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Self-Determination – solution or problem?

A Study of a Possible Right to Self-Determination for the
Swedish Sami Population

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Summary

The term self-determination is embedded in much difficulty. It is a term whose meaning has developed considerably from its first intended usage. Today, in a world that is in several respects becoming smaller and more conformed, certain peoples claim rights they have previously not been granted in order to protect their subsistence and preserve their culture. The Sami is one of these peoples. This essay investigates if the Sami have a right to self-determination in international law that they are currently being denied nationally or if Sweden does comply with its international obligations.

Having searched the instruments most commonly claimed to internationally grant the Sami such a right, no obligation for Sweden to grant the Sami self-determination is found. The monitoring organs of these instruments are also the instances by which Sweden has been severely criticized. The instruments in question are common article 1 of ICCPR and ICESCR, article 27 of ICCPR and ICERD. However, the Sami are possibly not granted enough protection nationally but regarding the right to self-determination internationally, they are. When examining the ILO 169 that Sweden has on numerous occasions been criticized for not yet ratifying, no obligation to grant self-determination had Sweden been a party to it is found. Had the UN Draft Declaration on the Rights of Indigenous Peoples been finalized, it would not have severely impacted the situation either since the document is not legally binding.

Drawing on critical legal studies a different perspective on the current legal situation is achieved. Also feminist legal theory provides criticism of the underlying ideologies and when examining the entire international legal system Sweden's motives are illuminated and explained. Conclusions drawn are that due to extensive ambiguities in the international legal system Sweden cannot be condemned for being hesitant to grant the Sami self-determination without an existing universal definition of the term. Numerous terms are interpreted too arbitrarily and subjectively. However, Sweden can be criticized for not executing its investigations at satisfactory speed, and for not granting the Sami more influence, control and protection despite the lack of an international obligation to grant self-determination, if Sweden wants to retain its position as a human rights role model.

Preface

I would like to take the opportunity to thank my family and friends for their support and interest when writing this thesis. In particular I would like to thank Kristin, who has been there for me through the entire process, good days and less good days. I would also like to thank my supervisor Olof Beckman for guidance and positive support, and Marie Jacobsson at the Swedish Foreign Ministry for introducing me to the topic.

Abbreviations

HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of all forms of Racial Discrimination
ICJ	International Court of Justice
ILO	International Labour Organization
ILO 169	Convention concerning Indigenous and Tribal Peoples in Independent Countries
ILO 107	Convention concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries
UN Draft Declaration	Draft United Nations Declaration on the Rights of Indigenous Peoples

1 Introduction

“The rational, ruthlessly ordered world of sovereign states has no place for those portrayed as unruly, disordered, subversive, primitive or irrational.”¹

“Diversity is not, in itself, contrary to unity, any more than uniformity itself necessarily produces the desired unity.”²

Globalization is at present one of the most frequently used words in media, news reports, organizations and corporations. Migration is a factor that presumably every state deals with, whether it is immigration, emigration or urbanization. We are exposed to several different cultures in one state, and this trend seems to only be increasing. However, now more than ever, we start to move from an assimilationist worldview to a more culturally protective and appreciating view. The realization that we can learn from each other and the realization that certain cultures are disappearing has made us more aware of the value of giving certain cultures special protection. Although this latter attitude is growing, there is still a fear that this protection can go too far, that it will happen at other peoples' expense. States are rarely ready to give up parts of their sovereignty, but will often show good will to a certain degree, a degree that they themselves decide. The unforeseeable evolution of the concept of self-determination has made states hesitant to the word's significance. At least in an initial fase, this is not particularly surprising.

Sweden is time and time again criticized for not protecting its indigenous peoples, the Sami, properly. On the other hand Sweden is often eager to state that other supposed peoples or groups around the globe need protection. Indigenous peoples themselves argue that they need to be granted means to protect themselves, since the states do not provide enough protection. If a state does not wish to grant indigenous peoples suitable protection under national law, the indigenous peoples will need to claim rights under international law. This is what the Sami do. Self-determination, is by indigenous peoples seen as the one collective human right that, when granted, gives them the means necessary to guarantee them other human rights which they feel are not secured otherwise. The existence of collective human rights is debated, and questions asked are whether one is ready to separate certain groups from others and if it is at all possible to grant collective rights within the framework of human rights. The current situation for most indigenous peoples of the world undoubtedly shows that there are reasons to actively take measures to oppose discrimination and help groups to an adequate standard of living. But is self-determination and collective human rights the only or even the most suitable way? The Swedish state and the Sami have different views on the interpretation of the

¹ Orford, Anne; “The Uses of Sovereignty in the New Imperial Order” 1996, 63 at 72

² Cobo 1983:54 para. 402 in Castellino & Allen; “Title to Territory in International Law”, 2003 p 226

right to self-determination, and the concept is not sufficiently defined under international law. However, the concept still exists, and hence it is necessary to investigate whether Sweden has an unfulfilled obligation under public international law.

1.1 Purpose and delimitations

This thesis is to a great extent based in theory and the compatibility of the legal system with states' attitudes. The purpose of my thesis is to make an analysis of the current legal situation of the Swedish Samis' potential right to self-determination in international law. I want not only to display the present situation, but also investigate how a possible ratification of the ILO Convention No. 169³ and the approval of the UN Draft Declaration⁴ could change the current situation. Finally I intend to give an overview of how the entire system can be criticized and an analysis of *de lege lata* from a critical legal standpoint using for instance feminist legal theory will be undertaken. To achieve this I will ask a number of questions:

- * Does Sweden fulfill its obligations under public international law concerning the Samis' right to self-determination?
- * Would the situation be different if Sweden had ratified the ILO Convention 169 and if the UN Draft Declaration were brought to a conclusion?
- * How can the current legal situation regarding collective human rights and self-determination be critically analyzed?

When discussing collective human rights, the term group human rights has been used interchangeably. The instruments I have chosen to analyze are the instruments most commonly claimed and argued to contain a right to self-determination. I have not analyzed all possible instruments due to space and scope reasons. I have chosen to focus on the right of self-determination. Indigenous peoples strive for this right because internationally this could possibly provide them with certain rights to land and natural resources, and also greater influence and ability to make decisions about issues that concern them and their way of life. However, what the right to self-determination might contain or not contain, will not be discussed at length in this thesis. How collective human rights or individual human rights could be reconciled, how it would be possible to have a system that contains both, will not be discussed at length since this is also a consequence of a granted right to self-determination. Sweden and the Sami is the focus of this thesis, and I will not compare the situation of the Sami with situations of other specific indigenous peoples around the globe unless it is necessary to make a point. I will not discuss at length what Sweden would legally have to do to make certain that the potential right to self-determination is fulfilled. Since this analysis is not feminist in its entirety but merely contains a chapter with

³ ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries

⁴ UN Draft Declaration on the Rights of Indigenous Peoples

such perspective, deeper development of feminist jurisprudence and ideas is not included.

1.2 Outline and method

Following the introductory part of my thesis I will provide a background and a thorough presentation of the concepts at issue. A background and a knowledge of the relevant terminology is crucial for an understanding of the problems rising from the lack of general definition regarding several concepts. Additionally, I will present a background of the evolution of human rights and the underlying theory of the human rights we protect today.

In the following chapter I will outline the present legal tools that regulate the right of self-determination in relation to indigenous peoples and more specifically the Sami. Henceforth, I will analyze the regulations in relation to Sweden and investigate whether or not their demands have been nationally fulfilled. This investigation on the current legal status is an analysis using legal dogmatism, as this is what legal dogmatism by definition does.

Next, I present the ILO Convention No. 169 and the currently negotiated UN Draft Declaration on Indigenous Peoples Rights, and try to find an answer to how these two treaties, not yet applicable to Sweden, could possibly be made compatible with Swedish human rights policy in the future, concerning the right to self-determination.

Finally, I want to present a different point of view. To scrutinize Sweden's human rights policy as well as the current concept of collective human rights I will also apply critical theories paired with my own critical analysis of the current situation. I will present criticism of the present legal situation such as individual human rights versus collective human rights and liberalism as a foundation for human rights. To demonstrate how one can use theories other than the obvious, I have also chosen to use feminist legal theory.

After these chapters that has presented my work with the right of self-determination concerning the Sami, I will provide a conclusion and a discussion of the topic and the thesis.

To provide an in-depth analysis of the right to self-determination, certain other concepts need to be discussed. These concepts include human rights, collective human rights, and "peoples". I have in this analysis mainly relied on the legal texts themselves and the General Comments provided by various Committees. Since most of the concepts are not clearly defined and widely questioned, I have in addition used several articles to understand the complex of problems and what arguments that are generally used to support different standpoints. Materials include official statements from the government of Sweden such as the National Action Plan for Human Right,

but also writings by the Sami Council Committee dealing with their opinion on self-determination. My intention has been to provide an objective analysis of the current situation, and using critical legal theories is not only intended to criticize any one standpoint, but rather to show the advantages and disadvantages of all. I do not want to represent neither the state nor the Sami, but instead see what is left if the politics are left out.

1.3 Theory

There is a lively existing discussion on the existence or non-existence of the right of self-determination for indigenous peoples, and also its possible content. There is considerable disagreement between states and indigenous peoples, as well as between different debaters.⁵ I have tried to use varied material that represents several points of view. My intention has been to provide in depth information on arguments provided from both the Swedish government, Sami activists and different scholars. Almost all of the concepts used in this thesis are frequently disputed. Indigenous peoples themselves obviously argue for a collective right to self-determination, but certain writers, on the other hand, argue that this is not the best way for them to achieve their goals. Donnelly, for instance, is very critical to collective human rights, but admits that if there should be any such right, it should be the right to self-determination.⁶ Other writers, like Muehlebach, argue that the quest for self-determination in reality is a quest for land and, by implication, culture.⁷

It is easy to discern a difference in states' attitudes and indigenous peoples' attitudes. This difference, rooted in politics and a disparity in aims, is probably what has affected my thesis the most. Two views that are seemingly incompatible that may still need to be made compatible. Politics is a large part of how the concepts are developed, which is particularly obvious in my thesis. Since many concepts are not internationally defined, peoples with different opinions try to shape and argue that the concepts have meanings that suit them.

⁵ The contents of the possible right are the most widely debated topic, and also the reluctance to admit the existence of a concept that is not explicitly defined. States are hesitant to grant the right since it will mean giving up parts of its sovereignty, while the indigenous peoples wish to increase their rights and power to govern themselves. Debators discuss the possible consequences of self-determination.

⁶ Donnelly, J; "Universal Human Rights in Theory & Practice" 2003 pp 212-217.

⁷ Muehlebach, A; "What Self in Self-Determination?" 2003 p 261.

2 Background and Concepts

This first part of my thesis will consist of a survey of basic concepts that one needs to be acquainted with when discussing the problematic situations below. I will try to give a short definition of the concepts without much discussion on what problems the different concepts present. The dilemmas the concepts create will be discussed at length in the following chapters.

2.1 Human Rights

Human rights today rest to a great extent on interstate agreements regulated in international law. Thus, a state not providing the individual with the human rights protection it has undertaken to ensure, is in violation of international law. However, international law has traditionally only had states as subjects. Regulations under international law has earlier concerned relationships between different sovereign states. Now, it contains measures that regulate the relationship between states and the populations residing within its territorial boundaries. Human rights regulate the relationship between the individual and the state. They are thus a limitation of the state's power over the individual, and at the same time they establish certain obligations for the state toward the individual. Human rights law can be said to challenge the state-centered scope of international law, since individuals now can make international legal claims toward the state. It also poses a significant challenge to the concept of state sovereignty because it asserts an international interest in the way states treat their populations.

International law interacts with national legislation, and most states today have inserted or harmonized human rights with the fundamental law of the state. Options available are incorporation of the particular law as state law, or transformation of national law to conform to international law. Sweden's particular choice will be discussed further below.

2.1.1 Development and Theory

It can be discussed how and when human rights and the theory behind the concept first saw the light of day. Nevertheless, most agree that the idea that every human has certain fundamental rights that demands respect from the authorities has very old roots. It cannot be doubted that the value system of Christianity and Judaism, political theories on sovereignty and social contract and natural law principles have been crucial to the development of human rights law. Human rights' roots can largely be found in Western philosophical theories concerning the ruler and the people that are ruled.⁸ Two periods in particular does stand out, when the idea received enough backup and public opinion to influence political action and thus the legal evolution. We can find the first period in the latter part of the 18th century,

⁸ Charlesworth & Chinkin; "The boundaries of international law: A Feminist Analysis", 2000 pp. 201.

in the ideologies of France in the time of the revolution, and also in the American Declaration of Independence and the Federal Constitution. The second period took place in the years following World War II. At this point, what was new was the international aspect of human rights.⁹ Now the idea that human rights are universal and applicable to everyone without discrimination was forwarded, and this has been the official policy internationally towards minorities and their demands since then. The experiences of war brought this policy to the forefront. People had been graded, separated and mobilized on the basis of ethnic origin, and thus it was considered that ethnicity should no longer be a basis for rights. There was a wish to depart from categorizing and instead move towards assimilation, which for instance ILO 107 is proof of.¹⁰ Since then it has been shown that merely prohibiting discrimination has not been satisfactory protection for certain groups.¹¹ Hence, the discussion of rights have moved towards a possibility for providing group human rights to certain groups. These alleged group human rights would be a so called “third generation” of rights.

2.1.2 Generations of Rights

Not everyone agrees on the division of human rights in so called generations, but the division nevertheless exists in the discussion and as such I will shortly describe what the generations comprise of.

First generation rights consist of civil and political rights. They are generally characterized as rights that can be claimed by individuals against governments. This generation was based on the principle of liberty, and were essentially rights that required abstention on the part of the state from certain acts such as torture and arbitrary deprivation of life. The foundation of this generation is the preservation of the autonomy of the individual, and the major document protecting these rights is the ICCPR.¹²

Economic, social and cultural rights constitute the second generation. As opposed to the first generation, these rights require the state to act in order to safeguard their protection. Equality is the codeword for this generation of rights. They are debts owed to individuals by the state, that can be realized only by political activity. The state assumes an interventionist role. ICESCR is the major instrument protecting these rights.¹³

The controversial third generation would encompass group rights. Examples of these are the right to self-determination, the right to development and the right to peace, and they will be described in further detail below. Fraternity or solidarity is the rationale behind this generation of rights. Claims of

⁹ Danelius, Hans; ”Mänskliga rättigheter” 1993, p. 16.

