areas the situation under the Convention must be that the indigenous people cannot oppose other parties having rights to natural resources which do not directly collide with their own use of the land in question. However, the rules on procedures and compensation set out in article 15 para. 2 also apply to such situations.

The starting point concerning lands to which an indigenous people has rights of ownership or possession under article 14 para. 1 first sentence is, as stated, the general limitation on the owner's sole right of disposal under the general rules of property law. For example, in Norwegian law, the point of departure is that the owner has the sole right to exploit all resources pertaining to a property. Exceptions apply in the case of certain minerals and sub-surface resources where the principle of freedom to mine applies to claimable minerals while the right to sub-surface petroleum deposits belongs to the state.⁵⁷ Other natural re-

⁵⁵ See Swepston, see note 28, 704.

⁵⁶ See Barsh, see note 31, 229 and S.J. Anaya, *Indigenous Peoples in International Law*, 1996, 106.

⁵⁷ See section 3 of *lov om bergverk* (Mining Act) of 30 June 1972 No. 70 and section 1 of *lov om undersøkelser etter og utvinning av petroleum i grunnen under norske landområde* (Act relating to Onshore Exploration for and Production of Petroleum in Norway) of 4 May 1973, No. 21.

sources accrue to the owner, subject to the restrictions entailed by concrete usage rights held by other parties by agreement, prescription or immemorial usage and public right.⁵⁸ As a general point of departure, this entails that in areas covered by article 14 para. 1 first sentence, the Sami people are entitled under article 15 to exploit all natural resources that accrue to an owner subject to the reservations entailed by public right, the right to prospect and the state's exclusive right to petroleum deposits.

Deviations from this general point of departure are conceivable in both directions. In countries where restrictions on the owner's right to exploit natural resources are wider-ranging than in Norway, it is conceivable that consideration for indigenous people's traditional livelihoods and life conditions may call for them to be granted wider rights to their lands than indicated by the country's general rules. It may also be relevant to ask, in the particular case, whether there is a basis for greater curtailment of the indigenous people's right of disposal over natural resources than is generally the case. Curtailment of such peoples' disposal of resources on the grounds that they are an indigenous people and therefore do not have rights to their lands on a par with others, conflicts with the prohibition of discrimination. The same will apply in the case of curtailment grounded in the notion that the indigenous peoples, due to their customs and traditions, have practised a different usage of their lands and have referred to their use and their relationship to their lands in different terms than the public in general.

A different situation applies with regard to rights grounded in individual or collective traditional rights acquired through immemorial usage, prescription etc., such as rights accruing to certain properties or rural communities. Recognition of such rights could not be said to discriminate against the indigenous people as owner of the land in relation to other owners in the national legal system since these are rights that any owner has to respect in such a situation. The provisions of article 15 para. 2 will nonetheless apply in relation to these rights.

Article 15 para. 1 entitles the indigenous peoples to participate in the use and management of natural resources pertaining to their land. What this means in practice will depend on whether it is a matter of land to which the indigenous peoples have rights of ownership and possession, or whether it is a matter of land which they have the right to use under article 14 para. 1 second sentence. It is clear that article 15 applies to

⁵⁸ See T. Falkanger, *Tingsrett*, 5th edition, 2000, 428-436.

both categories of land areas; see article 13 para. 2 where this is expressly stated.⁵⁹

In areas over which indigenous peoples have rights of ownership and possession, the right to participate in the use and management of natural resources will primarily be of significance for public law rules on the exploitation, management and protection of natural resources. They will already enjoy the private law right to exploit the natural resources by virtue of the rights that are recognised in pursuance of article 14. In other words the provision entails a right to participate in the public law management of natural resources. Article 15 para. 1 provides a right to “participate in the use”, in contrast to for example article 15 para. 2 which refers to “consult these peoples” and article 6 which mentions “consult the peoples concerned.” Based on the wording, it is natural to assume that the indigenous peoples must be represented in the agencies that make decisions and are responsible for the management of resources in the indigenous peoples’ lands. However, since the provision uses the word “participate” there cannot be any requirement that public law management should be left to the indigenous peoples or that the latter should be given decisive influence in matters concerning resources pertaining to their lands. To the extent that lands under article 14 para. 1 first sentence are situated in municipalities where the indigenous peoples are in a majority or constitute such a large part of the population that they can be said to participate in the formation of the municipality’s policies and decisions, the assumption would be that the requirement is fulfilled where municipal agencies participate in the formulation of decisions.

