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We Were Here since before the Earth Was Round

– The Right to Participation of Indigenous Peoples and the Sami People in Sweden.

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Contents

Summary

In September of 2017, the Swedish government introduced a proposal for a new Consultation Act that would require the government and other state agencies to consult with the indigenous Sami people on issues of importance to them. The aim of the proposed law is to strengthen and promote the influence of the Sami people over their own affairs. This thesis analyses whether the proposal is in line with the current standard of the right of indigenous peoples to participate in decision-making processes on matters that concern them.

In order to do so, the legal framework and authoritative interpretations of the right to participation is examined in great detail. The common elements of the right to participation that are identified are then presented as the current standard of the right to participation. These elements include consultation; participation pursued in good faith; free, prior and informed participation; consent requirements; and judicial review.

The reasoning behind the proposal is presented to gain an understanding of why the Swedish state has decided to introduce this law. The provisions of the proposed law are also examined to identify which rights and corresponding duties the Consultation Act would give rise to. The identified current standard of the right to participation is then compared with the content of the Consultation Act. The main conclusion drawn from the analysis is that there is a discrepancy between the protection of the right to participation offered by the Consultation Act and the identified current international standard of the right to participation. To rectify this, the Swedish state should revise the proposal and include certain elements and clarify others. A revised Consultation Act should for example introduce a flexible consent requirement, that necessitates Sami consent for projects and actions that risk the survival of the Sami people. The thesis also concludes that it is of utmost importance that a revised proposal gains the acceptance of the Sami Parliament for the Consultation Act to have any legitimacy as a vehicle for participation and influence.

Preface

Min mormor föddes 1918 in i en värld som ännu inte kunde tillvarata kvinnors potential. Trots att hon var väldigt intelligent fick hon inte vidareutbilda sig vid universitet då det ansågs vara slöseri med både tid och pengar. Hon fick sin revansch när hon vid 78-års ålder tog licentiatexamen i antikens kultur och samhällsliv vid Lunds universitet. Mormor, du var en ständig påminnelse om att kvinnor kan och att det aldrig är för sent att göra det man vill. Den här uppsatsen tillägnar jag dig. Vi ses!

Abbreviations

CEACR	Committee of Experts on the Application of Conventions and Recommendations
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Court of Human Rights
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FPIC	Free, Prior and Informed Consent
HRC	Human Rights Committee
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ILO no. 169	ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries
OSCE	Organization for Security and Co-operation in Europe
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues
VCLT	Vienna Convention on the Law of Treaties
WGIP	Working Group on Indigenous Populations

1. Introduction

Without the indigenous peoples,
humanity is diminished and cursed;
with them, we can achieve
a more complete vision of ourselves.
- Hugh Brody, The Other Side of Eden.[1]

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1.1 Contextual Background

The right to participation of indigenous peoples is one of the most important emerging indigenous rights but at the same time also one of the hardest ones to define. It concerns the right of indigenous peoples to participate in the decision-making on all issues affecting them that are left to the larger institutions of decision-making.[2] In September 2017, the Swedish government introduced a proposal for a new Consultation Act[3] aimed at securing the right to participation for the indigenous Sami people – this thesis will examine whether the law lives up to the current international standard on the right to participation.

There is no strict definition of the right to participation and the elements required to ensure it varies depending on which source is consulted. What the sources agree on is that the right to participation involves a broad duty to consult and that these consultations should be set up in a way that ensures effective and genuine participation.[4] Consultations should be carried out in a manner that is free from coercion, prior to any decision being made and the indigenous people should be presented with the required resources and information for the participation to be informed. The consultation further needs to have the overarching aim of obtaining indigenous agreement or consent.

Almost all major human rights instruments lack explicit mention of indigenous peoples or any specific rights pertaining to their status as such.[5] The two major instruments that include

[1] Brody, Hugh. *The Other Side of Eden.* New York: North Point Press, 2002, 314.
[2] Anaya, James. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2004, 151.
[3] Ds 2017:43. *Konsultation i frågor som rör det samiska folket.*
[4] Portalewska, Agnes. 'Free, Prior and Informed Consent: Protecting Indigenous Peoples' Rights to Self-Determination, Participation, and Decision-Making', *Cultural Survival* [website], Dec.-2012. https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous (Accessed 14/5-2018).
[5] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence.* Oxford: Hart Publishing, 2016, 1.

indigenous participatory rights both represent a shaky foundation for an argument aimed at enhancing the rights of the Sami people in Sweden: *The ILO Convention no 169* has not been ratified by Sweden and the *UN Declaration on the Rights of Indigenous Peoples* is, as the name implies, in the form of a non-binding declaration.

The greatest impact on the rights of indigenous peoples has instead come from authoritative bodies within the international and regional human rights systems. Through the creative application of general human rights to the distinct context of indigenous peoples, these institutions have revolutionized and greatly enhanced the protection that is awarded to these groups.[6] However, even though great strides have been made in the last 25 years to clarify and extend the scope of protection for indigenous peoples, what actually constitutes legally binding obligations is still very much shrouded in mystery. This is as true for Sweden as it is for the rest of the international community.

The uncertainty of what the right to participation entail for indigenous peoples is not only the result of the varying legal force of its legal sources. It also stems from the fact that a right to participation can be argued from several different legal perspectives. The right of indigenous peoples to participate in the decision-making processes on matters that concern them have been argued as being a part of the minority rights framework, it has been presented as being an essential part of a *sui generis* right to self-determination of indigenous peoples and it has also been argued as being part of the right to self-determination that applies to all peoples, regardless of them having an indigenous status or not. These different approaches and arguments all advocate for the significant role of participation and influence of indigenous peoples over matters that concern them in order to ensure their dignity. But the precise requirements and extent of the ensuing obligations vary.

All over the world and throughout history, indigenous peoples have been the greatest losers in the rapid and transformative processes of social and economic change[7] – the indigenous Sami people in Sweden is no exception to this rule. Precisely when the Sami people settled in Sápmi[8] is not clear but the Swedish Supreme Court has declared their presence as tracing back to time

[6]Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 1.
[7] Kosko, Stacy J. Agency Vulnerability, Participation, and the Self-determination of Indigenous Peoples. *Journal of Global Ethics.* Vol. 9 no. 3 (2013): 293-310, 293.
[8] Sápmi refers to the northern parts of Sweden, Norway, Finland and the Kola Peninsula of Russia which traditionally has been inhabited by the Sami people. Roughly translates to “The Sami Homeland”. It is the Sami name for their traditional lands.

immemorial – long before the dawn of the nation state of Sweden.[9] The colonialization of Sápmi by the Swedish Crown started in the 14th Century, as a result of the conquest of the northernmost parts of Sweden.[10] During this era, the Swedish Crown started to levy tax on the Sami people and that tax pressure would increase exponentially in the centuries to come.[11]

By the early 17th Century, the Swedish Crown had realised that it was dealing with a potential treasure chest when discovering the great riches of the natural resources in Sápmi.[12] When a silver deposit was unearthed in Nasafjäll, the State solved its manpower problems by simply using Samis as forced labour due to their reindeers providing efficient transportation of the silver ore.[13] By the late 17th century the Swedish state moved into a more active phase of its colonialization process. Ads were placed in newspapers, trying to persuade southern Swedes to move to the north by promising them a 15-year tax-exemption.[14] During the 18th century the state's settlers-policy had been so successful that the settlers had now gradually forced the Sami people out of their traditional lands.[15] The building of protestant churches all over Sápmi also began during this period. The traditional Sami belief system was branded as a heathen religion and banned by law. Samis who continued their traditional religious practices in defiance of the law met with draconian punishment – in some cases even being burned at the stake together with their sacred religious objects.[16]