¹⁰ For further information, see chapter 4.

¹¹ Gunner; Namli: ”Allas värde och lika rätt” 2005, pp 217-218.

¹² International Convention on Civil and Political Rights, UNTS Vol. 999, p. 171.

¹³ International Covenant on Economic, Social and Cultural Rights, UNTS Vol. 993, p 3.

peoples' rights is argued to be possible against both the international community and against states.

This supposed third generation of rights is the collection of rights and ideas that are to be dealt with in this thesis. It is a controversial idea and term not least because there is no proper definition or legal base for it. Many of the rights it is supposed to protect are contained in "soft law" instruments, i.e. instruments that are not binding on states but merely urging and inciting. Examples are UN General Assembly declarations and resolutions. The only extensive real translation into so called hard law has been in the African Charter of Human and Peoples' Rights.¹⁴ The third generation of rights are the relevant rights in this thesis. Hence I will explain what collective or group human rights are in depth below.

2.1.3 Collective Human Rights

The current system of human rights has been frequently criticized, and a standard complaint is that they are overly individualistic. Hence group or collective human rights are an often advanced solution. Many are of the opinion that discussing rights in liberal states is synonymous with discussing individual rights. Recently it has been argued that certain rights could be better suited to protect some groups rather than individuals. Ideas such as multiculturalism, preservation of cultural identity and political representation, are all based in the present increasing globalization and appreciation of differences that can be seen around the globe. The well-known liberal virtue; individualism, is not a favorable surrounding to the idea of giving certain groups rights. Hence third generation rights have been promoted primarily by developing nations and only cautiously accepted by the Western human rights community.¹⁵ As argued by John Edwards, "*(h)uman rights - and in particular - certain types of collective rights, do not exist in an ideological vacuum notwithstanding the fact that they may be enshrined in law.*"¹⁶

There are different aspects to the expression of collective rights. It is important to note that some individual rights can be expressed collectively, such as freedom of assembly and the right to manifest one's own religion. Other rights are purely collective, such as the possible peoples' rights to self-determination and the prohibition of genocide. Further possible collective rights are the right to development, a healthy environment and the right to peace.¹⁷ But as expressed above, all prospective collective rights have been questioned.

¹⁴ Charlesworth & Chinkin, s 203f; Donnelly "Third generation rights" p. 122.

¹⁵ Charlesworth & Chinkin, s 240; Edwards, pp. 259.

¹⁶ Edwards, John; "Collective Rights in the Liberal State" 1999 s 260

¹⁷ Shaw, "International Law" p 262, pp 280.

2.1.3.1 Definition

What, more specifically, are group rights? What is the determining factor that distinguishes them from individual rights? Jovanovic argues that what distinguishes a right as a group right is its subject. This is no doubt the starting point; the group as a legal subject that can be a holder of rights. It is not the individual's right toward the state but the group's. In another attempt to describe group rights, Jovanovic makes a comparison to affirmative action. Affirmative action is described as temporary measures with a specified time limit. As soon as the aim is reached, the measures would cease to exist. Yet collective rights should be seen as permanent.¹⁸ Eide also stresses the importance of separating the two; *“two entirely different phenomena: transitional preferential measures (affirmative action) to achieve equality in the common domain, versus special measures to maintain and promote separate identities.”* Eide argues that collective rights are intended to be a *“lasting manifestation of difference”*.¹⁹

To conclude, the determining factor for group rights is the group as a legal rights holder in relation to the state. The group achieves special protection from the state, and the state is obliged to make sure that the group's rights are not violated. The right there is least disagreement on concerning its existence and existence as a human right is the right of self-determination.

2.1.3.2 Right of Self-determination

Many argue that collective human rights do not exist. The idea of collective human rights does exist, but it is frequently argued that no one would benefit from them being expressed in binding documents. In spite of that, even the most vehement opposers of collective human rights admit that the right of self-determination could possibly be an exception to this rule. The right of self-determination is the only collective right expressed in the currently discussed international human rights instruments.²⁰ It is a right for peoples or groups to choose for themselves a form of political organization and their relation to other groups. It could be argued that a sovereign state in theory is built on the self-determination of its population, the citizens should determine the way the government is organized. However, perhaps other collectivities could have this right as well.

The right of self-determination is expressed in common article one of both ICCPR and ICESCR. The International Court of Justice refers to the principle, and hence it can be argued that the right of self-determination is positive law. It can further be argued that the right is *jus cogens*, since the

¹⁸ Jovanovic, Miodrag; "Recognizing Minority Identities Through Collective Rights" 2005, pp 638.

¹⁹ Eide, A; "Minority Protection and World Order: Towards a Framework for Law and Policy" 1995 at 87, 101.

²⁰ Hedlund Thulin, K; "Lika i värde och rättigheter" 2004, pp 79.

court has not only applied the right once but kept to it in evolving other rules, such as state responsibility.²¹

When it comes to the implication of the right to self-determination, it is often disputed. Its latest development started after World War I, when there was a problem of management concerning certain areas in Europe. It was proposed that all “peoples” in Europe should be granted self-determination, and not be under foreign rule. Thereafter it developed as a response to imperialism, and it became applicable to all colonized peoples as well. Imperialism usually denied its victims their human rights. The imperialistic threat to colonized areas were foreign and affected entire peoples’ human rights. Hence, the emphasis was on the collective dimension of the right to self-determination, and it is a right of peoples.

In 1960 the UN General Assembly adopted the “Declaration on the Granting of Independence to Colonial Peoples.”²² Erica Daes, the founding Chairperson and Special Rapporteur of the United Nations Working Group on Indigenous Populations, has called it the cornerstone of the UN law of self-determination,²³ even though it does not define neither the concept of “peoples” nor the concept of “self-determination”. It did have an implicit meaning shared by the existing states at that point in time; that the right of self-determination referred to colonies and their possibility of creating sovereign states. States have the responsibility of protecting the human rights of its citizens, and theoretically imperialist states could have provided this. In reality, they did not, and hence there was a need for an opportunity of the colonized peoples to help themselves.²⁴

Traditionally, the right of self-determination has been used as a means for colonized peoples to freely determine their political status, i.e if they want independence, integration with a neighbouring state, free association with a state or any other status freely chosen. However, the principle can also have significance in the creation of new states or keeping a state’s sovereignty. Hence, the right of self-determination is applicable in other areas than decolonization, within the framework of current territorial boundaries. CERD has recommended in its general comment no. 21 that the concept of self-determination should be divided into an “internal” and an “external” aspect. The internal aspect would be a use of the concept within existing international boundaries, while the external aspect is the aspect of decolonization and creation of new states.

So far, the right of self-determination has not generally been used to devolve existing sovereign states. The principle has as a decisive principle in the collective human rights doctrine been analyzed by the Human Rights

²¹ Simma, Bruno; “The Charter of the United Nations: A Commentary” 2002 p 55.

²² UN Doc. A/RES/1415 (XV), 14 December 1960.

²³ Daes, E-I; “The Spirit and Letter of the Rights to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration”, pp 74-75.

²⁴ Muehlebach, p 247; Donnelly, “Universal Human Rights in Theory and Practice” 2003 pp 222.

Committee in the interpretation of common article 1 (ICCPR, ICESCR). The Committee pointed out that the realization of the right of self-determination has been a basic demand for an effective guarantee and observance of individual human rights.²⁵

Indigenous peoples do not necessarily want to create a new state. Arguments consist of them never been given the opportunity or right to themselves decide what relationship they would like with the state within whose territory they exist. Many view themselves as colonized peoples that have not been recognized under international law, so called “internal colonies”.²⁶ The boundaries of the states were determined by the Western states, and indigenous peoples never had the opportunity to be part of drawing boundaries. Hence, they have similarities with peoples colonized on territories outside the original state boundaries. The aim of the claim to self-determination is to guarantee the collective right of indigenous groups to culture via claiming land and resources.²⁷

When we have established what the right to self-determination is, or could be, we must move further to establish who its subjects are. What constitutes a people?

2.1.3.3 “Peoples”

To have a right of self-determination, the group has to fulfill the criteria of being a “people”. This term is not properly defined in international law. States as well as individuals tend to choose whatever definition suits their agenda. However, self-determination is in every form protected by international law, a right of a group. In most regulations and states’ opinions, the issues have progressed significantly from a point in time where no state would agree to the meaning of the word implying “people” as a group. “People” was understood in the sense of an individual, in the sense of a “person”. There was also another idea of “people” meaning population; every citizen within the state’s boundaries no matter what other characteristics they had in common.

Today, several states argue that “indigenous peoples’ rights” in for instance the Draft Declaration²⁸ does deal with collective rights (though on Sweden’s behalf not necessarily collective HUMAN rights). There is one definition of “people” used more frequently than others; the Kirby definition²⁹. It has

²⁵ General Comment No. 12 concerning ICCPR art. 1 and Shaw, 2003 pp 230.

²⁶ Muehlebach, “What Self in Self-Determination?” 2003 p 247.

²⁷ Muehlebach, “What Self in Self-Determination?” 2003 p 261.

²⁸ The difference between collective rights and collective human rights is important to some debaters, although it is disregarded as wordplay by others. A state may grant a certain group collective rights on its territory, however collective human rights is something a group has without the state internationally is obliged to grant a group.

²⁹ 1. *A group of individual human beings who enjoy some or all of the following common features:*

- a. a common historical tradition*
- b. racial or ethnic identity*

been used by for instance UNESCO and is the working definition I have chosen to use in this thesis.

The evolving meaning of “peoples” and “self-determination” is problematic. Indigenous peoples want to use the meaning of the words in ways that promote their goals. They would like to be seen as marginalized groups that are different in culture, and this understanding would also promote the idea of them as being a collective that has rights internationally.³⁰

2.1.4 Human Rights in Sweden

As mentioned above, the concept of human rights refer to the rights states guarantee their individual citizens through international agreements. The rights express obligations for the state towards the individual. The concept of human rights refer to the rights states guarantee their individual citizens through international agreements. The starting point for the government is the international obligations concerning human rights that Sweden has voluntarily entered into.³¹ Sweden has a dualistic system, which means that the treaties we are party to are not applicable in themselves under Swedish law, but Swedish law must be changed in order for an individual to be able to make a claim under it. Sweden has established that there is a harmony of norms between international conventions and Swedish law, hence no measures need to be taken since national law is considered to reflect the conventions’ regulations.

If a new treaty were to be entered into, national law would possibly have to be changed to reflect the regulations of the new treaty. An exception is the European Convention on Human Rights and Freedoms that has been incorporated as such and is now Swedish law.³² In the Swedish National Action Plan for Human rights, it is expressed that the human rights rules are tied to the individual who should be able to enjoy the rights alone or together with others. In addition, it is stated that the government is responsible for the rights to be respected, and that every right for an individual means an obligation for the state.³³ Sweden finds it important to

-
- c. cultural homogeneity*
 - d. linguistic unity*
 - e. religious or ideological affinity*
 - f. territorial connection*
 - g. common economic life*

2. *The group must be of a certain number which need not be large, but which must be more than a mere association of individuals within a State*

3. *The group as a whole must have the will to be identified as a people or the consciousness of being a people – allowing that group or some members of that groups, through sharing the foregoing characteristics, may not have that will or consciousness: and possibly*

4. *The group must have institutions or other means of expressing its common characteristics and will for identity.*

³⁰ Muehlebach, ”What Self in Self-Determination?” 2003 p 246.

³¹ Nationell handlingsplan för mänskliga rättigheter, Regeringens skrivelse 2005/06:95, p 15.

³² Gunner; Namli; ”Allas värde och lika rätt”, 2005 p 21.

³³ Nationell handlingsplan för de mänskliga rättigheterna, Regeringens skrivelse 2001/02:83, p 7: ”De mänskliga rättigheterna reglerar förhållandet mellan statsmakten och

separate collective rights from collective human rights, which Sweden denies the existence of. Collective rights could be reindeer herding, or hunting and fishing rights. This differentiation that Sweden does is important to note, since this is important for Sweden's attitude towards the rights the Sami claim to have. It is also important to note the denial of existence of collective *human* rights. Perhaps Sweden has in only the past few years become more open to the possibility of its existence, but has yet to accept it fully. Where Sweden mentions the right of self-determination it is with great caution not to make a statement which could be interpreted as accepting too much.

A representative example of Sweden's attitude towards individual versus collective human rights can also be seen in the negotiations concerning the right to development. The final document of the UN world conference in 1993 acknowledges a right to development. However, it took some discussion to reach this end. The right was considered to be a collective right, which several states, including Sweden, did not want to accept as even existing. They instead underlined the individual character of human rights, and in the end a compromise was made. The western states had to accept the document stating the right to development as a universal and unalienable right, and the developing states had to accept the right as pertaining to the individual as the central subject in development. Hence, the right to development is today an individual right and the responsibility for its upkeeping rests with the national government.³⁴

Sweden has been criticized under the ICCPR for not being able to invoke the Covenant directly before national courts or administrative authorities. The Committee urges Sweden to satisfy the demands and uphold the standards the Covenant protects, and that the national legislation should give full effect to the rights protected. The European Convention of Human Rights does not have the same degree of protection as the Covenant in certain areas³⁵, still only the ECHR has been incorporated in Swedish domestic law.³⁶ Sweden ratified the European Convention on Human Rights in 1953 and the ICCPR in 1971. Neither of the two was incorporated in Swedish law through legislation.³⁷ As written above, the European Convention is today incorporated but not the ICCPR.

2.1.4.1 Sami in Sweden

Despite the Swedish Sami being recognized as an indigenous people, the Swedish Constitution does not grant them cultural protection or protection

individuella människor. Dessa regler är knutna till individen som skall kunna åtnjuta rättigheterna ensam eller tillsammans med andra. De riktar sig till "staten", dvs. i första hand regeringarna och deras olika exekutiva organ; det är regeringarna som har ansvaret för att rättigheterna respekteras. Varje rättighet för individen innebär således en skyldighet för statsmakten."

