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The legal position of the Sami in the exploitation of mineral resources in Finland, Norway and Sweden

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// *Acknowledgments*

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Abstract

The situation of the indigenous peoples in the world is difficult. They have to struggle against the States in order to see their rights recognised. The right to land takes a special place among these. This is one of the most important rights for the indigenous peoples, due to the fact that one of the features that differentiate the indigenous peoples from other groups or minorities is their relationship with ancestral lands. Moreover, if we consider the amount of natural resources that can be found in indigenous areas, it is easy to understand how complex the situation of the indigenous peoples is.

The focus of this work is on the situation of the indigenous people (the Sami) of the three Nordic countries (Finland, Norway and Sweden) and how they face the exploitation of natural resources in their areas. Northern Europe is in fact, rich in natural and subsoil resources and it is not easy for the governments to reach a balance between the rights of the Sami and the rights of the other citizens of the State. By means of analysing the Mining Acts of the three above mentioned States, we will point out whether the national law safeguards the Sami rights in a satisfactory way. In order to see if there is compliance between the provisions established in national law and in international law, a comparison between the Mining Acts and ILO Convention No. 169 will be made.

This comparison is important, given the fact that one of the aims of this thesis is to point out the actions taken from the State in order to protect indigenous rights and if States are respecting the international provisions established for the protection of indigenous rights in the national legislation, also without ratification of the international instruments. The other aims of this work are to analyse: if the obligations enshrined in the Mining Acts are sufficient to guarantee a good protection of Sami rights in case of mining activities, if the Sami are involved during the decision making process as well as if there are mechanisms of participation and legal remedies for the Sami.

Table of acronyms and abbreviations

CEO	Chief Executive Officer
CERD	Committee on the Elimination of Racial Discrimination
FPIC	Free, Prior and Informed Consent
GDP	Gross Domestic Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
NAS	National Adaptation Strategy
NGO	Non Governmental Organisation
RAIPON	Russian Association of Indigenous People Of the North
TUKES	Finnish Safety and Chemicals Agency
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
USA	United States of America
WCIP	World Council of Indigenous Peoples
WGIP	Working Group on Indigenous Populations

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1. Introduction

1.1. General overview

It is always difficult to establish in law the adequate level of living conditions of the indigenous peoples. This argument is true with respect to the indigenous peoples of the entire world, as well as with respect to the indigenous groups of Northern Europe, the Sami.

The Sami are the unique indigenous people of the entire Europe and they live in four different States: Norway, Sweden, Finland and the Russian Federation.[1] It is difficult to establish the precise number of the Sami who are living in this area; however it is a considerable number. Around 50.000-65.000 of them live in Norway, around 20.000 in Sweden, around 8.000 in Finland and less than 2.000 in the Russian Federation. There are three different statutory assemblies that represent the Sami (one in each of the three Nordic countries), while in Russia there are NGOs, coordinated by the Russian Association of Indigenous People of the North (RAIPON). In 2000, the three assemblies established the Sami Parliamentary Council.[2]

The role of the Sami assemblies is to safeguard the Sami interests and, in some cases, participate in defining public policies. These assemblies are public, autonomous from the states, but nonetheless dependent of public funding. They can decide how to spend the money, but only for the part of the budget which is not allocated for specific purposes (i.e. to support the Sami languages, the Sami culture, etc.).[3] Thus, appears as if these assemblies have only a marginal role in cases where economic interests of the states are at stake. In particular, this is the case concerning the exploitation of natural resources in the Northern countries, which is a complex matter in which the States are reluctant to give the possibility to local assemblies to participate in decision-making

[1] See annex No. 1.
[2] Strömgren, 2011, p. 29.
[3] Ibidem, p. 30.

process. Such reluctance can be explained with the fact that States wish to avoid problems with starting new mining activities in indigenous areas and also wish to prevent the loss of economic revenues. Northern Europe is rich in natural resources.[4] This means that a part of the gross domestic product (GDP) is obtained from these resources.[5] In the last twenty years, the level of exploitation of natural resources in Finland, Norway and Sweden has grown significantly. For instance, there are many projects of exploitation in which an Australian company called Scandinavian Resources is involved.[6] They are exploring iron ore in Northern Sweden and Norway, in three Sami locations (*Laevas, Girjas* and *Lainiovuoma*). Another example regards the Swedish-British company Beowulf Mining. They are exploring natural resources in the area of *Jokkmokk, Kallak* and *Grundträsk* in Northern Sweden. Also in this case two Sami communities are involved. These are only some examples of exploitation processes in the Sami areas, showing that the situation of the Sami mining processes is in need of a more serious examination.

1.2. Research questions

This brief presentation of the situation of the Sami allows a better understanding why the Sami are struggling to defend their rights. It is a complex situation in which many violations of indigenous rights may occur, with the result of compromising the Sami traditional lifestyle. In this work we will focus on the situation of the Sami in Finland, Norway and Sweden, but not in Russia. This is so because the situation in the Russian Federation is more complicated and the Sami of Kola are facing many problems with the official recognition of their rights, e.g. the right to use their lands. One of the reasons for such problems is that the Sami of Russia are not entitled to the gratuitous use of their land, given the fact that this right was removed from the Land Code of the

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[4] See annex No. 2a and 2b.

[5] To have an idea on the amount of mineral resources in Northern States, it is possible to visit this web-page: http://geomaps2.gtk.fi/website/fodd/viewer.htm (accessed on 28/2/2014).

[6] In 2012 Hannans acquired Scandinavian Resources Limited including its subsidiary companies Scandinavian Resources AB and Kiruna Iron AB. The purpose of the acquisition was to gain access to the Kiruna Iron Project in northern Sweden and the portfolio of copper-gold projects in Sweden and Norway. For more information, visit the following web-site: http://www.hannansreward.com/company-profile.php (accessed on 28/02/2014).

Russian Federation in 2001.[7] The scope of our work does not allow us to look deeper at the Russian situation, although it can be the reason for further research.

The right to land is one of the main rights for the indigenous peoples, together with the right to use natural resources that can be found in those lands. Unlike Russia, the three Nordic countries recognise the right of the indigenous peoples to use the land, although in many cases violations of the right to land may happen in relation to the ownership over land, as well as in relation to the use of natural resources that can be found in that land. Violations of many articles of ILO Convention No. 169[8] (which is the most important international legally binding document on the protection of the indigenous peoples) may take place; in particular violations of articles 13, 14, 15, and 16 of this treaty.

The said leads us to the first research issue: although ILO Convention No. 169 is legally binding, only a few States have ratified it.[9] Among the three Nordic States, only Norway has ratified this Convention, while Finland and Sweden have not yet done it. So, the question is how is it possible to protect and safeguard the rights of the Sami if the States at stake have not ratified the ILO Convention No. 169? In our work it will be demonstrated that it is possible, if the States want, to defend indigenous interests also without ratification of the international Conventions, with the help of due application of domestic laws.

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[7] Riekkinen, 2011, pp. 111-112.

[8] About ILO Convention No. 169: http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (accessed on 28/02/2014). The entire text of the convention can be read at this web-pages: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312314:NO (accessed on 28/02/2014).

[9] There are two ILO Conventions that are legally binding: Convention No. 107 and Convention No. 169. The main difference between the two documents is their approach to the indigenous issue. In fact, the Convention No. 107 has an assimilationist approach, while the Convention No. 169 safeguards the indigenous rights and their diversity. However, must be kept in mind that there are countries (i.e. India) that have not ratified the Convention No. 169, but only the Convention No. 107. Hence, in these countries, the Convention No. 107 is the only legally binding instrument to protect indigenous rights. The list of the countries that have ratified the ILO Convention No. 107 is available at this link: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252:NO (accessed on 25/3/2014). Regarding the ILO Convention No. 169, consult this web-page: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (accessed on 25/3/2014).

In addition, in this work it will be studied if it is possible for the States to improve the legal framework for the protection of the Sami in cases which relate to mining activities. In particular, it will be analysed if there is the possibility to increase the involvement of the Sami in decision-making processes, in order to take shared decisions to safeguard the Sami traditional lifestyle, but without compromising the economic interests of the state. Mainly, the aim of this work is to answer to the following questions:

- Are the rights enshrined in the international documents fully implemented in selected Nordic States? In particular, we focus on the rights set forth by the ILO Convention No. 169.
- Are the obligations enshrined in the Mining Acts of selected Nordic States sufficient to guarantee due protection of the Sami rights in case of mining activities?
- Are the Sami involved during the decision-making processes? Is there a special legal mechanism of indigenous participation in the national law? Are there legal remedies for the Sami assemblies to stand up for the indigenous rights?
- Is it possible for the States to defend indigenous interests without ratifying the international Conventions, but by due implementation of domestic laws?

1.3. Methods, materials and delimitations

In order to study the issue regarding mining activities in selected Nordic countries, an analysis of the right to land of the Sami will be carried out, considering natural resources that can be found in the Sami areas. After that, the ICCPR[10] will be analysed with specific focus on article 27 on the protection of minorities. In this part of the work, some jurisprudence of the UN Human Rights Committee will be mentioned. Regarding the international legal instruments, the UN Declaration on the Rights of Indigenous Peoples [11] and the two ILO Conventions Nos. 107 and 169 will be analysed.

[10] The text of the ICCPR: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed on 28/02/2014).

[11] The full text of the Declaration can be downloaded at the following web-page: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed on 27/02/2014).

In particular, ILO Convention No. 169 will be studied as the core instrument and it will be pointed out how Finland and Sweden are working with it, due to the fact that they have not yet ratified it. Subsequently, in order to understand how the States deal with exploitation of natural resources in the Sami territories and whether there are specific legal provisions regarding the protection of the Sami rights during mining activities, the Mineral Acts of the three Nordic countries will be analysed. With the goal to find out if there is the same level of protection of the Sami rights in Finland, Norway and Sweden, a horizontal comparison between the Mineral Acts of these three States will be conducted. Finally, to assess whether there is compliance between national law and international law, a comparison between the provisions established in ILO Convention No. 169 and the Mineral Acts of the Nordic states will be done.

The final aim of this work is to conduct a horizontal comparison among the Mineral acts of the three Nordic countries and a vertical comparison between the national law and the international law. In particular, we link the international provisions on the rights of the indigenous peoples enshrined in ILO Convention No. 169 with the selected national legal instruments (i.e. the three Mineral Acts and the Constitutions). Such comparisons will help us to understand if there are violations of the rights enshrined in international law at the national level or if the national law contains specific provisions protecting indigenous rights in a satisfactory way. These comparisons are also relevant to the States which have not ratified the ILO Convention No. 169. The mechanism of participation of the Sami, the role of the Sami Assemblies and the Sami Parliamentary Acts will be analysed in the final chapter. It is important to underline that the following issues are not analysed in this research:

- the impact of exploitation of natural resources in Northern Europe on the global environment;
- the situation of natural resources in the Arctic region (Greenland and Canada);
- alternative natural sources to avoid the exploitation of the Arctic;
- the situation of the indigenous peoples of the Arctic region (Greenland, Alaska);
- impact of the exploitation of natural resources on the indigenous peoples of the entire world.

2. Mining in indigenous territories: between the right to land and economic gain

2.1. The importance of the right to land for the indigenous peoples

The right to land can be seen as one of the most important rights for the indigenous peoples.[12] It is possible to say that this right is one of the pillars on which the distinction between the indigenous peoples and minority groups is based. In the definition of the indigenous peoples elaborated by Josè Martinez-Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the right to land is the main pillar. The definition states that:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[13]

According to Martinez Cobo, the following reasons can explain those strong relationships which the indigenous peoples have with their traditional homelands: occupation of ancestral lands (or at least part of them), common ancestries with the original occupants, culture in general, language, residence in particular parts of the country or in particular regions of the world.[14] In order to validate these features, in particular the centrality of land rights for the indigenous peoples, it is possible to analyse the etymology of the word "indigenous". Based on the definition of the on-line

[12] It is important to underline that the right to land for the indigenous peoples does not mean a right to self-determination. In the case of Sami peoples, which is the topic of this work, the right to land means the right to use the lands for hunting, fishing and reindeer grazing. For more information regarding these issues see: Alves, 1999, pp. 35-57; Anaya, 1996, pp. 75-109; Anaya, 2000, pp. 3-18; Assies, 1994, pp. 31-72; Clech-Lam, 2000, pp. 225-248; Cole, 2000, pp. 11-66.

[13] Martinez Cobo, *Study on the Problem of Discrimination against Indigenous Populations,* UN Doc. E/CN.4/Sub.2/1986/7/Add.4, para. 379.

[14] Myntti, 2000, p. 110.

Oxford dictionary, the term indigenous means "originating or occurring naturally in a particular place; native".[15] The word "indigenous" comes from the Latin *"indigena"* and it is a composition between two words: *"indu"* (in, within) and *"gen"* (root).[16] In French the word *"autochtone"* (that comes from the ancient Greek *"khthon"*, which meant land) is defined in the dictionary as "who comes from the land where he lives and who did not come as a result of immigration".[17] Hence, the historical links with the territory is a defining element of indigenousness. In fact, in the definition of Martinez Cobo, the relationship of the indigenous peoples with their lands is the central factor. In particular, the indigenous peoples have a strong tie with their territories because they:

a) have occupied these territories in the past, given that they have a historical continuity with "pre-colonial" and "pre-invasion" societies that conquered their territories;
b) occupy these territories nowadays, because they live on these territories;
c) will occupy these lands in the future, because they want to transmit to future generations their ancestral territories.[18]

In order to help the international stakeholders to deal with the problems and the particular needs of the indigenous peoples, Erica Irene Daes, Chairperson-Rapporteur of the UN Working Group on Indigenous Populations, has developed a list of factors which can be taken into account when dealing with the indigenous matters. These factors are:

a) priority in time, with respect to the occupation and use of a specific territory;
b) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
c) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity;
d) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[19]

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[15] The on-line Oxford dictionary available at the following web-site: http://www.oxforddictionaries.com/definition/english/indigenous?q=indigenous (accessed on 9/3/2014).
[16] Gilbert, 2006, p. XV.
[17] Le Petit Robert, Dictionnaire alphabetique de la langue francaise (1991).
[18] Gilbert, 2006, p. XVI.
[19] Erica Irene Daes, *Working Paper on the concept of "indigenous people"*.
UN Doc. E/CN.4/Sub.2/AC.4/1996/2, para. 69.

Notwithstanding all provisions about the right to land of the indigenous peoples in different international documents, there is still a significant debate about this right in the academic world, as well as in the human rights arena. This debate has culminated in the intensified discussion at the level of the UN. For example, the main theme of the 2004 Session of the UN Working Group on Indigenous Populations (WGIP) [20] was "Indigenous People and Conflict Resolution". [21] In his Working Paper, Mr. Miguel Martinez stated that:

> "The fundamental root source of conflict between indigenous peoples, on the one hand, and States and non-indigenous entities and individuals, on the other, is their differing views as to which actor possesses valid title to the land and resources located in territories traditionally occupied by indigenous groups."[22]

The author of this thesis agrees with the statement of Miguel Martinez. In fact, in the last twenty years, the number of transnational corporations that have used the indigenous lands in order to exploit natural resources grew up significantly. Given that the indigenous lands are rich in natural resources, the recognition of the indigenous peoples land rights should ensure that these peoples preserve their right to pursue own economic and social development. Anyway, in spite of all the natural wealth concentrated in indigenous areas, the indigenous peoples remain at the "margins of economic development".[23]

After this brief introduction regarding general situation of the indigenous peoples and the reasons explaining their strong relationships with their ancestral lands, we move on to discuss the main issue of this thesis, i.e. the exploitation of natural resources in indigenous homelands and the situation of the Sami peoples in the Nordic States.[24]

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[20] The Working Group on Indigenous Populations (WGIP) was established in 1982 and it was one of the six working groups overseen by the Sub-Commission on the Promotion and Protection of Human Rights. In 2007 the Human Rights Council decided to replace it with The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). More information can be found at the official web-page: http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx (accessed on 11/3/2014).

[21] Gilbert, 2006, p. XVII.

[22] Miguel Alfonso Martinez, *Working Paper on Indigenous peoples and conflict resolution.* UN Doc. E/CN.4/Sub.2/AC.4/2004/2, para. 14.

[23] Gilbert, 2006, p. XVIII.

[24] For more information about indigenous people and right to land you can consult these books: Anaya-Williams, 2001, pp. 33-88; Castellino, 2005, pp. 89-116; Fodella*,* 2006, pp. 565-594; Howard, 1992, pp.

2.2. Mining in indigenous homelands: between public affairs and indigenous interests

2.2.1. Access to the mining process: an overview with the focus on selected Nordic States

The process of mining requires a lot of time and economic effort as well explained in several academic sources.[25] Normally, when a company identifies its target for mining and decides what geographical area must be investigated, it takes information from governmental geological data and former national research. In addition, if mineral resources are found in a certain area, the company will need a suitable right under the mining law in order to start the mining and to have the exclusive rights on that area. In fact, it must be taken into account that starting the mining process requires big capital investments and for this reason it is quite often an "all or nothing" matter, we can also say a "Hobson's choice". [26] The companies want to have the certainty that the government will not stop them once a mineral site is discovered, as well as they do not want that the government changes the national laws about mining once the mining is started. Hence, it is obvious that if the government of the country is stronger (i.e. because the country is rich and it has a stable political situation), the companies will be in a weaker position when they ask advantageous conditions for the mining process. But if the state is poor and the political situation not so stable, in order to improve its attractiveness in mining activity, the state will be more available to have a policy that gives many advantages to the companies.[27] On the one hand, a considerable part of the new mines is opening in developing countries of the South America, Asia, and Africa.[28]

105-156; Meijknecht, 2001, pp. 65-114; Minde, 2003, pp. 75-106; Scheinin, 2005, pp. 3-16; Tahvanainen, 2005, pp. 397-419; Westra, 2008, pp. 71-124; Xanthaki, 2007, pp. 237-279.

[25] For more information regarding the mining process see: Barton, 2009, pp. 1-9; Cotula, 2012, pp. 55-123; Halonen-Rinne-Sairinen-Simonett-Stuhlberger, 2012, pp. 8-57; Salminen, 1999, pp. 5-48.

[26] Barton, 2008, pp. 1-2.

[27] Ibidem, pp. 1-2.

[28] Ibidem, p. 3.