In land outside the scope of article 14 para. 1 first sentence, i.e. land which the indigenous peoples inhabit or otherwise use, but where they are not the predominant population, the right to participate in the exploitation and management of the natural resources must have both private law and public law implications. This follows directly both from the wording and from the fact that the provision of article 13 applies to land to which the indigenous peoples do not have rights of ownership and possession. In private law terms the provision entails that these peoples must not only be given the right to use the land under article 14 para. 1 second sentence but also a right to exploit natural resources to the requisite extent. In addition they must be entitled to participate in the exploitation and management of natural resources in cases where this may come into conflict with indigenous exploitation rights. Such

⁵⁹ See C. Thornberry, *Indigenous Peoples and Human Rights*, 2002, 356.

conflict is conceivable where several parties are entitled to exploit the same resource, and for example where exploitation of one type of resource may displace exploitation of another.

Article 15 para. 2 concerns the exploitation of resources of which the state retains ownership. Based on the purpose of this provision, it necessarily embraces all natural resources which can be exploited by parties other than the indigenous people concerned, i.e. in Norway's case all claimable minerals in addition to petroleum resources owned by the state. True enough, under Norwegian law claimable minerals are not a type of resource of which "the state retains ownership." If claimable minerals do not come under article 15 para. 2, the alternative is that they come under para. 1 and thereby constitute a natural resource whose exploitation and management the Sami are entitled to participate in directly in those areas which come under article 14 para. 1 first sentence, and indirectly to the extent that their right of use is affected in areas coming under the second sentence. It must be justifiable to interpret the provision such that it is applicable in all cases where the landowner's right of disposal is restricted for the benefit of other parties, either because ownership of the resource is, in the first instance, reserved for the state which can then grant production licences or, as in the case of Norway's Mining Act, exploitation rights accrue to the first party to claim such rights. In both cases it is a matter of limiting the landowner's exploitation rights for the benefit of others on the basis of general political, economic and social considerations. With reference to article 34 it must be justifiable to assert that the applicability to the indigenous people's right of disposal of a general limitation cannot depend on the state being the owner of the resources in question. Hence it should not be considered to be in conflict with the Convention that the principle of freedom to mine should also be retained for areas coming under article 14 para. 1 first sentence.⁶⁰

⁶⁰ Norway has been criticized by the ILO for not conducting consultations under article 15 para. 2 prior to granting mineral exploration permits (Comments made by the Committee of Experts on the Application of Conventions and Recommendations (from 1990) Indigenous and Tribal Peoples Convention, 1989 (No. 169), CEACR 1995, 65th Sess., para. 23).

IV. Sami Land Rights and the Proposed Finnmark Act

1. Introduction

The Sami people inhabit areas of Sweden, Finland and Russia, but most of its population (more than 40.000) lives in Norway. The rights to the land areas in Finnmark, which is the northernmost county of Norway of 48.649 km² (larger than Denmark), have long been disputed. The Sami Rights Committee was established by the Norwegian government in 1980 as a result of the conflict over the interference of hydro-electric power development in the Alta-Kautokeino watercourse. The first report by the Committee resulted in the Sami Act of 1987 and establishment of the Sami Parliament, and a new article 110 A of the Norwegian Constitution relating to the Sami people in 1988. The Committee submitted a new report in 1997 relating to rights to natural resources and land.⁶¹ This report formed the basis for the government's Bill concerning land rights and management in Finnmark (the Finnmark Act).⁶²

The proposed Finnmark Act presents a common administrative arrangement for all land in Finnmark that is currently registered as the property of *Statskog SF*, i.e. 95 per cent of the county's land area. The Bill establishes a legal entity, the *Finnmark Estate*. Registered title to state land in Finnmark is transferred from Statskog to the new Finnmark agency. This unequivocally turns the new agency into a land-owning body, and not, in principle, an administrative agency. In relation to public authorities, the Finnmark Estate essentially has the same status as a private owner, subject to two important modifications: a.) its legal position can be changed by subsequent legislation (section 19); and b.) compensation will not be paid in the event that land is expropriated for a number of public purposes (section 18). In relation to private right holders the situation is more complicated. The Bill expressly makes no encroachments on private or collective rights based on prescription or immemorial usage, while not defining what types of rights this may involve in different geographical areas (section 5). Evidently there may be a question here of rights of use within the usual meaning of property law. However, in light of recent practice by the Norwegian Supreme Court,⁶³ the possibility cannot be ruled out that in some areas the local

⁶¹ NOU (*Norway's Official Reports*) 1997: 4 *Naturgrunnlaget for samisk kultur*.