³⁴ Hedlund Thulin, "Lika i värde och rättigheter" 2004 pp 247-248.

³⁵ Art. 25-27.

³⁶ Concluding Observations: Sweden. 24/04/2002, CCPR/CO/74/SWE, para. 6.

³⁷ Danelius, Hans; "Mänskliga Rättigheter", 1993 p 78.

of their means of economic subsistence. Legally, the Sami Council is in no formal position to manage traditional Sami land.³⁸ In appendix 1 to Sweden's first state report it is expressed how the Parliament as early as 1977 recognized the Sami as an indigenous population, and that they as such have a special status.³⁹ This is also mentioned in the National Action Plan for Human Rights. Since this attitude has been repeated in several instances since 1977, it can be assumed that Sweden has not changed its opinion in this matter. The UN Human Rights Committee has also confirmed that the Sami are to be recognized as an indigenous people in statements concerning Sweden's fifth periodical report.⁴⁰ This is how the Swedish government expressed their view on the situation as regards the Swedish Sami:

*"The Sami have a long, continuous, historical link to the areas they inhabit and this link can be traced back to the timeperiod before the creation of the nation-state. Hence, the Sami are to be considered an indigenous population in Sweden and have the right to demand a special cultural treatment under international law. Through their special relationship with land and water, an indigenous population are in need of other rights than other minorities, foremost self-determination, to evolve their identity and culture. The provisions on indigenous populations goes further compared to other minorities. Mostly concerning land, water and self-determination."*⁴¹

The Sami do have a collective right to engage in reindeer farming that was established on the basis of ancient custom, but reindeer husbandry legislation had long existed. The right of the Sami people to engage in reindeer husbandry should thus be seen as a privilege. It is even expressed that this privilege is not in conflict with the constitutional protection of the freedom of trade and profession.⁴² The Swedish attitude on reindeer husbandry as a privilege and not as a right is representative of Sweden's traditional view of the government granting collective rights, and the denial of existence of any such right that can be claimed internationally.

When the Sami Council was started, Sweden was of the opinion that this Council was not an organ for Sami self-government. It was rather presupposed that Sami political rights were secured by participation in state and local election on an equal basis with other Swedish citizens.⁴³ At this point the government viewed Sami rights as minority rights. But as stated above, today most states agree on the need for special protection of minorities. When the Sami Council was started, there was not much debate on a potential right to self-determination. Today, the Swedish government does mention self-determination, in for instance the National Action Plan

³⁸ ECOSOC Commission on HR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, WGIP, 50th Session, Item 5 of Provisional Agenda.

³⁹ Prop 1976/77:80, Bet 1976/77:KrU43, Rskr 1976/77:289, Report submitted by Sweden pursuant to article 25 §1, of the Framework Convention for National Minorities (received 8 June 2001).

⁴⁰ UN Doc CCPR/CO/74/SWE, 24 April 2002, para. 15.

⁴¹ Nationell handlingsplan för de mänskliga rättigheterna, Regeringens skrivelse 2001/02:83, p 91, Author's translation.

⁴² 4th Periodic Report, 10/11/94. CCPR/C/95/Add.4, para. 123.

⁴³ Sami Council Investigation pp 98, in turn referring to Prop. 1992/93:32 p 35.

for Human Rights.⁴⁴ These statements are very vague (see quote above), and cannot, I think, be interpreted as granting the Sami an international collective human right to self-determination. They are formulated in a different manner, as something the state can grant the Sami if they find the need, or as something not corresponding with an international view of what the right to self-determination actually contains. The first sentence quoted is in my view more of an observation of a need the Sami have, a need that might possibly be larger than that of other minorities, and that need is larger self-determination possibilities. The second sentence, that too dubious, is an observation of what public international law provides. However, public international law contains today for the most part treaties voluntarily entered into, and Sweden has not (as we shall see) yet ratified any treaties that specifically give the Sami a collective right to self-determination. Additionally, it does not specify what such a right could mean. Sweden has thus not by this statement granted the Sami a collective human right of self-determination, even though the sentences at first glance seem very positive in indigenous peoples eyes. I believe it is a way to portray that Sweden is close to recognizing this right nationally, but still avoiding it when analyzing the sentences in further depth.

In its 4th Periodic Report Sweden describes the, at that point, newly appointed Sami Council. Sweden stated that:

“ ... in addition to its main task of fostering Sami culture, the Sameting has been assigned other functions, inter alia, to decide on the distribution of funds allocated by the Government to promote Sami culture and to support Sami institutions. The Sameting will also allocate other funds placed at the disposal of the Sami community for the joint utilization and will appoint the board of the Sami school. The Sameting will also direct efforts to promote the Sami language and will participate in public planning to ensure that Sami needs are taken into consideration in the utilization of land and water resources, for reindeer breeding for example. The Sameting will also be responsible for information about Sami affairs.”⁴⁵

This does not fulfill the requirements or standards of the HRC, and has received criticism since. The CCPR Committee has expressed concern at the lack of influence the Swedish Sami via the Sami Parliament has regarding their traditional territory. In addition they express similar concern at economic activities⁴⁶ in these territories that the Sami does not have influence in. The Committee urges Sweden to take steps to involve the Sami in decision-making affecting their environment and economical survival.⁴⁷ It is interesting to note that the Committee refers to article 1 in this context. Article 1, as I will discuss below, is the only article that expressly deals with

⁴⁴ *”Genom sin speciella relation till land och vatten är samerna ett ursprungsfolk i behov av andra rättigheter än minoriteter i övrigt, främst självbestämmande.”*

”Folkrättsligt går regelverket längre för ursprungsfolk än för övriga minoriteter. Det gäller främst ursprungsfolkens relation till land, vatten och självbestämmande.”

⁴⁵ CCPR/C/95/Add.4 (1994) para. 124.

⁴⁶ Mining and forestry, hydroelectricity, privatization of land (arts 1, 25, and 27 of the Covenant).

⁴⁷ Concluding observations: Sweden 24/04/2002, UN Doc CCPR/CO/74/SWE para 15.

self-determination. Hence the Committee seems to believe that the Sami have a right to self-determination, albeit not expressly stated.

In November 2005 a proposal of a Nordic Sami Convention was presented. The negotiations had consisted of an expert group with both government representatives and Sami representatives present. The proposal will now be up for approval in the Swedish Parliament. Sweden was obviously part of the negotiations, but it remains to be seen if the Swedish Parliament approves it. Finland was the only state that was not satisfied with the final result, although they have not yet made any reservations. In article 3 it is proposed that the Sami have a right of self-determination, to be practised by the Sami Council. The public authorities are obliged to negotiate with the Sami before making decisions affecting the Sami. The Justice Department have not taken a position at this point, but it will be interesting to see what the end will be. If it is approved, it will be the first time Sweden have approved a right to self-determination for the Sami and also somewhat specified what this would mean. However, states are the only signatory parties to the treaties, which means that the Sami cannot be a party to it. It is also important to underline that the land- and water rights in the Nordic Convention are not as far reaching as the ILO Convention 169 which will be discussed below. Additionally it is important to note that the Convention recognized the Sami as indigenous peoples inhabiting all three states.

2.2 Indigenous Peoples

The concept, as with “self-determination” and “peoples”, is still not internationally defined. There is no unitary understanding. Special Rapporteur José Martín Cobo did attempt to define “indigenous” in his 1986 “Study of Indigenous Peoples”, and this definition is often quoted.⁴⁸ ILO Convention 169 also contains a definition, but Sweden is not (yet) a party to it. A unifying factor in the different existing definitions is indigenous peoples’ strong connection to land. However, it is not necessary for the purpose of this thesis to define what an indigenous people is, since the government of Sweden has already stated that the Sami are an indigenous people. It has also been expressed by a legal expert body negotiating the proposal to a Nordic Sami Convention.⁴⁹ Internationally, the UN Human Rights Committee has also named the Sami an indigenous people, in Sweden’s fifth periodic report to ICCPR and Norway’s fourth report.⁵⁰

Hence, it is not interesting to see whether the Sami fulfill the possible international criteria of an indigenous people. What is interesting is whether an indigenous people necessarily constitutes a “people”, in self-determination purposes. The concept of “people” is discussed above. Some scholars, for instance, is of the opinion that all indigenous peoples with no

⁴⁸ UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4

⁴⁹ Nordisk Samekonvention, Jo 3006/632

⁵⁰ UN Docs. CCPR/C/79/Add.112 (1999) and CCPR/CO/74/SWE, 24 April 2002 para. 15.

doubt are “peoples”, but this is not a universal opinion. The criteria for indigenous peoples and “peoples” are very close. The indigenous concept usually involves an additional relationship towards another, dominant group. In this thesis I will hence assume that the Sami fulfill the criteria of being a “people” in the international, self-determination, sense.

2.2.1 Minorities vs. Indigenous peoples

It is important to note that certain rights belong to peoples as minorities, and certain other rights possibly belong to indigenous peoples. An indigenous people can constitute a minority, and as such they would receive both minority and indigenous protection under the law. If an indigenous people constitute a majority, naturally they would not have minority protection. The most important criteria that distinguishes an indigenous people from a minority is a historical attachment to a specific area of land, an attachment that minorities lack.

Spiry argues that minorities have cultural rights, but no political or territorial such. The most central right discussed internationally that could belong to indigenous peoples but not to minorities is the right to self-determination. International law has clearly stated that minorities do not have such rights.⁵¹ In the Sami Council report they explain this difference in the following way: *“Minorities have the right to keep and develop their group affiliation within the framework of a process of integration, while indigenous rights aim to consolidate and strengthen indigenous peoples as a distinct and separate group in relation to other ethnic groups within the state.”*⁵² Minority rights focus on effective participation in the larger society they are a part of, while indigenous rights aim to make it possible for indigenous peoples to make their own decisions.⁵³

2.2.2 Why self-determination?

What can self-determination provide for indigenous peoples that they feel self-government or autonomy cannot give? Indigenous peoples argue that self-determination cannot occur without access to and control over land and natural resources – for many indigenous peoples land is the important issue. Self-determination would also require influence concerning issues important to their cultural subsistence. Sami lawyer John Henriksen for instance argues even though autonomy and self-governance would be beneficial to indigenous peoples, none is the easy solution if they want to free themselves of states’ possibilities and intentions to exercise authority over them.⁵⁴ None could guarantee indigenous peoples collective rights to land and natural

⁵¹ Spiry, Emmanuel; “From Self-Determination to a Right to ‘Self-Development’ for Indigenous Groups” 1995 p 139.

⁵² Report of the Swedish Sami Council Committee, 2004 p 20, Author’s translation.

⁵³ Report of the Swedish Sami Council Committee, 2004 p 20.

⁵⁴ Henriksen, J; “Implementation of the Right to Self-Determination of Indigenous Peoples”, pp 6-21.

resources.⁵⁵ Indigenous discontent over states' (dis)ability to solve competing claims between indigenous peoples and others to territory and natural resources is important in their struggles.⁵⁶

Interestingly, Holder and Corntassel argues that it is not rarely the problem of oppressors in treating individuals as belonging to a group that provides the need for collective solutions and protection for that group as such.⁵⁷ This is also argued by the Sami Committee. An essential part of the problems indigenous peoples deal with are a result of them being attacked as a people merely because of their group belonging. It is not an attack on individuals belonging to the group but on the group as such. This is what motivates international protection. The group, not the individuals are being discriminated, and hence measures to correct this must also concern the group as such.⁵⁸

Legal personality is the most important factor that attaches to the right of self-determination. Negotiations with states and other parties on an equal basis, participation internationally in discussions that concerns their communities and the possibility to appeal to international protection from possible state abuse are all aims for indigenous peoples that would be fulfilled with legal personality. The claim to self-determination also contains aims to gain political and economical protection and support, which is conjoined with rights to cultural integrity and difference.⁵⁹

Indigenous peoples underline the pointlessness in discussing indigenous rights to self-determination without including decision-making rights concerning land, water and natural resources in the term self-determination. They argue that it can be established that the idea of the right to self-determination is a right of all peoples to make decisions that concern their societies and their economic and social development. It follows that indigenous peoples' societies, and cultures are deeply and inseparably connected to their traditional land- and waterareas and natural resources. A division of this sort, they argue, is not appropriate.⁶⁰

⁵⁵ Muehlebach, Andrea; "What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism" 2003 p 253.

⁵⁶ Corntassel & Holder, "Indigenous People and Multicultural Citizenship: Bridging Collective and Individual Rights" 2002 p 141-142.

⁵⁷ Corntassel & Holder, "Indigenous People and Multicultural Citizenship: Bridging Collective and Individual Rights" 2002 p 136.

⁵⁸ Report by the Sami Council Committee, pp 20.

⁵⁹ Muehlebach, Andrea, "What Self in Self-Determination?" 2003 p 243.

⁶⁰ Report by the Sami Council Committee, p 37.

3 Sweden's obligations under international law

In this chapter the following questions will be addressed. What obligations exist today for Sweden? What relevant treaties are we party to that possibly deals with self-determination, and how is this possibly provided for in Swedish legislation?

3.1 Sources of international law

The International Court of Justice is subjected to a Charter, where its undertakings are regulated. In article 38 of this Charter, it is expressed what sources the ICJ is allowed to use in making its judgments. This comprehensive list is often referred to in various contexts when determining what the sources of international law are. It is generally regarded as a complete statement of sources of international law. Treaties, customary law, and by the peoples acknowledged principles are mentioned and these sources are the ones I intend to examine in relation to Sweden's obligations in this thesis. I will explain their content more thoroughly below.

Article 38.

1. *The Court, whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
 - (a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;*
 - (b) *international custom, as evidence of a general practice accepted as law;*
 - (c) *the general principles of law recognized by civilized nations;*
 - (d) *subject to the provisions of Article 59⁶¹, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*
2. *This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.*

3.1.1 Treaties

Article 38(1)a is applicable on both multilateral and bilateral treaties. They can have different "names" depending on the circumstances of their creation. "Treaties" is an inclusive term which covers most denominations such as "convention", "protocol", and "additional protocol". Important to note is the intent to achieve an obligation under international law. If such an intention exists, the name is less important.⁶²

The difference between conventions and declarations is crucial. Declarations and explanations are not legally binding for state parties, nor are the resolutions that the UN General Assembly makes. They rather

⁶¹ Article 59; The decision of the Court has no binding force except between the parties and in respect of that particular case.