However, on the other hand, in the last years a big effort was put by the companies to ensuring that mining has a positive effect on the host States and on the host communities, given that many countries have seen a worsening of the standards of life during the process of exploitation of natural resources.[29] It is clear then that an important role in the mining process is played by national legislation. National law should define the dispositions for every different stage in the mineral development sequence (i.e. reconnaissance, exploration and production). The allocation of the land rights as well as the conditions for restrictions or limitations of these rights should be clearly defined in the law. Furthermore, the law on mining should establish clearly the situation when the holder of an exploitation right is for instance entitled to obtain production rights, who has the ownership of the natural resources, how to deal with the protection of lands from mineral activity (in particular in areas where there are the indigenous peoples). According to Barton, access to mining is a complex matter and it depends largely on the political and economic situation of the State.[30]

As for those Nordic States which accommodate the Sami indigenous peoples, i.e. Finland, Norway and Sweden, there are several different types of access to the mining process. The summary analysis of the mining legislation in these selected states is based on the analysis of many academic sources, undertaken by the author of this thesis, like: the Mining Acts and the Constitutions of Finland, Norway and Sweden, as well as specific documents as the "Finland´s National strategy for adaptation to climate change" and the "Finnish Action Plan for the Adaptation to Climate Change 2011-2015" realised by the Finnish Ministry of Agriculture and Forestry; the "Final report from the Swedish Commission on Climate and Vulnerability: Sweden facing climate change – threats and opportunities" realised by the Swedish Government; the "Official Norwegian Reports NOU 2010: Adapting to a changing climate. Norway's vulnerability and the need to adapt to the impacts of climate change", realised by the Norwegian Ministry of the environment.

[29] Ibidem, p. 4.
[30] Ibidem, p. 3.

In chapter 4 it will be analysed in depth how works the entire process of access to the mining process in Sami areas, but for the moment we will introduce this topic just to start to familiarise with it.

a) In Finland the mining is regulated by the Mining Act[31] of 2011 with other laws (among others: the Reindeer husbandry Act of 1990, the Act on the Protection of Wilderness Reserves of 1991, the Land Use and Building Act of 1999 and the Environmental Protection Act of 2000), while the authority involved in the management of the mining is the Finnish Safety and Chemicals Agency (Tukes). There are two different permits that can be granted:

   I. The "prospecting permit", necessary if the activity of mining is dangerous for the health of the population or for the general safety. The permit is released for a fixed term of 4 years and can be renewed (up to 3 years at time) for a maximum of 15 years.
   II. The "mining permit", necessary to start the process of mining. This permit is normally released for an unfixed time, except in particular circumstances.
   III. Finally, for every kind of mining an "environmental permit" is required and the entire process will be supervised by the environmental authority.

b) In Norway the mining is regulated by the Norwegian Mineral Act[32] of 2010, together with other different laws (the Pollution Control Act of 1981, the Planning and Building Act of 1985 and the Nature Diversity Act of 2009). The authority involved in the management of mining is the Directorate of Mining. The licenses that the Norwegian Mineral Act provides are:

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[31] The complete text of the Finnish Mining Act is consultable at the following link: http://www.finlex.fi/en/laki/kaannokset/2011/en20110621.pdf (accessed on 8/4/2014).

[32] The full version of the Norwegian Mining Act can be downloaded from this web-site: http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf (accessed on 8/4/2014).

I. "Exploration license", which can last for a maximum of 7 years, in order to allow the companies to start the exploration of the area. If there is the possibility to prove that on that area there is a considerable mining deposit, it is possible to apply for an exploitation permit.
II. "Exploitation permit", but without a mining concession (valid for maximum 10 years).
III. "Exploitation permit", with a mining concession (valid until the area is productive).
IV. Also in Norway, as in Finland, before starting any type of exploitation, an environmental impact assessment has to be done.

c) In Sweden, the law that regulates the mining process is the Swedish Mineral Act[33] of 1991, with other laws (the Off Road Driving Act of 1975, the Certain Peat Deposits Act of 1985, the Cultural Heritage Act of 1988, the Swedish Environmental Code of 1998 and the Planning and Building Act of 2010). Following the Swedish legislation on the mining process, two different type of licenses can be released:

I. The "exploration permit", valid for 3 years, can be extended up to 15 years. With this permit the company can access to the area for the exploitation work.
II. The "exploitation concession", granted for maximum 25 years. This concession is necessary for particular types of minerals.
III. Also in Sweden, before releasing a mining permission, the environmental impact will be thoroughly evaluated.[34]

[33] The complete version of the Swedish Mineral Act is available at the following web-site: http://www.sgu.se/dokument/service_sgu_publ/SGU-rapport_2007-26_minerals-act_ordinance.pdf (accessed on 8/4/2014).
[34] Speight-Shabazz, 2013, pp. 1-2.

2.2.2. The system of remedies and compensations for the indigenous peoples

Taking into account the different systems that a certain State can adopt in order to issue a permit for the exploration of natural resources in a specific area, it becomes evident that the mining activities in the indigenous homelands can cause many problems to the indigenous populations. Above all, the exploitation process can compromise the indigenous traditional lifestyle and the regime of the traditional land use. The next chapters will demonstrate that the protection of traditional indigenous lifestyle can be considered a significant component of national legislation on mining. However, amidst the mining processes, big changes in the traditional lifestyle of the indigenous populations are unavoidable. For example, in a case where a big deposit of natural resources is found in an indigenous area, it would be hardly possible to prevent the damage to the indigenous lifestyle. Nonetheless, at least economic damages for the indigenous communities can be reimbursed. For this purpose national laws should provide legal remedies to protect the indigenous rights to land, acknowledging the rights to reparation or compensation.

In this work, the term ”remedy” does not have the same meaning as ”reparation”, because the term ”reparation” is used to describe only one of the aspects of the concept of ”remedy”.[35] According to the UN Secretary-General who commented upon the right to reparation for victims of gross human rights violations, the main aim of the reparation from a human rights-based approach is to ”render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations”.[36] There are some features of the reparation that must be respected. First of all, the reparation must be adequate; this means that the reparation is full, namely that the reparation should remove all the effects of the injustice, using all the necessary measures (restitution, compensation, satisfaction and rehabilitation). Furthermore, the process of reparation must be effective in the sense that it is efficient in removing the suffered injustice (all type of injustice: economic, spiritual, moral, social, etc.) and to re-

[35] Lenzerini, 2008, p. 12

[36] Van Boven Theo, *Note by the Secretary-General on the right to reparation for victims of gross violations of human rights.* E/CN.4/1997/104.

establish the existing situation before the exploitation.[37] In order to ensure adequacy and efficiency in the reparation process, the remedies must be proportionate to the gravity of the case and must be considered adequate and effective by the groups to which it is addressed. Obviously, not all the types of reparation can ensure the same degree of adequacy and effectiveness.

Amongst the different potential measures of reparation the most optimal is, perhaps, the *"restitutio in integrum"*, given that there is a full re-establishment of the original situation in this case. There is the *"restitutio not in integrum"* in cases where it is impossible to restore the situation at the exact point as it was before the injustice. In the last case, the reparation process consists of providing a possibility for the injured party or the community to return to a certain territory which is as close the original as possible. These are the two types of reparation that consist in the restitution of the original land or of the similar one. The others forms of reparation such as the monetary compensations can be also invoked depending on the nature of the act having violated the right and on the perception of the interested community. For example, according to Lorenzini, compensation is mostly inadequate to restore justice in the case of expropriation of the indigenous lands, considering that it is impossible to evaluate the cultural damage that these populations have suffered.[38]

The right to compensation for the indigenous peoples is a novelty in the area of international law. It has been acknowledged only in the last few decades, when the principle of indigenous self-determination was recognised by the authorities of those states that had for centuries refused it.[39] In particular, national courts recognised a lack of strong justification for the principle of *"terra nullius"* that the most of the European countries have used in order to conquer the indigenous territories. Hence, there is

[37] Lenzerini, 2008, pp. 12-13.
[38] Ibidem, pp. 14-15.
[39] Joinet Louis, *Question of the impunity of perpetrators of human rights violations (civil and political),* UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, paragraph 40.

evidence supporting the claim that the indigenous peoples enjoy sovereignty on their original lands, although they are under the sovereignty of the national state.[40]

The right to land of the indigenous peoples mean, first of all, that the indigenous peoples can be moved from their lands to other lands only in exceptional situations, unless the removal is agreed with the indigenous peoples. It is useful to underline that ILO Convention No. 107[41] states in article 12 that "the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations".[42]

Even if we assume that this article grants protection to the indigenous peoples, it was strongly criticised because such a legal provision allows the States to remove the indigenous peoples from their lands.[43] This article 12 was replaced by article 16 of ILO Convention No. 169, according to paragraph 2 of which "where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned".[44]

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[40] Lenzerini, 2008, p. 11.

[41] The ILO Convention No. 107 was adopted in 1957 and was replaced only in 1989 with the Convention No. 169. The Convention received strong critics because it was oriented to the integration and assimilation of indigenous people, given that it was founded on the assumption that the indigenous peoples were temporary societies destined to disappear with the modernization.

[42] It is possible to consult the full text of the Convention at the web-site: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C107 (accessed on 18/3/2014).

[43] Gilbert, 2006, p. 143.

[44] The full Convention No. 169 is available at this link: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf (accessed on 18/3/2014).

It is useful to underline that the Sami of the Nordic States have never been forcedly removed or relocated.[45] The provisions enshrined by article 16 of ILO Convention No. 169 can be applied on the indigenous peoples of Southern America, where there have been many cases of displacement.

It is important to notice the change of terminology between the two ILO Conventions. The term "removal", used by ILO Convention No. 107 was changed into the word "relocation" by the present ILO Convention No. 169. This is an important change, reflecting the difference in the approach of the two Conventions, i.e. a change from an assimilationist approach to a protective approach.[46] In this connection, Jose Martinez-Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that:

> "Whenever the removal of populations is necessary for an exhaustively justified reason, the indigenous populations involved should be moved to areas that resemble their ancestral lands as closely as possible with fauna and flora of the same type. The suffering of these populations should be reduced to an absolute minimum and any losses compensated. Unless natural phenomena make it possible, their return to their ancestral lands should always be an essential part of any plan."[47]

Hence, the provision on the restitution of the land rights of the indigenous peoples gets more recognition on the international arena and also ILO Convention No. 169 emphasised this provision at article 16. In cases where the restitution of the land is impossible, the state should provide a kind of compensation (in term of payment of money, another land or any other measures agreed by the involved parties). However, the UN Committee on the Elimination of Racial Discrimination claimed that the mere monetary compensation is not enough to be a full remedy against the removal of the indigenous peoples. In fact, in its General Recommendation No. 23, the Committee

[45] There is only one case of relocation of Sami people: the Skolt Sami case. However, this episode happened during the Second World War, in a particular context. For more information see: Suksi, 2008, pp. 71-81, and the following web-site: http://www.samimuseum.fi/saamjiellem/english/historia.html (accessed on 26/3/2014).
[46] Gilbert, 2006, pp. 142-143.
[47] Martinez Cobo, *Study on the Problem of Discrimination against Indigenous Populations,* UN Doc. E/CN.4/Sub.2/1983/21/Add. 8, para. 558.

claimed that “the restitutions of the lands must be the priority and only when this is not possible the compensation will be used”.[48]

This statement enshrined in the General Recommendation is important, also because for many states a just compensation means providing for the indigenous peoples a just price for their land based on the market value. However, for these peoples it is obviously not enough, because it is impossible to evaluate the value of lands only in terms of market value without considering the loss of culture and the lifestyle of the indigenous community.[49] Finally, it is useful to underline that also in the UN Declaration on the Rights of Indigenous Peoples there is a provision in order to safeguard indigenous people from removal to their land. Article 10 provides the following:

> “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.”[50]

In this article is possible to note that only with the free, prior and informed consent (FPIC) it is possible to relocate the indigenous peoples. Furthermore, the indigenous peoples are entitled to have a fair compensation and the option of return must be taken into account. We can say that this provision enshrined in the UN Declaration on the Rights of Indigenous Peoples represents a step forward in the recognition of the indigenous rights, given that 143 States voted in favour of the Declaration.

2.3. The situation of the Sami in the Nordic States

2.3.1. Historical overview on the Sami right to land

According to Sillanpää, in Sweden and Finland (at that time these two countries were unified under the Crown of Sweden) the recognition of the particular needs of the

[48] *General Recommendation of the Committee on the Elimination of Racial Discrimination (CERD) No. 23*, UN Doc. A/52/18, annex V, paragraph 5.
[49] Gilbert, 2006, p. 148.
[50] Article 10, UNDRIP, 2007.

peoples who inhabited the area known as Lapland has been defined in the legislation since 1550. In particular, hunting, fishing and breeding reindeer were recognized in the legislation as sources of Lapp livelihood. In a Lapp village, each family controlled and used a specific area which documentary sources define as hereditary or tax land. The Lapp tax was based on the fact that these land areas should be taxed because of the gain that Lapp people had by fishing, hunting, etc. in that land (in Finland some form of Lapp tax was paid until the First World War).[51]

Hence, while these peoples paid taxes for their land, their right to land as well as the ownership over the lands should have been recognised. In this respect, for instance, Kaisa Korpijaakko, a professor of history at the University of Lapland, has conducted many research projects with the aim to demonstrate that the Sami peoples had a legitimate title to their lands. The title of land rights is based on the fact that the law and the case-law by many courts in Lapland had recognised this situation.

Historically, Lapland was divided into six different administrative areas: Ångermanland, Ume, Pite, Lule, Torne and Kemi Laplands, which were divided into Lapp villages. These Lapp villages were, later on, divided amongst clans and families, later called Lapp tax lands.[52] This kind of division became also a way for the state to exercise in those lands a fiscal request and a judicial power. It must be underlined that the payment of the Lapp taxes could apply only if ownership of the Lapps to the land was legally and officially recognised.[53] In this regard, it is recognised that the Sami right to their lands was comparable with ownership.[54]

That regime changed in the XIX century when Finland was detached from Sweden and became a part of the Russia Empire. Basically there was an important change in the interpretation and in the practices of land administration in Northern Finland. For example, references to the Lapp tax disappeared from the official records and in many

[51] Sillanpää, 1994, p. 42.
[52] Joona, 2012, pp. 281-282.
[53] Sillanpää, 1994, p. 43.
[54] To know more about this topic see: Joona Juha, 2011, pp. 367-393.

cases the authorities started to ignore the existence of the land rights in question. The new legislation did not take into account the right of the Sami to these lands but, given that none of these rights were abrogated by law, it is possible to say that the rights of the Sami in Finland continued to exist in a state of legal dormancy.[55]

According to Korpijaakko the Sami progressively lost their right to land also in Sweden. Year after year, the central authorities opposed the decisions of the local courts and took steps to restrict their powers. For example, the County Governor of *Västerbotten* complained in the court against the Swedish central government and the restrictions of his powers by the latter. The reaction of the government was that the *Västerbotten* court could not make decisions in financial matters anymore. Hence, the Sami who paid Lapp tax could not go to the court as they did in the past.[56]

In Norway the situation was different, given that there was a division in the Sami community. This division concerned the Sami of the coast whose main traditional activity was fishing and the Sami of the interior, who had practiced different forms of traditional lifestyle and above all reindeer husbandry.[57] During the XVI and XVII centuries, the situation of the coastal Sami community was quite different than that of the other citizens. In fact, while Sami were paying only the "Lapp tax" that was a personal tax, the Norwegian settlers were paying also the land taxes. Furthermore, the "Sami tax" was lower than the "Norwegian tax" and the State recognized to the Sami the rights of inheritance to the lands.[58]

All these special rights and privileges were abolished in *Nordland* in 1661. In Southern *Troms* and Northern *Troms* they were abolished in 1755.[59] However, the rights and privileges of the coastal Sami were confirmed in 1726 in two legal documents (the

[55] Korpijaakko, 1993, p. 17.
[56] Ibidem, p. 17.
[57] Sillanpää, 1994, p. 45.
[58] Ibidem, p. 46.
[59] It is useful to underline that until 1751 there was no border between Norway and Sweden in Sami territories. In fact only with the signed of the "Sami Codicil" in that year, the boarders were defined. In addition, in this agreement Sami were recognised as an ethnic minority that could continue to use the lands without regards to the new borders.

Charter of Rights for the Coastal Sami), that permitted to the Sami to continue their traditional use of common lands for herding, hunting and berry picking.[60] Hence, it is quite difficult to define the real situation of the Sami at that time.[61]

What is true, for the past and in particular nowadays, is that farming, fishing and hunting are seen by the State as typical activities of all Norwegian citizens and for this reason natural resources must be seen in a national context. For example in this way the Sami of the coast, with their traditional smaller boats, have lost in the competition for the resources with the bigger international groups. In fact, amongst the relevant actors in sectors like fishing, farming, etc., there is a strong will to avoid protecting the special Sami interests, which are considered peripheral and not economically sustainable for the management and the exploitation of the resources.[62]

2.3.2. The two main cases about the Sami right to land: the *Taxed mountains* case and the *Alta* case

It is important to underline that until the recent decades the official opinion in Finland, Norway and Sweden about the Sami right to land was that when the government had annexed those lands, it had taken possession of "ownerless lands" and only forty years ago things started to change. In fact, in 1966, a Sami group of the *Jämtland* brought a case on the land ownership and usage since time immemorial against the Swedish state (so called "*Skattefjällsmålet* – Taxed Mountains case") to the Supreme Court of Sweden. This was the first important case about the Sami land and water rights and after 15 years, in 1981, the case was solved by the Supreme Court of Sweden.

It is important to underline that the decision of the court was unanimous (with only the dissenting opinion of the judge Bengtsson regarding fishing and hunting rights of the

[60] Sillanpää, 1994, p. 46.
[61] The difficulty to define the real status of the Sami of Norway in that period is due to the fact that until 1814 Norway was an integral part of Denmark, from 1814 to 1905 Norway was in personal union with Sweden and only since 1908 Norway is completely independent.
[62] Ibidem, p. 47.