⁶² Proposition to the Odelsting, see note 5.

⁶³ See especially Supreme Court Reports 2001, 769, and 2001, 1229.

population must also be regarded as holding formal ownership rights to certain areas within the Finnmark Estate.

Since the Bill does not seek to define a boundary between the powers of ownership assigned to the Finnmark Estate and the rights held by the Sami people on the basis of prescription or immemorial usage, the crucial point in relation to the ILO Convention article 14 para. 1 is whether the proposed administrative arrangement in itself fulfils the requirements of the provision. Sections 22-24 of the Bill give the local population of Finnmark, which of course includes the Sami population, the right to exploit certain resources. However, they give no special rights to the Sami as an indigenous people. The rights are positively enumerated, and the exercise of them depends on what regulations the Finnmark Estate lays down as regards permits, fees and allotment of areas. Against this background it is obvious that the rights of use granted by these provisions of the Bill do not meet the requirements of article 14 para. 1 first and second sentence as regards ownership or possessory rights or rights of use.

Since, equally, the Bill draws no distinction between areas coming under article 14 para. 1 first and second sentence, it follows that the administrative arrangement for the entire area has to fulfil the requirements of article 14 para. 1 first sentence. It has been concluded above that article 14 para. 1 first sentence requires the indigenous peoples in the geographical areas encompassed by this provision to be granted rights of ownership and possession which correspond in both the legal and *de facto* sense to those normally accruing to an owner, with the reservation that title over these areas need not be transferred. How these rights are to be formulated in detail is not established in the provision. The provisions of the Bill that raise problems in relation to article 14 para. 1 first sentence are first of all the governance arrangement for the Finnmark Estate (section 7).

The focus of the following discussion will be, first of all, to what extent the governance arrangement proposed by the Finnmark Bill is consistent with the requirements of the ILO Convention No. 169 article 14 para. 1 first sentence. Article 27 of the ICCPR will also be addressed. The content of the Covenant's article 1 on self-determination is not clarified in sufficient detail by the HRC to conclude that the Bill does not fulfil its requirements.

2. Article 14

Section 30 of the Finnmark Bill assigns registered title to the lands in question to the Finnmark Estate. According to section 6, the Finnmark Estate is an independent legal entity with its seat in Finnmark which shall administer land and natural resources etc., that it owns in compliance with the act. Apart from this transfer of title, the Bill makes no changes in the underlying existing proprietary conditions or rights. Since the Sami as an indigenous people are neither awarded material rights to their lands directly nor receive title, the question is whether management via the Finnmark Estate can be equated with the rights of ownership and possession to which the Sami people are entitled under article 14 para. 1 first sentence.

This is, above all, a matter of the content of the governance arrangement for the Finnmark Estate. According to section 7, the board of the Finnmark Estate shall comprise seven members. Finnmark County Council and the Sami Parliament shall each elect three members with a personal deputy. The members and deputies shall be resident in Finnmark. Among the members elected by the Sami Parliament at least one board member and that person's deputy shall be representatives for reindeer husbandry. One non-voting member with a personal deputy shall be appointed by the government. The board itself will appoint its chairperson and deputy chairperson from among its members. If no-one achieves a majority, the board member appointed by the state shall be the chairperson.

This composition of the board does not at the outset give the Sami people sufficient rights over the lands in question to support the contention that their rights of ownership or possession are thereby recognised. However, control over the land in question depends on voting procedures, the interplay between the Finnmark Estate, the Sami Parliament and other public bodies, and any material limitations on decision-making authority.

Under section 9, the board has responsibility for the management of the Finnmark Estate. Section 9 establishes that the board may make decisions when at least five voting members are present. Except as otherwise provided by section 10, decisions are made by simple majority. Where a vote is tied, a decision is deemed not to have been made. If the board member appointed by the state regards it as necessary for the operation of the Finnmark Estate that a decision be made, the member may request that the matter be decided by the ministry. A decision by the ministry has the same effect as such a decision by the board.

To the extent that governmental decisions can be made in cases concerning private law management of the land in question, the requirement as to Sami control under article 14 cannot be regarded as being fulfilled. However, section 10 sets out further rules on the treatment of cases concerning changes in the use of uncultivated land etc.

Section 10 first paragraph contains rules regarding what interests are to be attended to in cases concerning changes in the use of uncultivated land:

“In matters concerning changes in the use of uncultivated land, the Finnmark Estate shall assess the significance a change will have for Sami culture, reindeer husbandry, commercial activity and social life. In making this assessment, the guidelines of the Sami Parliament pursuant to section 4 shall be followed.”