⁶² Bring; Mahmoudi; "Sverige och folkrätten" 1998 pp 22.

express a political aim or an intention. Conventions or treaties on the other hand are interstate agreements and legally binding for the states that have ratified them. Those states are obligated to respect the regulations in the convention and to give reports on their fulfillment nationally.⁶³

3.1.2 Customary Law

What makes custom customary law? There are both objective and subjective criteria; on the one hand states' continued practice and on the other hand a legal conviction from the states that the practice is legally binding. This combination gives custom the status of customary law. Because of the multitude of treaties and because they have developed a status similar to international legislation, treaties today have larger practical impact than customary law. Before the conduct of using treaties was common, customary law was considered the primary source. Customary law is considered automatically binding for all states, as opposed to treaties which have to be actively consented to.

Not consenting to a universal customary rule does not change the rule's existence in relation to a state. The persistent objector is the only exception. States can, through treaties, agree on customary law not being applicable between the parties. Certain rules can not be opted out of, for instance the prohibition on genocide and aggression.⁶⁴ There are certain criteria one can look at when determining whether a practice has reached a level where it can be called custom. One is that the practice must have had a certain duration; it must have been exercised for a certain period of time. The practice must also have been consistent, no major departures should have taken place, preferably it should have been uniform. Generality is also important, several states must have taken the action or attitude, the fewer the number of states that have adopted the practice, the less of a sign of custom it is. Finally, the attitude of states is of great importance, their *opinio juris*. States must also be of the opinion that the practice is legally binding, otherwise customary law has not evolved.⁶⁵

3.1.3 General Principles

The general principles exist to fill gaps in international law, not yet regulated. Principles today are used both nationally and internationally. Examples are *pacta sunt servanda* and *ne bis in idem*. As can be seen above, they are recognized as legal sources in article 38(1)c.⁶⁶ I will not investigate the concept of self-determination as a principle, which it has been claimed to be, since principles are not relevant to this thesis.

⁶³ Gunner; Namli; "Allas lika rätt och värde" 2005 pp 21.

⁶⁴ Bring; Mahmoudi; "Sverige och folkrätten" 1998 pp 22.

⁶⁵ Brownlie; "Principles of Public International Law" 1998 pp 5-11.

⁶⁶ Bring; Mahmoudi; "Sverige och folkrätten" 1998 pp 24.

3.1.4 Legal praxis

Legal praxis is regulated in article 38(1)d, however legal decisions are only to be seen as tools to establish *de lege lata*.⁶⁷ And as such, they are important, but it is also important to note that judgments are only legally binding between the parties to the dispute.

3.2 Human rights obligations

The multilateral conventions that human rights obligations are generally based on contain obligations for states to uphold certain standards within their national justice systems. When a state fails to uphold this standard an international intervention is of essence. This intervention or action can consist of controlling, possibly judicial organs interpreting the existing treaties. In interpreting they also add precision and could fill in where proper definition is lacking. This is often valuable since lack of precision increase the possibility of disputes. The conventions and in addition the conclusions and working methods of the mentioned organs are all part of international law.⁶⁸

To voluntarily agree and become part to various treaties, and to follow unwritten rules for a certain amount of time, is for states to give up part of their sovereignty. It limits their freedom of action. However, every time a state becomes part to a treaty it is using its sovereignty. It is an independent decision to be a party to an agreement, but after becoming part the state is obliged to conform and adjust to the treaty.

3.3 Current regulations of indigenous peoples in international law

Do these regulations give Sweden an obligation to grant the Sami a collective right to self-determination? There is no doubt that international law is changing and developing, which is illuminated by the quote below.

“Having previously been an instrument in effect putting colonialism on a legal footing, international law is shifting to give voice to the victims of a legal system based on “western concepts”. It was only during the 1970s that international human rights law rejected its assimilationist approach and started to recognize their unique existence and specific culture.”⁶⁹

Nevertheless, a change of attitude does not inevitably change law, and the existence of a legal obligation is what I wish to search for.

⁶⁷ Bring; Mahmoudi; ”Sverige och folkrätten”, 1998 p 25.

⁶⁸ Eek, Bring, Hjerner; ”Folkrätten”, 1987 p 431-432.

⁶⁹ Castellino & Allen, ”Title to Territory in International Law” 2003 p 205.

3.3.1 Common article 1 (ICCPR and ICESCR)

Article 1:

1. *All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*
3. *The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.*

The ICCPR and ICESCR are both introduced with a first article concerning all peoples' right to self-determination. The principle of self-determination can also be found in articles 1 and 55 in the UN Charter, but is there presented more as a political principle than a legal right.⁷⁰ The Covenants themselves do not provide us with information on how to interpret the article concerning the word "peoples". However, at the time of ratification certain states seems to have been of the opinion that the right to self-determination is a right of all peoples and is applicable not only in a colonial context. France, Germany and the Netherlands objected to Indias opinion of the right to self-determination being applicable only for peoples under foreign rule, who were not part of the population of an independent state. Germany and the Netherlands argued that the right to self-determination is everybody's right, not only people under foreign domination. France added and argued that Indias attempt to limit the extent of the right to self-determination violates the UN Charter. Hence, some states argued for the articles to have a wider application than India argued and not only be relevant in a colonial context. "Peoples" at this point in time were probably in most opinions the sum of all inhabitants in a state or colony.⁷¹

However, public international law has evolved a great deal since then. The UN Charter itself, where it refers to the right of self-determination, - "*territories whose peoples have not yet attained a full measure of self-government*"⁷² - refers to peoples, in plural, and hence one can assume that peoples that have this right do not necessarily need to be peoples as in "population". It seems clear that the right of self-determination is applicable to peoples, not populations, and need not be the sum of all citizens within a sovereign state or a limited territory.

⁷⁰ Hedlund Thulin, "Lika i värde och rättigheter" 2004 p 80.

⁷¹ Report by the Sami Council Committee, p 24-26.

⁷² Article 73, UN Charter.

In 1984, the Human Rights Committee expressed that several states reporting to the Committee concerning the implementation of ICCPR article 1 seems to have misunderstood the entire meaning of it:

“Although the reporting obligations of all State Parties include Article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore Article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws.”⁷³

Sweden should definitely embrace this criticism and take it to heart. Sweden has consistently avoided reporting on the Sami in relation to article 1 of ICCPR and ICESCR. As late as 2002 Sweden argued before the HRC that indigenous peoples, in Sweden’s opinion, were not necessarily “peoples” practising the right to self-determination according to the colonial declaration.⁷⁴ In 1994, Sweden’s 4th periodic state report, Sweden’s comment under ICCPR article 1 was:

“1. Sweden has no colonies and is not responsible for the administration of any Non-Self-Governing or Trust Territories”.⁷⁵

The introductory article concerning the right of self-determination has no equivalent in neither the Universal Declaration on Human Rights nor the European Convention on Human Rights. Sweden voted against the article during the negotiations, however did not bother to make a formal reservation at the ratification. Sweden did repeatedly express that since the Covenant dealt with individual rights and not collective, this article did not belong in the Covenant. However, Sweden did also express the general importance of the article, if situated elsewhere.⁷⁶ There are a very limited amount of statements made on what Sweden believes the right to self-determination might contain. In the directives for the Sami Council Investigation⁷⁷ the proposed meaning was “a right to determine their cultural development”. Hence the researching committee believed that Sami self-determination was limited to cultural issues and practised by way of cultural autonomy. Consequently, one can believe that the government wants to limit self-determination to not encompass political or economical issues.

3.3.2 ICCPR Article 27

Article 27:

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

⁷³ Human Rights Committee, General Comment 12 (21) concerning CCPR Article 1, 21st Session, 13 April, 1984, para. 3.

⁷⁴ Declaration on the Granting of Independence to Colonial Countries and Peoples, GA res 1514(XV) of 14 Dec 1960.

⁷⁵ UN Doc CCPR/C/95/Add.4, para. 1.

⁷⁶ UD-info, ”De medborgerliga och politiska rättigheterna” 1999 p 10.

⁷⁷ Sametingsutredningen.

culture, to profess and practise their own religion, or to use their own language.

Some argue that article 27 has a collective dimension and refers to how it gives individuals right to enjoy the rights together with others that are part of the same group. However, the article has been discussed at length and there are people that argue that this expression does not provide for group rights, that it only concerns individuals.⁷⁸

No specific article deals with indigenous peoples in the ICCPR. Nevertheless, the Human Rights Council (HRC), the monitoring organ of this covenant, has often dealt with indigenous issues within the framework of minority rights. In its General Comment on art. 27, the HRC has stated that under the exercise of cultural rights protected by art. 27 of the ICCPR:

*“... one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may be particularly true ... of indigenous communities constituting a minority ...
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.”⁷⁹*

The HRC’s decisions are of great importance, despite it not being mandatory to follow its General Comments. The Comments are still valued concerning codifying and evolving human rights law. Culture and family life are two important factors in determining what indigenous peoples’ relationship to their traditional lands are, according to the HRC. Protection of indigenous peoples’ land rights is important to the HRC, even though such protection does not exist in the ICCPR. In spite of its non-existence, the Committee has claimed that protection of land rights belongs with protection of minority cultures and individual family life.⁸⁰ It seems that culture and family life today is already widely recognized as very significantly connected to indigenous peoples’ land. In General Comment No. 23 concerning ICCPR article 27, it is expressly stated that the Covenant draws a distinction between the right to self-determination and the rights protected under article 27. They refer to Part I of the Protocol, which as we have seen deals with a right belonging to peoples. However, they continue to express that the enjoyment of a particular culture “may consist in a way of life which is closely associated with territory and the use of its resources”, which, is stated, may be particularly “true of members of indigenous communities constituting a minority”.⁸¹ It is further argued that albeit the rights protected under this article are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language, or religion.⁸²

⁷⁸ Gunner, “Allas värde och lika rätt” 2005 p 221.

⁷⁹ General Comment No 23 para. 3.2 and 7.

⁸⁰ Castellino & Allen; “Title to Territory in International Law” 2003 p 211-213.

⁸¹ CCPR/C/21/Rev.1/Add.5, General Comment No. 23, 50th Session, 1994, para. 3.1-3.2.

⁸² CCPR/C/21/Rev.1/Add.5, General Comment No. 23, 50th Session, 1994, para 6.2.

The Human Rights Committee expressed concern in its concluding observations on Sweden's state report No. 5 (2000) "at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land (arts 1, 25 and 27 of the Covenant)". Sweden should take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence.⁸³

Since it is expressed that the exercise of individual rights are dependent on what rights and possibilities the group has, one can argue that the right of self-determination is seen as a prerequisite for the other rights to be exercised. Significant is also the expressly meaningful connection with land as regards the protection of the right to culture especially concerning indigenous peoples. Despite the fact that the right to self-determination is expressly disregarded concerning this article, I believe one can find traces and arguments for the existence of such a right. However, that right is not generally accepted nor express, and one can just as easily argue against such a right. I do believe that Sweden, under this article, does not have an obligation to grant the Sami the right of self-determination. The most recent interpretations of the article perhaps show of a recommendation of granting them such a right, and together with other documents an obligation may arise, but this article alone does not provide as much.

3.3.3 ICERD⁸⁴

The monitoring organ of ICERD; the Committee on the Elimination of Racial Discrimination (CERD), supervises state parties and their compliance with the Convention. CERD has been critical towards Sweden because the state has not counteracted racist organizations strongly enough, and also for its treatment of the Sami.⁸⁵ ICERD does not deal with self-determination specifically, but as can be seen in General Recommendation XXIII (51), it does deal with indigenous peoples' land rights, which is in the prolongation what indigenous peoples argue to have by way of the right of self-determination.

General Recommendation XXIII (51), para. 5:

5. The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by

⁸³ UN Doc CCPR/CO/74/SWE (24 April 2002), para. 15.

⁸⁴ International Convention on the Elimination of All Forms of Racial Discrimination, entry into force 4 January 1969.

⁸⁵ Gunner, "Allas värde och lika rätt" 2005 p 223.

the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.

Regarding ownership, individually and in association with others, equality before the law in the enjoyment of rights without distinction on the grounds of race, colour, national or ethnic origin is demanded by article 5 ICERD. According to CERD, the basis of discrimination against indigenous peoples is to be found in the disrespect by states for indigenous peoples' land rights. General Recommendation XXIII (51) encourages states parties to acknowledge and protect indigenous peoples' rights to collectively owned territories. They should also protect indigenous peoples' rights to develop, control and use such areas.⁸⁶

Since the Sami repeatedly lose court battles over land and usage rights there is definitely a certain degree of misconduct by Sweden. Perhaps the national laws are followed, but the current legislation might need to be changed. CERD has requested states with Sami population to acknowledge their right to own land and natural resources. The Committee has encouraged Sweden to legislate on Sami land rights and has especially underlined hunting and fishing rights.⁸⁷ They especially pointed to the importance of such legislation in order to avoid legal uncertainty in their comment of 2004. CERD has also made a general statement encouraging states to acknowledge indigenous rights to land. The completion of the land rights investigation within reasonable time was also highlighted, as was their worry of Sami interests repeatedly having to stand back in legal disputes. The lack of financial support for the Sami in these disputes was discussed.⁸⁸

Hence, it is obvious that Sweden does not live up to the standards that CERD require. However, nothing is mentioned of the right to self-determination, even though it can be argued that a right to own land collectively might possibly be a way of exercising such a right. In ICERD, the two rights are not explicitly connected and hence it is difficult to argue that Sweden under ICERD is required to grant the Sami a right of self-determination.

3.3.4 Customary Law

There is definitely an evolving opinion among states that indigenous rights, even their right to land and natural resources, must be developed further. However, this is not yet customary law. The ICCPR and ICESCR and ICERD are instruments pertaining to individual rights, and the instruments (as we shall see below) that do deal with collective rights have not yet received a large number of ratifications. The ILO Convention 169 has 17

⁸⁶ Castellino & Allen; "Title to Territory in International Law" 2003 p 213.