Sami)[63]. Basically, the Sami applicants wanted to see recognised the ownership of certain areas in the northern part of the province of *Jämtland* (known as *Skattefjäll*) and some adjacent properties known as “extended territories”. After a careful evaluation, the Court decided that the legal situation in the area was unequivocal before the promulgation of the "Reindeer Grazing Act" of 1886 in which it was stated that the State was the owner of the Taxed Mountains and the right of the Sami was limited to right of use. Hence, in the opinion of the Court, the Sami could not request the ownership rights because of their use since time immemorial. The final verdict of the Court was that the Swedish State was the owner of the Taxed Mountains and that the claims of the Sami to ownership could not be sustained.[64]

Notwithstanding the fact that the decision was not positive for the rights that the Sami were claiming, many legal principles in favour of the Sami rights were written in the verdict of the Court. In fact, the decision can be seen as a victory of the Sami rights, given that the Court stated that it was possible to acquire title to land for reindeer grazing, hunting and fishing. With this decision, the Court rejected the position of the Swedish Government that was against the possibility for nomadic people to acquire ownership rights. Furthermore, the Court declared that, even if the Sami have no rights other than those awarded by legislation on the Taxed Mountains, these rights of use can be constitutionally protected in the same way as ownership rights. Finally, also if this does not mean that the Sami rights are protected against expropriation, their rights cannot be taken without compensation. It is important to underline that the Supreme Court clearly stated that this decision was valid only for the county of *Jämtland*, so it was not applicable to other claims by Sami in other part of Sweden.[65]

Another case connected with both the indigenous right to land and the economic interests of the state is the *Alta* case. Alta, one of the biggest municipalities in the Finnmark County, in Norway, became famous in 1979 because of the struggle of the Sami against a government decision. In 1978, the Norwegian Government decided to

[63] Ibidem, p. 90.
[64] Ibidem.
[65] Ibidem, p. 91.

build a hydro-electric dam on the Alta-Kautokeino river system. This project was considerably smaller than the first one, given that the previous project was supposed to submerge the Sami village of Maze.[66]

Notwithstanding that the second project was smaller than the first one, the Sami peoples were concerned that this dam could have had an important impact on the salmon fisheries in the Alta River, as well as on the reindeer grazing. The opposition to this project culminated with one of the largest civil disobedience cases ever had in Norway, with hundreds of policemen who removed the demonstrators from the project site. The issue was brought to court and in 1982, the Supreme Court of Norway stated that the project could carry on, but the Sami had the right to receive a form of monetary compensation.[67] After the verdict of the national court, the issue was brought also to the Commission of the European Court of Human Rights, in the *E. and G. v Norway* case. In particular, two representatives of the Sami indigenous community claimed that they suffered a violation of article 8 (right to respect for private and family life) of the European Convention of Human Rights, due to the fact that the building of the dam would compromise their traditional reindeer grazing grounds. The Commission agreed with the idea that traditional practices and indigenous lifestyle could be seen as private and family life, but found that the project was necessary for the economic well-being of the country. For this reason the application was declared inadmissible.

Notwithstanding that the actions of the Sami in the courts were insufficient in order to stop the construction of the dam, these actions resulted in a number of meetings between the Norwegian Government and the Sami delegations, with the result that the Government appointed two committees to discuss the cultural issue and the legal relations of the Sami peoples.[68] These two committees were important for the birth of the Sami Assembly in Norway in 1989 and for the adoption of the Finnmark Act by the Norwegian government in 2005.[69]

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[66] Solbakk, 2006, p. 165.
[67] Sillanpää, 1994, p. 92.
[68] Solbakk, 2006, pp. 164-167.
[69] Ibidem, pp. 168-170.

2.3.3. The mining process in the Sami areas: between traditional and non-traditional indigenous resources

In article 4 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it is written: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".[70]According to this article, the rights of the indigenous peoples to natural resources and lands should be considered as an internal indigenous affair. Furthermore, according to Mattias Åhrén,[71] it should be useful to distinguish between two types of natural resources: the traditional resources of the indigenous peoples and the non-traditional resources that are in the areas of indigenous people. The expression "traditional resources" means all kinds of natural resources that are used by the indigenous peoples from centuries for their traditional livelihood, while the expression "non-traditional resources" implies all types of resources that are not used by the indigenous peoples or that were not used in the past (above all oil and mineral resources). According to Åhrén, the Sami have the full right to manage their traditional natural resources, while for non-traditional resources that are in the areas of the indigenous peoples, the Sami should have the right to exert some influence regarding the utilisation of these resources and also they should have the rights to have some compensation. Finally, the Sami should have the right to give their binding opinion regarding the utilisation of non-traditional resources if the exploitation can damage their land or compromise their lifestyle.[72] Hence, it is clear that participation in decision making processes regarding the land rights (which will be analysed in the next chapters) is important in order to involve the Sami in the processes of decision-making.

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[70] The full text of the UNDRIP can be consulted at this web-page: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (accessed on 16/3/2014).

[71] Mattias Åhrén is a Sami, now Chief Lawyer of the Sami Council. In 2002 took up the position as Head of the Sami Council's Human Rights Unit. He has represented the Sami peoples in many UN conferences and other international meetings, e.g. during the successful negotiations on the UN Declaration on the Rights of Indigenous Peoples, and has also represented Sami communities in cases relating to right to land. He was also a member of the Expert Group that drafted the Nordic Sami Convention.

[72] Henriksen, 2011, pp. 9-10.

3. The sources of international human rights law on protection of the indigenous peoples

3.1. Protection of the indigenous rights under the ICCPR

3.1.1. The safeguards of the right to land and traditional lifestyle

The struggle of the indigenous peoples to be recognised as a group with particular features and needs has brought results only in the last few decades, when ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples were adopted. Before these two important international documents were introduced, there had been very few legal instruments on the protection of the indigenous peoples.

One of the legal instruments that can be invoked for the protection of indigenous rights is the International Covenant on Civil and Political Rights (ICCPR),[73] adopted in 1966 and entered into force in 1976. In fact, there are at least two provisions most explicitly referring to the indigenous peoples in this Covenant: article 1 (self-determination and use of natural resources) and article 27 (protection of minority groups). While the relationship between self-determination, natural resources and indigenous rights seems to be clear, understanding the link between the protection of minority groups and the protection of the indigenous peoples is in need of a more detailed explanation.

In this regard, it should be noticed that, until the completion of the study on the indigenous peoples by the UN Special Rapporteur Martinez Cobo, there was no legal definition of “the indigenous peoples”. For this reason, the indigenous peoples were considered as a particular minority group. In fact, although considering the indigenous

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[73] The ICCPR is consultable at this link: http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed on 24/3/2014).

peoples as a minority group was not exact, in the past such a solution was the only way to provide them with legal protection.

There has been a wide discussion on this topic amongst scholars, keeping in mind that many groups of the indigenous peoples do not consider themselves a minority (although they are numerically small) because they had been the first inhabitants of their territory. On this regard Erica Irene Daes, the Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, stated that "there is an important distinction between indigenous peoples' rights and minority rights, precisely because indigenous peoples are not minorities".[74]

There is no unique definition of a minority in the international law. The most widely recognised definition was elaborated in 1977 by prof. Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. According to that definition, a minority is:

> "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[75]

Another definition of a minority was elaborated by the UN Special Rapporteur Jules Deschenes in 1984. He defined a minority as:

> "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law."[76]

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[74] Erica Irene Daes, *Working Paper on the concept of "indigenous people"*. UN Doc. E/CN.4/Sub.2/AC.4/1996/2.

[75] Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities.* UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 568.

[76] Jules Deschenes, *Proposal Concerning a Definition of the Term 'Minority'*. UN Doc. E/CN.4/Sub.2/1985/31, para. 181.

As we can see, these two definitions can be applied to the indigenous peoples due to the fact that many of them represent numerical minorities in the state where they live. For this reason, the UN Human Rights Committee[77] acknowledged the fact that persons belonging to indigenous groups can invoke article 27 of the ICCPR in order to obtain legal protection of their rights. The article 27 guarantees the following:

> ”In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”[78]

This means that indigenous groups that are in a minority position in the state can take advantage of legal provisions established for the protection of minorities. In particular, in its General Comment No. 23, the Human Rights Committee claimed the following:

> “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.[79] 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.”[80]

[77] The United Nations Human Rights Committee is composed by 18 independent experts nominated by Member States. Its role is to monitor the implementation of the International Covenant on Civil and Political Rights by the States that have signed it. For more information: http://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx (accessed on 24/3/2014).

[78] Article 27, ICCPR, 1966.

[79] Regarding the right to live in reserves and other indigenous rights that can be protected by article 27 of ICCPR, could be useful to consult the case *Lovelace Vs Canada*. UN Doc. CCPR/C/58/D/671/1995.

[80] Human Rights Committee, General Comment No.23.
CCPR/C/21/Rev.1/Add.5. 26 April 1994. The full text is available at the following link: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.5&Lang=en (accessed on 24/3/2014).

Regarding the protection of right to land and land resources, it is useful to point out the case of *Poma Poma v. Peru*,[81] in which article 27 of the ICCPR was invoked in order to protect indigenous rights. This case is about exploitation of natural resources in indigenous area. More precisely it concerns the possibility to use water in indigenous homeland, from where the government had decided to divert the main river. The applicant, Ms. Poma Poma is a citizen of Peru and a member of the indigenous group Aymara that had been living in the Andes territory for more than 2000 years. During many years, a lot of wells have been built on this territory and the normal direction of the main river was diverted, exerting a serious impact on the traditional lifestyle of the Aymara that were living in that area. Ms. Poma Poma brought the case to the Committee alleging that article 1, paragraph 2 (right to freely dispose of natural wealth and resources) and article 17 (right to privacy) of the ICCPR had been violated by the state of Peru.[82] The case was considered admissible; however the Committee based the validity of the complaint on article 27 of the Covenant. In fact, article 1 of the ICCPR could not be the subject of proceedings because the Optional Protocol No. 1 to the ICCPR[83] establishes that only individual complaints can be considered by the Committee, while the Committee did not consider article 17 of the ICCPR violated.

Although article 27 refers to individuals, it must be seen as a provision that protects individuals belonging to a minority group, in order to ensure for those individuals the opportunity to enjoy the particular culture of that group.[84] In particular, in this case, the construction of the wells compromised the right of the members of Aymara indigenous community to enjoy their culture and live following their traditional lifestyle.[85] Furthermore, the Human Rights Committee stated that such a big interference in the traditional lifestyle of the indigenous peoples can be justified only if the people involved were included in the decision-making process. In addition, it is not sufficient

[81] Human Rights Committee Doc. CCPR/C/95/D/1457/2006 of 24 April 2009. The complete explanation of the case is available at this link: http://www.bayefsky.com/pdf/peru_t5_iccpr_1457_2006.pdf (accessed on 8/4/2014).
[82] Göcke, 2010, p. 343.
[83] The full text of the Optional Protocol No. 1 to the ICCPR is available at the following link: http://www.ohchr.org/Documents/ProfessionalInterest/ccpr-one.pdf (accessed on 10/4/2014).
[84] See in particular paragraph 7.2 and 7.3 of the Doc. CCPR/C/95/D/1457/2006 of 24 April 2009.
[85] Göcke, 2010, pp. 343-344.

for public authorities to merely organise a prior consultation, but to look for a “free, prior and informed consent of the members of the community”.[86] In this case, the members of Aymara community were not involved in the decision-making process. The Peruvian Government did not initiate any studies in order to understand the impact of the construction activities on the indigenous life and, finally, no measures were adopted in order to prevent the negative effect of the construction of the wells on the indigenous well-being. Acknowledging that implementation of the contested governmental project had a serious impact on the indigenous lifestyle, the Human Rights Committee found a violation of article 27 of the ICCPR by the Peruvian state. With this verdict, the Human Rights Committee imposed on the state of Peru an obligation to provide effective and full remedies for the victims and to adopt necessary measures in order to avoid such violations in the future.[87]

Regarding the concept of effective participation in decision making process, it is useful to remember that article 25 of the ICCPR establishes the right to participate for everyone.[88] Hence, the provisions enshrined in this article can be invoked by the indigenous peoples in order to safeguard their right to participate in the conduct of public affairs. There are other two international instruments that can be used to protect the right of participation of the indigenous peoples: the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD),[89] in which this right is protected at article 5, and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[90] in which this right is

[86] Ibidem, p. 345.
[87] Ibidem, p. 346.
[88] Article 25 of the ICCPR states: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access, on general terms of equality, to public service in his country”.
[89] UN Convention on the Elimination of All Forms of Racial Discrimination, full text consultable here: http://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf (accessed on 15/5/2014).
[90] UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities A/RES/47/135. Full text consultable at the following web-page: http://www.un.org/documents/ga/res/47/a47r135.htm (accessed on 25/3/2014).

safeguarded at article 2.[91] However, no reference is made to the right to autonomy or self-government of these persons. It is possible to say that the aim of this article 2 is to provide persons belonging to minorities (and also the indigenous peoples in a minority position in the State) with the right to express their opinions on those matters in which they are involved.[92] Anyway, we must keep in mind that the decision to use these dispositions is based on the indigenous peoples' will. Furthermore, the fact that the indigenous peoples can use legal provisions on minority rights must not have an adverse consequence on the status of indigenous groups.[93]

3.1.2. The protection of the right to self-determination in the jurisprudence of the UN Human Rights Committee

The right to self-determination is a fundamental right that the indigenous peoples have always invoked in order to get a recognition of their autonomy, as outlined at the beginning of this chapter. In general, the right to self-determination is a fundamental principle of international law, recognised in many important international documents, *inter alia*, in the UN Charter, in the International Covenant on Civil and Political Rights (ICCPR) and in the International Covenant on Economic, Social and Cultural Rights (ICESCR). In particular, the common article 1 of the two Covenants guarantees that:

> "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."[94]

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[91] Article 2 states: "2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life. 3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they be long or the regions in which they live, in a manner not incompatible with national legislation".

[92] Myntti, 2000, pp. 126-127.

[93] Ibidem, pp. 124-125.

[94] Article 1, ICCPR and ICESCR, 1966.

Notably, self-determination has many important features, among other things, the opportunity to freely dispose natural resources, which is one of the most important issues for the indigenous world. Utilisation of natural resources is one of the reasons why the States are reluctant to recognise the right of the indigenous peoples to self-determination. In fact, with such recognition the States would lose the possibility to exploit natural resources in indigenous areas with a consequent loss of economic income.[95] Article 1 of the two Covenants enshrines that "all peoples" have the right to self-determination, yet there is no universally accepted definition of the term "peoples" in international law. For the same reason, there is no universal definition of the indigenous peoples. In this regard, it is also true that the indigenous representatives have claimed that it is not necessary to elaborate definition of the indigenous peoples. First of all, they made such a claim because in this way the peoples that feel themselves as being indigenous can be excluded if the definition is too restrictive; secondly, in the absence of a definition of the peoples, it would not be necessary to invent a definition of the indigenous peoples.[96] Erica Irene Daes, the Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, claimed that there is no difference between "indigenous peoples" and "peoples", given that the only difference is that the indigenous peoples were unable to exercise their right to self-determination.[97]

Regarding the right to self-determination, it is useful to underline that this right does not run out with the notion of independence and the creation of a sovereign state. There are some cases in the jurisprudence of the UN Human Rights Committee that deal with the requests for recognition of the right to self-determination by individuals. A relevant case is the *Lubicon Lake Band v. Canada*. The case was brought to the Court by Mr. Ominayak, the representative of the Lubicon Lake Band, a Cree Indian Band living in Alberta, Canada, where they live since time immemorial. They claimed that, notwithstanding the Indian Act of 1970 and the Treaty of 21 June 1899 concerning aboriginal land rights in Northern Alberta, the government of Canada allowed the state

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[95] Henriksen, 2000, p. 136.
[96] Ibidem, p. 132.
[97] Erica Irene Daes, *Working Paper on the concept of "indigenous people"*. UN Doc. E/CN.4/Sub.2/AC.4/1996/2, para. 72

of Alberta to expropriate the land of the Lubicon Lake Band for economic reason (gas exploitation). For this reason, Canada was accused to have violated article 1 of the Covenant. In this case the Committee has taken a strong position in protecting the right to self-determination. The Committee stated that:

> "The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights".[98]

Hence it is clear that, especially for the indigenous peoples, the right to self-determination can be implemented not only under the precondition of their independence (the so-called external self-determination), but also with respect to the so-called internal self-determination (i.e. the possibility to choose freely the system of government). In this respect, one of the participants of the UNESCO Expert Conference on the Implementation of the Right of Self-Determination as a Contribution to Conflict Prevention found that the right to self-determination can include:

> "guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity".[99]

Hence, from this report it is possible to note that the right to self-determination can be implemented in different ways that affect the life of the indigenous peoples and not just with the creation of a new, independent State.

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[98] *Lubicon Lake Band v. Canada*, Communication No. 167/1984 (26 March 1990). U.N. Doc. Supp. No. 40 (A/45/40), paragraph 32.1.

[99] Van Walt, 1998, pp. 9-22.

3.2. The efforts of the ILO in the area of protecting the indigenous peoples

3.2.1. The establishment of the ILO to the Convention No. 107/1959

The International Labour Organisation (ILO) is a specialised agency of UN that since its creation under the Statute of the League of Nations had undertaken studies on the condition of the indigenous workers. In 1954, the Committee of Experts on Native Labour opened a discussion about the integration and the artificial assimilation of these populations, concluding that the cultural autonomy of these groups had to be respected. Also for these reasons the 1957 International Labour Conference adopted the Convention No. 107 [100] on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Population in Independent Countries.

Having been ratified by 27 states, the ILO Convention No. 107/1957 was nonetheless replaced by Convention No. 169 in 1989, given the fact that it has an assimilationist approach to deal with indigenous issues. However, Convention No. 107 is still valid in those countries that have not yet ratified Convention No. 169.[101] Convention No. 107 has taken an assimilationist approach and this is clear on the basis of the preamble, in which is stated: "Considering that there exist in various independent countries indigenous and other tribal and semi-tribal populations which are not yet integrated into the national community". This concept is reaffirmed in article 1, while in article 2 governments are encouraged to integrate indigenous people in the society. As it is possible to notice, the aim of that Convention was, more than to protect the indigenous peoples but, to integrate them into the societies of the states. This approach was based on the consideration that indigenous peoples were undeveloped groups and indigenous culture would have disappeared once the progress would have reached these groups.[102]

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[100] The full text of the Convention No. 107 is consultable at this link: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C107 (accessed on 28/3/2014).

[101] The complete list of the States in which the Convention No. 107 is still in force is consultable here: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252 (accessed on 28/3/2014).

[102] Thornberry, 2002, pp. 330-331.

ILO Convention No. 169, instead, has a protective approach for indigenous rights and faces the indigenous issues without discrimination.

There is no mention, in Convention No. 107, of the right to self-determination of the indigenous peoples, yet in the Part II of the Convention (from article 11 to article 14) we can find some provisions about the right to land. In particular, there is the recognition of the ownership of indigenous people (art. 11) and the right to receive compensation in case of removal (art. 12a). However, there is no mention of the right of the indigenous peoples to use the resources that can be found in their territories, as well as to the right to freely dispose of their natural resources. As it will be pointed out in the next paragraph, there is a big difference between these provisions and those enshrined in Convention No. 169 regarding the recognition of the spiritual value of lands for the indigenous populations, the protection of indigenous environment, the right to participate in the management of their resources and the right to return in the indigenous territory if it is possible.[103] As we said before, the most important issue with Convention No. 107 was its assimilationist approach. In this regard, the report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention No. 107/1957 stated that:

> "The Meeting is unanimous in concluding that the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. In 1956 and 1957, when Convention No. 107 was being discussed, it was felt that integration into the dominant national society offered the best chance for these groups to be a part of the development process of the countries in which they lived. This had, however, resulted in a number of undesirable consequences. It had become a destructive concept, in part at least because of the way it was understood by governments. In practice it had become a concept which meant the extinction of ways of life which are different from that of the dominant society. The inclusion of this idea in the text of the Convention has also impeded indigenous and tribal peoples from taking full advantage of the strong protections offered in some parts of the Convention, because of the distrust its use has created among them".[104]

[103] Ibidem, pp. 333-334.
[104] International Labour Office, Report VI (1) *Partial revision of the Indigenous and Tribal Populations Convention No. 107/1957,* 75th Session 1988. Consultable at this link: http://www.ilo.int/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/lang--en/index.htm (accessed on 28/3/2014).