The oppression of the Sami people would continue throughout the centuries but take on new shapes and disguises. The Swedish state would adopt a strange hybrid policy towards the Sami people which applied an assimilationist- or segregationist-approach depending on what grouping of Sami was considered. The semi-nomadic reindeer-herding parts of the Sami population were dealt with according to the "Lapp must remain lapp[17]"-premise[18]. For this sector of the Sami people, the result was a segregated life barred from development and choice. The non-reindeer herding Samis on the other hand became subject to aggressive assimilationist policies directed at "swedification". These policies included placing Sami children in boarding

[9] NJA 2011 s. 109, para. 35.
[10] Lundmark, Lennart. *Så länge vi har marker.* Stockholm: Rabén Prisma, 1998, 18
[11] Ibid*,* 37.
[12] Ibid.
[13] Ibid, 43.
[14] Ibid.
[15] Ibid.
[16] Christoffersson, Rolf. Svenska kyrkan och samiska trummor. In *De historiska relationerna mellan Svenska kyrkan och samerna Band 2.* Daniel Lindmark and Olle Sundström (eds.), 657-680. Uppsala: Artos & Norma bokförlag, 2016, 667.
[17] In Swedish "Lapp skall vara lapp" where "Lapp" is a derogatory term used for a Sami individual.
[18] See for example Sten Henrysson, 'Darwin, Ras och Nomadskola', *Forskningsarkivet vid Umeå Universitet* [website], 1993. http://www.foark.umu.se/sites/default/files/publikationer/scriptum/script37.pdf (Accessed 8/5–2018).

schools where the use of the Sami language was strictly forbidden at all times, even though most of the children only spoke Sami at the time of enrolment.[19]

The Swedish government and the Sami people's historical relationship can be summarized as one ripe with abuse and characterized by a governmental attitude rooted in the notion that the Samis were an inferior and subhuman race. It was not until 1976 that the Swedish government recognized that the Sami people had a special status as an indigenous people and as such had rights under international law.[20] Any official apology or recognition of the historical violations by the state of the Sami people has never really been offered.

The historic state-Sami relationship has been of an oppressive nature and the effects of this relationship still lingers. Exclusion from decision-making and non-participation runs like a common thread throughout the centuries and continues to this day.[21] It is clear that policies and decisions regarding the Sami people have been made repeatedly without them being able to participate in the process and that this is the cause of many of the issues still facing them.[22] Even though the state has left their explicitly racist policies in the past, many of the current laws are based on, or directly copied from, earlier legislation influenced by notions of the Sami as an inferior race.[23]

The issues currently facing the Sami all have non-participation as a common denominator. The deteriorating conditions for reindeer husbandry are the result of the Sami people not being allowed to decide on how and for what their traditional lands are being used.[24] The presence of non-Sami hunters and fishermen is disruptive to the reindeer husbandry but also takes a toll on limited natural resources on the traditional Sami lands.[25] The laws regulating this were passed despite vocal protests by the Sami people and were designed without their involvement.[26] The category splitting of the Sami people and the resulting internal conflicts are to a large extent the result of state policies and definitions that the Sami people have had no say on.[27] The weak

[19] Kråik Jannok, Anneli, 'Språket en viktig pusselbit för samisk identitet', *Samer* [website]. 20/5-2014. http://www.samer.se/4435. (Accessed 8/5-2018).
[20] Proposition 1976/77:80 Om insatser för Samerna.
[21] See for example Lundmark, Lennart. *Så länge vi har marker.*
[22] See for example Lundmark, Lennart. *Så länge vi har marker* and Rolf Sjölin. The Sami in Swedish Politics. In *The Sami National Minority.* Birgitta Jahreskog. (ed), 11-22. Stockholm: Almqvist & Wiksell, 1982,
[23] See for example Lundmark, Lennart. *Så länge vi har marker,* 113.
[24] See for example Baer, Lars Anders. The Sami – An Indigenous People in Their Own Land. In *The Sami National Minority.* Birgitta Jahreskog. (ed), 11-22. Stockholm: Almqvist & Wiksell, 1982, 18.
[25] Lundmark, Lennart. *Så länge vi har marker,* 127.
[26] Ibid, 131.
[27] See for example Lundgren Skerk, Josefina, 'Speech by Josefina Lundgren Skerk', *Sametinget* [website], 2015. https://www.sametinget.se/88495. (Accessed 8/5 2018).

standing of the Sami Parliament as a vehicle for Sami self-determination and participation is also the result of state policy that hinders them from exerting any real influence or decision-making power, despite being the publicly elected representatives of the Sami people.[28] Not only are these problems the result of past exclusion from decision-making – by their existence they continue to hinder the Sami people from effectively participating in such processes.[29]

The current Swedish policy on Sami issues appears to be much friendlier than its historic predecessors. Through an amendment in 2011, the Sami is now explicitly mentioned as a separate people in the Swedish constitution and that they as such are deserving of certain rights.[30] It is clear that the present Swedish government endeavours to, or at least likes to keep up the appearance of, acknowledging and being respectful towards the Sami people. For example, the minister responsible for Sami affairs made headlines when she wore a dress by a Sami designer featuring distinct Sami patterns to the Nobel Prize Ceremony in 2014[31] and she has been a permanent fixture at the annual openings of the Sami Parliament and Sami national day celebrations since taking office. Additionally, in their *Strategy for National Efforts with Human Rights*, the government stated that they intended to:

> continue the work with an increased level of ambition to promote the opportunities for the Sami people to keep and develop their own culture and society and strengthen the Sami people's right to self-determination. The government wants to protect a Sami civil society that has faith in the future. The special status the Sami people has as Sweden's indigenous people shall be respected and the compliance with their rights shall be secured.[32]

To fulfil these goals, the government explicitly mentioned the work with introducing a specific consultation act.

A new chapter in the story of Sami participation began in September 2017 with the proposal for a new Consultation Act. If passed by the Swedish parliament, the law will give rise to a duty for the government, all state agencies, municipalities to consult with the Sami parliament or representatives of the Sami people on all matters that are of particular importance to them. The aim of the proposed law is to "promote and strengthen the Sami people's influence over

[28] See for example Mörkenstam, Ulf and Lawrence, Rebecca. Självbestämmande genom myndighetsutövning? *Statsvetenskaplig Tidskrift.* Vol. 114 no. 2 (2012): 207-239.
[29] See for example Baer, Lars Anders. The Sami – An Indigenous People in Their Own Land. In *The Sami National Minority.* Birgitta Jahreskog. (ed), 11-22. Stockholm: Almqvist & Wiksell, 1982, 15.
[30] SFS 1974:152. *Regeringsformen* 1 kap. 2 §.
[31] Sarri, Thomas, 'Alice Bah Kuhnke i samiskt på Nobelfesten', *Sveriges Radio* [website], 11/12-2014. http://sverigesradio.se/sida/artikel.aspx?programid=2327&artikel=6042969 (Accessed 8/5-2018).
[32] Regeringens skrivelse 2016/17:29 *Regeringens strategi för det nationella arbetet med mänskliga rättigheter*, 60.

their own matters in decision-making processes"[33]. The proposal is clearly following the trend where the Swedish government acknowledges that the Sami people is an indigenous people and that they as such have certain rights that are not applicable to other sectors of the population. But with the disappointing history in mind it is hard not to remain sceptical. Is this a genuine attempt of the Swedish government to redeem themselves for past human rights abuses and make itself a pioneer in this area as it has been in others – or is this merely window dressing? A proposal conceived to silence the critics for the time being? Should the Consultation Act be seen as a proverbial band aid on the large and oozing wound that make up Sami and state relations?