⁸⁷ Concluding Observations: Sweden 01/05/2001. CERD/C/304/Add.103, para. 13 och CERD/C/64/CO/8, para. 12-14.

⁸⁸ Nationell Handlingsplan för mänskliga rättigheter, Regeringens skrivelse 2005/06:95 p 166-167.

ratifications as of today, and even though some academics argue for it to be customary law, I believe its ratifications are too few.

Åhrén argues that since Sweden has expressed a wish to adjust legislation to make a ratification possible and since several people agree on the need to extend indigenous peoples' rights ILO 169 has come to reflect customary law.⁸⁹ I, on the other hand, do not share his opinion. Most states are very reluctant to accept the land rights spelled out in ILO 169 and the number of ratifications shows the states lack of eagerness and agreement on this matter. The Convention has been in force since 1991, i.e. for 15 years. The UN Draft Declaration is just that, a declaration, non-binding and hence it is obvious that states do care to a lesser extent for how the formulations turn out.

Negotiations have been active for almost 10 years and even though indigenous peoples may have a wish to make this declaration binding at some point, I believe that states today agree on more than they would have if it were binding, only to finish the Declaration. Many states may agree to grant their indigenous peoples more rights, but for the most part they want to be the granters voluntarily and not have an obligation under international law. Consequently, states are reluctant to grant an international right of self-determination, since they do not know exactly what they would be giving up.

I do not believe that customary law in this area exists. I would also argue that this new, more open attitude towards self-determination for indigenous peoples, is still too new to be regarded as customary law. The argument that customary law exists falls both on the duration criteria, the *opinio juris* criteria, the consistency of practice criteria and the generality of practice criteria. Reasons are that there is no general definition on what self-determination would mean, since states tend to have different opinions toward different indigenous peoples and because the lack of a general opinion between states.

However, there are people that argue differently. Castellino and Allen, for instance, argue that despite lack of strength in international legislation regarding indigenous rights, nationally judges in certain countries⁹⁰ find a change regarding indigenous land rights necessary. This conclusion was reached because all national case law has made references to international law. Further, they argue that the national legislations of these states are indicative of an evolving international customary law. International pressure, they argue, is the explanation as to why national legislation in these states has advanced in the current manner.⁹¹

I, on the other hand, do not believe that states are as accommodating to indigenous rights as Castellino and Allen want it to seem. In addition, I do not believe that the states they enumerate are a satisfactory amount of states.

⁸⁹ SOU 2005:79, Åhren, p 64-65.

⁹⁰ Canada, Australia, Finland, Norway and Sweden.

⁹¹ Castellino & Allen; "Title to Territory in International Law" 2003 p 227.

To summarize, the current situation does not meet the criteria for establishing customary law. However, there has probably been a change in customary law regarding the term “people”, as explained above. From having the meaning of a people within colonial territorial boundaries until colonial rule is overthrown, to a right of states to control their territory (populations), to a broadening of the concept and opening up the possibility of having several “peoples” living in one state. Today, it is definitely not an unproblematic term, but indigenous peoples probably fall under the latest definition of “peoples”, as explained above.

3.3.5 General principles and legal praxis

As seen above, the right to self-determination is expressed in the UN Charter, but more as a general principle than a collective human right. In this thesis I will not deal with the possible right to self-determination as a principle, only as a possible collective human right, hence I will not discuss the principle.

Regarding praxis, most cases do not deal with the issue of self-determination or collective human rights. I will hence only describe one case. It is known as the Taxed Mountains Case, and it took nearly 20 years before it reached the Swedish Supreme Court. The decision was presented on 29 January 1981. It concerned the claim of Sami ownership of certain areas, mainly in Jämtland County. The conclusion reached was that the state has to be regarded as the owner of the area, while the Sami rights are limited to rights of use. No existing laws did regulate who was the owner of the disputed area. However, the Court stated that the Sami have reindeer grazing and fishing rights, based on a general interpretation of the Swedish Constitution. The Court rejected the governmental claim that the Sami as a nomadic people cannot acquire title to land. Instead they stated that it is possible to acquire such title. This could be done by using it for traditional Sami economic activities such as reindeer husbandry, fishing and hunting, without engaging in farming or having a permanent dwelling. Even if traditional use of land could establish title to land, the Sami party did not have a proper evidential basis for the claim that such use had taken place in this particular case. Despite the fact that the Sami did not have success in this matter, it can be of legal importance in the future if the Sami can prove traditional use of other territory.⁹²

3.4 Conclusion

Despite the obvious increased acceptance for indigenous peoples’ claim to self-determination, there does not seem to be a legal obligation for Sweden to grant the Sami this right. Although apparent pressure is put on the state, and on every other state with indigenous peoples within its borders, I cannot

⁹² ECOSOC Commission on HR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, WGIP, 50th Session, Item 5 of Provisional Agenda.

find a legal responsibility under the treaties Sweden currently is party to, nor can I find a responsibility under customary law. Common article 1 seems at first glance to grant this right, but when looking at its original purpose and intent, it is too farfetched to conclude that this right is currently internationally protected for indigenous peoples. Perhaps the Sami morally speaking should have this right, however states have to agree to be internationally obligated and Sweden has at this point not concurred. ICCPR article 27 explicitly deals with individual rights, as interpreted in the General Comment. Hence, depicting it as dealing with collective human rights is also unconvincing. ICERD deals with the Sami situation and their lack of land rights and participation. The rights argued not to be satisfactorily protected do not legally need to be protected by collective human rights. Despite the considerable amount of criticism Sweden has received on the Sami situation, I cannot find legal support for granting them self-determination.

It can be agreed upon that the protection Sweden needs to provide indigenous peoples with under international law is not sufficient. However, this does not necessarily mean that they should be granted a collective human right to self-determination. Expanding individual rights and perhaps granting certain group rights to land and natural resources and that enable the Sami to have greater influence is possibly needed, but nevertheless there is no obligation to grant them collective human rights at present. Sweden has been called upon on several occasions to ratify ILO Convention No. 169, and are taking part in negotiations to develop a UN Declaration on Indigenous Peoples. Perhaps a ratification and a completion of the UN Declaration will alter the situation?

4 The future; ILO 169 & the UN Draft Declaration

Considering how close we are to a ratification of the ILO Convention No. 169 and that the final negotiations regarding the UN Draft Declaration has taken place I find it necessary to adress these documents in this thesis. Interestingly, there is a possibility that a Swedish ratification of the ILO 169 will change the present situation for the Sami considerably. There is also a possibility of a finished UN Declaration, even though not internationally binding, showing an evolving attitude towards collective human rights. Hence, I will investigate how these documents are different from those currently relevant for Sweden.

International instruments concerning indigenous peoples rights such as ILO 169 and the Draft Declaration do contain various regulations that underline indigenous people's individual rights. In addition, they contain a system of collective rights where the indigenous peoples themselves are subjects and does not grant individuals rights belonging to the peoples as such. This is definitely an evolution of the concept of human rights and in peoples' attitudes, but is there a change in states' attitudes? Spiry argues that increasing indigenous peoples' rights compared to the rights of minorities is today expressed more frequently in international law, in for example above mentioned ILO 169 and the UN Draft Declaration on the Rights of Indigenous People. Hence, the protection of indigenous people is today more comprehensive than just minority rights.⁹³

4.1 ILO Convention No. 169

The Committee on Economic, Social and Cultural Rights has requested that Sweden ratify ILO 169 and also clarify the situation concerning Sami land rights.⁹⁴ A special relationship between indigenous peoples and their land is highlighted by the UN Human Rights Committee, and indigenous peoples special needs as different from other minorities is widely accepted.⁹⁵ The HRC has on this basis on several occasions advised Sweden to ratify and implement ILO 169. But what makes this convention significant and what do this convention provide, specifically?

The International Labour Organization has adopted two conventions on Indigenous and Tribal Peoples (107 and 169). In this regard the ILO became active in this field long before the UN. It started in 1957, when the International Labour Organization adopted Convention No. 107 on Indigenous and Tribal Populations. This Convention used an assimilationist

⁹³ Spiry, "From Self-Determination to a Right to 'Self-Development' for Indigneous Groups" 1995 p 139.

⁹⁴ Concluding Observations: Sweden. 30/11/2001, E/C.12/1/Add.70, para. 28.

⁹⁵ Shaw, M; "International Law" 2003 p 277.

approach and this was approach was explicit. This early approach is acknowledged in the preamble of ILO 169 but was disregarded and avoided in the new Convention.

ILO No. 169 was created as a new and updated version of ILO 107. It contains some important alterations, for instance the change in the use of wording from “populations” to “peoples” (although the term “peoples” is limited in its interpretation, as we shall see below). The focus in ILO 169 has changed to be more sensitive to indigenous peoples culture, social system and values.⁹⁶

However, there are additional differences. Where the 1957 Convention aimed at integrating indigenous populations, the one of 1989 contains measures to make possible for indigenous peoples to preserve their distinctness. Hence, since there is no doubt of the Sami status as an indigenous people in Sweden, the Convention, if and when it is adopted, should be relevant to the relations between the Sami and the Swedish state as well as between the Sami population and the non-Sami population. Norway, however, is the only state that has ratified the Convention in relation to the Sami.

The group character of the rights in this convention is what makes it different from rights in the other documents mentioned above. The meaning of the group character in the Convention is debated, some view it as a sign of self-determination, while others vehemently argue that the rights are purely individual. According to the Convention states should make sure that their indigenous peoples are represented politically in decision-making organs when questions concerning themselves are discussed, and they should also have the possibility of creating their own institutions.

Even though the convention is widely discussed in terms of land rights, the text seems according to Gunner to be relatively clear about indigenous peoples right to their lands.⁹⁷ ILO 169 does recognize a collective character of the relationship of indigenous peoples with their land according to Castellino and Allen, especially via noting its spiritual and cultural importance (art 13.1).⁹⁸ The Convention is the only legally binding international instrument that acknowledges recognition of indigenous land ownership and customs regarding transmission of land (art 17). However, indigenous peoples are not able to submit complaints of states' behaviour, and states merely need to report to ILO on its status. Obviously, the monitoring mechanism is not very developed.

ILO 169 expressly states in article 1.3 (see below) that the Convention does not wish to take a stand in the question of peoples' right to self-determination. Albeit, ILO 169 contains a number of articles which closely relates to the right to self-determination. This can be seen in the way ILO

⁹⁶ Shaw, "International Law" 2003 p 278.

⁹⁷ Gunner, "Allas värde och lika rätt" 2005 p 224

⁹⁸ Castellino & Allen; "Title to Territory in International Law", 2003 p 209-210.

169 uses the expression “indigenous peoples” as opposed to ILO 107 that used the term “indigenous populations”. Alfredsson, too, argues that in the ILO Convention 169 groups’ right to own land join the customary list of minority rights. In addition he argues that this opinion is fortified through the HRC’s practice⁹⁹ in interpreting and applying article 27 of the ICCPR.¹⁰⁰ Brölmann and Zieck argue differently. In their view, the Convention’s acknowledgment of indigenous peoples’ right to be and remain different is of no essence, since it does not contain any means to enable them to act as a group. Mere participation by national election will bring us back to assimilation and hence would the Sami (as a minority) never be heard.¹⁰¹

In articles 14-15 ILO 169 expresses that indigenous peoples land rights and rights to their natural resources should be protected.¹⁰² Rights to ownership of territories where indigenous peoples are dominant population-wise, but also usufructary rights to natural resources on territories traditionally used by indigenous peoples but that are today inhabited additionally by non-indigenous people. Means to provide rights to participation in the use, management and conservation of natural resources are also contained.¹⁰³ Alfredsson argues that these regulations concerning land governing and natural resources do presuppose indigenous participation that does not exist today. Independent and representative institutions that are authorized to deal with these issues will be needed. If Sweden does ratify the Convention it is inevitable that Sami self-government would have to increase, and so will Sami demands for self-government until it in reality has.¹⁰⁴

According to ILO 169, an indigenous people is a group with roots in an ethnic group that inhabited the state or the geographic region before colonization, conquest or establishing of boundaries. This is an objective criteria, but the basic criteria is a subjective one; self-identification. The dominant definitions of minorities uses both objective and subjective criteria to determine who is included. In ILO 169 (art 1(2)) on the other hand, self-identification is seen as a basic criteria for the Convention to be applicable.¹⁰⁵

Regarding the right to self-determination explicitly, one of the most significant paragraphs for this thesis is article 1.3. It is a protectory clause that states:

⁹⁹ Kitok v. Sweden, Lubicon Lake Band v. Canada.

¹⁰⁰ SOU 2005:79, Alfredsson, G; “Ursprungsfolkens markrättigheter och kulturella rättigheter enligt internationell rätt” p 35.

¹⁰¹ Brölmann & Zieck; “Indigenous Peoples”, 1993 p 208-209.

¹⁰² SOU 2005:79, Alfredsson, G; “Ursprungsfolkens markrättigheter och kulturella rättigheter enligt internationell rätt” p 38.

¹⁰³ Semb, Anne Julie; “How Norms Affect Policy – The Case of Sami Policy in Norway” 2001 p 197-198.

¹⁰⁴ SOU 2005:79, Alfredsson, G; “Ursprungsfolkens markrättigheter och kulturella rättigheter enligt internationell rätt” p 40.

¹⁰⁵ Shaw, M; ”International Law” 2003 p 278.

3. *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.*

In adding this paragraph, the ILO opened up the possibility for states to ratify the convention, that would have doubted without it. The paragraph clearly removes all possibilities to argue for the use of “peoples” in the self-determination sense. Removing this option is a safeguard for states reluctant to grant their indigenous peoples self-determination. ILO itself also states that it is outside its competence to interpret the political concept of self-determination, but that the Convention does not place any limitations on the right to self-determination. The Convention is supposed to be compatible with any future international instrument which may establish or define such a right.¹⁰⁶

4.1.1 Legal status

We have above established that the ILO Convention No. 169 is an international binding convention. However, Sweden has not yet ratified the Convention, even though we have at several occasions stated a wish and an intent to reach this end after thorough investigations and preparations have taken place. Sweden does not wish to ratify the Convention before certain territorial boundaries have been guaranteed and approved. Regarding its international status, it is a Convention in force but there are only 17 state parties.¹⁰⁷

4.2 UN Draft Declaration

The UN Draft originated when the Sub-Commission recommended that a study of discrimination against indigenous populations should be made and this was completed in 1984. A definition of indigenous populations was suggested and various suggestions were also made as to future action. In 1982, the Sub-Commission established a Working Group on Indigenous Populations (WGIP) and a Draft Declaration on the Rights of Indigenous Peoples was adopted in 1994.¹⁰⁸ Indigenous activists find this particular document very important and valuable since it is the first international human rights document constructed with direct involvement and participation of various indigenous peoples themselves.¹⁰⁹ This document was produced by a body of human rights experts with significant participation by indigenous representatives. However, state representatives in the Human Rights Council were to adopt it, and since state representatives are likely to have a different view, it would have been

¹⁰⁶ “ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual”, Geneva, International Labour Office, 2003.