Hence, it was clear to the Meeting of Experts that the provisions enshrined in ILO Convention No. 107 were not adequate to protect indigenous rights. Although the aim of the Convention was to ensure a good protection of indigenous rights, in the reality it was an integrationist document, also because of the use that the governments did of it. For all these reasons, a new Convention was realised.

3.2.2. The safeguards of the right to land and the right to self-determination in ILO Convention No. 169/1989

The revision of Convention No. 107 resulted in the adoption of ILO Convention No. 169. The new Convention was adopted in 1989 with 328 votes in favour of it, 1 vote against and with 49 abstentions. It entered into force on September 1991 and it has been ratified by 22 countries.[105] Already the title of this new instrument suggests difference from the approach of the previous Convention No. 107. While the Convention No. 107 is entitled the "Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries", Convention No. 169 is called the "Convention concerning Indigenous and Tribal Peoples in Independent Countries". Hence, it is clear that with Convention No. 169 there is a change of approach and the indigenous peoples are seen not as populations that must be integrated in the State, but as peoples of the state that must be protected.

Firstly, it is possible to note that there is no word "integration" in the Convention of 1989, although the term was present in the previous Convention No. 107. This is a good indicator of the fact that the approach to the needs of the indigenous peoples is different in these two Conventions. Secondly, there is reference to "the peoples" but not to "the populations" in the new Convention No. 169. The usage of the word "the peoples" was the result of long negotiations, because many states were concerned with the link that could be made between the terms "the people" and the right to self-determination.[106]

[105] The complete list of the States that have already ratified the Convention No. 169 is consultable here: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (accessed on 28/3/2014).
[106] Thornberry, 2002, pp. 342-343.

For example, the representative of Argentina stated that notwithstanding the Argentinian government was not in favour to have this word in the Convention, it would have accepted it only with a specific provision included in the Convention in which it was affirmed that there was no relation between the word peoples and the right to self-determination.[107] All requests of other governments resulted in article 1, paragraph 3, which states:

> “The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law”.[108]

The change in the approach taken by the new Convention No. 169 is particularly evident in its section dedicated to the land right of the indigenous peoples (part II, article 13 to 19). Article 13 of this instrument states that the government must respect the special relationship that indigenous people have with their territories (also in the collective aspects), in particular regarding the importance of the cultural and spiritual values. Equal importance is given to the recognition of the right to ownership over the lands that the indigenous peoples had usually occupied and used during the centuries (article 14). Precisely, article 14 make a claim about lands that the indigenous peoples “traditionally occupy”.[109] Anyway, the term “occupancy” has not been fully respected in many states in their practices. For example, the USA refused to recognise the ownership of the indigenous peoples over the land that they have historically occupied, but only to the lands that they are currently occupying.[110] With regard to this issue, the Manual to ILO Convention No. 169 proposes a compromise between two extreme points of view, i.e. the possibility of recognition of the right over the land historically occupied and recognition of the right over the land presently occupied. This solution was proposed because the first point of view gives too much of a privilege to the historical connection with the land, while the second fully denies the value of historical

[107] International Labour Conference, Provisional Record 25, Geneva, 66th Session 1989, para. 36.
[108] Article 1, paragraph 3, ILO Convention No. 169/1989.
[109] Thornberry, 2002, pp. 351-352.
[110] International Labour Office, Report IV (2 A) *Partial revision of the Indigenous and Tribal Populations Convention No. 107/1957,* 76th Session 1988. Consultable at this link: http://www.ilo.int/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/lang--en/index.htm (accessed on 31/3/2014).

occupation of the land. Furthermore, article 14 of the Convention No. 169, guarantees not only the right to ownership, but also the right to possession of the lands, given that it is important for the indigenous peoples to underline the concept of possession of their lands and not only the right to ownership. In fact, this is an important difference between Convention No. 107 and Convention No. 169, given that the first Convention recognises only the right to ownership over the lands, while the second instrument acknowledges the right of possession of lands.[111] In the English jurisprudence, ownership implies title to land and full rights of management but not necessarily possession, which can be seen as the enjoyment of benefits that can belong to the owner at equity.[112]

Article 15 of ILO Convention No. 169 is about the protection of natural resources that could be found in indigenous territories. This article states:

> "I – 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.
> II – 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."[113]

It is an important provision, in the light of the fact that Convention No. 107 was silent about natural resources of the indigenous peoples. Taken in conjunction with articles 6 and 7, article 15 of ILO Convention No. 169 provides the indigenous peoples with a good mechanism of practicing participation in decision-making processes and in management of natural wealth. Regarding this provision, the Tripartite Committee of the ILO Governing Body stated that:

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[111] Thornberry, 2002, pp. 353-355.
[112] Berge, 2003, pp. 12-13.
[113] Article 15, ILO Convention No. 169/1989.

> "When differing interests and points of view are at stake such as the economic and development interests represented by the hydrocarbon deposits and the cultural, social and economic interests of the indigenous peoples situated in the zones where those deposits are situated, […] the parties involved seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation".[114]

The content of article 15 of ILO Convention No. 169 was strongly discussed during the negotiation process between States and indigenous representatives. Many States argued that natural resources should remain in the ownership of the State, because they are retrieved from the national territory. In contrast, the indigenous representatives argued against the possibility of guaranteeing for them the right to land without recognition of the right to natural resources.[115] Although the mentioned article 15 claims that indigenous natural resources must be safeguarded, many researchers strongly criticise this provision. In fact, in the ILO Convention, there is a distinction between right to ownership over the lands and right to use natural resources, without ownership on them.[116] For this reason, MacKay claims that article 15 is one of the most inadequate of the entire Convention No. 169. In fact, in the way that it is structured it is not sufficient to prevent the indigenous lands from exploitation of natural resources and the following destruction of indigenous homelands.[117] Indeed, during the activities of exploration and exploitation there may be several types of problem, as environmental problems and pollution on the area as well as serious health problem for the population.

This is the case of *Ogoni*, in which the military government of Nigeria was alleged to be directly involved in irresponsible oil exploitation practices in the *Ogoni* region, without consult the peoples that were living in those territories.[118] Precisely, the Nigerian National Petroleum Company (NNPC) formed a joint venture with Shell Petroleum Development Corporation (SPDC). Their activities in the Ogoni region caused

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[114] ILO Governing Body, 282nd session, November 2001, GB.282/14/2, para. 36.
[115] Ulfstein, 2004, p. 27.
[116] Doyle-Gilbert, 2011, p. 302.
[117] MacKay, 2002, p.18.
[118] *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*, Communication 155/96, ACHPR 2001. Full case available here: http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf (accessed on 27/6/2014).

environmental degradation and health problems among the Ogoni people, due to the contamination of the environment.[119]

In this regard, the African Commission on Human and Peoples' Rights enshrined that article 21 of the African Charter on Human and Peoples' Rights, which is about the right to dispose of natural resources, had been violated.[120] The Commission stated:

> "The State party should not act arbitrarily in exercising the right to freely dispose of its wealth and natural resources. The non-participation of the Ogoni people and the absence of any benefit accruable to them in the exploitation of the oil resources by the Nigerian government and the oil companies were undoubtedly contrary to Article 21 of the Charter".[121]

As well pointed out by the African Commission, there were two main violations in the *Ogoni* case: the non participation of the Ogoni in the decision-making process and the absence of benefit for them. In fact, according to the ILO Manual to ILO Convention No. 169, the government has the responsibility to respect the provisions enshrined in the Convention, above all to include the indigenous peoples in the decision making process. Furthermore, it is preferable to start the consultation before that a company starts an exploration, in order to avoid economic loss for the company. Once starting the consultation, the indigenous peoples that can be affected of the exploitation process have the right to explain for which reasons should not begin an exploration in that land. Notwithstanding the fact that the indigenous peoples do not have the right to veto, in the consultation process they can reach an agreement with the company, for instance stipulating to use particular techniques during the exploitation process in order to minimise the damage for the environment, as well as agree for benefits.[122]

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[119] Suksi, 2002, pp. 320-323.
[120] Article 21, paragraph 1 of the African Charter on Human and Peoples' Rights states: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it".
[121] Errico, 2011, p. 345.
[122] Manual of ILO Convention No. 169, 2003, p. 40.

This was the case of an area populated of Sami, in Norway. In fact, in 1993 the government of Norway granted a permit to the multi-national company Rio Tinto-Zinc, allowing it to explore Sami areas. In taking the decision, the Norwegian Government did not consult the Sami Assembly of Norway nor Sami were informed. First of all, the Sami Assembly asked to the government to nullify the permit and as a consequence of the refusal of the government to do it, the Sami Assembly contacted and started to negotiate directly with the company. At the end of the consultation the Assembly was able to reach an agreement with the company, according to which no mining activity would have been started without the approval of the Sami Assembly.[123]

As for natural resources that could be found in indigenous territories, article 16 of ILO Convention No. 169 about the prohibition to the removal of the indigenous peoples is also of a significant relevance. This article establishes that only if the removal is unavoidable and under the precondition of the free, prior and informed consent (FPIC), the right to compensation must be applied. The possibility for the indigenous peoples to return to their lands in the future must be considered, and if the return is impossible they should be provided with another land plot with the same value or with the monetary compensation. The provision about the possibility to return to the indigenous homeland is important, because it was lacking from the Convention No. 107. Although Convention No. 107 had some references to the possibility of displacement of the indigenous peoples,[124] Convention No. 169 is more "indigenous friendly", which can be noticed from its wordings. In particular, Convention No. 169 does not use the term "removal", as Convention No. 107, opting for a more neutral term "relocation". In addition, the new convention claims that the indigenous peoples must be informed about the relocation and must agree with it.[125] Finally, Convention No. 169 introduces article 17, guaranteeing that the traditional way of transmission of the right to land must

[123] Manual of ILO Convention No. 169, 2003, p. 40.

[124] ILO Convention No. 107, article 12, paragraph 2 states: "When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development".

[125] Thornberry, 2002, pp. 356-357.

be respected, article 18 that protects the indigenous peoples against unauthorised use of their lands, and article 19 regarding the regulation of National Agrarian Programmes.[126]

Concluding our analysis of ILO Convention No. 169, we can say that, although this Convention cannot possibly solve all the problems of the indigenous peoples while being unable to protect the interests of all the indigenous groups in the world, some provisions enshrined in it are capable to improve some aspects of the indigenous life. It must kept in mind that, if Convention No. 169 is implemented in due faith, it will provide workable measures for protecting the right of the indigenous peoples, safeguarding a self-governing regime, in which these people can enjoy their cultural rights, their right to land, natural resources, etc. Finally, the fact that this Convention has abandoned a paternalistic approach towards understanding the indigenous rights while taking a more indigenous friendly approach should not be underestimated. [127]

3.2.3. ILO Convention No. 169 in the legal frameworks of Finland, Norway and Sweden

Of all the selected Nordic states, only Norway has ratified ILO Convention No. 169. The reasons why Finland and Sweden have abstained are different. However, although such a decision not to ratify ILO Convention No. 169 can be seen as a possible avoidance of legal responsibilities regarding the protection of the Sami indigenous peoples, it must be kept in mind that Finland and Sweden introduced other effective measures for the protection of the Sami.[128]

Finland is not a state party to Convention No. 169 because of the dispute with the Sami about land rights. In particular, the Sami argue for official recognition of their ownership over the Sami homeland, while the Finnish Government is reluctant to

[126] Ibidem, pp. 357-358.
[127] MacKay, 2002, p. 19.
[128] Joona, 2012, p. 172.

provide such recognition.[129] In fact, article 14 of the mentioned Convention enshrines that all the indigenous peoples have the right of ownership over the lands that they have traditionally occupied and for this reason the Finnish Government has not yet ratified the Convention.[130] Anyway, the Finnish Government has opened the discussion on the possibility of ratifying Convention No. 169, and for this reason it allocated in 1999 a special expert whose task was to prepare a report on the issues of land, water, natural resources and traditional lifestyle of the Sami. There are, however, no provisions about the ownership of the lands in that report, neither there is any mentioning of the possibility for Finland to ratify the Convention.[131] Basically, that report analyses the provisions enshrined in Convention No. 169 and in national legislation, proposing some modifications to national legislation on land rights.[132]

After this report had been presented, the Finnish Ministry of Justice decided that Finland needed to conduct even more specific studies before it could possibly ratify the Convention. Dr Wirilander was appointed as a legal expert with the task to conduct a legal assessment of the regime of land ownership in the Sami homelands.[133] In his study Wirilander found no link between the Lapp villages and the ownership over the lands that they used, but he found clear evidence regarding the existence of the family ownership over the indigenous lands used for fishing, hunting, and reindeer herding. At this point the Ministry of Justice had decided to start a research project in order to study the land ownership and the land use in the entire Finnish Lapland from a historical and political point of view.[134] However, even after this detailed study on the land ownership in Lapland, Finland has not yet ratified ILO Convention No. 169. Anyway, the ratification of ILO Convention No. 169 by 2015 is one of the aims of the current government (the proposal of the government for the ratification is pending in the

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[129] The Sami Homeland is an area that includes the municipalities of Enontekiö, Inari and Utsjoki. Notwithstanding the name, the Sami in this area are a minority within the total population.
[130] Myntti, 2000, p. 205.
[131] Pekka Vihervuori, Maahan, veteen ja luonnonvaroihin sekä peinteisiin elinkeinoihin kohdisuvat oikeudet saamelaisten kotiseutualueella (Helsinki: Oikeusministeriön yleisen osaston julkaisuja 3/1999).
[132] Joona, 2012, pp. 179-180.
[133] Jihani Wirilander: Lausunto maanomistusoloista ja niiden kehityksestä saamelaisten kotiseutualueella (Helsinki: oikeusministeriö 8. elokuuta 2001).
[134] Joona, 2012, pp. 180-181.

Parliament now), as stated in the Second National Report by the Government of Finland of the UPR of the UN Human Rights Council.[135]

The situation around implementing the indigenous rights is different in Norway. The Sami issues in Norway had its culmination in the *Alta* case, between the end of the 1970s and the beginning of 1980. After that case, a special Commission was established, with the aim to protect the Sami rights in the Norwegian Lapland. The work of the Commission was important for the Sami of Norway, given that a provision regarding the Sami was included in the Norwegian Constitution in 1988 (art. 110a).[136] Probably as the result of the active work of that Commission, Norway was the first country that ratified ILO Convention No. 169, in 1990.[137]

Although Norway was the first country that ratified Convention No. 169, there were certain problems in the interpretation of the provisions of this Convention. In Norway there was the dispute about the indigenous rights to land, in particular those guaranteed by article 14 of Convention No. 169. The Norwegian Ministry of Justice agreed with the provisions enshrined in article 14, paragraph 1 about the recognition of the indigenous rights of ownership and possession of the lands that have been traditionally occupied by the indigenous communities. Nevertheless, the Ministry did not undertake any measures in order to identify those areas that had been occupied, as was established in paragraph 2. In practice, Norway has ratified the Convention, but without accepting *"in toto"* the provisions of article 14. This view has been strongly criticised by the ILO Committee of Experts, although the ILO has no doubt about the good faith of the Norwegian Government about the interpretation of the provisions enshrined in article 14.[138]

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[135] Universal Periodic Review of the UN Human Rights Council, 2012.

[136] Article 110a of the Constitution of Norway states: "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life".

[137] Joona, 2012, pp. 181-182.

[138] ILO Committee of Experts, Observation 1995, paragraph 17.

The perspective of the Norwegian Government regarding article 14 of ILO Convention No. 169 was criticised not only at the international level, but also at the national level. In particular, many legal experts and the Sami Rights Commission complained against the interpretations of the Government. For this reason the Commission released two reports in 1997. The last of those reports, prepared by the sub-committee of the Commission, argues that although article 14 does not obligate the State to give to Sami any entitlements on the lands that they have traditionally occupied, the State must give to them at least more power on that land. Precisely, the Sami of Inner Finnmark (that include the area of Karasjok, Kautokeino and Upper Tana) should have this right.[139] In this regard, the Sami Rights Commission stated that: a) Land and natural resources should be transferred from the State to a new governmental council (so called Finnmark Land Management); b) the Sami Assembly should be given the veto power when Sami interests are in danger.

After a wide legal and political discussion, a bill was prepared with the aim to establish the right of the Sami to manage their lands and their natural resources in Finnmark County.[140] On May 2005 the Finnmark Act was approved. With this Act, about 95% of the area in Finnmark was transferred to the Finnmark inhabitants with the creation of a proper new agency, called the Finnmark Estate. Hence, this Act is important for the management of the Sami lands and natural resources in Norway. It is important to underline that in the Act it is established that the scope and content of ownership and usage held by Sami on the basis of the prescription or immemorial usage must be identified.[141] The Act establishes also that there should be the Finnmark Land Management Commission, an independent body governed by a Board of seven actors (three members are elected by the Finnmark County Council, three by the Norwegian Sami Assembly and one is appointed by the King in Council) with the aim to supervise the use of land and the management of natural resources.[142]

[139] Ibidem, pp. 182-183.
[140] See annex No. 3.
[141] Josefsen, 2007, pp. 17-18
[142] Joona, 2012, pp. 183-184.

As for Sweden, it has not yet ratified ILO Convention No. 169. However, this does not mean that the Swedish Government has not addressed this problem given that, in 1997, a Commission was established by the Government with the scope to analyse the Convention and point out the reasons why Sweden should have ratified it. In the conclusion of the so-called Heurgren Report of this Commission it is established that Sweden could ratify the Convention if it was able to solve some controversial issues about right to land of Sami, in particular: a) Sweden should identify the Sami lands in order to recognise Sami rights; b) the Sami must be protected against any violations of their reindeer husbandry rights; c) Finally, the Sami have the right to have enough land for their needs, above all reindeer husbandry.[143]

This case also demonstrates the problems concerning the rights to land. For this reason, the Swedish Government decided to create a boundary commission, composed by experts of property law, in order to have a clearer scenario and, after the evaluation of the commission, discuss again the possibility to ratify the convention.[144] The aim of the ratification of ILO Convention No. 169 was reiterated also in the Report of the Working Group on the Universal Periodic Review, where is stated that "The Swedish Government continued to study the ratification of ILO Convention No. 169."[145]

As we have tried to establish in this section, the Nordic states put a lot of effort in order to ratify (in the case of Norway) or to start the process of ratification of ILO Convention No. 169 (Sweden and Finland). The main problem regarding the ratification of this instrument is the recognition of the right to land, considering the fact that the Convention is legally binding and the states are obliged to respect the provisions enshrined in it. Perhaps, this is another reason why the States are so reluctant to ratify this instrument and why the approach of the UN Declaration on the Rights of Indigenous Peoples is different, given that the Declaration is not legally binding. In fact, all the three Nordic States have voted for the Declaration.