1.2 Purpose of the Study and Research Questions

The purpose of the study is to answer the question:

> Does the proposed Consultation Act fulfil the international standard concerning the right of the Sami people to effectively participate in decision-making processes?

This thesis will examine whether the proposed Consultation Act is compatible with Sweden's binding international legal obligations and if it will be in compliance with the right to participation as interpreted by authoritative bodies. The aim of the Consultation Act is to promote and strengthen the Sami people's influence over their own matters in decision-making processes and to be in line with Sweden's international obligations. The aim of the proposal makes it necessary to compare with not only the affirmed legal obligations but also with what authoritative bodies have identified as necessary elements for actually ensuring effective and genuine indigenous participation. The underlying hypothesis is that there might be a discrepancy between the content of Sweden's international legal obligations and what practice is actually needed to promote and strengthen the Sami people's influence in all matters concerning them.

To answer the main research problem, the following research questions will be examined:

- How can the right to participation in relation to indigenous peoples be defined?

[33] Ibid,1.

- What is the current standard of the right to participation under international law as interpreted by authoritative bodies?
- Is the proposed Consultation Act in line with the identified current standard?

1.3 Delimitations

The thesis will focus on the participatory rights of the Sami people. These rights emanate from a range of different norms including, but not limited to, the right to self-determination. The thesis will therefore not discuss the set-up of the Sami parliament or its potential institutional deficiencies as an authority through which the autonomy and self-governance aspects of the right to self-determination can be practiced. This thesis will focus on how and if the new Consultation Act will strengthen the ability of the Sami parliament to participate in and genuinely influence decision-making in matters affecting Samis. Not the efficiency of the institution itself in this process.

Nor do I go into the debate surrounding the application of the status of "national minority" on indigenous peoples like the Sami. This is a very contested issue and the Sami people have expressly renounced such a classification[34]. For the purpose of this thesis, it suffices to state that they are considered a national minority under national law and minority rights will be applicable to them in practice, regardless of whether they welcome this protection or not.

There are of course many other pressing issues for the Sami people which raises the question of the extent of Sweden's international obligations. However, since the purpose of the thesis is to evaluate the compliance of the proposed Consultation Act it is only the international standard of the right to participation that will be examined. For example, the thesis will not go into detail regarding the issue of Sami land rights. For the purpose of my thesis it suffices to say that the right to participation is often actualized in matters concerning the use of land.

The thesis will not discuss whether the right to self-determination applies to indigenous peoples. This has historically been a matter of great debate but that indigenous peoples have a right to self-determination can be argued to be a well-established principle these days.[35] That is the underlying assumption that this whole thesis is based upon.

[34] Heikki, Jörgen, 'Sametinget vill slopa begreppet nationell minoritet', *Svt Nyheter* [website], 12/8-2015. https://www.svt.se/nyheter/lokalt/jamtland/sametinget-vill-slopa-begreppet-nationell-minoritet (Accessed 8/5-2018).
[35] Åhrén, Mattias. *Indigenous People's Status in the International Legal System.* New York: Oxford University Press, 2016, 100.

I will only look at the situation of the Sami people in Sweden and not in Norway, Finland or Russia where the rest of the Sami people resides. Small comparisons will be made with the Norwegian equivalent to the Consultation Act due to the government listing this act as one of the "inspirations" for the Swedish Consultation Act. The joint Nordic Saami Convention will also be discussed to some degree, both as a basis for the Swedish proposal but also as a potential source of regional legal obligations if it is ratified. A comparative study between the different countries inhabited by the Sami people would of course be of immense value, as it is a people that transgress state borders, but that would be beyond the scope of this thesis.

1.4 Method

To examine the content of the participatory rights of indigenous peoples in general and for the Sami people in Sweden in particular, a legal doctrinal method is employed. The legal doctrinal method is "research that aims to give a systematic exposition of the principles, rules and concepts governing a particular legal field […] and analyses the relationship between these principles, rules and concepts with a view to solving unclarities and gaps in the existing law".[36]

The content of the international and regional treaties will be analysed with the help of legal interpretation. The method of legal interpretation used is largely based on Martin Scheinin's chapter "*The art and science of interpretation in human rights law"* in the anthology "*Research Methods in Human Rights"*[37] and is outlined below:

For the interpretation of the relevant treaty norms, articles 31 and 32 of the VCLT acts as a point of departure.[38] In line with article 31 of the VCLT, this thesis will interpret treaty provisions "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". According to Scheinin, this calls for a systematic interpretation where attention is directed to the provision's "own linguistic expression but also taking into account that all other provisions in a treaty (and other texts adopted in parallel to it) will affect how that linguistic expression is to be understood".[39]

[36] Smits, Jan. M. What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research. In *Rethinking Legal Scholarship: A Transatlantic Dialogue*. Rob van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds.), 207-228. New York: Cambridge University Press, 2017, 5.
[37] Scheinin, Martin. The Art and Science of Interpretation in Human Rights Law. In *Research Methods in Human Rights.* Bård Andreassen and Siobhán McInerney-Lankford. (eds.), 17-37. Cheltenham: Edward Elgar Publishing, 2017.
[38] Ibid, 23.
[39] Ibid.

Article 31(3) adds other factors that should be taken into account when interpreting treaty provisions, namely: (a) subsequent agreements regarding the interpretation or application of the provisions (b) subsequent practice in the application of the treaty and (c) any relevant rules of international law applicable in the relations between the parties. Scheinin argues that this paragraph broadens "the understanding of what counts as context" and that subparagraph (c) "clearly goes beyond the context of a specific treaty and establishes a principle of coherence-based understanding of any provision of international law".[40]

Article 32 offers supplementary means of interpretation if the interpretation in accordance with article 31 has left the meaning "ambiguous or obscure" or if it "leads to a result which is manifestly absurd or unreasonable". The article offers a short, but not exhaustive[41], list of two means of supplementary interpretation: the preparatory work of the treaty and "the circumstances of its conclusion", which here means "other statements or events related to the conclusion of the treaty than those already included under 'context' in article 31[2]".[42] Scheinin argues that even though the VCLT lists preparatory works as a supplementary means of interpretation, they have a crucial part to play under article 31 when establishing "in good faith what the object and purpose was, or how the ordinary meaning of the terms of the treaty was understood at the time it was drafted".[43]

A limitation of the VCLT that is of great importance for human rights research in general[44] and for this thesis in particular, is the fact that the VCLT does not at all mention "the interpretive authority of a court, tribunal or treaty body established under a treaty".[45] As follows, the VCLT offers no guidance how to relate to the numerous concluding observations, recommendations and even case law on the topic of indigenous participatory rights that have been issued by treaty bodies and courts. This is the material that is "relied upon when presenting informed opinions on what is the correct interpretation of a particular treaty provision".[46] Despite this, Scheinin argues that case law from treaty bodies and courts can indeed be used as a means of interpretation. Due to these judicial or quasi-judicial bodies being:

[40] Ibid, 24.
[41] Ibid.
[42] Ibid.
[43] Ibid, 25.
[44] Ibid, 27.
[45] Ibid, 22.
[46] Ibid, 27.

> "created to monitor state compliance with the treaty, it will possess the *inherent power* to interpret the treaty at the level of international law and hence with considerable authority in respect of individual states that are bound by the treaty".[47]

Additionally, the fact that VLCT article 31(3)(b) lists "subsequent practice" under its primary means of treaty interpretation and that judgements by treaty established courts and monitoring bodies "do count as subsequent practice that establishes the correct interpretation of the provisions of the treaty in question" further supports the use of these documents as means of interpretation.[48]

Additionally, in the second part of the thesis, a comparative and critical analysis will be used to assess the compliance of the proposed Consultation Act with Sweden's international and regional legal obligations as well as the current standard of the right to participation.