¹⁰⁷ Norway, Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, Honduras, Denmark, Guatemala, The Netherlands, Fiji, Ecuador, Argentina, Venezuela, Dominica and Brazil.

¹⁰⁸ Castellino & Allen; “Title to Territory in International Law”, 2003 p 207.

¹⁰⁹ Muehlebach, Andrea; “What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism” 2003 p 248-249.

possible that the final result would be more narrow in scope.¹¹⁰ However, the Human Rights Council has as of June 29, 2006 adopted a resolution on the Declaration on the Rights of Indigenous Peoples, and it has been forwarded to the UN General Assembly for approval.¹¹¹ Before it is approved, nothing has in reality changed.

The right of self-determination is central to the Declaration. All articles but two contain the term “peoples” and the importance of being defined and included within this term cannot be underlined enough. It is the basis for the claim of having the right to self-determination. Article 3 refers to the wording of ICCPR and ICESCR, and by doing so it makes the word “peoples” more inclusive and separates it from its previous position as a synonym to populations.¹¹² With the new UN Draft Declaration it will be difficult to claim that indigenous peoples do not have any kind of self-determination, at least as an offshoot from the principle of peoples’ right to self-determination. All the articles referring to land rights also recognize collective ownership of land. The Draft Declaration takes the starting point that indigenous peoples have designated rights (art 4) and distinctively separates collective rights from individual rights (art 8). This, according to Jovanovich, makes the Draft Declaration much bolder than ICCPR.¹¹³ Since indigenous peoples often have a different view of ownership than the Western world, it is sometimes not possible for them to separate individual interests from collective. For instance, access to certain territory can have other meaning than merely capitalistic. Perhaps the land is used in cultural ceremonies or have special spiritual value of some sort (art 13).¹¹⁴

But there is also critique of adding self-determination to this draft, or at least criticism toward using the term “self-determination”. The expression “internal self-determination”, according to Alfredsson, strongly contributes to explain why the suggestion has not been approved after many years of negotiations. The mere mentioning of “self-determination” is threatening to governments that vision demands for secession and trouble.¹¹⁵ Norway has in the negotiations of the Draft Declaration found it important to emphasize that the indigenous right to self-determination does in no manner threaten a state’s right to territorial integrity and does not bring a right to dissolve an existing state. They are of the opinion that this statement will make a larger number of states ready to accept a right to self-determination, even if they

¹¹⁰ Castellino & Allen; “Title to Territory in International Law” 2003 p 207.

¹¹¹ Homepage of International Work Group for Indigenous Affairs (IWGIA), 2006-12-02 <http://www.iwgia.org/sw248.asp>

¹¹² Muehlebach, Andrea; “What Self in Self-Determination? Notes from the Frontiers of Transnational Indigenous Activism” 2003 p 248-249.

¹¹³ Jovanovic, Miodrag A; ”Recognizing Minority Identities Through Collective Rights” 2005 p 628-629.

¹¹⁴ Holder & Cornassel; ”Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights” 2002 p 148.

¹¹⁵ SOU 2005:79, Alfredsson, G; “Ursprungsfolkens markrättigheter och kulturella rättigheter enligt internationell rätt” p 40.

have been hesitant. Hence they introduced a new preamble paragraph 15.¹¹⁶ This suggestion was actively supported by the Nordic states, including Sweden.¹¹⁷ An addition to the preamble was later made, and the expression “..., and thus possessed of a government representing the peoples belonging to the territory without distinction of any kind”; the use of the words “peoples belonging to the territory” is a sign of the states accepting the existence of more than one people within a state.¹¹⁸ Since, the formulation has changed again. The two questionmarks usually surrounding the UN Draft Declaration are the potential right of secession and the right to permanent sovereignty over natural resources. But what the Draft Declaration represents to indigenous peoples is their experience as being colonized, and a united aim to gain greater spiritual and political independence and to minimize what they feel to be intrusions and violations by their host state.¹¹⁹

The Draft Declaration more specifically contains articles that give them the right to nurture their distinctness. One of the most important and emphasized rights is the right to maintain and develop their distinct identities. It also notes that indigenous peoples have the right to self-determination which is particularly important (art 3) and the right to maintain and strengthen their distinctive characteristics and legal systems, but still be able to take part in the affairs of the state (art 4). They are expressed to have the collective right to live in freedom and security as distinct peoples (art 6) and the right to be protected from ethnocide and cultural genocide (art 7).¹²⁰

4.2.1 Legal Status

There is as of today no finished product, the Declaration is still being negotiated and the Draft Declaration is all one can ponder on. When the Declaration is agreed on, though, it will not be a binding document but merely a declaration. Hence, several states will perhaps find it easier to accept further reaching articles and rights for indigenous peoples, when it merely is a recommendation. Declarations are statements of purpose rather than legally binding documents, and even though several indigenous activists wish for the declaration to in the future become a binding international agreement, I believe that aim is today rather farfetched.

¹¹⁶ “Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, yet nothing in this Declaration shall be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples.”

¹¹⁷ Report by the Sami Council Committee, p 33.

¹¹⁸ Report by the Sami Council Committee, p 35.

¹¹⁹ Holder & Cornassel, “Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights” 2002 p 143.

¹²⁰ UN Draft Declaration

4.3 What changes will the ratification of ILO 169 and the carrying out of the UN Draft Declaration require Sweden to make?

Obviously the only document that obliges Sweden to change its national law is ILO 169. The changes Sweden would have to make are perhaps not that far-reaching, if one does not acknowledge the fact that Sweden is very reluctant to acknowledge group human rights. However, Sweden could argue that the ILO 169 is merely a statement of the rights Sweden are obliged to grant the Sami. If Sweden does not grant them these rights, the Sami cannot complain, under the ILO system. Ratifying the ILO 169 is voluntary, however Sweden can fulfill the obligations they have under the Convention in whatever way they choose. In spite of that, there are certain changes that would have to be done. The Sami would need greater influence in the governing of their lands and natural resources, they would also need to develop the Sami Council and perhaps create more institutions. Their issues would also have to be made more visible. The finished product of the UN future declaration would not do much more than show states' attitudes towards indigenous peoples, and perhaps be a more tangible instrument as a sign of where we could be heading in the future, of what perhaps would be an aim for the well-being of both the state and the indigenous peoples.

At this point we can see that ILO 169 will force Sweden to make certain legislative modifications, but the Convention is cautiously formulated. Hence, Sweden does not need to change its attitude towards human rights as exclusively individual rights, as Sweden can avoid this by granting the Sami certain group rights voluntarily and nationally. Which has already been done, prior to the whole discussion of self-determination, by granting the Sami reindeer herding rights. We have also seen that a finished UN declaration will merely be a declaration, a statement of purpose, and will probably consequently reach further than the ILO 169, even though states will have to approve it before it can be considered complete. The negotiations have stretched into time and the negotiators will probably agree to certain articles they otherwise perhaps would not, since it will not be binding. Nevertheless, neither of the two require Sweden to acknowledge a Sami right to self-determination, despite the fact that they do require Sweden to give them further reaching rights than they currently possess.

4.4 Conclusion

The attempt to separate internal and external self-determination expressly in the UN Draft Declaration has been an intelligent move. I am of this opinion since most indigenous peoples do not strive for secession; separation from the state, but rather view self-determination as a starting point where they feel that they can negotiate on an equal footing with their host states. Hence, I am not surprised at this attempt, but rather find it a smart move. They do try to reconcile the national integrity interest and the survival and self-

management of indigenous peoples. However, I can see the difficulties with choosing the wording “self-determination”. For many states this term is stigmatized and for many indigenous peoples it is seen as the solution to all their problems. Personally, I cannot see that self-determination is either or. Or perhaps, it is both. The lack of a general definition is presently the largest issue, since it leaves a possibility for different subjects to shape the term to the meaning that best serves their purposes. Hence, I can understand why “self-determination” is not mentioned and why the phrase “peoples” is cautiously used. The ILO hoped this would provide for a greater number of ratifications, since the words that create the most difficulty were removed. However, 17 years after its entry into force, only 17 states have ratified it. Perhaps this shows that despite the fact that the words were not used expressly, states are wary of later interpretations of the Convention as providing for the very content they try to avoid.

Sweden is performing investigation after investigation concerning if, how and when ILO 169 could be ratified. This makes the state seem positive towards its ratification, but it is hard not to ask the question if they truly want to perform a comprehensive survey or if they try to delay the ratification. No state wants to give up more sovereignty than they feel pressured to do, not even a state that tries to be a moral role model to the world. Since the Swedish system works in a way that would require it to change its laws to agree with the treaties voluntarily entered into, it is obvious that Sweden does not want to change the laws and then later realize that they did not have to grant certain rights that they have already granted. It is easier for Sweden to promote and be positive towards the UN Draft Declaration, since it merely is a statement of purpose and perhaps Sweden does have the intention of granting the Sami certain rights, but as of today they do not feel that they can grant these rights since that would have to change their attitude towards the entire human rights system, which will be discussed below.

Would a ratification of the ILO 169 and the UN Draft Declaration, when becoming a finished product, in reality make a difference for indigenous peoples? Do the indigenous activists strive for something that, when reached, will make a tangible difference in their lives? There are several holes in the current system of rights and the international law system, and looking at indigenous peoples’ situation is a way of illuminating its weak points. Can there truly be a society where all peoples’ needs are met? In the next chapter I will try to portray different aspects and ways to criticize certain aspects of international law, with an emphasis on the human rights system.

5 A Critical Legal Standpoint

*“The problem with rights discourse is not that the discourse itself is constricting but that it exists in a constricted referential universe”.*¹²¹

Human rights have developed in the Western world, and have been legislated on as late as the 20th century. We are all caught in frames when we watch the world, based on our culture, upbringing, social surroundings and environment. Rights are not created from nowhere and despite attempts, they are not thoroughly objective. Paradigms of thought change, and our view on justice and fairness also evolve. Hence it is not farfetched to see that our current human rights system must acclimatize too. When noticing the difficulties with the present system, something new and better suited to handle new issues must develop. Sometimes it is hard to look outside the box and imagine what could be different, but it is therefore all the more important. Perhaps the human rights system will never change its core, but I find it crucial to widen our thoughts and ideas and try to find the weak points of the existing system. One must never stop striving for improvement and for justice. However, one man’s justice is another (wo)man’s injustice.

5.1 Feminist legal theory

To see the underlying structures of our entire existing societies we must challenge our learnt ideas and question the origin and purpose of everything. If one looks deeper and outside the regular framework of what is practical and what exists today, one will possibly find that there are ways of criticizing the present legal system, and hence find needs and patterns that are not obvious when looking at *lex lata*. The legal system has not developed in a vacuum, rather it has evolved through ideologies and politics that have been forwarded with a purpose. How we ended up with the system of today is to be traced back to the paradigms and ideologies of the past. It is easy to accept our present system and only ponder on how we can progress forward, but I find it important to see what ideas and concepts lie behind our current situation and I also find a need to depart from the most prevailing worldview and try to question the system, if only to see it more clearly.

Hence, I want to use feminist legal theory to discuss the situation of indigenous peoples, to show how the current rights system can be questioned to its core and how certain critical legal studies are useful not only in its more obvious context. In this chapter of the thesis, I want to present tools that can be used in examining the rights system. The tools are chosen from a variety of feminist theories, as I have chosen to use the same method as Charlesworth and Chinkin in their book *The Boundaries of International Law: A Feminist Analysis*, since I find it to be the most useful theory regarding this matter that I have found. At times, cultural and

¹²¹ Charlesworth, “The Boundaries of International Law: A Feminist Analysis” p 211 (quote Patricia Williams).

feminist scholars express similar ideas and especially criticism toward international human rights law and dominant powers in society. In two fundamental ways in particular is the critique similar but with different subjects. According to both fields, the main discussion is founded on a philosophy that excludes all other perspectives, namely an individualistic moral philosophy. In addition, both fields defy the “liberal notions of the self” in for instance self-determination. What the dominating discourse thinks “self” signifies, other perspectives may not agree with.¹²²

It has been argued that “the only consistent function of rights has been to protect the most privileged groups in society.”¹²³ Discussing rights would then make social structures appear permanent without any alternatives and diminish any possibility of changing them and in addition change attitudes.¹²⁴ There is no doubt that the most privileged group in our society is the white middleaged male, which is here implied to be protected by existing human rights. Subsequently, not only immigrants and women, homosexuals and disabled, indigenous peoples and religious minorities are disadvantaged, but all minorities in our society. Indigenous peoples argue that they need protection as a group since the majority population has traditionally put them in a special category, as outsiders.

There is a need for developing a discourse that acknowledges disparities of power, rather than assuming all people equal in relation to rights. In the first, descriptive chapter above, I explained the idea of generations. This is an idea that has been criticized from several directions. The metaphor of generations is not particularly advantageous to indigenous peoples. Generations imply a hierarchy of rights, and the superiority of either the first generation, if one views it as a triangle, or the third generation, if you look at it as secession, as one substituting the other. Either way, rights are not via the language of generations construed as equal in value.¹²⁵ This provides difficulties when one comes to the point of weighing different rights against each other. One right, depending on its character and which generation it is pertaining to, might be considered more important on account of this terminology. Certain rights are naturally seen as more worthy of protection than others, but what rights are valued higher could differ from culture to culture. Hence, a division of rights in generations would present the rights as divided, as opposed to equal.