Section 10 fourth paragraph establishes that this section applies correspondingly to cases concerning “sale and leasing of uncultivated land or rights to uncultivated land, concerning assignment of special rights for local utilization of renewable resources and concerning local management of hunting and fishing.” The section does not apply to the management of cultivated land.

Section 4 states the following on the Sami policy guidelines:

“The Sami Parliament may issue guidelines for assessing the effect of changes in the use of uncultivated land on Sami culture, reindeer husbandry, commercial activity and social life. The guidelines and amendments to the guidelines shall be approved by the Ministry.

In matters concerning changes in the use of uncultivated land, state, county and municipal authorities shall on the basis of the guidelines issued by the Sami Parliament assess the significance such changes will have for Sami culture, reindeer husbandry, commercial activity and social life.”

According to section 4 first paragraph, the guidelines shall be established by the Sami Parliament but both the guidelines and changes to the guidelines will require ministry approval. However, the ministry will not undertake any review of the Sami Parliament's assessment of what would be detrimental to Sami culture etc. The Sami Parliament's assessments will be left entirely to that body's discretion. Nonetheless, part of the approval process will be to check whether the guidelines comply with the delimitation in section 4 or, in other words, whether they address impacts on Sami culture, reindeer husbandry, commercial activity and social life or go beyond this. Disagreement between the Sami Parliament and the ministry may lead to no guidelines being

adopted. Hence the Sami Parliament does not have ultimate control over the content of the guidelines.

It is also important that section 10 first paragraph does not entail that the Sami Parliament's guidelines represent binding limitations on the Finnmark Estate's decisions concerning changes in the use of uncultivated land. This provision establishes that the guidelines shall underlie assessments of what *significance* changes in the use of uncultivated land will have for Sami culture, reindeer husbandry, commercial activity and social life: the guidelines do not establish binding rules for the content of the Finnmark Estate's decisions. This is also clear from the commentary to this provision which states: "The guidelines are not directly binding, but there is a clear presumption that substantial importance will be given to the guidelines in the assessment."⁶⁴

This entails that importance shall be attached to the Sami policy guidelines when the Finnmark Estate considers changes in the use of uncultivated land. According to section 4 second paragraph, assessments made by state, county municipal and municipal authorities shall also be based on the guidelines. But since the Sami Parliament does not have the final say on the content of the guidelines and the guidelines are not binding for decisions made concerning the use of uncultivated land, the provisions on the guidelines cannot be placed on the same footing as the rights of ownership and possession required by ILO Convention article 14.

Section 10 second paragraph sets forth rules on the decision-making process in regard to changes in the use of uncultivated land:

"Decisions concerning changes in the use of uncultivated land always require the support of at least four board members who are entitled to vote if the whole minority bases its opinion on due consideration for Sami culture, reindeer husbandry, commercial activity and social life assessed on the basis of the guidelines of the Sami Parliament. If the majority consists of four or less, a collective minority may during the board meeting demand that the matter be placed before the Sami Parliament. If the Sami Parliament does not ratify the decision of the majority or does not consider the matter within a reasonable time, a collective majority of the board may demand that the Finnmark Estate place the matter before the King [i.e. the Government], who shall then decide whether the decision shall be ap-

⁶⁴ Proposition to the Odelsting, see note 5, 127.

proved. Such approval of the decision has the same effect as such a decision by the board.”

This provision entails that at least one representative appointed by the Sami Parliament must support a decision to change the use made of uncultivated land in order for the decision to be made, in cases where a collective minority justifies its standpoint with reference to Sami culture etc. on the basis of the Sami Parliament's guidelines. This collective minority can have the decision submitted to the Sami Parliament, but the Sami Parliament cannot prevent the decision from being made. A collective majority of the board of the Finnmark Estate is namely entitled to submit the matter to the King who will then make a final decision.

The above procedure provides protection against interference with Sami culture, reindeer husbandry, commercial activity and social life. The commentary to this provision states that the procedure “will assure the Sami Parliament substantive influence over land management.”⁶⁵ It also states that “it is the state authorities that are ultimately responsible for compliance with international law obligations and for ensuring that ratification of a decision regarding changes in the use of uncultivated land does not conflict with the protection afforded by international law.”⁶⁶ However, the procedure does make encroachments possible provided that majority decisions are supported by a minority of the board representatives appointed by the Sami Parliament. This entails that the Sami, as an indigenous people, do not have rights on a par with owners as required by article 14 of the Convention. Nor is it sufficient to cite the state authorities' obligation to comply with obligations under international law if the act lays the basis for a decision-making system that is contrary to international law.