1.5 Material

In line with the sources doctrine of international law, international treaties such as the ICCPR, ICESCR, UN Convention on Biological Diversity, ILO Convention no. 169 together with the UNDRIP will be examined as the main sources of the legal obligations concerning indigenous participatory rights. The recommendations, general comments, concluding observations from different treaty bodies (the HRC, CESCR, CERD, CEACR of the ILO etc.) will be used for authoritative guidance on the content of these obligations. Other international documents and soft law provisions including ILA res. No 5/2012, the 2nd Thematic Study of the EMRIP on the Right to Participate in Decision Making, sources from the Inter American-system, reports from the Special Rapporteurs on the Rights of Indigenous Peoples will also be used to further clarify the content of the current standard of the right to participation.

Treaties and soft law concerning the right to participation of national minorities will also be examined due to the Sami people's dual status as both an indigenous people and a national minority under national law. Main documents include the European Council's Framework Convention for the Protection of National Minorities and the OSCE's Lund Recommendations on the Effective Participation of National Minorities in Public Life.

[47] Ibid, 29.
[48] Ibid, 30.

The very foundation for this thesis is found in the proposal for a new Consultation Act *DS 2017:43: Konsultation i frågor som rör det samiska folket* which is thoroughly examined together with some of the comments on the proposal by different parties obtained by the government through their consultation process.[49] The thesis also relies on the legal doctrine concerning the issue of indigenous participation rights.

1.6 Literature Review

Since the proposal for a new Consultation Act was introduced as recently as in September 2017, very little scholarship on the issue exists. Christina Allard, associate professor at Luleå University of Technology, published an article in the February 2018 issue of the *Arctic Review of Law and Politics* examining the rationale for the duty of consultation with indigenous peoples in Norway, Finland, Canada and Sweden. She outlines the current legal basis for consultation in Sweden and briefly presents the Consultation Act-proposal and concludes that if the law is passed "it will allow the Sami Parliament, other Sami organisations and affected reindeer herding communities to have a stronger influence in matters pertaining to the Sami people and their own future".[50] Other than that, there has not been any scholarly activity regarding the proposed Consultation Act outside of statements made by academics in news reports in the wake of the proposal. However, this is likely to change once the final law proposition is presented before the parliament and is potentially passed as a law.

The literature outlining the content of indigenous peoples' right to participation is far more extensive. These scholarly pursuits have been essential for the outlining of the content and scope of the current standard of the right to participation of indigenous peoples. One of the leading scholars on indigenous rights is James Anaya, the Dean of the University of Colorado Law School and former U.N. Special Rapporteur for the Rights of Indigenous Peoples. He has authored two books that can be considered general references for international indigenous peoples law; *International Human Rights and Indigenous Peoples*[51] and *Indigenous Peoples in International Law.*[52] Mattias Åhrén, a Professor of Sami origin at the Arctic University of Norway, has authored *Indigenous Peoples' Status in the International Legal System*[53] which

[49] N.B. not "consultation" in the indigenous rights sense of the word but a procedure that is part of the Swedish legislative process where the government collects comments and suggestions on law proposals.
[50] Allard, Christina. The Rationale for the Duty to Consult Indigenous Peoples: Comparative Reflections from Nordic and Canadian Legal Contexts. *Arctic Review on Law and Politics.* Vol. 9 (2018): 25-43, 33.
[51] Anaya, James. *International Human Rights and Indigenous Peoples.* Austin: Wolters Kluwer Law & Business, 2009.
[52] Anaya, James. *Indigenous Peoples in International Law*.
[53] Åhrén, Mattias. *Indigenous People's Status in the International Legal System.*

expertly outlines the international obligations applicable to indigenous peoples and, of great relevance to this thesis, examines the participatory aspects of the right to self-determination.

Another title of general reference to the topic is Ben Saul's *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* which, as the name implies, outlines the jurisprudence of international and regional bodies that has been crucial for the shaping of indigenous rights as we know them today. The anthology *Operationalizing the Right to Self-Determination of Indigenous Peoples*, edited by Pekka Aikio and Martin Scheinin, collects texts by academics, indigenous activists and international lawyers. The book addresses self-determination as a collective human right under international law, discusses governmental objections to applying the right of self-determination to indigenous peoples and describes the operationalisation of self-determination in the Sami Parliaments and the Sami Council.[54]

There are a few key publications discussing international indigenous rights in the specific context of the Sami people. In 2016, Christina Allard and Susann Funderud Skogvang published an anthology entitled *Indigenous Rights in Scandinavia – Autonomous Sami Law* which offers an analysis of the current legal position of the Sami people in the Nordic states as well as offering recommendations on *de lege ferenda.* In 2013, a collection of essays titled *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* edited by Nigel Bankes and Timo Koivurova. The anthology was published as a way of providing "a global and theoretical context" for the development of the Draft Nordic Saami Convention as well as examining "the international legal issues associated with the Convention".[55]

1.7 Disposition

After the introduction, the second chapter will be dedicated to outlining the basis and content of the right to participation in decision making processes in matters that concern indigenous peoples. This chapter will start with a presentation of the development of the right to participation in international law. Where does the right have its origins and how has it been crafted as part of the international standard? The following section will introduce possible

[54] Åbo Akademi, 'Operationalizing the Right of Indigenous Peoples to Self-Determination", [website], 2000. http://web.abo.fi/instut/imr/publications/books/9521206853.htm (Accessed 8/5-2018).
[55] Hart Publishing, 'The Proposed Nordic Saami Convention- National and International Dimensions of Indigenous Property Rights'. *Bloomsbury Professional* [website], 2013. https://www.bloomsburyprofessional.com/uk/the-proposed-nordic-saami-convention-9781849462723/ (Accessed 8/5 2018).

definitions of the right to participation. The next section will outline the legal basis of the right to participation in decision-making processes and how the right has been interpreted by authoritative bodies. This will be done by examining the content of different treaty provisions, jurisprudence from the HRC and other UN Treaty Bodies, the IACtHR, reports from Special Rapporteurs and the EMRIP as well as other soft law documents. The following section will briefly discuss the legal force of soft law documents. The last section will offer a conclusion on what the current standard of the right to participation is as interpreted by authoritative bodies and outline the identified elements of this standard.

In the third chapter, the proposal for a new Consultation Act will be examined. The first section will outline the background of the draft. This section will include the reasoning of the government for introducing this draft, the inspiration behind it as well as a brief look at what participatory rights the Sami already have under current legislation. The next section will outline the content of the proposal to clarify what duties and corresponding rights it will give rise to if passed.

The fourth chapter will with the use of a comparative and critical analysis, examine whether this proposal for a new Consultation Act will be in line with the earlier identified current standard of the right to participation. The chapter will conclude with a section of concluding remarks summarizing the earlier findings and offer some suggestions on how the Consultation Act could be improved to be in compliance with the international standard of the right to participation.

2. The Right to Participation of Indigenous Peoples

2.1 Introduction

Indigenous rights are currently one of the most dynamic areas of international law and the right to participation has taken centre stage within contemporary indigenous activism. The right to participation is hard to define due to its multiple dimensions and as many interpretations. For example, the CERD argues for the indigenous right to participation in terms of non-discrimination, the HRC uses mainly cultural rights as their framework while UNDRIP frames it in terms of indigenous self-determination.[56] Other bodies have instead focused on land and property rights as the foundation of the right.[57] This chapter will more closely outline these various interpretations and their legal foundations to identify the elements of the right to participation and to see how the current standard of the right has been interpreted by authoritative bodies. Regardless of from which perspective the right to participation is argued, the aim of the argumentation is the same – to increase the influence of indigenous peoples over their own lives and futures and to rectify their historical exclusion from decision-making.