[143]Ibidem, pp. 184-185.
[144] Ibidem, p. 186.
[145] UN Doc. A/HRC/15/11, Report of the Working Group on the Universal Periodic Review, paragraph 19.

3.3. The UN Declaration on the Rights of Indigenous Peoples: a step forward to the recognition of the right to self-determination and the right to land of the indigenous peoples

The United Nation Declaration on the Rights of Indigenous Peoples was adopted in September 2007.[146] This Declaration points out an important development regarding the protection of the rights of the indigenous peoples in the entire world, taking into account that 143 states voted in favour of it, 11 states abstained, and only 4 were against of the adoption of this Declaration (Australia, Canada, New Zealand and USA).[147] However, we must keep in mind that the presence of such a Declaration, which is not legally binding, cannot solve all the problems of the indigenous peoples, because the rights enshrined in this document could go against national interests (above all, such rights which regard the exploitation of resources in indigenous lands).[148] In this regard, it should be underlined that the Declaration is not a document that clearly favours the position of the indigenous peoples; rather it represents a compromise between the text proposed by the indigenous peoples and the requests of the state members of the UN.

The Declaration faces real problems of the indigenous peoples, such as the right to self-determination and prohibition of discrimination. In fact, after having once conquered their lands, the colonizing countries destroyed indigenous political, social and religious institutions thus denying the possibility to recognise the right to indigenous self-determination. The States started the process of assimilation of the indigenous peoples, while denying these peoples equal treatment with others. For these reasons, one of the aims of the Declaration is to ensure for the indigenous peoples their right to maintain their own institutions, cultures and traditions as well as the protection from any kind of discrimination in many areas (i.e. education, employment, health).[149]

[146] UN Resolution A/61/295. Full text of the Declaration consultable here: http://www.un-documents.net/a61r295.htm (accessed on 6/4/2014).
[147] Daes, 2011, p. 36.
[148] Burger, 2011, p. 41.
[149] Ibidem, pp. 42-43.

One of the main problems during the process of negotiations of the Declaration was related to the right to self-determination. However, a provision regarding the right to self-determination is included in the UN Declaration of 2007. This is a success for the indigenous peoples, although the Declaration is not legally binding. Yet, the non-binding nature of the 2007 indigenous Declaration is among the reasons why the States agreed to keep the right to self-determination in this document. Anyway, the acceptance of this provision by the States represents an important development: states are changing their views about the right to self-determination, from a right applicable to peoples under colonial domination to a right applicable to other peoples, such as the indigenous peoples.[150] Article 3 of this Declaration states that:

> "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[151]

Moreover, article 4 of this document provides the following:

> "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[152]

Notably, these two articles are explicit in guaranteeing self-determination for the indigenous peoples. However, the right to self-determination is understood by this Declaration in its internal sense, which becomes evident after reading of the provision of article 4.[153] The reason why it is possible to affirm this is article 46, paragraph 1, according to which:

> "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[154]

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[150] Quane, 2011, pp. 259-260.
[151] Article 3, UNDRIP, 2007.
[152] Article 4, UNDRIP, 2007.
[153] Quane, 2011, pp. 264-265.
[154] Article 46, UNDRIP, 2007.

The presence of this provision in article 46 must be seen in the context of the compromises which led to the adoption of the Declaration. In fact, although the majority of the indigenous peoples do not understand their right to self-determination as giving them a possibility to secede from the state, the states do not want to give to indigenous such a possibility, taking into account the potential risk it can bring for national unity.[155]

Related to the right to self-determination, there is the right to land, which is fundamental for the indigenous peoples. Article 25 of the Declaration states that:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[156]

This article is significant for the indigenous peoples, because it is the first time officially recognised of that particular relationship which the indigenous peoples establish with their traditional territories as well as the recognition of their inter-generational approach to their lands.[157]

Directly related to the right enshrined in article 25, there is another fundamental right for the indigenous peoples, recognised in article 26 of the Declaration: the right to ownership over the land. The provision states:

> "I - Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> II - Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. III - States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[158]

[155] Ibidem, p. 266.
[156] Article 25, UNDRIP, 2007.
[157] Doyle-Gilbert, 2011, p. 294.
[158] Article 26, UNDRIP, 2007.

We can see that this article 26 attempts to safeguard the right to land for the indigenous peoples without opening a discussion about the meaning of this concept. In fact, there is a big debate in academic literature regarding the meaning of the right to land for the indigenous peoples and whether this right implies ownership or both, ownership and the right to use the land. As it is possible to see from article 26, the Declaration includes both, the right of ownership and the right to use the lands, in the right to lands of the indigenous peoples.[159] Despite the fact that article 26 of the analysed Declaration recognises the right to ownership and the right to use the indigenous lands, we must underline that this right is valid only for the territories which are presently occupied by the indigenous peoples. Although paragraph 1 of article 26 of the 2007 Declaration states that “indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”, its contents are ambiguous, given that they do not explain if the right to land is a right to use, to ownership or to control the indigenous lands. This lack of clarity is probably the result of a compromise, according to which national legislation should define which type of rights the indigenous peoples will have regarding the lands that they have traditionally owned or used in the past.[160]

We can see that in the two articles (25 and 26) there is the reference to lands as well as to resources that can be found in those lands. In particular, paragraph 2 of article 26 recognises that the indigenous peoples have “the right to own, use, develop and control the lands, territories and resources” in their territories. Probably, the negotiation process regarding this provision was quite difficult, given that it was necessary to find a balance between the state economic interests for the development of the nation and the rights of the indigenous peoples.[161] It is useful to underline that the protection of the right of ownership and use of traditional lands of the indigenous peoples should be seen in the context of the protection of their cultural, social and economic integrity. For instance, the former UN Special Rapporteur Erica Irene Daes states in this respect that:

[159] Ibidem, p. 297.
[160] Ibidem, p. 298.
[161] Errico, 2011, pp. 329-331.

> "the developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that the indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories."[162]

Regarding the right of the indigenous peoples over natural resources, the Inter-American Commission on Human Rights has taken an active role. The decisions of this Commission are important because are based on the *rationale* adopted in the UN Declaration regarding the right over natural resources of the indigenous peoples.[163] For instance, in the case *Awas Tingni Community v. Nicaragua*[164] the Court, based his decision on article 21 of the American Convention on Human Rights[165], stated that:

> "Property can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."[166]

This position of the Court was strongly reaffirmed in the case *Saramaka People v. Suriname*. In this case the State was alleged to not having adopted the necessary measures to safeguard the right to use and enjoyment of the lands that the Saramaka has occupied since immemorial time and to have violated the right of ownership over these lands of this people. The Court stated:

[162] Erica-Irene Daes, Final Report of the Special Rapporteur, *"Indigenous peoples' permanent sovereignty over natural resources"*, UN Doc E/CN.4/Sub.2/2004/30. Consultable at this link: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/149/26/PDF/G0414926.pdf?OpenElement (accessed on 9/4/2014).
[163] Doyle-Gilbert, 2011, p. 303.
[164] The Awas Tingni Community brought the state of Nicaragua to the Court alleging that Nicaragua has not adopted effective measures to guarantee the right to property of the Community to its lands and natural resources and because it released a concession on lands of the community without its assent.
[165] The full text of the American Convention on Human Rights is available at the following web-page: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf (accessed on 22/5/2014).
[166] *The Mayagna Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, Inter-American Court on Human Rights, No. 79 (2001), paragraph 144. Full text available here: http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html (accessed on 22/5/2014).

> "[…] the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life."[167]

This decision is a cornerstone for the indigenous peoples, given that is enshrined that it is meaningless to recognise the right to land of the indigenous peoples without giving them also the opportunity to enjoy the right over their natural resources. Furthermore, with such a decision, the impact that exploitation of natural resources can have on the survival of indigenous community is recognised.[168]

In order to protect and ensure the realisation of the right to territories, lands and resources, the free, prior and informed consent (FPIC) of the indigenous peoples should be fulfilled.[169] Regarding the FPIC and the right to lands, territories and resources, article 32 of the Declaration states:

> "I - Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. II - States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. III - States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."[170]

According to this article, in particular paragraph 2, the FPIC is not just necessary in order to prevent exploitation of natural resources from outside, but it has a fundamental importance in order to guarantee the development of the indigenous peoples. We can say that the FPIC is established, in article 32, as the most important instrument to realise

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[167] *Saramaka People v. Suriname*, Judgment of 28th November 2007, -American Court on Human Rights, paragraph 122. Full text available here: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf (accessed on 22/5/2014).

[168] Doyle-Gilbert, 2011, p. 303.

[169] Ibidem, pp. 303-304.

[170] Article 32, UN Declaration on the Rights of Indigenous People, 2007.

the right to development of the indigenous peoples.[171] Also the Tripartite Committee of the ILO Governing Body expressed itself on indigenous participation, saying that:

> "In order for consultation to be effective, sufficient time must be given to allow the country's indigenous peoples to engage their own decision making processes and participate effectively in decisions taken in a manner consistent with their cultural and social traditions."[172]

As it is easy to understand, the debate about the management of natural resources in indigenous territories is not easy and become more complex when we start to talk about the subsurface resources in indigenous areas. In this regard, it must be noticed that indigenous representatives tried in several ways to introduce into some articles of the Declaration a provision on the ownership of subsurface resources (in particular in articles 25 and 30).[173] Anyway, this proposal did not find the approval of the delegations of several states and for this reason it was not put in the Declaration.[174] The following articles of the analysed Declaration refer to the management of lands and resources in indigenous areas (article 27), the compensation that indigenous people are entitled to receive in case of relocation (article 28), protection of indigenous environment (article 29), protection against military activity in indigenous areas (article 30) and the right to cultural heritage (article 31).

In conclusion of this chapter we can say that, although the UN Declaration is not a legally binding document, its adoption is important for indigenous rights. In particular, not only Courts started to look at the provisions enshrined in it, but also multinational corporations have started to consider them. Notably, corporations consider the consultation process before the beginning of their activities as a useful instrument in order to avoid risks of loss of money and time as well as the protection of the indigenous peoples' cultural integrity as a right that must be ensured to these peoples.[175]

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[171] Ibidem, p. 314.
[172] ILO Governing Body, 282nd session, November 2001, GB.282/14/3, paragraph 79.
[173] UN Doc. E/CN.4/2004/WG.15/CRP.4, 14 October 2004.
[174] Errico, 2011, pp. 340-341.
[175] Errico, 2011, p. 356.

4. Mineral Acts of Finland, Norway and Sweden: compliance with the international law standards on protection of indigenous rights

4.1. The Mineral Acts of the three selected Nordic States

4.1.1. Finland, a complete Act for the Sami rights

Introducing an effective legal regulation of the mining process is important in order to prevent possible violations of indigenous rights. In particular, due implementation of such legislation is significant for the protection of the Sami rights. A short analysis of the provisions of the Mineral Acts in the three Nordic countries entailing the protection of the Sami peoples is presented in the beginning of this chapter. Further in this chapter a comparison between the obligations enshrined in the national law and those established in the international law will be done. The final aim is to point out if the provisions enshrined at the national level are sufficient to grant a good protection to the Sami rights also in those states that have not yet ratified ILO Convention No. 169 (like Finland and Sweden).

Finland adopted the new Mining Act in June 2011, in substitution of the previous Mining Act of 1965.[176] One of the most important innovations of the 2011 act is shifting the authority to deal with the mining issue: from the Ministry of Employment and Economy to the Tukes (Finnish Safety and Chemical Agency). Now all the permits and licenses are granted by the Tukes.[177] In comparison with the former Mining Act, the new 2011 Act takes more extensively into account the rights and the responsibility of the parties involved in the process of mining, the environmental issues, and the rights of the landowners and gives more power to the municipalities in order to allow the

[176] PWC, 2012, p. 8.
[177] New Mining Act and gold panning permit, http://tukes.fi/en/Branches/Mining/Gold-panning/New-Mining-Act-and-gold-panning-permit/ (accessed on 9/5/2014).

stakeholders to influence the decision-making process.[178] The new approach of the 2011 act is evident also as regards the protection and safeguarding of Sami rights. Already Section 1 of Chapter 1 establishes that:

> "The activities referred to in this Act shall be adapted in the Sami Homeland, referred to in the Act on the Sami Parliament (974/1995), so as to secure the rights of the Sami as an indigenous people. This adaptation shall pay due attention to the provisions of the Skolt Act (kolttalaki 253/1995) concerning the promotion of the living conditions of the Skolt population and Skolt area, opportunities for making a living, and the preservation and promotion of the Skolt culture".[179]

This is a strong provision and can be seen as the complete recognition of the Sami rights as indigenous peoples as is stated in the Finnish Constitution of 1999 (Section 17 and 121).[180] It is important that also the Skolt Sami are mentioned in this section and this statement can be seen as a further step of the Government of Finland towards the recognition and the protection of the three different Sami groups living in Finland. Section 12 (Notification of field work and construction in the exploration area) contains another provision dealing with the Sami and Skolt peoples. It states:

> "Moreover, a notification must be submitted to the Sami Parliament in the Sami Homeland, the appropriate local reindeer owners' associations within an area specifically intended for reindeer herding as stipulated in the Reindeer Husbandry Act (a special reindeer herding area), and to a village meeting of the Skolt people in the Skolt area referred to in the Skolt act (kolttalaki 253/1995)."[181]

Also in this case it is possible to note that the 2011 Act allows a broader protection of the Sami. A similar obligation to notify the authorities about the field works in the gold panning area is enshrined in Chapter 4, Section 27, which states:

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[178] Mining news, http://www.investinfinland.fi/articles/news/mining/finlands-new-mining-act-comes-into-force-at-the-beginning-of-july/49-321 (accessed on 10/5/2014).

[179] Finnish Mining Act, 2011, Chapter 1, Section 1. Full text available here: http://www.finlex.fi/en/laki/kaannokset/2011/en20110621.pdf (accessed on 30/4/2014).

[180] The full text of the Constitution of Finland is available at the following web-page: http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf (accessed on 30/4/2014).

[181] Finnish Mining Act, 2011, Section 12.

> "In writing, the gold miner must provide advance notification to the authority or institution responsible for management of the area of all field work that could cause damage or inconvenience. Moreover, notification shall be submitted to the Sami Parliament in the Sami Homeland, to the appropriate local reindeer owners' associations in a special reindeer herding area, and/or to a village meeting of the Skolt people in the Skolt area, as relevant. Further provisions on the notification procedure may be given by government decree."[182]

In addition, regarding the gold mining area, Section 30 stipulates that:

> "The mining authority shall inform the following about the final inspection: the gold miner and the authority or institution responsible for management of the area; within the Sami Homeland, the Sami Parliament; within the Skolt area, the Skolt village meeting; and, within a special reindeer herding area, the local reindeer owners' associations."[183]

References to the safeguards of the Sami rights can be found in the Part II, Section 5 of the 2011 Mining Act which refers to the permit procedures. When it comes to the Sami rights, Section 38 enshrines precise obligations (like the evaluation of the impact that a mining activity can have on that area and consider measures in order to decrease and prevent damage) that must be applied in the Sami Homeland, in the Skolt Area and in the special reindeer area.[184] It is interesting to notice that this provision states that the permit authority must co-operate with the Sami Parliament, the reindeer herding associations and the institution responsible for the management of the area. Beyond the fact that the provision enshrined in this Section safeguards in a good way the interests of the Sami, the most important thing is that this provision points out the will of the State to co-operate with the Sami also in the decision-making process.

In addition, it is useful to underline the provisions enshrined in Chapter 6, Section 50. This Section, in line with the previous one, could be considered as a milestone for the protection of Sami rights in the Mining Act. It is important because establishes that it is not possible to grant a permit (exploration, mining or gold permit) if this permit could

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[182] Finnish Mining Act, 2011, Section 27.
[183] Finnish Mining Act, 2011, Section 30.
[184] Finnish Mining Act, 2011, Section 38.

compromise the traditional Sami lifestyle and their culture.[185] The protection of the Sami people as an indigenous people is reaffirmed also in Sections 51, 52 and 54. In the final part of the Mining Act we can find the provisions regarding the rights of the Sami to be informed about the conclusion of the mining activity (Chapter 15, Section 146), but the most important provision is enshrined in Section 165. This Section is about the right of appeal and it states:

> "A decision on an exploration permit, mining permit, or gold panning permit; a decision to extend the validity of said permit; a decision on its expiry, amendment, or cancellation; or a decision to terminate mining activity may be challenged by way of an appeal by the following: […] the Sami Parliament, on the grounds that the activity referred to in the permit undermines the rights of the Sami as an indigenous people to maintain and develop their own language and culture".[186]

This is a strong provision that gives to the Sami Parliament the opportunity to challenge every decision regarding the mining activities if these decisions could allegedly threaten the Sami traditional lifestyle. It is useful to underline that the right of appeal of the Sami is also enshrined in the Water Act of 2011, in Chapter 15, Section 2.[187]

4.1.2. Norway, a focus on the Finnmark area

The new Norwegian Mineral Act was adopted in 2010 and, as the Finnish Mineral Act, it introduced some new obligations regarding the protection of the Sami living in Norway.[188] In Chapter 1, Section 2, it is stipulated that the fundamentals Sami rights, their culture and their lifestyle in the process of using mineral resources must be respected.[189] Section 10, establishes that the party involved in the research of ore deposits must inform the landowners at the latest one week before the beginning of the

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[185] Finnish Mining Act, 2011, Section 50.
[186] Finnish Mining Act, 2011, Section 165.
[187] Finnish Water Act, 2011, Section 2. Full text available here: http://www.finlex.fi/fi/laki/kaannokset/2011/en20110587.pdf (accessed on 11/5/2014).
[188] Speight-Shabazz, 2013, pp. 1-2.
[189] Norwegian Mineral Act, 2009, Section 2. Full text consultable at this link: http://www.regjeringen.no/upload/NHD/Vedlegg/lover/mineralsact_translation_may2010.pdf (accessed on 11/5/2014).

research.[190] However, if the research will be in the Finnmark area, the seeking parties must inform the Sami Parliament, the Finnmark Estate and, if it is possible, also the Sami village (so-called 'Siida', which is the traditional Sami local community and can be seen as the basic organizational unit for large-scale herding).[191] As is stipulated in the Finnmark Act, the Finnmark Estate is an independent legal entity which aim is to administer the lands and natural resources in the Finnmark area.[192] The Finnmark area is the northern part of Norway,[193] where around 74000 persons live, most of whom are Sami.[194]

In Chapter 4, Section 13, which is about the requests of exploration permits, it is established that "in Finnmark, the Directorate of Mining shall inform the landowner, the Sameting (the Sami Parliament), the relevant area board and district board for reindeer management, and the municipality of the permit".[195] Section 17 of the same chapter, which is about the exploration of natural resources in the Finnmark area, establishes that the parties involved in the mining process must take all the possible measures in order to assess whether the exploitation of the resources in the Sami indigenous area can possibly affect the Sami interests. The same Section establishes that such permission may be refused if the exploitation of natural resources will be against the interests of the Sami living in that area.[196] Finally, in Section 18 it is stipulated that in the Finnmark area the parties involved in the exploitation process must give "written notice to the Sami Parliament and the relevant area board and district board for reindeer management."[197]

[190] Norwegian Mineral Act, 2009, Section 10.
[191] Sara, 2009, p. 153.
[192] Finnmark Act, 2005, Chapter 2, Section 6. Full text available here: http://www.galdu.org/govat/doc/the_finnmark_act_act_17_june_2005_no_85.pdf (accessed on 5/6/2014).
[193] See annex No. 3.
[194] Ween-Lien, 2012, p. 96.
[195] Norwegian Mineral Act, 2009, Section 13.
[196] Norwegian Mineral Act, 2009, Section 17.
[197] Norwegian Mineral Act, 2009, Section 18.