The division of characteristics in the public versus the private sphere is well known. Characteristics usually associated with women belong to the private sphere, and they are traditionally not valued as highly as characteristics belonging to the public sphere that is traditionally associated with men. Indigenous peoples also have the characteristics considered belonging to the private sphere, i e emotion, body, nature, passivity, non-selfgoverning, political. Hence, they are in the same situation as women concerning what is

¹²² Charlesworth, “The Boundaries of International Law: A Feminist Analysis” 2000 p 225.

¹²³ Charlesworth, “The Boundaries of International Law: A Feminist Analysis” 2000 p 209.

¹²⁴ Charlesworth, “The Boundaries of International Law: A Feminist Analysis” 2000 p 209.

¹²⁵ Donnelly, J; ”Third Generation Rights” in Brölmann, 1993 p 125.

valued in contemporary society. The “male” terms, such as legal, logic, mind, action, sovereign are valued more than their pairs. Additionally, this reinforces stereotypes.¹²⁶ States should be legally neutral to ethnic or cultural differences. Especially, as argued above, since the division of backgrounds was brought to its peak in the period during and preceding World War II. The differences are now treated as belonging to the private sphere, as pertaining to the interests of the individual. Consequently, the state is prohibited to interfere in these issues.

Considering ethnic origin or other different background characteristics to be unimportant in the face of the state is crucial. It can be argued that justice cannot be defined in difference-blind rules or institutions, taken out of its context. It is important to note that political decisions on such state symbols as official language, national holidays and non-working days do in most cases express the majority ethno-cultural identity.¹²⁷ It is not farfetched to believe that minorities and not least indigenous peoples do not feel acknowledged or represented in this context. Placing indigenous peoples and women in the private sphere, in the eye of the state viewed as less important to legislate on, do put them in a different situation as opposed to the majority population. The characteristics viewed as describing them are less important to the state. Here, we find a major difference in approach.

A very important factor that can be criticized when it comes to international law is the absence of certain groups. In feminist legal theory women are thus argued to be absent. But one can also argue for an absence of indigenous peoples views. As we have seen, western liberal argument is where the idea of human rights developed. The only instrument in international law that actually was developed with and by indigenous peoples is, as explained above, the UN Draft Declaration. Absence of indigenous peoples is certainly a factor in legal institutions as well. Martti Koskenniemi¹²⁸ has pointed out that the international legal notion of statehood operates to privilege particular voices and to silence others, which historically without doubt has been the case of indigenous peoples. If one is not heard and recognized, how can one make a difference?

Absence of diversity is certainly a matter requiring change, diversities must instead be recognized. Feminist legal theories often criticize the legal system since it, when it comes to promoting equality for women and men, often uses the method “add women and stir”, instead of changing structures and institutions made by men from the root. The world is male-defined, and if women want to be successful in it they will in most cases be left with no choice but to adapt to it.¹²⁹ For many years, and somewhat still, this is the

¹²⁶ Charlesworth, “The Boundaries of International Law: A Feminist Analysis” 2000 p 49.

¹²⁷ Jovanovic, Miodrag A, “Recognizing Minority Identities Through Collective Rights” 2005 p 626-627.

¹²⁸ Koskenniemi, M; “From Apology to Utopia: The Structures of International Legal Argument” 1989 at 499.

¹²⁹ Charlesworth, “The Boundaries of International Law: A Feminist Analysis” 2000 p 38-39.

same view or attitude used towards the Sami. It requires them to conform to a society defined by the majority, the assimilationist method. This is what indigenous peoples and many with them want to depart from, to find new parameters and celebrate the differences instead of blurring them out. Today, we are departing from the assimilationist method. However as of yet, no structural changes have been made. The Sami are not even recognized as an indigenous people in Swedish domestic legislation, even though they are politically recognized.

States are the prevailing legal subjects of international law. As we have seen above the international legal system is based on the idea of sovereign states. To be a state there must be a defined territory to show what area the government is supposed to rule. The state has a legal right to rule itself without outside intervention or meddling. Sovereignty is a cherished right and principle. A lack or infringement on a state's sovereignty is seen as great threat, and governments often see it as a weakness of that state. This view, however, stimulates a variety of problems; no state is willing to give up territory for another group or actor, be it the Sami or the Israel/Palestine conflict. Had giving up territorial sovereignty not been viewed as such a threat, could many a conflict have been solved.

Multiple areas and groups are not helped by the current system, as they do not qualify as states, i.e. legal subjects. Ethnic groups inhabiting border-straddling areas, areas that are disputed border-wise do not meet the criteria of being a state. The Sami clearly fall into the category of having no established territory and that puts them in difficulty when opposing interests want access to the land. Sami relationship to land differs from western views in that their relationship is spiritual and based on usage rights as opposed to ownership. When state boundaries were drawn and private persons wanted to buy land off the state the Sami had no registered right of ownership. The current territorial conflicts are often based in historical controversy, and are conflicts that have not arisen recently but have roots in dramatically different societies.¹³⁰ The historical view and traditional criteria of what constitutes a strong and evolved state are perhaps changing as we start to recognize how much conflict they generate.

5.2 Arguments and views for and opposed to collective human rights

The very idea of collective human rights can be criticized in different ways. Usually, as we have seen, states are the negative ones toward the concept while indigenous activists are positive. How can one argue for or against collective human rights? Obviously there are several arguments in either direction. I have discussed above for what reason indigenous activists argue that they have a right to self-determination, which would be a collective human right. Additionally, I have explained that Sweden and several other

¹³⁰ Charlesworth, "The Boundaries of International Law: A Feminist Analysis" 2000 p 129-131.

states are of the opinion that collective human rights do not exist. Here I intend to display the advantages and difficulties such rights will bring.

5.2.1 Positive aspects on collective human rights

Indigenous activists and several scholars argue that individual human rights do not provide collectivities with the security they need. They have been, and are still to this day, disadvantaged in comparison to the majority population in their various states. Hence, to fight the disadvantages with this protection it is necessary to give these groups the same opportunity, possibilities and starting point as the dominant powers. Indigenous peoples argue that “colonization” of their lands and the suppression of their culture and values have never stopped. It is hence apparent that even though individual human rights have existed for quite some time and minority protection is a factor in many states, indigenous peoples still feel disadvantaged. In Sweden in particular, they feel that their interests are not represented by the government, they lose the majority of land disputes in courts, their culture and values have at various occasions had to give way for industrial and capitalist demands.

Another argument brought forward is that as a legal subject and with the right to self-determination, groups could determine for themselves on which terms they want to interact with other groups and peoples. They can have bargaining power and be able to negotiate on their own behalf. They would be a legal subject on an equal basis with populations. As we have seen, to no international treaties are the Sami themselves allowed to be part. Not even to the proposed Nordic Sami Convention, which the Sami Council need to approve, and in whose negotiations they have taken part in, are the Sami allowed to be one of the contracting parties. The parties are instead only the internationally recognized states. One can criticize the fact that international agreements concerning Sami interests are being entered into but the Sami cannot be a signatory part and hence an equal party to the states, even though they will be legally obliged to live by the legislation and even though it dramatically concerns their lives.

In many states, the only possibility for indigenous peoples to take part in national affairs is through the individual right to vote. Important to note is that the right to vote is not to be compared to meaningful participation. If indigenous peoples constitute a minority in their state, their impact in elections is slim to none. One can ask the question whether indigenous voices will be heard and regarded with the lack of protection or means to raise their voices. If majority decisions are as a rule used, perhaps this in other words simply is assimilation. If we are concerned about indigenous peoples’ opinion, they need further means than the individual vote to make their opinions heard.¹³¹

¹³¹ Brölmann & Zieck; “Indigenous Peoples”, 1993 p 208-209.

When arguing against collective human rights, the problematic situation of how competing interests between individual human rights and collective human rights can be solved is often brought to the forefront. However, conflicts of rights are common also in regard to individual rights. When they are in conflict the problem is solved as a matter of priority. This is how the conflict between collective and individual human rights should be dealt with as well, argue the proponents. The conflict of interest between conflicting individual human rights is not less difficult to solve, and it is yet solved every day in different courts where rights are weighed against each other.

As in all legal matters, one cannot see individual action outside of its collective context. One can wonder why some contexts should be treated as more important than others, be more worthy of protection than others, but it is most states' opinions that indigenous peoples are worthy of special protection due to their earlier oppression. But an individual's capacity to act depends on the collective entity's prior ability to act – hence, if a state fails to provide the opportunity for a collective to act, it cannot help its individual members.¹³² If the entity is disadvantaged already when a conflict arises, how could the individual be equal to other individuals in disputes? If one collective is reoccurringly in a better starting position than others, how can it be argued that individuals in that same collective are on the same level? Hence, collectives must be brought to the same level as regards its possibilities and abilities to act to make individuals in that same collectivity equal to other individuals.

Indigenous activists have argued that “rights to self-determination and territory would not be the end but the beginning of a relationship”, a relationship where indigenous peoples would have more influence to better negotiate their future. One can “understand self-determination as a principle based on non-dominance rather than non-interference.”¹³³ Non-dominance rather than non-interference is an argument I find to be important. When states are reluctant to give up their sovereignty over territory, the idea of rather giving up their dominant position and putting indigenous peoples, in this case the Sami, in an equal position to the majority population, seems more of an acceptable act. It is not non-interference from the states indigenous populations possibly are looking for, because in most cases they do need to keep good relations with the host state and need support too, but they are searching for non-dominance where they have greater space to develop, cherish and promote their own culture and values.

5.2.2 Negative aspects on collective human rights

Some argue that if there are any collective human rights at all, self-determination should be it. From this argument one might state that perhaps

¹³² Cornassel & Holder, “Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights” 2002 p 134-135.

¹³³ Muehlebach, “What Self in Self-Determination?” 2003 p 257-258.

the mere possible existence of ONE human right of peoples could mean that human rights are basically rights of individuals. Perhaps self-determination is the exception that proves the rule. If self-determination were the only existing accepted collective human right that would definitely be a sign of a lack of general acceptance and existence of collective human rights at large. Hence, an agreement on self-determination as the only collective human right is not helpful for an argumentation for collective human rights.

At any rate, it is important to note that individual human rights do have collective dimensions. In the debate on collective versus individual human rights this aspect tends to be forgotten. Some individual human rights are practised as a collective, as for instance the right to assembly. When arguing against collective human rights, this aspect is often underlined.

It can be argued that third generation rights cannot provide indigenous peoples with protection that other peoples lack, if third generation human rights truly are rights of all peoples. A right of all peoples cannot single one people out. If a group in addition is seen as different from the majority, there is a tangible risk that the majority is not very likely to grant the different group special rights. Therefore, Donnelly argues, “in the case of indigenous peoples, individual human rights are a safer and probably more effective course to pursue than peoples’ rights”.¹³⁴ Individual human rights are easier for everyone to accept and it does not come with the notion of infringing on other groups’ rights.

Collective human rights could be outright unhelpful as a label, since it suggests a false dichotomy with individual rights. It may not be the best way to help indigenous peoples. Perhaps collective human rights that belong to the Sami as such, is not the best way to promote Sami rights. Opponents to collective human rights argue that a full and proper implementation of individual rights is enough protection even for indigenous peoples. It is not a lack of collective rights that constitutes the problem, but a lack of states’ desire to assure all individuals their human rights. One cannot assume that indigenous peoples are in an extra problematic situation simply because they are indigenous. Certainly, indigenous peoples will argue that they are, to gain more rights towards the majority population.

Before singling all indigenous peoples out as more worthy of protection than other groups, one should investigate what their situation in the individual case is really like. Can their interests not be protected by a full implementation of individual human rights? Is their situation really as problematic and terrible as they want to make it seem or are the indigenous peoples trying to achieve a certain goal that they might be granted because of a state’s bad conscience? Perhaps the goal the Sami strive for, self-determination, is not really the aim in itself but a way to argue for greater rights to land and resources. The question whether they really deserve these rights when looking at the situation crassly needs to be answered. The Sami

¹³⁴ Donnelly, J; “Third Generation Rights” in “Peoples and Minorities in International Law” (Eds. Brölmann, Lefeber, Zieck) 1993 p 149-150.

in Sweden are 20,000 people, and they want usage rights of an area covering a great percentage of the state territory. Is this reasonable and proportional? Or is it a way for a state to appease former maltreatment?

There is a fear that accepting collective rights would open the possibility for governments to abuse human rights by picking and choosing the rights they want to respect in different situations, in relation to different groups. It is important not to water out and detract attention from already recognized human rights.¹³⁵ The current human rights system is rather new, seen in perspective. Several of the rights have not yet been properly defined in different treaties, many nations have different opinions on what they mean and several nations have not even started to implement the international legislation nationally. Starting to grant peoples or groups different collective human rights would raise even more problematic issues, when so many old ones are not yet solved. When weighing different rights against each other, the fear of states and courts to find priority to what rights best serves their interests is not unfounded. Who is to decide what rights are most worthy of protection in what case? Perhaps we need to give the system of individual human rights more time to sort itself out prior to adding possible collective rights to the soup and stirring.

Indigenous activists argue that the granting of a right to self-determination, though not defined, would give them psychologically a better starting point than where they are today. It would give them confidence as recognized and accepted in the international society, as a people deserving of certain (unidentified) rights and recognition of past injustices towards them. However, the psychological importance of collective rights cannot be the only or the primary reason for recognizing collective rights. There must be another purpose, something that would make their situation different from before, if there should be a reason for adding these difficulties to the existing human rights system.

There is another need to be wary, there is a risk that collective rights could be dangerous for groups within groups, such as women. What is good for the collective is not always good for individual members. A conflict of interest within a group can easily emerge. It is important to make certain, before granting collective human rights, what rights are more important and more worthy of protection. A woman might have to give up individual rights to equality in order to protect the culture and values of a certain people, and this is not something we would want to strive for. In addition, there will also be a problem of representation, who will be the legitimate spokesperson for the group? There is a tangible risk that leaders will try and promote their own agenda. The Sami, for instance, have several different political parties with different views on what is best for the Sami, and how can these differences be reflected in a right that belongs to the group as such? Will the elected leader use this fora to promote the interests that are closest to him or her?