Equally, the Bill's object and purpose clause (section 1) cannot make any difference in relation to the administrative arrangement's status under international law:

“The purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of Sami culture, reindeer husbandry, commercial activity and social life, the inhabitants of the county and the public at large.”

⁶⁵ Proposition to the Odelsting, *ibid.*, 127.

⁶⁶ Proposition to the Odelsting, *ibid.*, 128.

This provision enjoins an overall assessment in which Sami interests are one of several considerations to be attended to. Moreover, it is merely of a guideline nature, and does not provide binding protection in terms of substantive law.⁶⁷

Section 3 of the Bill is a general provision on the significance of international law for the application of this act:

“The Act shall be applied in compliance with the provisions of international law concerning indigenous peoples and minorities and with the provisions of agreements with foreign states concerning fishing in border zones.”

This section requires the act to be interpreted and applied in compliance with ILO Convention No. 169. It does not, however, provide a basis for setting aside provisions of the act should they conflict with Norway’s obligations under international law. Hence section 3 does not remedy those elements of the Bill that are contrary to the ILO Convention. However, the provision entails a limit to the Finnmark Estate’s competence to dispose over the land areas in question where such disposal conflicts with Sami rights based on the international rights of indigenous peoples. While this may partially serve to remedy the conflict between the Bill and the Convention, viewing the Convention as a limitation on the Finnmark Estate’s competence will not suffice to fulfil obligations in those areas coming under article 14 para. 1 first sentence.

Thus far the conclusion is that the governance arrangement for the Finnmark Estate, and the rules governing the content of decisions which may be taken, do not afford the Sami population the rights of ownership and possession to which this indigenous people is entitled to under article 14 para. 1 first sentence.

3. Article 34

A pertinent question is, however, whether article 34 of the Convention, which establishes that the Convention shall be implemented “in a flexible manner, having regard to the conditions characteristic of each country,” makes allowance for the solutions contained in this Bill.

It has already been concluded that article 34 provides a basis for adapting the application of the Convention to conditions in the respective countries, but not where this results in poorer or significantly dif-

⁶⁷ Proposition to the Odelsting, *ibid.*, 120.

ferent rights for indigenous peoples than those afforded by other provisions of the Convention. Since the Bill is not considered to fulfil the Convention's requirements in the geographical areas encompassed by article 14 para. 1 first sentence, the issue is whether this can be compensated for with Sami influence over a significant portion of the lands in Finnmark, in an area which is far larger than that which is assumed to be encompassed by article 14 para. 1 first sentence.

It may be asserted that such an arrangement gives opportunities to protect Sami interests in 95 per cent of lands in Finnmark, which may, *inter alia*, be of positive significance for reindeer husbandry. Moreover, it is conceivable that such an arrangement would be more acceptable in relation to non-Samis, and would thereby mitigate conflict since geographical division into areas under and outside Sami control would be avoided. However, it is difficult to compare the disadvantages of having less control over the lands encompassed by article 14 para. 1 first sentence with the advantages of having influence over a significantly larger geographical area.

The ministry bases itself on the notion that the crucial point is the "totality of the arrangement and whether it effectively promotes the considerations underlying the provisions of the Convention" and has stated that "an overall solution for Finnmark will be in accordance with international law if the Sami people acquire sufficient influence over land management in such a way as to ensure a stable basis for the preservation and development of Sami culture."⁶⁸

How far the Bill assures a stable basis for the preservation and development of Sami culture depends on how the Finnmark Estate and the state exercise the powers which the Bill accords the board and the state, respectively. The rules on decision-making are formulated so as to enable the Sami Parliament to exercise influence on the basis employed for assessing the impact of the management on Sami culture, reindeer husbandry, commercial activity and social life. Cases concerning changes in the use of uncultivated land which are not supported by a majority of the Sami representatives can be submitted to the King by the Sami Parliament. In other words, the design of the Bill lays the basis for the state to fulfil its obligation under the ICCPR article 27 to protect the material basis for Sami culture. However, this is not crucial to an assessment of whether the obligations under the ILO Convention are fulfilled.

⁶⁸ Proposition to the Odelsting, *ibid.*, 90-91.