As mentioned previously, the historic situation of the Sami people is in no way unique. All around the world indigenous peoples have been oppressed and persecuted. They have been marginalised in their own lands and other parties have thought themselves better suited to decide over the lives and futures of these peoples. Because of this history, a desire for participation and influence has been created. This chapter will start by outlining the development of the indigenous right to participation, to answer why this norm exists on an international level. The next section will outline the international and regional legal framework for the right to participation. The section will also present how the right to participation has been interpreted by authoritative treaty bodies and other institutions. This will show what states actually have to do in practice to not only fulfil their international obligations, but also what is needed to ensure the effective participation of indigenous peoples. The following section will introduce a brief discussion on the legal force of the soft law documents outlined. The chapter

[56] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 2-3.
[57] Ibid, 3.

will end with a concluding section that summarizes the elements needed for effective and genuine participation.

2.2 Development of the Right to Participation in International Law

Under the early human rights instruments of the UN, the only beneficiaries of human rights were individual human beings and the human rights regime established at the time focused on anti-discrimination and the integration of all into an equal society.[58] However, this focus did not satisfactorily ensure the rights of the world's different indigenous peoples. In response to the lacunae in the international human rights regime, indigenous organisations started to get involved in the normative development at an international level, for example through the UN Working Group on Indigenous Populations and the drafting of the ILO no. 169.[59] One of the latest developments under indigenous peoples' rights is the right to participation in decision-making processes on matters that concern them.

Asbjörn Eide, one of Norway's leading experts on human rights, identifies two interrelated trends that have led to the emerging of the right to participation for indigenous peoples:

1. Growing pressure: There is an increased demand by the dominant society on the natural resources on traditional indigenous land. This is due to the advent of modern technology, the pursuit of economic profit and growth, and increased accessibility due to global warming. [60]
2. A stronger resistance: Increased organization of indigenous peoples to oppose the outside pressure which has led to more attention to their plight. For example, during the mid to late 1970's, the World Council of Indigenous Peoples, the Inuit Circumpolar Conference as well as the International Indian Treaty Council was established. Their demands focused on increased participation in decision-making processes that concerned their lives and their resources. These regional and global indigenous movements have "received an increasingly positive response at the normative level by the international community, particularly through the United Nations human rights bodies". [61]

[58] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources. *The Yearbook of Polar Law.* Vol. 1 no. 1 (2009): 245-281, 249.
[59] Ibid.
[60] Ibid, 247.
[61] Ibid.

The first explicit mention of a right to participation in a major international instrument was included in the ILO Convention no. 169 in 1989. Another important event for the development of the right to participation was the establishment of the WGIP in 1982[62] which was given a mandate to review human rights developments and the situation of indigenous peoples and promote the evolution of international standards on indigenous rights.[63] In 1985, WGIP also began the work on preparing a Draft Declaration on the Rights of Indigenous Peoples. [64] The Draft Declaration as well as the finalized UNDRIP in 2007 both include a far reaching right to participation that includes consultation and free, prior and informed consent.[65] There has also been an increased mention of the right to participation by UN Human rights bodies in the past few decades, where these bodies have derived a right to participation for indigenous peoples from several of the major human rights treaties including the ICCPR, ICESCR and the ICERD.[66] This leaves us with the status of the right to participation we have today, where it is definitely part of the international standard but the exact content and the exact scope of its legal force is less clear.

2.3 Defining the Right to Participation

There is not one universally agreed upon definition of the right to participation, instead the interpretation of the right depends on the source one refers to. The words "participation", "consultation" and "self-determination" are sometimes used interchangeably and sometimes they are discussed as separate but interrelated concepts. In this thesis, the term "consultation" will be used to describe a process that can be employed to ensure the right to participation and "self-determination" as one possible legal basis from which the right to participation can be argued. Free, prior and informed consent (or FPIC) is another concept that is repeatedly invoked as a strategy for ensuring the right to participation.

The UNDRIP defines the right to participation as indigenous peoples having "the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures".[67] ILO no.

[62] Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 34th session: study of the problem of discrimination against indigenous populations. E/CN.4/RES/1982/19, paras. 1-2.
[63] Anaya, James. *Indigenous Peoples in International Law*, 63.
[64] Ibid.
[65] See UNGA resolution 61/295 (13 September 2007), Annex: UN Declaration on the Rights of Indigenous Peoples, art. 18 and E/CN.4/Sub.2/1994/, art. 19.
[66] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 1-2.
[67] UNGA resolution 61/295 (13 September 2007), Annex: UN Declaration on the Rights of Indigenous Peoples, art. 18.

169 states that the right to participation is ensured when indigenous people are able to "freely participate […] at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them".[68] A way to ensure such participation is to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly".[69]

James Anaya defines the right to participation as a right that ensures the "effective participation of [indigenous] communities in all decisions affecting them that are left to the larger institutions of decision-making".[70] He further argues that the "concept of participation has given rise to requirements of consultation that are to be applied whenever the state makes decisions that may affect indigenous peoples". His definition and interpretation will be used as a point of departure in this thesis while the aspects that are needed to ensure "effective" participation depends on the different interpretations and legal frameworks, which will be surveyed in the sections below.

2.4 The Legal Framework of the Right to Participation and the Current Standard under International Law

2.4.1 International Standards

2.4.1.1 ICCPR and the HRC

The *International Covenant on Civil and Political Rights* doesn't include any explicit mention of indigenous peoples but has increasingly been used to advocate and promote the rights of such communities.[71] It is mainly article 27 that has become the basis of those claims.[72] Article 27 states that:

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

As mentioned previously in this chapter, article 27 was only intended for individual right-holders when the convention was drafted. But through HRC's application, a collective

[68] ILO Convention No 169 concerning Indigenous and tribal Peoples in Independent Countries, 5 September 1991, art. 6(b)
[69] Ibid, art. 6(a).
[70] Anaya, James. *Indigenous Peoples in International Law*, 151.
[71] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 1-2.
[72] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 250.

dimension of the right has slowly evolved. When indigenous peoples have brought claims before the HRC based on article 27, states have rarely denied that the right has a collective dimension.[73] Åhrén suggests that this means that states have indirectly accepted the HRCs interpretation of the article and that it therefore constitutes subsequent practice pursuant to VCLT article 31.3(b) and the provision has thus evolved to take on a new meaning.[74]

In their 1995 General comment no 23, the HRC declared that article 27 is applicable to the distinct situation of indigenous peoples:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[75]

In the Apirana Mahuika-case[76], the HRC explicitly underlined the interdependence between article 27 and article 1's right to self-determination. The Committee submitted that the right to culture enjoyed by indigenous individuals must be understood in light of the collective right to self-determination. [77]

Indigenous organisations have for a long time argued that the right to self-determination set down by common article 1 ICCPR & ICESCR is applicable to all indigenous peoples.[78] Article 1 holds that all peoples have a right to freely determine their political status and freely pursue their economic, social and cultural development. They may for their own ends freely dispose of their natural wealth and resources. Since 1998, the HRC have included implementation of the right to self-determination for domestic beneficiaries as one of the issues member states should comment on in their reports to the treaty body.[79] According to Eide, this has resulted in a conception of an internal right to self-determination based on the interdependence between article 27 and article 1. This approach gives rise to the possibility that the right to self-determination when read in the light of article 27 could require a degree of autonomy, or self-