There are several provisions about the protection of the Sami rights as well as many provisions are established for the regulation of the mining activities in the Finnmark area in the analysed act. However, no references are made to the Coastal Sami. The majority of the Coastal Sami live in the inner part of the fjords; their economy is based on fishing, hunting and animal husbandry (so called *fiskarbonden* – fishermen farmer).[198] The Coastal Sami can be considered a different group given the fact that, in the early 19th century, the Mountain Sami of *Karasjok* started to consider that group of Sami as *"dáčâ"*.[199] This word indicated persons that are not Sami when it comes to their behaviour, outlook and activities. The Coastal Sami have gone through a strong Norwegianization[200] process and now they live on the coast of Northern Norway and they are considered a population with Sami origins, but not as other Sami.[201] Perhaps this is one of the reasons why there are no special provisions on their safeguarding in the Norwegian Mineral Act.

4.1.3. Sweden, a lack of provisions on the Sami rights

The Swedish Mineral Act[202] was adopted on 24 January 1991 and, in contrast with the Mineral Acts of Finland and Norway, which are more recent, there is no mentioning of the Sami in it.[203] The Sami were not recognised for long time as an indigenous people in the Swedish Constitution and only with the constitutional amendment of 1 January 2011, they were recognised as a people.[204] Now the part of the Swedish Constitution entitled the Instrument of Government, establishes the following in Chapter 1, article 2:

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[198] Lätsch, 2012, p. 4.
[199] Im Kim, 2010, p. 5.
[200] The Norwegianization process was the process implemented by the Norwegian Government between 1880 and 1950 with the aim to assimilate the Sami into the Norwegian national identity. In particular, all Sami children were obliged to speak, read and write in Norwegian and to not use their language in the school and in public places in general.
[201] Im Kim, 2010, p. 5.
[202] The full text of the Swedish Mineral Act is available at this web-page: http://www.sgu.se/dokument/service_sgu_publ/SGU-rapport_2007-26_minerals-act_ordinance.pdf (accessed on 10/5/2014).
[203] Speight-Shabazz, 2013, pp. 1-2.
[204] The full text of the Swedish Constitution is available at the following link: http://www.riksdagen.se/en/Documents-and-laws/Laws/The-Constitution/ (accessed on 9/5/2014).

> “The opportunities of the Sami people and ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own shall be promoted.”[205]

As it is possible to notice, there is a distinction between the Sami people and other minorities and this is the result of a long-standing request of the Sami to be seen as a people and not as a minority.[206] In Chapter 2, article 17, there is a provision about the protection of the rights of the Sami to practice reindeer husbandry.[207] These general provisions enshrined in the Swedish Constitution are the only obligations (together with the provisions enshrined in the Reindeer Grazing Act) on the protection of the Sami of Sweden. There is, then, a lack of protection of Sami rights in the context of mining activities and this is a great lack in a country rich of natural resources in Sami territories like Sweden.[208]

4.1.4. Horizontal Comparison of the three Mining Acts

This paragraph is devoted to comparison between the three Mining Acts. Our aim is to find the common features, the differences, and the legal problems that can be found in each Act. In particular, we will link the obligations that a State must respect in order to protect indigenous rights with the most important rights for the indigenous peoples (right to land, right to self-determination, right to participate and the legal guarantee that the indigenous peoples are entitled to have). In this way it will be possible to understand if the obligations enshrined in international law (in the ICCPR, in ILO Convention No. 169 and in the UN Declaration on the Rights of Indigenous Peoples) regarding the safeguarding of indigenous rights have found an application in the national law.

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[205] The instrument of the government, Chapter 1, article 2.
[206] Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 - Case study: Sami rights to culture and natural resources,* 28 June 2012, full text available at this web-page: http://www.refworld.org/docid/4fedb3de37.html (accessed on 12/5/2014).
[207] The instrument of the government, Chapter 1, article 2.
[208]Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 - Case study: Sami rights to culture and natural resources,* 28 June 2012.

OBLIGATIONS	FINLAND	NORWAY	SWEDEN
Protection of Sami rights in the Purpose of the Act	Present, with a specific mention about the protection of Sami and Skolt peoples (Section 1)	Present, with a specific mention about the protection of Sami rights (Section 2, b)	No mention of Sami rights
Notification of field work and construction in the exploration area/gold panning area (right to participate)	Present, with specific provisions on Sami and Skolt peoples (Section 12 and 27)	Present, with specific provisions on Finnmark area (Section 10 and 13)	No mention of Sami rights
Notification after the expiration of the exploration permit (right to participate)	Present, with specific provisions on Sami and Skolt peoples (Section 15)	No specific provisions about the necessity to notify the expiration of the exploration permit to Sami peoples	No mention of Sami rights
Control of the impact of mining activities (right to land and to traditional lifestyle)	Present, with specific provisions on Sami and Skolt peoples (Section 38, 52 and 54)	Present, with specific provision on Sami peoples (Section 17)	No mention of Sami rights
Refusal to grant a mining permit (right to land and legal guarantee to indigenous lifestyle)	Present, with specific provisions on Sami and Skolt peoples (Section 50)	Present, with specific provision on Sami interests (Section 17)	No mention of Sami rights
Ensuring public and private interests (right to indigenous lifestyle)	Present, with a specific provision on Sami and Skolt rights (Section 51)	Present, with specific provision on Sami interests (Section 17)	No mention of Sami rights
Information regarding a permit decision (right to participate)	Present, with a specific provision on Sami and Skolt rights (Section 58)	Present, with specific provision on Sami peoples and Finnmark area (Section 18)	No mention of Sami rights
Final inspection after mine closure (right to land)	Present, with a specific provision on Sami and Skolt peoples (Section 146)	No provision about final inspection in general	No mention of Sami rights
Right of appeal (right to participation)	Present, with specific provisions for Sami and Skolt peoples (Section 165)	Present (Section 17), with specific reference to Sami Parliament	No mention of Sami rights

After this comparison of the three Mineral Acts of Finland, Norway and Sweden, it is possible to say that the Finnish Act is the most "Sami friendly". It contains several provisions on the protection of Sami rights, while guaranteeing legal safeguards of the Sami interests. This approach can be seen as a natural evolution of the dispositions pointed out in the new Constitution of Finland in which the Sami are recognised as an indigenous people.[209] Although there is still a lack of participation in decision-making process, it must not be underestimated the different articles present in the Finnish Mining Act regarding the participation of the Sami (notification of field work, section 12 and 27, notification after the expiration of the exploration permit, section 15, information regarding a permit decision, section 58 and the right of appeal, section 165). The other rights that are taken into account and that found a good protection in the Finnish Mining Act are the right to land and to traditional lifestyle of the Sami (in section 38, 50, 51, 52, 54, 146).

However, the Sami in Finland can face certain obstacles in maintaining their traditional way of life. In particular, mining activities are in expansion in the municipality of Sodankylä and this can have negative effects on reindeer husbandry.[210] In fact, the national legislation does not grant any specific right to the Sami community regarding reindeer husbandry, given the fact that in Finland (unlike Norway and Sweden) this practice is not exclusively for the Sami, but is open to everyone.[211] Anyway, in the Finnish Reindeer Husbandry Act of 1990 it is established that state authorities must consult representatives of the Sami reindeer associations when Sami rights can be affected by governmental decisions.[212] Hence, although Finland has not yet ratified ILO Convention No. 169, it is possible to say that the provisions established in the national law safeguard in a satisfactory way the rights of the Sami living in Finland. Hence, the protection of the Sami rights is not only guaranteed in relation to the

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[209] Constitution of Finland, Section 17.

[210] Zimoch Urszula, Mining the North Pole and reindeers – my first trip to Lapland, http://blogs.helsinki.fi/hy-ruralia/2013/03/18/mining-the-north-pole-and-reindeers-my-first-trip-to-lapland/ (accessed on 6/6/2014).

[211] Joona, 2012, p. 179.

[212] Finnish Reindeer Husbandry Act, Chapter 8, Section 53. Full text available here: http://www.finlex.fi/fi/laki/kaannokset/1990/en19900848.pdf (accessed on 12/5/2014).

traditional uses and lifestyle of Sami, but also regarding the subsoil resources and the mining activities, as pointed out in the table above.

Also Norway ensures a good protection of the Sami rights in its Mineral Act. Although the provisions established in the Norwegian Mineral Act may seem narrower than the provisions established in the Finnish Mineral Act, this does not mean that they do not ensure a good safeguarding of the Sami rights.[213] Anyway, it is true that some provisions enshrined in the Finnish Mining Act are not present in the Norwegian Mineral Act, among others the provision regarding the notification after the expiration of the exploration permit and the final inspection after mine closure. Hence, it is possible to say that the Norwegian Act is more lacking than the Finnish Act, although there are provisions for guaranteeing the participation of the Sami as the notification of field work, section 10 and 13, information regarding a permit decision, section 18, and the right of appeal, section 17). Although in a limited way in comparison with the Finnish Mining Act, also the right to land and to traditional lifestyle of the Sami are entitled to receive protection, according to section 17 of the Norwegian Mineral Act.

Furthermore it should not be underestimated the fact that Norway has recognised and apologised for the suffering and the forced assimilation that the Sami suffered in the past due to the Norwegianization policies.[214] Maybe due to this reason, Norway was the first State that ratified ILO Convention No. 169, although there are still problems with interpretation of some provisions of this Convention (e.g. article 14 about the right of ownership).[215] It is useful to underline also the fact that, in 1988, a provision about the protection of the Sami culture, language and way of life was introduced in the Norwegian Constitution.[216]

[213] It must be considered that in the Norwegian Mineral Act the Sami rights are mentioned without a complete explanation of their features, while in the Finnish Mining Act there is a complete and detailed explanation of Sami rights. However, it must kept in mind that the entire structure of the Norwegian Act is different in comparison with the Finnish Act and, in general, it is quite short.

[214] Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2012 - Case study: Sami rights to culture and natural resources,* 28 June 2012.

[215] Joona, 2012, p. 21.

[216] Constitution of Norway, article 110a states: "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life".

In conclusion it is possible to say that, according to the legal provisions established in the Mineral Act, Norway ensures a good protection to the Sami, although most of the legal provisions about the safeguarding of the Sami during the mining activities are referred only to the Finnmark area.

The legal status of the Sami in Sweden is different, due to the fact that the Swedish Mineral Act lacks the provisions about the Sami, as well pointed out in the table above. The Constitutional regulation of the Sami rights is summed up in two vague provisions on the protection of the Sami. In addition, Sweden has not yet ratified ILO Convention No.169.[217] If we consider all this, it seems that Sweden provides the least legal guarantees for the Sami rights in its mining legislation among the three Nordic countries considered in our comparison. It will be assessed in the next chapter if such a scarcity of legal provisions can have a negative effect on the everyday life of the Sami.

4.2. Comparing ILO Convention No. 169 with the Nordic Mineral Acts

This paragraph is devoted to a comparison between ILO Convention No. 169 and the Mineral Acts of Finland and Norway. Although Finland has not yet ratified ILO Convention No. 169, the ratification of this convention by 2015 is one of the aims of the current government, according to the Second National Report by the Government of Finland to the UPR of the UN Human Rights Council.[218] In this comparison, the Mining Act of Sweden is not taken into account for the reason that it contains no specific provisions on the protection of the Sami rights. The aim of this comparison is to find out if the national law includes any provisions ensuring due protection and guarantees for the indigenous rights of the Sami, according to the obligations enshrined in international law. Furthermore, in this way, it will be possible to verify if the provisions established in national law are more detailed regarding the safeguarding of Sami rights.

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[217] Joona, 2012, p. 172.
[218] Universal Periodic Review of the UN Human Rights Council, 2012.

Given the fact that this thesis regards the exploitation of natural resources in Sami territories we will concentrate on the rights of the indigenous peoples related to the exploitation of natural resources. The comparison will be only with ILO Convention No. 169 because of the fact that the UN Declaration on the Rights of Indigenous Peoples is not legally binding and so, notwithstanding the fact that it has a symbolic meaning, it is not possible to compare it at the same level of the legally binding documents.[219]

OBLIGATION ENSHRINED IN ILO CONVENTION No. 169	FINLAND	NORWAY
Promoting the full realisation of the social, economic and cultural rights (Article 2, paragraph 2b)	Present, with a specific mention about the protection of Sami and Skolt rights (Section 1)	Present, with a specific mention about the protection of Sami rights (Section 2, b)
Consulting with the indigenous people when a decision can affect them directly and participation in the decision making process (Article 6, paragraph 1a, 1b)	There are no specific provisions about the previous consultation of Sami people in the Mining Act, where there are only provisions regarding the right to Sami and Skolt people to be informed (Section 12, 15, 27, 58, 146). However, in Section 9 of the Sami Parliamentary Act is enshrined for the authorities the obligation to negotiate with the Sami Parliament in case of mining activities	There are no specific provisions about the previous consultation of Sami people. Anyway, there are obligations established the right to Sami people to be informed (Section 10, 13, 17, 18)
Protecting the relationship of the indigenous peoples with their lands and in particular safeguarding the natural resources that can be found in indigenous lands (Part II, from article 13 to article 19)	There are no explicit provisions on the protection of right to land of Sami or Skolt Sami. However, there are provisions about the impact of mining activities in Sami land (Section 38)	No specific provisions about right to land of Sami people are established.

[219] It should be taken in mind that also article 27 of the ICCPR is applicable for the protection of the indigenous peoples. However, for the scope of our analysis we will focus only on the ILO Convention No. 169.

Control of the impact of mining activities (Article 7, paragraph 3)	Present, with specific provisions on Sami and Skolt people (Section 38, 52 and 54)	Present, with specific provision on the Sami people (Section 17)
Refusing to grant a mining permit (Article 15, paragraph 2)	Present a specific provisions on Sami and Skolt people (Section 50)	Present, with specific provision on Sami interests (Section 17)
Ensuring the same rights between the indigenous peoples and other citizens (Article 2, paragraph 2a)	Present, with a specific provision to ensure public and private interests of Sami and Skolt people (Section 51)	Present, with specific provision on Sami interests (Section 17)
Right of appeal (Article 12)	Present, with specific provisions for Sami and Skolt people (Section165)	Present, with specific reference to Sami Parliament (Section 17)

As it is pointed out in the table of comparison, almost all the provisions enshrined in ILO Convention No. 169 are present also in the Finnish Mining Act and in the Norwegian Mineral Act. In the next paragraph we will analysed in deep the results of this comparison, but now it is important to notice that in the two acts there is a lack regarding the participation in the decision making process, precisely because in the two national acts there is no provision of previous consultation with the indigenous people when a decision can affect them directly. Anyway, regarding Finland, this lack is covered in the Sami Parliamentary Act, where it is established that authorities are obliged to negotiate with the Sami Parliament in every case that Sami lifestyle can be affected (also in case of mining activities). Another important lack is the absence of a provision that clearly safeguards the relationship of the indigenous peoples with their lands and in particular the safeguard of the natural resources that can be found in indigenous lands. Due to this lack and although there are important provisions enshrined in the national law on the protection of indigenous rights (i.e. control the impact of mining activities, refuse to grant a mining permit, ensure the same rights between the indigenous peoples and other citizens and the right of appeal), we cannot say that the protection ensured by the national law is the same of that insured by the international

law. In conclusion of this paragraph it is useful to mention some case law, in order to observe if the law helps to solve the problems of the Sami.

In the *Länsman et al. v. Finland*, the authors claim that Finland had violated article 27 of the ICCPR and, in supporting their complaint, they referred to the view adopted by the Committee in the *Kitok v. Sweden* case,[220] in the *Lubicon Lake v. Canada* case and to the provisions enshrined in ILO Convention No. 169 about indigenous rights. The authors are all Sami of the area of Inari and Angeli involved in reindeer herding, and they appealed against the decision of the Central Forestry Board to sign a contract with a private company (Arctic Stone Company), allowing the quarry of stone in a Sami area. Furthermore, the authors complained because of the fact that the site of the quarry, mount Etelä-Riutusvaara, is a sacred place of the old Sami religion. Expressing its judgment, the Committee refers to paragraph 7 of its General Comment on article 27, which states that "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". Hence, the Committee concluded that in this case there is no violation of the article 27 of the ICCPR.[221]

In the other case *Jouni E. Länsman et al. v. Finland*, a group of Sami claimed against the plans of the Finnish Central Forestry Board to allow the construction of roads in an area of 3,000 hectares suitable for winter herding. Also in this case, the authors claimed the violation of article 27 of the ICCPR and they invoked the views of the Committee in *Ivan Kitok v. Sweden* case, *Lubicon Lake v. Canada* case and *Ilmari Länsman et al. v.*

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[220] In the *Kitok v. Sweden* case, a Sami individual claimed that his right to self-determination had been violated by the state of Sweden. Mr. Kitok was descendent of a Sami family, active in the reindeer husbandry since long time. The author claimed that he has inherited the right to reindeer husbandry and the right to water in Sörkaitum Sami Village. It appeared that the Swedish State denied to the author the possibility to exercise these rights, because he lost his membership in the Sami village. The Committee stated that the right to self determination enshrined in article 1 of the ICCPR was meant for the peoples and not for individuals, while there was no violation of article 27 of the ICCPR; for these reasons the claims of the applicant had been dismissed. *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988).

[221] *Länsman et al. v. Finland,* Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994).