As mentioned above, considerations of purpose should not justify a limiting interpretation of the rights following from article 14 para. 1 first sentence. Hence the fact that an area is managed in such a way as to protect Sami culture is not sufficient to fulfil article 14 para. 1 first sentence unless the Sami people themselves are assured such influence over the management as accrues to an owner or possessor of the relevant areas of land. The question of whether the influence required by article 14 para. 1 first sentence can be “exchanged” for greater influence over lands other than those which the Sami would otherwise have been entitled to use under article 14 para. 1 second sentence is a distinctly political issue that is poorly suited to an assessment of a purely legal nature. There is no basis in the Convention for the notion that states are accorded such leeway to implement their obligations, without the indigenous people itself participating in such political assessments by, in the event, expressing its support for them. Hence the crucial point is that the Bill does not lay a basis for Sami rights of ownership and possession in areas traditionally occupied by them. This being the case, article 34 cannot be cited as a basis for stating that non-fulfilment of article 14 para. 1 first sentence is compensated for by greater Sami influence on the management of other areas. The conclusion is thus that article 34 does not provide a basis for accepting the Bill’s system for management of land in Finnmark.

4. Case Law

In the ILO’s examination of state reports on the implementation of ILO Convention No. 169, and in complaints made under the same Convention, it is difficult to find cases comparable to the management of land areas proposed in the Finnmark Bill. But the system for rights to land in Greenland merits some examination.

Denmark has an administrative system for the whole of Greenland that is not based on a division of lands falling respectively inside and outside the geographical scope of the ILO Convention article 14 para. 1 first sentence, and where the administrative agency is not formally composed of representatives of the indigenous Inuit people and non-indigenous peoples. In Greenland it is not possible to gain ownership to land by physical or legal entities. The land is administered by the

Greenland Home Rule Administration.⁶⁹ This means that the management of property is undertaken by an institution where the indigenous

⁶⁹ The Danish State issued on 9 October 1997 the following declaration upon ratifying the Convention:

“With reference to article 14 of the Convention, the Danish government wishes to state the following:

1. In Denmark there is only one indigenous people in the meaning of Convention no. 169. This is the original population of Greenland, the Inuit. The Greenland Home Rule Act (no. 577 of 29 November 1978) introduced a home rule system for Greenland. The home rule system consists of a popularly elected assembly, the Landsting or Home Rule Parliament, elected by permanent residents of Greenland, and a politically elected leadership, the Landsstyret or Home Rule Administration, which is elected by the Home Rule Parliament. According to the Greenland Home Act, Greenland is a special community within the Kingdom of Denmark.

2. The Greenland Home Rule Act (no. 577 of 29 November 1978) laid a basis for legislative and administrative competency in a large number of judicial areas to pass to the Home Rule Administration. By agreements between the Danish government and the Greenland home rule administration, legislative and administrative competency in a number of the areas encompassed by the Convention in question have subsequently been transferred.

3. It has at no point been possible to achieve land ownership rights in Greenland, either for physical or legal entities.

4. Property rights to land in Greenland are organised in a unique manner along traditional lines. The various legal and actual rights, together constituting the right of ownership, are divided between the State, the Greenland Home Administration and the individual Greenlanders. The point of departure is that the public authorities -- the State -- has right of ownership to Greenland's lands as such. However, the day-to-day right of determination over lands in Greenland resides with the Greenland Home Rule Administration which i.a. is empowered to render decisions on the allocation of land use rights. Greenlanders who are allocated land use rights in Greenland are entitled to erect buildings on land so allocated. Such buildings may in given cases be mortgaged, and may, with the Home Rule Administration's permission, be made over to others together with the right to use the land on which they built.

The state of law described above applies to all citizens of Greenland, both the original Greenland population and immigrants. As mentioned, the state of the law is of very old provenance inasmuch as it has never been possible for individuals to acquire complete ownership rights to land in Greenland. Hence it is a matter of a state of law determined by tradition which has very long historical roots in Greenland society and which Greenland's Home Rule Administration attaches great importance to preserving.

people have a majority. This system has been accepted by the Inuits, as well as by the ILO.⁷⁰

It could be asserted that the fact that Denmark has gained ILO acceptance for an administrative system for the whole of Greenland that is not based on a division of lands falling respectively inside and outside the geographical scope of article 14 para. 1 first sentence, means that it must be possible to opt for the same type of solution for Finnmark. However, the situation in Greenland cannot be compared with that in Finnmark since the Inuit people of Greenland account for more than 80 per cent of the population of this land area. The fact that the Sami people also enjoy voting rights and are eligible for election to the Finnmark County Council does not mean that the influence that the Sami minority in Finnmark as a whole has over the governance of the Finnmark Estate will be comparable with the Inuit people's influence over the Greenland Home Rule Administration. Besides, the Inuit people have not laid claim to special arrangements for administration of the lands in question; they have on the contrary declared to the ILO that they agree with the existing arrangement.