¹³⁵ Donnelly, J; "Third Generation Rights" in "Peoples and Minorities in International Law" (Eds. Brölmann, Lefeber, Zieck) 1993 p 123.

Another important issue that needs to be reflected on is why certain groups should have rights regarding land, resources and representation that members of other groups do not have? Why should other ethnic minorities not have protection that the Sami have? Are their cultures not worthy of the same protection, even though they do not have any land rights claims? And how about other groups, such as religious or sexual minorities, are they not as worthy of protection?

5.3 Right or Human right?

Not many authors differentiate between group rights and group human rights, at least not explicitly. Donnelly does though, and he vehemently argues that he is not challenging group rights for minorities. Rather, he is “questioning the idea of group *human* rights for minorities, the requirement that all states must recognize group rights for all minorities”.¹³⁶ This idea agrees with Swedish policy, since Sweden also makes a point of differentiating between group rights and group human rights. The line to be drawn between these two concepts is very thin. Group human rights would be rights that can be claimed internationally, while group rights are rights granted to specific groups nationally, since its host state finds the need to give this group special protection.

I acknowledge the difference, and for states that have denied the existence of group human rights the difference is very significant. However, I do not think that states in the long run can claim the lack of existence of group human rights, at least to a limited number. States granting certain groups rights will perhaps suffice to some extent, but at a point in time it will not be satisfactory. Today there are too many questions to solve before collective human rights is an option that will be accepted fully. The questions raised in this thesis, for instance, are not questions that I think will be solved at the turn of a wind. However, as we have seen, politics and ideologies have brought us to this situation, and as paradigms change, ideologies and politics evolve and societies grow (or devolve), they will also bring us forward and perhaps, in a future climate (which is probably not too far ahead) pressure will be strong enough to rethink and ponder structural changes.

5.4 The international legal system

Looking at the problems surrounding the right of self-determination, collective human rights and indigenous peoples' situation, several of them lead us to weaknesses in the entire international legal system. I want to highlight a few of them in this thesis, to explain what brought us to this complex situation. The issues I will highlight are closely related and can in some cases not be separated. One leads to the other and they are intertwined. Still, they are very important to note.

¹³⁶ Donnelly, J; "Universal Human Rights in Theory & Practice" 2003 p 213-214.

One is the problem of *subjectivity*. With this term I mean the problem of a possibility to portray concepts as having whatever substance suits the subject. It is the problem of the lack of definition that surrounds several significant terms or concepts. If there were no questions surrounding the definitions a significant amount of disputes and controversies would be settled. In the term *subjectivity* I also want to underline the states' lack of understanding of the less fortunate. As long as the state and what the government considers its majority or most important people are satisfied, all is well. Their lack of understanding is visualized in their view of sovereignty and control over land and resources as, in many cases, the most important goal to achieve and a virtue, instead of trying to provide the best possible for ALL their citizens.

Another problem is the concept of international *legal personality*. This is at present only awarded states, and in some instances (human rights and international criminal law) individuals. Internationally, we know that all persons within the boundaries of a state are not of the same origin and we also know that many "peoples", especially non-Western, never had a say when boundaries were drawn and states were created. Peoples that live across borders or peoples that inhabit only part of a state have no international fora where their rights are protected. A lack of legal personality is a major disadvantage when it comes to promoting rights internationally, and it is not surprising that several peoples seek this possibility. The lack of legal personality for indigenous peoples hence derives them ability to help themselves.

Due to the fact that groups, "peoples", cannot have legal personality they can also not be a *signatory party* to treaties. Hence they are exposed to states' good will. States are the only legally acknowledged parties to treaties, which creates difficulties when treaties are negotiated or discussed whether to be entered into. For instance, the future Nordic Sami Convention which expressly concerns the Sami, does not allow for the Sami themselves to be party to it. Hence states enter into treaties concerning a population group that cannot itself neither claim rights under the treaty nor be an equal party to the states in this matter. States make decisions for the Sami, as if they were not suited make their own.

Representativity is at most times said to be fulfilled by the one person, one vote, one time- rule. This is supposed to represent all opinions in society and the people elected should be representative of the population. However, if a group of people is consistently outnumbered in elections and their interests are consistently overridden by "higher" interests, it is difficult to claim that their interests are represented. Additionally, if this group is deemed to be worthy of special protection because of its features, their possibilities to promote their own interests must be increased. But how do one determine which groups should receive this protection or not? And what is proportional representation? The state should act as a protector when citizens cannot help themselves or provide another situation for themselves. When states fail to provide this protection, where should they turn? Not

internationally, since they do not have legal personality if they do not want to claim violations towards every individual and hence not attend to structural inadequacies.

In discussing *participation*, we can note that as argued above, participation by one man, one vote is not sufficient. There is also a lack of participation in international negotiations concerning the Sami themselves, but also in discussing national issues that appertain to them. This is where the Sami Council could receive expanded possibilities of self-government and participation in decisions that are of Sami interest, and perhaps not only be an advisory organ when discussing these issues. In participation and representation there is also the difficulty with diverse interests within the group. How to determine who is the proper representative for a certain group will not be discussed here.

These concepts all bring difficulties to the determination of the Sami situation. However, they are problems not only in regard to indigenous peoples, but rather display weaknesses of the entire system of public international law and they can to some extent explain why Sweden and other states have developed the policy they present today.

5.5 Swedish Human Rights Policy

Swedish policy on the Sami situation has been explained above. Summarily, it can be described as not admitting the existence of collective human rights, and hence Sweden does not want to grant the Sami a collective right of self-determination under international law. Nevertheless, they do feel pressured to do so, and consequently try to investigate how certain standards can be fulfilled without changing its human rights attitude. However, whether they want to grant the Sami a right to self-determination or not, they still do not fulfill the requirements necessary to protect the Sami people and culture.

Internationally it is recognized that the Sami are not treated satisfactory. Their possible rights to land and natural resources are uncertain and they have little to no influence via the Sami Council. One can argue that the protection they want must be weighed against a public interest and also against other private interests. Since the Sami are a numerically small group, perhaps the protection is not proportional? But on the other hand one must recognize the maltreatment they have received ever since Sweden as a state started to take form, and the importance of protecting their culture especially because of their numerical size and historical significance. Many agree on that the comparison of the number of members of the group compared to the Swedish population is not important, because of the value of protecting their culture.

Sweden seems to fear the possible result of granting the Sami usufructuary rights and rights of natural resources, as well as giving them greater influence over issues that concern them. One can ponder on what they fear regarding the above mentioned. Monetary losses? Restrictions in

sovereignty? Disputes and a discontent non-Sami population? These questions lead to another question: do Sweden view the Sami as opponents, or are they viewed as citizens with circumstances that make them in need of certain protection that they have no possibility of providing for themselves? During 1970s the problems surrounding the legal status of the Sami needed to be solved. There were several reasons for this, for instance that Sami politicians highlighted Norway's international actions and involvement in protecting rights of minorities and indigenous peoples when their policy towards the Norwegian Sami was considerably different.¹³⁷ This disparity in policy could perhaps also be found in Sweden. Perhaps there is a difference of opinion on what rights an indigenous people in a for instance South American, Asian or African state has on the one hand, and what rights we ourselves should grant our own indigenous people.

5.6 Conclusion

What I wanted to underline with this last chapter is how one can view international law from different angles, and the importance of doing so. After looking at the situation from a feminist critical viewpoint, from looking at the advantages and disadvantages of collective human rights, and from a critical point of view of the public international law system and concerning Swedish policy, I feel that I have provided options to the most obvious and general standpoints. I have shown the importance of digging deeper into the problems of international law and criticizing its core.

Perhaps a concept that hardly seems reasonable at present, will, after looking at its history and consequences, provide a different answer. Perhaps what seems fair when looking at *lex lata* does not seem as fair if one theoretically can watch from a fundamentally critical point of view. Perhaps when looking at the politics and purposes of certain actions possibilities can be discovered that are easily hidden in what is presented as impossibilities. Feminist legal theory has shown how the state as the only legal subject and how societies' structures can be disadvantageous to people that do not fit the society's norms.

Looking at the benefits and inadequacies of implementing collective human rights in addition to individual human rights, we can search deeper in the possible consequences than one would find by looking at the right of self-determination separately. Swedish policy might seem rigid and unaccommodating towards the Sami, but on the other hand it has developed for a reason. Not acknowledging collective human rights is not a matter that is claimed only towards the Sami, but it has been continuously claimed concerning all possible collective human rights. Perhaps not admitting their existence feels important today, but in the future international law will be more clear and pursuant to that, Swedish policy in the matter may change.

¹³⁷ Semb, Anne Julie; "How Norms Affect Policy – The case of Sami Policy in Norway" 2001 p 189.

6 Final Analysis

6.1 Conclusion

I have not found a legal obligation for Sweden to grant the Sami a right to self-determination. However, I found many reasons and causes to do so. The question is whether the disadvantages are greater than the advantages of starting to acknowledge group rights, since numerous issues and concepts are not (yet?) properly explained internationally. Despite the fact that perhaps neither a ratification of ILO 169 nor a finished UN Declaration will change the existence of an obligation to provide a right of self-determination, they will still oblige Sweden to change several legislative items.

The Sami need greater self-government and perhaps this is how self-determination rather is defined today concerning indigenous peoples. The content of self-determination and the protection this right provides is probably more important than international legal recognition of this right. If the state provides reasonable protection the international community shall not need to interfere. Obviously today Sweden does not provide enough protection. However, even if Sweden did provide enough legal protection for the Sami, perhaps they would still claim the right to self-determination. As we have seen, this would give them legal personality and an ability to be party to international treaties concerning their own situation. This international recognition is not something Sweden can provide nationally.

At this point, I am inclined to criticize the public international law system rather than Sweden's attitude. The latter can definitely be altered as well, but when putting the difficulties and the multitude of opinions to the forefront I am inclined to argue that until there is greater clarity, Sweden's actions under international law are not wrong. However, if Sweden wants to claim to adhere to be a moral rolemodel internationally, we should raise our human rights standards toward the entire Swedish population. Hence, this leads us to the various criticism toward the international legal system that I have illuminated.

Many lawyers only practice existing law. The importance of the purpose of the law and how it has been developed is often lost in textual interpretations. In public international law specifically, a historical perspective is significant in understanding its development, especially in for instance customary law. This is why chapter five is crucial in this thesis. Criticism of the system, its weaknesses and its evolution can be made deeper than a criticism of the current situation. Perhaps the system will never change structurally, but nevertheless it is important to highlight where change is needed.

A human rights system, more than anything, should be as fair to every human being as utterly possible but perhaps fairness is not a characteristic it can boast possession of at present. I am hesitant to recommend a granting of

a right to self-determination to the Sami at present, since so many terms are still debated. However, in all fairness, I do believe that the Sami should have a right to determine their own fate (but still be obliged to follow the individual human rights system) and not be subjugated to Sweden's good will. As explained above, a regular one person – one vote-system does not provide the protection they need. Had the Swedish borders been drawn differently at a certain point in time, the Sami would have still been living on their own, traditional land. They cannot be blamed for peacefully subjecting themselves to the Swedish government. However, after many years there are now others that claim that same territory, and disputes are not solved as easily. Nevertheless, at least the Sami deserve adequate protection in practice under Swedish law.

6.2 Discussion

One can argue that the concept of self-determination is not relevant to the Sami situation. The Sami want a better situation and more protection under the law, and this can be argued to be provided by guaranteeing them individual human rights. An argument against this thesis could be that Sweden will, or even has, stated that the Sami deserve this right, hence it is not interesting to investigate whether Sweden has an obligation to grant them such a right. However, there are several arguments for the significance of this thesis:

- It is important to highlight the complexity of Sweden's attitude, that there is an attitude towards human rights that exists whether problems involve the Sami or non-Sami, hence the Sami is not merely being denied rights because of their heritage but (also) because of the difficulty of reconciling and harmonizing the Swedish attitude with the right of self-determination.
- Difficulties of granting the right of self-determination stretch back to ideologies of human rights and the development of human rights.
- Complexities are additionally added by the international legal system at large, as regards legal personality for instance.
- There is no international definition of the right of self-determination, hence Sweden could explicitly grant the right without fulfilling its supposed international meaning.
- The Sami claim to have an international right to self-determination to support their own agenda. They do not feel that the state of Sweden protects them sufficiently and hence want a possibility to protect themselves.

These are some issues and complexities that I want to underline. History is always important but in this case in particular time and evolution of concepts and ideologies are significant. I have found that there is more to these problems than what is evident *prima facie*. Writing this thesis I have had several changes of heart. From an initial conviction that the Sami undoubtedly have a right to self-determination, to the opposite opinion when realizing it would demand a change of attitude toward collective human rights, to seeing its complexity and that certain prerequisites need to be

fulfilled for its practical realization. Examining the legislation and regulations existing regarding this right internationally has made me realize that what seems today to be a possible interpretation was not even imagined at the point of ratification. Other difficulties noticed are the ones that arise when no consensus between nations can be found. Obviously, the protection Sweden provides the Sami with is not sufficient. Whether the reason is a fear of being portrayed as weak internationally, or whether Sweden is fearful of giving up control is open for discussion.

When trying to establish human rights legally all foreseeable problems were thought to be addressed. In the years passed since the first negotiations, several new problems have arisen. Threats to human dignity, whether systematic or not, change over time. Similarly do our understandings change of what a life worthy of a human being entails. What we consider important today, what we find to be the practical meaning of respect, is different from 50 years ago. We must consequently be not only willing but also eager to explore the weaknesses of our current model of human rights. We must strive for discovering needed additions and alterations. What we today consider authoritative is not likely to be the last version on international human rights, which I think is a fundamental idea to remember.

International law is dynamic. New remedies for new problems are developed consistently. Human rights law is relatively new, and there are definitely problems with changing it from applying only to individuals to work also for groups. However, perhaps non-Western states would feel more involved and engaged in the human rights system if group rights were acknowledged. But we must be wary of what we change, and not only try to reduce our bad conscience of former oppression. For instance, it is important not to accept a group right of self-determination as a right to disregard certain individual human rights that exist in the larger society; the state. Avoidance of for instance lack of opportunity for women to use the human rights system in their individual favour because of the prevalence of a group rights is crucial.

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