Finland case, as well as ILO Convention No. 169, the General Comment No. 23 on article 17 of the Committee and the United Nations Draft Declaration on Indigenous Peoples. Also in this decision the Committee recalled paragraph 7 of its General Comment on article 27 and concluded that in its view the facts do not reveal a breach of article 27 of the Covenant.[222]

As it is possible to note, although in the two cases article 27 of the ICCPR is mentioned as the main article, the fact that the authors refer also to the provisions enshrined in ILO Convention No. 169 and, in the last case, to the UN Draft Declaration on Indigenous Peoples should not been underestimated. This means that, although Finland has not ratified yet ILO Convention No. 169, the Sami take into account this Convention as a landmark in order to see their rights fulfilled.

Finally, regarding mining activities in Finland, in a recent case the Supreme Administrative Court of Finland decided in favour of the request of the Sami Parliament. In this case, the Finnish Safety and Chemicals Agency (TUKES) had a permit to starting the mining activities in the so-called Valley of the Kings, a gold-panning area of 4.9 acres in the municipality of Inari, in Sami territories. In accordance with Section No. 165 of the Finnish Mining Act, the Sami Parliament appealed against this decision and the Court decided in favour of the Sami Parliament. After that decision, TUKES appealed to the Supreme Administrative Court of Finland that, however, dismissed the case as wanted by the Sami Parliament. This is an important case because it is one of the first times that the Sami Parliament has used its right of appeal established in Section No. 165 of the Finnish Mining Act of 2011.[223]

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[222] *Jouni E. Länsman et al. v. Finland,* Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996).

[223] The complete text of the case (number KHO 2014:111) can be consulted at the following web page: http://www.kho.fi/fi/index/paatoksia/vuosikirjapaatokset/vuosikirjapaatos/1403502404022.html (accessed on 3/7/2014).

4.3. General comments and reflections on the international law and the national law

This paragraph examines the provisions established in national law in accordance with the provision of international law which entail in one way or another the issue of mining activities and indigenous rights. As it is possible to see from the table above, both Mining Acts (the Finnish one and the Norwegian one) set out provisions for the protection of the Sami rights. However, both of these acts avoid certain important issues, outlined by ILO Convention No. 169. For example, while the Convention establishes an obligation to consult the indigenous peoples regarding the decisions which can affect their rights and interests, the two Mining Acts do not introduce any specific provisions about consultations with the Sami. Anyway, this lacuna about the consultation of the Sami is covered in the Finnish legislation thanks to the Finnish Sami Parliament Act, in which Section 9 (3), establishes that:

> "The authorities shall negotiate with the Sámi Parliament in all far-reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people and which concern the following matters in the Sámi homeland: (3) applications for licenses to stake mineral mine claims or file mining patents."[224]

This is an important provision for the protection of the rights of the Sami, in particular because it enshrines that authorities are obliged to negotiate with the Sami Parliament in every situation that can affect the life of the Sami and their status as indigenous group. The fact that authorities must negotiate also in case of mining is a provision with fundamental importance, considering the fact that for the first time such disposition is written in a legal document of a national State.

In addition, there are obligations to inform the Sami peoples at the beginning and at the end of the mining activities (Section 12 and 15 of the Finnish Mining Act and Section 10 and 13 of the Norwegian Mineral Act). Also the issue of the land rights (that is

[224] Finnish Sami Parliament Act, Section 9(3). Full text available here: http://www.finlex.fi/en/laki/kaannokset/1995/en19950974.pdf (consulted on 4/6/2014).

broadly regulated in the Convention) is not sufficiently regulated in national law, given the fact that there are no provisions on the right to land of the Sami in the two Acts, although the impact of mining activities in Sami lands is taken into account in both acts. Notably, the two acts of Norway and Finland and ILO Convention No. 169 contain provisions regarding the refusal to grant a mining permit, if indigenous interests could be compromised. In the two acts there are also the provisions about the protection of the public and the private interests (Section 51 in the Finnish Mining Act and Section 17 in the Norwegian Mineral Act). This is an interesting obligation that finds full application in the national law, given the fact that it is established in the Finnish Act and in the Norwegian Act. At the same time, ILO Convention No. 169 introduces a provision ensuring the equality of rights for everybody but keeps silent about the necessity to balance between private or public interests during the mining process.

Finally, in article 12 of the ILO Convention, in Section 165 of the Finnish Mining Act and in Section 17 of the Norwegian Mineral Act, there is a provision that establish the right of appeal. While it is quite normal that this right is established in the Convention (given the fact that the Convention is not directly applicable at the national level), it is noteworthy to have this right in the national law. In fact the presence of this provision in the national law gives to the Sami the right of appeal in the cases established by the law.

In conclusion, it is possible to say that the provisions enshrined in the national law of Finland and Norway ensure a good protection of the Sami, following the general obligations enshrined in ILO Convention No. 169. Although it is not possible to say that all indigenous rights are protected, there is a satisfactory safeguarding of their rights in the Mining Acts of Finland and Norway (right to consult Sami when a decision can affect them, protection of their relationship with their land, control of the impact of mining activities on their lands, right of appeal). Hence, although Finland has not yet ratified ILO Convention No. 169, the provisions established in the Finnish Mineral Act and in the Sami Parliamentary Act grant a satisfactory safeguard to the Sami and this showed that it is upon the will of the state to protect the indigenous peoples with or without ratification of the international Conventions.

Furthermore, with the last steps regarding the protection of the Sami in the Finnish legislation it is strongly likely that soon Finland will ratify ILO Convention No. 169. Also Norway (that was the first State to ratify the Convention) is in a good position about the safeguarding of the Sami rights, although the obligations enshrined in the Norwegian Mineral Act are less extensive than the provisions set out in the Finnish Act and considering the fact that there are still problem in the interpretation of the meaning of article 14 of ILO Convention No. 169 by the Norwegian Government.

Hence, in the framework of the protection of the Sami rights among the Nordic States, the weakest position is for Sweden. As it is possible to see from the table of comparison above, Sweden has no obligations on Sami rights in its Mining Act, while in the Constitution and in the other national laws there are only vague references to the Sami as an indigenous people. In such conditions, it will be difficult that Sweden will ratify ILO Convention No. 169 in short time.

5. Legal mechanisms of indigenous participation in decision-making

5.1. Types of mechanisms of participation of the Sami and legal remedies

5.1.1. The three Sami assemblies and the three Parliamentary Acts

Among the provisions enshrined in ILO Convention No. 169 there is article 6, paragraph c, in which is stipulated that:

> "In applying the provisions of this Convention, governments shall: […] (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose."[225]

This obligation has been respected by all the three Nordic states, given the fact that in Finland, Norway and Sweden, Sami assemblies have been established. In the report of the Finnish State Commission on Sami Affairs, drafted in 1973, there was a strong recommendation about the creation of a "delegation" that could represent the interests of the Finnish Sami. At the end of that year the Cabinet Decree No. 824 was signed by the President of Finland, so creating the Sami Delegation. This Delegation was composed by 20 members, freely elected among the Finnish Sami every 4 years.[226] Since the beginning, the Sami referred to this Delegation with the appellative of "Sami Parliament". This Assembly was conceived as an advisory body, with the aim to draft recommendations regarding Sami affairs in particular areas such as:

a) Environmental issues and establishment of natural areas in the Sami homeland;
b) Mining issues and construction of hydro and water reservoirs;
c) Administration of fishing, hunting and reindeer herding in the Sami areas;
d) Primary, secondary and adult education.[227]

[225] Article 6, ILO Convention No. 169/1989.
[226] Myntti, 2000, p. 207.
[227] Sillanpää, 1994, p. 114.

Anyway, the position of this Delegation was unclear, due to the fact that it was not an association and not an ordinary state authority. Furthermore, it was not authorized to represent the Finnish Sami in the international arena and there were no compulsory provisions for the state to finance its activities.[228] For this reason, although the Sami Delegation must be taken into account regarding the Sami participation in Finland, the important step was realised only with the adoption of the Sami Parliament Act in 1995.

The Sami Parliament, established with the Sami Parliament Act (974/1995),[229] is an elected and representative assembly (like the Sami Delegation) with the aim to govern the Sami cultural autonomy (as provided at Section 121 of the Constitution of Finland). It is useful to underline that, although the Sami Assembly has not a real independent decision making power, its competence does not lie only in the cultural field, given the fact that it should be consulted every time that a decision can affect Sami homeland. Hence, it is possible to say that this cultural autonomy of the Sami is realised with the involvement of the Sami Assembly in the decision making process.[230]

An important difference between this Sami Assembly and the Sami Delegation is that the new one is put under the purview of the Ministry of Justice and is completely financed by the state (as established in Section 1 and 2). Anyway, despite this economic dependence, the Sami Assembly is completely autonomous from the state and it decides on its own internal matters. In Section 3 of the Sami Parliament Act, there is a provision that establishes who can be considered a Sami person, while Section 4 points out the extension of the Sami Homeland. As underlined before, the Sami Parliament should be consulted every time that a decision can affect the Sami Homeland and this is particularly important when speaking about mining activities. In fact, Section 9 (3) stipulates that the authorities should negotiate with the Sami Parliament if a mineral license can or cannot be released.[231] This provision is of a fundamental importance in

[228] Myntti, 2000, p. 207.
[229] The full text of the Finnish Sami Parliament Act is available at the following web-page: http://www.finlex.fi/en/laki/kaannokset/1995/en19950974.pdf (accessed on 26/5/2014).
[230] Myntti, 2000, p. 207.
[231] Sami Parliament Act, Section 9, paragraph 3.

the context of this thesis, due to the fact that it can be seen as the completion of the Finnish Mining Act, in which there are no provisions about the duty to negotiate with the Sami. Regarding the composition of the Sami Parliament, Section 10 stipulates that the Parliament is formed by 21 members and 4 deputy members, chosen by the Sami in free elections that take place every 4 years.[232] The right to vote for the Sami Parliament is reserved to all Sami (regardless of the domicile) that are at least 18 years old.[233] As outlined before, Section 3 of the Sami Parliamentary Act explains who Sami is by stating:

> "For the purpose of this Act, a Sámi means a person who considers himself a Sámi, provided: (1) That he himself or at least one of his parents or grandparents has learnt Sámi as his first language; (2) That he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or (3) That at least one of his parents has or could have been registered as an elector for an election to the Sámi Delegation or the Sámi Parliament."[234]

As it is possible to notice, the linguistic aspect is not the only way in order to demonstrate to be Sami, given the fact that also a descendant of Lapps[235] or a descendent of a person registered for an election to the Sami Delegation can be considered Sami.[236] However, the Sami Parliament was not satisfied with the content of Section 3, asking for an amendment to the law. This is so because, in the opinion of the Sami Parliament, a person can be considered a Sami only if he or she is able to speak a Sami language, due to the fact that the language is a fundamental feature for a Sami. Anyway, the law was not changed.[237]

In Norway already after the Second World War the first Sami institution was created. In fact, in 1953, the Provincial Government of Finnmark decided to create a Provincial Sami Council, composed by five members, with the aim to assist the Governor of

[232] Sami Parliament Act, Section 10, paragraph 1.
[233] Myntti, 2000, p. 209.
[234] Sami Parliament Act, Section 3.
[235] In this regard it is useful to point out that the term Lappalainen (Lapp) is the old term used in Finnish language to indicate Sami. Anyway there is a difference between the term Lapp and Sami: Lapp is used to refer to people that lost their contact with the Sami language several generation ago.
[236] Myntti, 2000, p. 210.
[237] Ibidem, pp. 201-211.

Finnmark in matters related to Sami traditional lifestyle. Around ten years later, in 1964, the Provincial Council was replaced by the Norwegian Sami Council. The aim of this new Council was to give advisory opinion in issues related with the culture and the economy. Then, at the beginning of the 1980s the Council was reorganised, becoming an advisory body regarding Sami issues. With this reorganisation, the authorities of all levels were obliged to consult the Council in all the matters regarding Sami issues, including the exploitation of natural resources.[238] In the same period, as a consequence of the *Alta* case, a Sami rights commission was established with the aim to analyse the special needs of the Sami of Norway. The Commission drafted a report in which it was proposed that the Constitution of Norway should be amended by introducing a disposition on the Sami rights. This proposal brought with it the insertion of article 110a in the Norwegian Constitution, in which it is established:

> "It is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life."[239]

The turning point for the Sami of Norway was the year 1989, when the Norwegian Sami Parliament was founded by an Act of Parliament (56/1987).[240] With this Act and the consequential creation of the Sami Parliament, full application of the new article 110a of the Norwegian Constitution was realised. The Sami Parliament is the representative political body of the Norwegian Sami and it is completely politically autonomous from the central government, although it is completely financed by the State. The role of the Parliament is to safeguard and develop the Sami culture, language and way of life, as established in Chapter 1(1). In particular, the Sami Parliament can take initiatives and make petitions to public authorities and private parties (chapter 2). In theory, all public authorities should consult the Sami Parliament before taking any decisions that can affect the Sami life in their lands.[241] The Sami Parliament of Norway is composed by 31 members, chosen in free election. To vote for the Sami Parliament, a person must be a

[238] Ibidem, p. 213.
[239] Article 110a, Constitution of Norway.
[240] The full text of the Norwegian Sami Parliament Act is available at the following web-page: http://www.regjeringen.no/en/doc/laws/acts/the-sami-act-.html?id=449701 (accessed on 28/5/2014).
[241] Myntti, 2000, p. 214.

Sami and also in Norway the first definition of Sami was based on the language. In particular, according to the previous definition, a Sami was:

> “a person who, according to his/her declaration, considered himself/herself a Sami and who a) has Sami as his/her home language, or b) at least one of his parents or grandparents either has or has had Sami as his/her home language.”[242]

Anyway, due to this restrictive definition of Sami, only 5613 person voted in the election in 1993. This low participation was also the result of this norm, according to which many Sami who had lost their language could not be considered Sami anymore. In order to solve this lack of participation, the definition of the Sami entitled to vote was changed in 1997 by an initiative of the Sami Parliament. According to the new definition, a Sami is:

> “a person who, according to his/her own declaration, considers himself/herself a Sami and who a) has Sami as his/her home language, or b) at least one of his/her parents, grandparents or their parents has or has had Sami as his/her home language, or c) is a child of a person who is entered or has been entered in the Sami electoral roll.”[243]

However, notwithstanding this amendment, the number of Sami voters did not increase as it was expected. Before concluding this analysis on the Norwegian Parliament Act, it is useful to underline that, although there is no provision that in an explicit way regards the mining activities, in Section 2.2 of the Norwegian Act it is stipulated:

> “Other public bodies should give the Sameting an opportunity to express an opinion before they make decisions on matters coming within the scope of the business of the Sameting.”[244]

This is an important provision, also taken in consideration the fact that in the Norwegian Mineral Act no provisions on consultation were present. Also in this case, as in the case of Finland, this provision can be seen as the completion of the Mineral Act, albeit not in the same explicit manner as in Finland.

[242] Ibidem, p. 215.
[243] Ibidem.
[244] Norwegian Parliamentary Act, Section 2.2.

In Sweden, after the *Taxed Mountain* case, the discussion about the necessity to create a representative Sami assembly began. For this reason, in 1983, the Swedish government charged a Sami Committee with the aim to analyse the needs of the Sami in Sweden. In its final report, the Committee pointed out that the best solution in order to meet the need of the Sami was to create an elected and representative Sami Parliament. Following the suggestion of the Committee, the Swedish Government adopted the Sami Parliament Act in 1992 and the Sami Parliament was established in 1993. [245] As established in chapter 2 of the Act, the aims of the Sami Parliament are to:

> "1) Decide on the distribution of state subsidies to the Sami culture; 2) Appoint the board of the Sami school; 3) Direct the effort towards the promotion of the Sami language; 4) Contribute to social planning and ensure that the interests of the Sami are taken into account; among them, the interests of reindeer breeding in relation to the exploitation of land and water; 5) Provide information on Sami conditions".[246]

Anyway, it must be underlined that the state is not obliged to consult the Sami Parliament, also in cases in which a decision can directly affect the Sami. Moreover, the Swedish Government had pointed out that the Sami Parliament is not superior in respect to other authorities and, in this sense, the interests of the Sami do not have to prevail in every case.[247] The Sami Parliament of Sweden is composed by 31 members, elected every four years by the Sami. Hence, also in this case, in order to be entitled to vote it is necessary to be Sami. In the Swedish Parliament Act there is a definition of the Sami, according to which a person can be considered Sami if:

> "1. Shows that it is likely that he/she has or has had Sami as a home language; 2. Shows that it is likely that at least one of his/her parents or grandparents has or has had Sami as a home language; 3. That at least one of his/her parents is or has been registered in the Sami electoral register".[248]

As it is easy to notice, also in Sweden, the language is a fundamental feature in order to define a Sami person. However, unlike the Finnish and the Norwegian definitions, it is

[245] The full text of the Swedish Sami Parliament Act is available at the following web-page: http://www.notisum.se/rnp/sls/lag/19921433.HTM (accessed on 28/5/2014).
[246] Sami Parliamentary Act, Chapter 2.
[247] Myntti, 2000, p. 219.
[248] Ibidem, p. 220.

not required that a person must know the Sami language and in fact, before the election of 1997, the election committee of the Sami Parliament decided that also non-Sami spouses could vote in the Sami elections.[249]

5.1.2. The Sami Council and the Sami Parliamentary Council

The Sami Council was founded in 1956 in Karasjok, during the second Nordic Sami Conference. At the time of its foundation it was called the Nordic Sami Council and its name was changed to the Sami Council in 1992, when it became a cooperative body also for the Sami of the Peninsula of Kola, in Russia.[250] The purpose of the Sami Council is to promote and safeguard the interests of the Sami, as well as to ensure social, economic and cultural rights of the Sami. The Council has eight member organizations: three from Norway (the Norwegian Sami Association, the Sami Reindeer Herders' Association of Norway and the Federation of the Sami People), two from Sweden (the Sami Association of Sweden and the National Association of Samiland), one from Finland (the Saami Association of Finland), and two from Russia (the Kola Sami Association and the Association of Sámi in Murmansk Region).[251]

As for the composition of the Council, it has fifteen members: five from Norway, four from Sweden and Finland, and two from Russia. Every four years the Sami Conference is convened, it is the most important decision-making body of the Council. Furthermore, the Conference sets up the statutes of the Sami Council and drafts the guidelines for its work. In 1976, the Sami Conference decided that the Sami Council should be part of the World Council of Indigenous Peoples (WCIP). However, the Sami Council has also a role outside the borders of the Nordic countries. In fact, it proposed many amendments to ILO Convention No. 107 and to ILO Convention No. 169, it has taken part in the UN Working Group on Indigenous Populations and it has an active part in the establishment of the Permanent Forum on Indigenous Issues.[252]

[249] Ibidem.
[250] Solbakk, 2006, p. 232.
[251] Ibidem.
[252] Ibidem, p. 236.