Furthermore, the ILO has already had the opportunity to consider the Finnmark Bill in connection with Norway's report of 2003. The ILO Committee (CEACR) made, *inter alia*, the following observation

5. Against this background both the Danish Government and the Greenland Home Rule Administration are of the view that the state of law described above is expedient and in conformity with article 14 of the Convention. Hence the state of law in Greenland, according to which the Home Rule Administration has complete right of disposal over land, fully promotes the considerations underlying article 14, namely that the original population's right of disposal over the areas traditionally occupied by them should be respected. In addition, the Convention imposes on governments of the participating states a number of obligations i.a. with a view to ensuring respect for tribal and indigenous peoples' customs and traditions. To the extent that conflict might arise between a special provision such as article 14 of the Convention and this overarching principle, it is the Danish government's perception that respect for these peoples' customs and traditions constitutes such a fundamental principle as to admit of no restriction resulting from a special provision in the Convention."

⁷⁰ Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuqartut Kattuffiat-SIK) (SIK), Submitted: 2000 Document: (GB.277/18/3), Document: (GB.280/18/5).

supporting the conclusion that the arrangement proposed in the Finnmark Act does not fulfil the requirements of article 14 para. 1 first sentence:

“16. As concerns the substance of the proposal for the Finnmark Estate, it appears to go beyond what is permitted under *Article 14* of the Convention, though under proper circumstances it could be in conformity with *Article 15*.”⁷¹

5. Consent of the Sami Parliament

A particular issue is whether the Sami Parliament can remedy breaches of articles 14 and 15 by consenting to the administrative arrangement. The international law group of the Sami Rights Committee assumed in its report that an arrangement of the type posited by the Bill can be defended on the basis of a “makeshift” point of view provided the arrangement does not impinge upon the Sami people’s opportunities to preserve and further develop their way of life and culture, and provided the Sami Parliament consents to it.⁷²

The international law group’s standpoint was based on the assumption that article 17 para. 2 of the Convention does not prevent “national legislation from establishing that rights to lands and other natural resources which an indigenous people is entitled to have recognised, may be transferred to others.”⁷³ The international law group considered the Sami Parliament to be a competent representative of the right holders regardless of whether the latter are considered being the Sami population group as such or Sami individuals on a collective basis.

It is not obvious that the Sami Parliament has competency to consent to an arrangement which departs from the rules of article 14 and 15. Article 17 para. 2 opens the way for the people in question to be given legal capacity to “alienate their lands or otherwise transmit their rights outside their own community.” However, this provision does not

⁷¹ Report of the Committee of Experts on the Application of Conventions and Recommendations, Indigenous and Tribal Peoples Convention, 1989 (No. 169), Observation, CEACR 2003/74th Sess., para. 16.

⁷² NOU (*Norway's Official Reports*) 1997: 5, 44.

⁷³ NOU (*Norway's Official Reports*) 1997: 5, 41. Article 17 para. 2 provides: “The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.”

itself assign competency to transfer property, but confines itself to establishing that indigenous peoples' rights to land need not necessarily be such that such rights cannot be transferred.

There are few constraints under international law on the authority that representative bodies can be granted *vis-à-vis* their own population. However, any assessment of the Sami Parliament's competency must be made on the basis of the Sami Parliament's status as an agency of the Norwegian State. This means that limits to the Norwegian State's authority *vis-à-vis* the population pursuant to the European Convention on Human Rights (ECHR)⁷⁴ and the ICCPR article 27 must also be applied to the Sami Parliament's competency. It would be in breach of ECHR Protocol 1 article 1 to empower the Sami Parliament to transfer private law rights without compensation to, or without consent or other allocation of competency from, the holders of these rights. It has, however, been concluded above that the Bill, according to section 5, does not encroach upon existing rights based on prescription and immemorial usage. The issue which it is pertinent for the Sami Parliament to consent to will accordingly be confined to the administrative arrangement envisaged by the Bill. Such consent will not violate ECHR Protocol 1 article 1.

It is, however, conceivable that the ICCPR article 27 sets limits to the Sami Parliament's competency. As shown in the treatment of article 27 above, this provision assigns individual rights to members of a minority. This must entail that the rights are protected against decisions adopted by public law agencies which do not derive their competency directly from the right holders involved. On this basis there is reason to agree with the international law group that if the Sami Parliament is to be able to consent to a legal arrangement which does not fulfil the ILO Convention's rules, a necessary condition is that "the arrangement is not to the detriment of the Sami people's possibilities for preserving and further developing their way of life and culture."