[73] Åhrén, Mattias. *Indigenous People's Status in the International Legal System*, 92.
[74] Ibid.
[75] UN Doc. CCPR/C/21/Rev.1/Add.5, para. 7.
[76] UN Doc. CCPR/C/70/D/547/1993.
[77] Åhrén, Mattias. *Indigenous People's Status in the International Legal System,* 92.
[78] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 251.
[79] Ibid.

government, by an ethnic or indigenous group inside the state, i.e. giving them a right to participate and exert influence on matters that concerns them.[80]

The HRC has explicitly linked the right to self-determination to the situation of indigenous peoples in different states. [81] For example it has urged Australia to strengthen the possibilities for its aboriginal peoples to participate in decision-making on matters that concern their traditional lands and resources. [82] When assessing Sweden's compliance with article 1, the HRC showed concern over the fact that Sweden didn't satisfactorily include the Sami people in decision-making processes that concern them.[83] In several concluding observations, the HRC recommends that the state in question consult affected indigenous communities before the granting of any licences for exploitation of traditional lands.[84]

The base requirement in article 1 in the context of indigenous peoples is that states ensure effective participation of indigenous peoples in decision-making processes that may affect their interests. Indigenous peoples should be allowed to participate in state institutions and in decision-making processes concerning their culture, lands and resources.[85] The HRC has further stated that before authorizing economic exploitation of lands under dispute, states must ensure effective consultation.[86] HRC further requires that the free, prior and informed consent of the affected indigenous people should be obtained before the exploitation of their natural resources.[87]

In their concluding observations on Sweden in 2016, the HRC was concerned by the limited circumstances and extent to which the state had to consult with representatives of the Sami people regarding extractive and development projects.[88] The HRC recommended Sweden to review legislation, policies and practices connected to the rights of the Sami people and change these so that "meaningful consultation aimed at attempting to obtain their FPIC" could be guaranteed.[89]

[80] Ibid.
[81] See for example UN Doc. CCPR/C/79/Add105, para. 8.
[82] UN Doc. A/55/40 498-528.
[83] UN Doc. CCPR/CO/74/SWE, para. 15.
[84] See for example UN Docs. CCPR/C/CAN/CO/5 2006 and CCPR/C/CHL/CO/5 2007.
[85] Tomaselli, Alexandra. The Right to Political Participation of Indigenous Peoples: A Holistic Approach. *International Journal on Minority and Group Rights*. Vol. 24 no. 4 (2017): 390-427, 400.
[86] Ibid.
[87] Ibid.
[88] UN Doc. CCPR/C/SWE/CO/7, para. 38.
[89] Ibid, para. 39.

The duty to consult and to allow for participation extends to other policy areas beyond land and natural resources. At the political level, the HRC was concerned that indigenous peoples had not been sufficiently consulted on Mexican constitutional reforms that affected their rights,[90] or on an Australian proposal to replace a national representative indigenous body.[91]

The HRC has further discussed the right to participation of indigenous peoples in its jurisprudence. In Ilmari Länsman (Länsman I) from 1992, the committee found that there had been no violation of the applicant's article 27 rights as they had been consulted and their interests had been taken into consideration in the decision-making process. This can be viewed as a sort of "minimum standard" for effective participation: Indigenous peoples are to be consulted and their interests should be heard and taken into consideration.[92]

In Jouni Länsman (Länsman II),[93] the committee held that states must take measures "to ensure the effective participation of members of minority communities in decisions that affect them".[94] HRC found that the consultation in this particular case fulfilled these requirements. The HRC cited Länsman I and found that the applicant in Länsman II had been properly consulted with and that the authorities "did go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management".[95] In the two Länsman-cases, the HRC introduced a two-part test when assessing whether a violation of article 27 rights of indigenous peoples had taken place. Firstly, the HRC assessed whether there had been adequate consultation. Secondly, the committee did not allow the economic wellbeing of the majority population to be used as a legitimate justification for eroding the culture of persons belonging to an indigenous or minority group. What counts is the viability and sustainability of the indigenous economy.[96]

This test was developed further in the Poma Poma-case[97], where the committee found that:

[90] UN Doc. CCPR/C/MEX/CO/5, 2010 para 22.
[91] UN Doc. CCPR/C/AUS/CO/5, 2009 para. 13.
[92] UN Doc. CCPR/C/52/D/511/1992, para. 9.6.
[93] UN Doc. CCPR/C/58/D/671/1995.
[94] Ibid, para. 10.4.
[95] Ibid, para. 10. 5.
[96] Scheinin, Martin. The Right to Self-Determination under the Covenant on Civil and Political Rights. In *Operationalizing the Right of Indigenous Peoples to Self-determination.* Martin Scheinin and Pekka Aikio. (eds.), 179-202. Åbo: Åbo Akademi University, 2000, 196-197.
[97] UN Doc. CCPR/C/95/D/1457/2006.

> the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.[98]

When decisions or measures that can substantially be to the detriment of indigenous culturally significant economic activities, HRC has found that the right to participation goes further than merely requiring consultation – their free, prior and informed consent must be obtained.[99] The HRC has for example criticised the newly drafted laws in Bolivia and Peru that only prescribed consultation but did not include a requirement of FPIC. The standard of consent in relation to indigenous peoples, has been found to be rather high.[100] For example, the HRC criticized Peru when not all affected communities had given their consent to a road-building project.[101]

This affirms that to ensure effective participation, both consultation and FPIC of indigenous peoples is needed. Consultation and FPIC are needed when legislative or administrative measures are likely to affect indigenous peoples' rights under article 1.2, i.e. their right to freely dispose of natural resources and not to be deprived of its own means of subsistence.

2.4.1.2 ILO no. 169; Convention concerning Indigenous and Tribal Peoples in Independent Countries

The drafting of ILO Convention no. 169 in 1989 was a ground-breaking moment for the status of indigenous peoples under international law. The paternalistic and assimilationist underpinnings of its predecessor, the ILO Convention no 107, were removed, and instead the aim of the ILO no. 169 was to enable indigenous people to maintain:

> their own different identities and ensuring self-identification, totally exempt from pressures which might lead to forced assimilation, but without ruling out the possibility of their integration with other societies and life-styles as long as this is freely and voluntarily chosen.[102]

[98] UN Doc. CCPR/C/95/D/1457/2006, para. 7.6.
[99] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 62.
[100] Ibid.
[101] UN Doc. CCPR/C/PER/CO/5, para. 24.
[102] International Labour Conference Provisional Record 31, 76th session at 31/4-5 1989. Quoted in Anaya, James. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2004, 138.