Another Sami institution is the Sami Parliamentary Council, a coordinating body for the Sami Parliaments in Finland, Norway and Sweden. The aim of this institution is to improve the cooperation of the three Sami Parliaments, given the fact that several interests must be protected regarding the entire Sami people.[253]

5.2. Listening the stakeholders: the opinions of the Sami, the points of view of the non-Sami groups and the reasons of the commercial companies

An Australian company, Hannans Reward Ltd, is planning to start the exploration just a few kilometres from the town of Kiruna, in Sweden. The project is well established and by the end of 2014 the company will apply for exploitation concessions in order to start with the activities of mining. According to Mattias Åhren, a member of the Sami Council, this project will affect forests and Sami territories, and taking into account the fact that mines produce a big amount of waste, it is easy to imagine that the mining activities will destroy the reindeer herding in that area. The Sami community is continuing its struggle and a complaint to the United Nations Committee on the Elimination of Racial Discrimination (CERD) were sent. However, the company stated that the project must go on according to the estimation that one billion tonnes of ore can be extracted in the area of Kiruna.

A similar case took place in Rönnbäcken, a town 300 kilometres south-west of Kiruna, and in that case a nickel mining project was stopped by UN intervention. In that situation, the Swedish mining inspectorate granted to Nickel Mountain, a Swedish company, the exploitation concessions. This decision was brought to the Court by local reindeer herders, in order to safeguard their right of reindeer herding. Anyway, in August 2013, the appeal was dismissed and the applicants took their complaint to the CERD.[254] After some months, the CERD asked the government of Swedish to suspend all mining activities at the Rönnbäcken sites. In that case Fredric Bratt, director of the

[253] Ibidem, p. 243.
[254] Concluding observations on the combined nineteenth to twenty-first periodic reports of Sweden, adopted by the Committee at its eighty-third session, CERD/C/SWE/CO/19-21, August 2013.

Nickel Mountain society, said that "the company was in dialogue with local reindeer herders and want to mine alongside them. However, their consent was not necessary and as the CERD only had an advisory role, the decision on mining was ultimately down to the Swedish government".[255]

Another case of exploration of natural resources occurred in Jokkmok, Sweden, where there was a strong division between the population, precisely between the Sami and environmentalists, on the one hand, and non-Sami and entrepreneurs, on the other hand. The position of the Sami can be summarised in this affirmation made by Henrik Blind, a Sami of Jokkmok: "I'm a Sami. And we are standing on Sami ground."[256] However, non-Sami have a different opinion due to the economic situation, as is pointed out by Kjell Ek: "Stores are empty, houses are empty - if no one comes to this society it will slowly die out. Unfortunately, we can't live on reindeer herding alone."[257] According to Fred Boman, the CEO of Beowulf Mining of Sweden, "the Sami village closest to the mine has a herding area for its 4,500 reindeer of around 4,000 square kilometers and the mine would use no more than 20 square kilometers. Furthermore, mining would create around 250 jobs, as well as opportunities for local businesses".[258]

As it is possible to notice from these examples, it is not easy to find shared solutions in order to respect the rights of the Sami as well as the rights of non-Sami. Moreover, also the position of the State must be taken into account, together with the interests of the companies involved in the mining process, due to the fact that the revenues from mining activities can be important for the national economy, as well as for companies. How to deal with all these issues is not easy, but we will try to do it in the conclusion of this work.

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[255] Nguyen Kim Paul, *Reindeer herds in danger as Australia's mining boom comes to Sweden*, http://www.minesandcommunities.org/article.php?a=12540 (accessed on 4/6/2014).
[256] Risong Malin & Mac Dougall David, *Sweden's indigenous Sami in fight against miners*, http://www.minesandcommunities.org/article.php?a=12431 (accessed on 4/6/2014).
[257] Ibidem.
[258] Ibidem.

6. Conclusions

The protection of indigenous rights is problematic already regarding the traditional rights, like the right to land, the right to participate in the decision-making process, the right to enjoy their culture and their lifestyle. For this reason, it is easy to understand how difficult can be to ensure indigenous rights in relation to the exploitation of natural resources and sub-soil resources. As explained in this work, the main problem is the right to land, which is directly related with natural resources that can be found in indigenous areas.

Among the three Nordic countries, only Norway has ratified ILO Convention No. 169. However, there are still problems in the full application in the Norwegian legal framework of the provisions enshrined in the Convention. In fact, as pointed out in chapter 4, Norway has a particular interpretation of article 14 of ILO Convention No. 169. For the Norwegian Government it is sufficient recognise to the Sami the right to use their land that they have occupied since immemorial time, without any recognition of the right to ownership of Sami over their lands. Notwithstanding this anomaly in the interpretation of ILO Convention No. 169, the fact that Norway has amended its Constitution, adding an article on the protection of the Sami (article 110a), must not be underestimated, as well as the fact that it was the first country that ratified ILO Convention No. 169, and one of the few countries in the world that have publicly apologised for the policy of Norwegianization implemented until the 1960s against its indigenous peoples. Furthermore, it must be underlined that the Norwegian Mineral Act established good protection for Sami rights, taking into account that the Sami are entitled to be informed when a mining process is going to start and to finish (although there is a lack in the decision-making process), that the State together with the company involved in the exploitation process is obliged to evaluate the impact the mining process can have on the Sami traditional lifestyle and that there is the possibility to deny the concession of a permission if there may be negative impact on Sami lifestyle.

Finally, the Sami Parliament of Norway is entitled to the right of appeal to the King in those cases where a permission was conceded without taking into account the needs of the Sami. In general, it is possible to say that Norway ensures a good protection of the rights of the Norwegian Sami, although the role of the Norwegian Sami Parliament is still marginal, above all during the decision making-process, due to the fact that national authorities of Norway are not obliged to consult the Norwegian Sami Parliament in every case that can affect Sami lifestyle (unlike the Finnish Sami Parliament Act, in the Norwegian Sami Parliament Act there is no provision regarding the duty to negotiate with the Sami).

Among the three Nordic states that we have analysed in this thesis, the most active in guaranteeing the protection of Sami rights is, without doubt, Finland. Already in the Finnish Constitution it is possible to find obligations on the protection of the Sami rights. However, it is the Finnish Mining Act adopted in 2011 that establishes broad provisions for the protection of the Sami in the context of mining activities. The Act, in fact, establishes that the Sami must be informed when a mining process is going to start and to finish (and in the Sami Parliament Act there is also a provision about the duty to negotiate with the Sami in every case that a decision can affect their life and so, also in case of start of a mining activity), the State together with the company involved in the exploitation process must evaluate the impact that the mining process can have on the Sami areas, and it is possible to deny the concession of a permission if there may be negative impacts on Sami lifestyle. Finally, Section 165 establishes the right of appeal for the Sami in those cases where a permit was conceded without taking into account the needs of the Sami. Although Finland has not yet ratified ILO Convention No. 169, it is possible to say that it ensures a good protection of the Sami rights in the national framework. Furthermore, the contents of the Mining Act, which is very protective for the Sami, represent a step forward for Finland in the direction of the ratification of ILO Convention No. 169 by 2016, which is the aim of the current government.

The weakest position in the protection of the Sami rights among the Nordic countries is in Sweden. As pointed out in chapter 4, there are no provisions regarding the protection of Sami rights in the Mineral Act of Sweden and this lack of obligations is also present in the Constitution. Although the Swedish Government is putting its effort in order to ratify ILO Convention No. 169 in the future, there are no comfortable progresses in the protection of the Sami rights until now. It seems that the position of the Swedish Government regarding the protection of indigenous rights is only theoretical and it does not find any application in the practice. Hence, it seems clear that for the moment the ratification of ILO Convention No. 169 is not the aim of the Swedish Government.

In conclusion, we can say that generally in all cases of mining activities, the right to land of the indigenous peoples is threatened. When we say right to land, all the implications that this right can have must be considered, like the right to use natural resources that can be found in that land, the right to enjoy the traditional lifestyle and the right to freely decide the way of development. Is it possible to ensure the protection of the right to land of the indigenous peoples and, at the same time, satisfy the economic needs of the states? This is a difficult issue, but a good way to try to ensure a good balance between the interests of the indigenous people and States is participation.

In particular, the right to Free, Previous and Informed Consent (FPIC) can be used to deal with such problems. As pointed out in the comparison between the Mineral Acts and ILO Convention No. 169, the real lack that must be solved is to guarantee to the indigenous peoples the opportunity to participate in the entire decision-making process, from the beginning to the end. Only in this way it can be possible to ensure a good protection for indigenous rights, to satisfy the economic interests of the states and also to create new economic opportunity for the indigenous communities.

If participation will be seen by the States as an important instrument to protect Sami rights and also of their interests, it will be possible in the reality involve the Sami in the entire decision making process. It seems that the FPIC and the right to participate of the indigenous peoples in general, established in the international documents, does not find

an application in the real world. In fact, it is interesting to think that the right to participate is established in ILO Convention No. 169 and that it is broadly confirmed in the UN Declaration on the Rights of Indigenous Peoples, which are two international documents, but it does not have a complete application in the national framework. It seems that there is a top-down approach in order to solve the lack of participation of the indigenous peoples in the decision making-processes. In effect, it is possible to say that the right to guarantee the right to participation to the indigenous peoples is not born at the local level until reaching the international level (bottom-up approach), but was conceived in the international arena, in order to be applicable also at the local level (top-down approach). However, it does not mean that this is negative, because it can be seen as a signal that for the international community the protection of indigenous rights and the indigenous heritage is a value that must be fulfilled. It seems that the international arena has been more active in order to realise instruments to protect indigenous rights then the national one, and this must not be underestimated, because it means that the international community can anticipate the States in decisions that can have an impact in the entire world.

We can say that the most important thing is that the decisions must not be imposed upon the indigenous communities, but the States should negotiate with them (as already it happens in Finland). The participation is a means to protect indigenous rights, but also to avoid useless loss of time and money for the States as well as the only way to reach an agreement between the States and the indigenous communities.

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1965	United Nations International Convention on the Elimination of All Forms of Racial Discrimination. Adopted by the UN General Assembly Resolution 2106 of 21 December 1965, entered into force: 4 January 1969. 660 UNTS 195.
1966	International Covenant on Civil and Political Rights, including Optional Protocol. Adopted by the UN General Assembly Resolution 2200A of 16 December 1966, entered into force: 23 March 1976. 999 UNTS 171.
1966	International Covenant on Economic, Social and Cultural Rights. Adopted by the UN General Assembly Resolution 2200A of 16 December 1966, entered into force: 3 January 1976. 993 UNTS 3.
1969	American Convention on Human Rights. Concluded: 22 November 1969, entered into force: 18 July 1978. 1144 UNTS 123.
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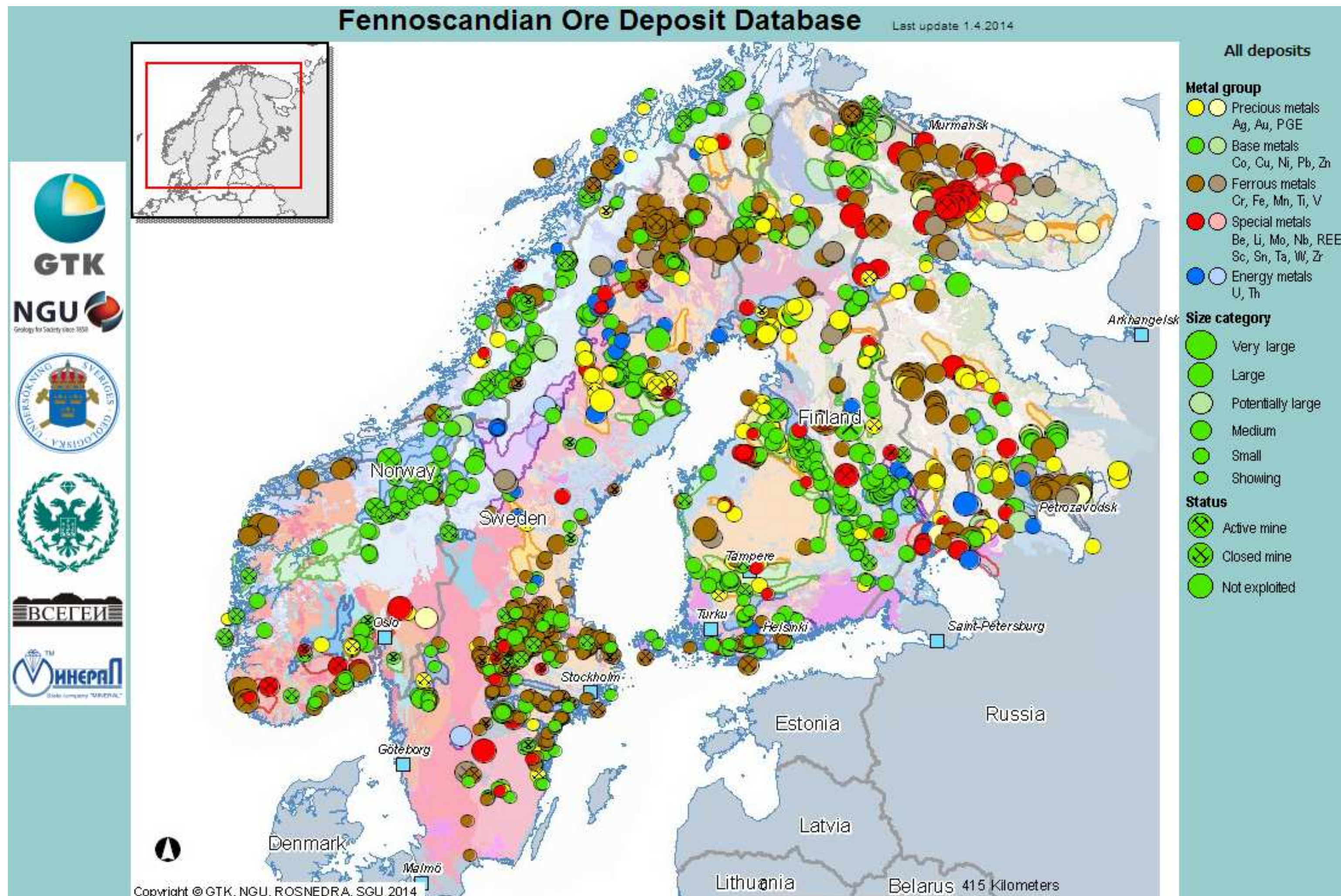
Annexes

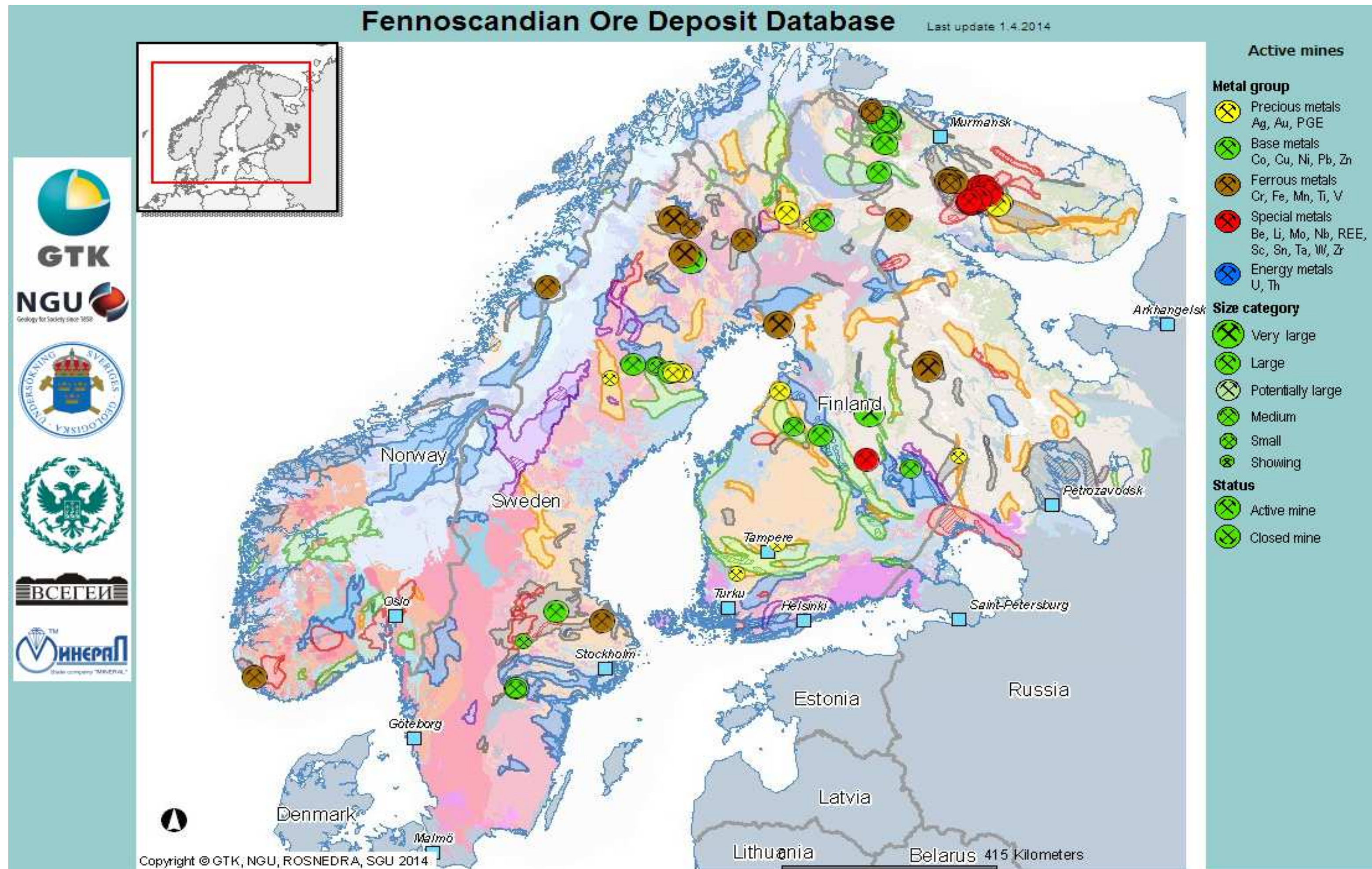
Annex No. 1 – In blue the area in which the Sami inhabit.

http://en.wikipedia.org/wiki/Sami_people (accessed on 7/6/2014).



Annex No. 2a – Map of all the deposits of natural resources present in Fennoscandia.

http://geomaps2.gtk.fi/website/fodd/viewer.htm (accessed on 7/6/2014).



Annex No. 2b – Map of all the active mines in Fennoscandia.

http://geomaps2.gtk.fi/website/fodd/viewer.htm (accessed on 7/6/2014).

Annex No. 3 – In red the Finnmark area.

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