On the other hand, the administrative arrangement itself is hardly protected by article 27. The crucial point under this provision is that the land in question should not be managed in such a way that the Sami people are deprived of the opportunity to exploit lands and resources in a way that enables them to maintain and further develop their culture. As long as the Finnmark Estate respects the rights protected by article 27, there is nothing to prevent the Sami Parliament from consenting to

⁷⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ETS No. 5).

departure from the protection that the ILO Convention articles 14 and 15 affords the Sami people on a collective basis.

The right of the Sami Parliament to consent to the arrangement in the Finnmark Bill finds support in the above-mentioned observation of the ILO Committee in connection with Norway's report of 2003:

"19. The process and the substance are inextricably intertwined in the requirements of the Convention, and in the present conflict. It appears to the Committee that if the Sami Parliament, as the acknowledged representative of the Sami people of Norway, were to agree to the proposal, they could accept this solution as a resolution of the claims of land rights which have long been the subject of negotiation between the Sami and the Government."⁷⁵

V. Conclusions

It is essential to resolve the indigenous peoples' right to land, based on their long-standing connection to the land areas they traditionally have inhabited, and the need to secure their cultural identity and economic development. While states have not been willing to accord these peoples external self-determination in the form of a right to secession, relevant human rights conventions have acknowledged their rights to land, both of a substantive and procedural character.

Articles 1 and 27 of the ICCPR have been interpreted by the HRC in the form of General Comments No. 12 (1984) and No. 23 (1994), as well as in comments to state reports and decisions in cases of individual complaints. The Committee has applied a judicious approach to article 1 on self-determination by requiring indigenous peoples a role in decision-making concerning land rights, and indicated certain substantive requirements. Under article 27 a right of "effective participation" in decision-making has been stated, and also a protection against measures that may amount to a denial of their right to enjoy their culture. Hence there is a threshold for the interference that can be made in the cultural life of indigenous peoples through the use of land. While recognizing an individual right of participation in decision-making, the collective right of internal self-determination is, however, still wanting.

ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, although only ratified by a limited number

⁷⁵ Observation, CEACR 2003/74th Sess., see note 71, para. 19.

of states, is of special importance since it contains concrete land rights, especially in its articles 14 and 15. These provisions not only establish a negative right to protection against interference, but provide positive rights to ownership and use. In this sense they go far in recognizing the traditional ownership rights of indigenous peoples. The collective character of the rights under the ILO Convention is also expressed in the rights of participation as expressed, *inter alia*, in articles 6 and 7. These peoples are allowed a consultative status in matters relating to the use of land and natural resources. The content of these articles has also been the subject of comments from the ILO bodies to reports by states parties and individual complaints. Although self-determination is not explicitly stated, the ILO Convention represents an important step towards internal self-determination.

The proposed Finnmark Bill represents an innovative approach to ownership rights and management of land by proposing to establish the Finnmark Estate and transfer ownership rights to this body. Article 14 of the ILO Convention requires, however, that the Sami people be given ownership or possession rights to those parts of the county where the Sami population traditionally reigns supreme. The Bill's administrative arrangements, in the form of representation of Sami interests on the board and the procedures for decision-making, fail to meet these requirements. It has also been concluded that article 34 on national adaptation of the Convention cannot remedy this deficiency. While the Sami Parliament can endorse an administrative arrangement for the Finnmark Estate that falls short of the requirements of the ILO Convention, such endorsement cannot be given with effect for rights enjoyed by individuals or groups of individuals with a basis in prescription and immemorial usage or in article 27 of the ICCPR.

If the Finnmark Act is to meet the ILO Convention's requirements as regards land rights, the Sami representation and rules on decision-making in the Finnmark Estate must be changed so as to assure the Sami people the control that is inherent to an ownership position. If this is not pertinent for the entire county, the specific Sami areas must be identified under article 14 para. 2, with a view to assuring the Sami people control and right of disposal over these areas. The Norwegian government has recently indicated that it would be possible to include mechanisms in the Finnmark Bill in order to demarcate the land areas that would fall under article 14 para. 1 first sentence.⁷⁶ Such approaches

⁷⁶ Letter of 14 June 2004 from the Ministry of Justice to the Justice Committee of the Norwegian Parliament.

are being discussed with the Sami Parliament. The consultations and possible mutual consent are of political importance, but may also be decisive for the status of the arrangement under international law.