Perhaps most notable is the use of the phrase "peoples in independent countries" in its title, as this implies that there can be more than one people within a state. This was contrary to the earlier prevailing idea that "people" referred to the aggregate population of a state.[103] However, article 1.3 confirms that the term "peoples" should not be construed as having any implications regarding the rights which may attach to the term under international law. Nevertheless, the convention had a great normative effect on the standing of indigenous peoples as it required states to consult with indigenous peoples on matters that could affect them and gave indigenous peoples the right to decide over their own development.[104] The convention emphasizes the importance of participation for indigenous peoples as well as the importance of allowing them to have influence over their own affairs.[105] One of the fundamental pillars of the convention is participation and specifically the participation of indigenous peoples in decision-making processes on matters that affect them.[106] It further sets out ground-breaking principles regarding ownership and control over indigenous traditional lands and natural resources.[107] Thornberry sees the ILO no. 169 as considerably less idealistic than other documents concerning indigenous peoples rights but that its value lies in it being a "pragmatic working instrument which can alleviate many indigenous concerns, and raise the profile and esteem in which the peoples are held by governments and the general population."[108]

The ILO no. 169 is only ratified by 20 states and Sweden is not one of them. Nevertheless, Ben Saul argues, "the low number of ratifying states understate the normative effects of ILO mechanisms, since they also engage ILO member states on ILO instruments that states have not ratified, including Convention No 169".[109] Its importance on a normative level is further exemplified by the fact that international, regional and national courts and bodies have all considered its provisions, especially within the Latin-American system.[110]

In their application and interpretation of the convention, the ILO supervisory bodies have found that the convention includes a strong requirement for the effective participation of indigenous peoples in decision-making processes on matters concerning their rights and interests.[111] To

[103] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 252.
[104] Ibid.
[105] Ibid.
[106] Thornberry, Patrick. *Indigenous Peoples and Human Rights*. New York: Manchester University Press, 2002, 417.
[107] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 252.
[108] Thornberry, Patrick. *Indigenous Peoples and Human Rights*, 417.
[109] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 6.
[110] Ibid.
[111] ILO, 'Indigenous & Tribal Peoples' Rights in Practice', *ILO* [website], 2009. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_171810.pdf. (Accessed 8/5-2018), 59.

ensure the realization of effective participation of indigenous peoples, the establishment of effective consultation processes is crucial.[112] The principles of consultation and participation are interrelated and as a result "consultation is not merely the right to react but indeed also a right to propose".[113]

The right to consultation is found in article 6.1:

> a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

and in its second paragraph the convention offers instructions on how this consultation should be set up:

> The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

This means that consultation should not only be a matter of informing indigenous peoples about the measures that will affect them, but rather it should be set up so that they are allowed genuine influence and involvement in decision-making processes affecting them.[114] Governments are through article 6 required to consider indigenous peoples own decision-making processes and ensure that they have access to any relevant information and expertise.[115] Anaya argues that when any decision is made that is in contradiction with the position of the affected indigenous community, the consultation provisions of the ILO convention obliges states to justify that decision "in terms consistent with the full range of applicable international norms concerning indigenous peoples".[116] It is however important to note that the convention's travaux préparatoires show that the article does not include a veto right for the affected indigenous people.[117]

[112] Ibid.
[113] Ibid, 60.
[114] Anaya, James. *Indigenous Peoples in International Law*, 154.
[115] Ibid.
[116] Ibid, 154-155.
[117] Myntti, Kristian. The Right of Indigenous Peoples to Self-Determination and Effective Participation. In *Operationalizing the Right of Indigenous Peoples to Self-determination.* Martin Scheinin and Pekka Aikio. (eds.), 85-130. Åbo: Åbo Akademi University, 2000, 120.

Article 7 sets out a right of indigenous peoples to participate in development plans affecting them. An ILO guide from 1995 states that the right does not entail a right of veto but that there must be "actual consultation in which indigenous peoples have a right to express their point of view and a right to influence the decisions".[118] The article requires signatory parties "to supply the enabling environment and conditions to permit indigenous and tribal peoples to make a meaningful contribution"[119] This can include ensuring that the indigenous party acquire the "skills and capabilities needed to understand and decide upon the existing development options".[120] Importantly, there is no consent requirement included in the article, not even when a project risks the subsistence and cultural life of the indigenous community. The state thus retains ultimate decision-making authority on such issues under the convention.[121]

ILO supervisory bodies have held that "the spirit of consultation and participation constitutes the cornerstone of ILO Convention No. 169 on which all its provisions are based."[122] The rights set out in Articles 6 and 7 are fundamental to the aim and purpose of the convention as a whole and form the "basis for applying all the others",[123] but explicit mention of both participation and consultation is found in other articles as well.[124]

For example, article 15 sets out a right of indigenous peoples to participate in the use, management and conservation of their natural resources. This means that indigenous peoples should have influence over decisions regarding natural resource exploitation and that they should be the beneficiaries of such activities.[125] Through article 16, state parties are required to acquire the free, prior and informed consent of the indigenous people before they are removed from the lands which they occupy. Article 17 further requires consultation whenever consideration is being given to their capacity to alienate lands to those outside their community. Article 20 states that indigenous peoples should be involved in the adoption of special measures aimed at ensuring the effective protection in recruitment and conditions of employment of

[118] ILO Guide 1995, 9. Quoted in Thornberry, Patrick. *Indigenous Peoples and Human Rights*. New York: Manchester University Press, 2002, 349.
[119] Thornberry, Patrick. *Indigenous Peoples and Human Rights*. New York, 349.
[120] Ibid.
[121] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 6.
[122] Report of the Committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL), GB.277/18/4, GB.282/14/2 (Nov. 14, 2001), para. 31.
[123] Observation (CEACR) - adopted 2005, published 95th ILC session (2006) Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Guatemala, 6.
[124] ILO, 'Indigenous & Tribal Peoples' Rights in Practice', 59.
[125] Anaya, James. *Indigenous Peoples in International Law*, 143.

indigenous workers. Article 22 requires states to allow indigenous peoples to participate in the development and design of special vocational training programmes aimed at them.

The ILO supervisory bodies have held that there is a minimum participatory requirement regarding natural resource development activities. A prior consultation is required if such activities could affect indigenous peoples. The same goes for any natural resource exploitation that could affect the lives of such a people.[126] In a 2001 report, an ILO Committee examined whether Colombia had been in violation of its obligations when issuing environmental licenses to a company without consultation with the affected indigenous community beforehand. The Committee held that consultation:

> must encompass genuine dialogue between the parties, involving communication and understanding, mutual respect and good faith, and the sincere desire to reach a consensus. A meeting conducted merely for information purposes cannot be considered as being consistent with the terms of the Convention.[127]

They further emphasized that such consultation must be "prior consultation, which implies that the communities affected are involved as early on as possible in the process, including in environmental impact studies".[128]

A committee set up to examine non-observance by Guatemala, emphasized the need for consultation processes to be set up in a way that "create a climate of confidence with indigenous peoples which favours productive dialogue" since the Committee considered that the development of a climate of mutual confidence was essential for any consultation process.[129] Regarding Brazil's conduct vis-à-vis the convention, the Committee stressed that consultation should "take into account the opinions of the various peoples involved in order to facilitate an exchange of information" and that "the consultation laid down in the Convention is […] not merely a formal requirement but a genuine instrument for participation".[130] When assessing Ecuador's conduct, the Committee stated that "if an appropriate consultation process is not

[126] Ibid.
[127] Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT), GB 276/17/1, GB 282/14/3 (2001), para. 90.
[128] Ibid.
[129] Report of the Committee set up to examine the representation alleging non-observance by Guatemala of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Federation of Country and City Workers (FTCC)GB 13. 294/17/1, GB 299/6/1 2007, para. 53.
[130] Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF), GB 295/17, GB 304/14/7 (2009), para. 42.

developed with the indigenous institutions or organisations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention".[131] The "good faith and with objective of reaching consent or agreement"-requirement in article 6 is aimed at stopping government's from merely instituting consultation as a formal process and then ignoring the indigenous opinions.[132] The ILO supervisory bodies have also found that governments should allocate enough time for the consultation in order for the indigenous people to be able to participate effectively and, if necessary, involve their own decision-making processes.[133]

In a 2009 guide to the convention, ILO summarized the elements of effective consultations that lead to effective participation: such consultation should be made through representative institutions, it should allow for inclusion of indigenous own institutions and initiatives, it should be held in good faith and "in a form appropriate to the circumstances". The consultation should further be made through appropriate procedures and aim at achieving agreement or consent.[134]

While the convention was ground-breaking on many levels by being the first international legal instrument solely dedicated to the rights and interests of indigenous peoples, the convention has still been met with criticism through the years. Just one year after its establishment, the convention was criticised before the WGIP. An indigenous observer stated that the convention "did not properly recognize the crucial requirement of indigenous consent".[135] Lee Swepston described the suggestion to consult as "a move unique in the ILO's history"[136] but other commentators have dubbed the consultation procedures and indigenous input into the revision process as a whole, "as less than adequate".[137] There was for example no direct, ongoing participation by the indigenous peoples sent by their respective organizations specifically to lobby the ILO.[138] Regardless of the critique, it is undisputable that the convention has been crucial for the development and shaping of the requirements for the proper application of the right to consultation and participation.

[131] Ecuador 2001 ILO Doc. GB.277/18/4, GB.282/14/2 (Nov. 14, 2001) para. 44.
[132] International labour conference 88th session 2000 Report III (part 1A) p. 449. Quoted in Thornberry, Patrick. *Indigenous Peoples and Human Rights*. New York: Manchester University Press, 2002, p. 349.
[133] ILO: Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Handbook for ILO tripartite constituents (Geneva, 2013), 15.
[134] ILO, 'Indigenous & Tribal Peoples' Rights in Practice', *ILO* [website], 2009. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_171810.pdf. (Accessed 8/5-2018), 62.
[135] UN Doc. E/CN.4/sub.2/1990/42
[136] Thornberry, Patrick. *Indigenous Peoples and Human Rights*, 339.
[137] Ibid.
[138] Ibid, 340.

2.4.1.3 ICERD and the CERD

The calls for indigenous participation and consultation have also been placed in the context of racial discrimination.[139] In 1997, CERD issued their General recommendation no. 23 specifically targeting the issues facing indigenous peoples. The Committee stated that it has "consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention".[140] CERD acknowledged that indigenous peoples throughout the world have historically been deprived of their human rights and discriminated against and that this continues to this day. The discrimination has been especially clear in the loss of their lands and resources to colonists, commercial companies and State enterprises.[141] CERD called upon states to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".[142]

From the summary record of the 1235th meeting of CERD, it is clear that the inclusion of the word consent in the recommendation was deliberate and had been debated extensively. For example, the records show that committee member Ivan Garvalov said that "the two terms 'consent' and 'participation' meant entirely different things. If indigenous peoples were to give their 'consent', they must agree to the proposal; they could 'participate' and express their approval or disapproval, without actually having any power over the final decision" and that he therefore preferred the word "consent".[143] Riidiger Wolfrum, another Committee member, did not want the General Recommendation to use the word "consultation" as it "did not imply that indigenous people had any actual say in the final decision".[144] In the General Recommendation the committee further emphasized the need for state 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 those lands and territories.[145] According to Eide, even though the Committee never mentions the principle of self-determination in the document, it is implicit in

[139] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 251.
[140] CERD General Recommendation No. 23 on the Rights of Indigenous Peoples, para. 1.
[141] Ibid, para. 3.
[142] Ibid, para. 4(d).
[143] UN Doc. CERD/C/SR.1235, para. 82.
[144] Ibid, para. 75.
[145] CERD General Recommendation No. 23 on the Rights of Indigenous Peoples, para. 5.

their recommendations that they recognize a level of autonomy or self-government for indigenous peoples.[146]

The Committee has also repeatedly discussed indigenous participation in its concluding observations on state party reports. In 2000, CERD stated that Australia had an obligation under the convention to ensure the effective participation of its indigenous people in decision-making processes affecting their land rights and reiterated the importance of acquiring informed consent on such issues.[147] The same sentiment has been repeated in concluding observations on other state parties as well, for example regarding the USA.[148] In their concluding observations on the USA, the Committee recommended that the State:

> recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans.[149]

In its concluding observations on Sweden in 2013, the Committee was concerned with the fact "that the State party allows major industrial and other activities affecting Sami, including under the Swedish Mining Act, to proceed in the Sami territories without Sami communities offering their free, prior and informed consent". The Committee recommended Sweden to:

> adopt legislation and take other measures to ensure respect for the right of Sami communities to offer free, prior and informed consent whenever their rights may be affected by projects, including to extract natural resources, carried out in their traditional territories.[150]

2.4.1.4 ICESCR and the CESCR

The Committee on Economic, Social and Cultural Rights has also extensively discussed indigenous participatory rights in concluding observations as well as in their general comments.

In their 2011 concluding observations on Argentina, the Committee urged the state "to develop institutional and procedural guarantees to ensure the effective participation of indigenous communities in decision-making on issues that affect them."[151] The Committee further urged Argentina to:

[146] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 252.
[147] UN Doc. CERD/C/304/Add.101 Australia, para. 9.
[148] UN Doc. CERD A/56/18, para. 400.
[149] UN Doc. CERD/C/USA/CO/6, para. 29.
[150] UN Doc. CERD/C/SWE/CO/19-21, para. 17.
[151] UN Doc. E/C.12/ARG/CO/3, para. 10.

> always enter into effective consultations with indigenous communities before granting concessions for the economic exploitation of the lands and territories traditionally occupied or used by them to State-owned companies or third parties, fulfilling the obligation to obtain the free, prior and informed consent of those who are affected by the aforementioned economic activities.[152]

Likewise, in their concluding observations on Nepal the Committee recommended the state to "ensure that indigenous peoples are represented through their own chosen representatives in the work of the Constituent Assembly and in the decision-making process on all issues that affect them"[153] and that the state "seek their free, prior and informed consent before launching any development project".[154] In connection with the exploration and exploitation of mining resources and hydrocarbons, the Committee has urged Guatemala "to adopt expeditious measures to carry out consultations to allow free expression of consent to the desirability of such projects, sufficient time and opportunity to reflect and take a decision."[155] It has further urged Paraguay to:

> take the legislative and administrative measures needed to ensure that free, prior and informed consent is obtained from indigenous peoples in relation to decisions that may directly affect the exercise of their economic, social and cultural rights.[156]

In its 2016 concluding observations on Sweden, CESCR urged the state to:

> ensure in law and in practice that the necessary efforts are made to obtain the free, prior and informed consent of all Sami people on decisions that affect them, and provide legal assistance in that regard.[157]

In their General Comment no. 21, CESCR urged state parties to "respect the principle of free, prior and informed consent in all matters covered by their specific rights" in relation to indigenous peoples.[158] Under the heading "Core obligations", they urged states to

> allow and encourage the participation of […] indigenous peoples […] in the design and implementation of laws and policies that affect them. In particular, states should obtain indigenous free, prior and informed consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.[159]

[152] UN Doc. E/C.12/ARG/CO/3, para. 9.
[153] UN Doc. E/C.12/NPL/CO/3, para. 9(b).
[154] Ibid, para. 9(d).
[155] UN Doc. E/C.12/GTM/CO/3, para. 7.
[156] UN Doc. E/C.12/PRY/CO/4, para. 6(a).
[157] UN Doc. E/C.12/SWE/CO/6, para. 14(c).
[158] UN Doc. E/C.12/GC/21, para. 37.
[159] Ibid, para. 55(e).

In summary, CESCR calls for the effective participation of indigenous peoples in decision making processes that may affect them and consultation to ensure that the participation is informed. They further require indigenous FPIC when indigenous peoples are likely to be affected by natural resources exploitations or development projects and whenever a decision may infringe the exercise of their economic, social and cultural rights.[160]

2.4.1.5 UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the General Assembly in 2007 and received almost unanimous support. 144 states voted in favour while 11 states abstained from voting at all. Only 4 states objected to the declaration being adopted.[161] UNDRIP focuses on the right to participation as part of the right to self-determination and its articles outline what self-determination would look like in practice.[162] According to article 43, it is a minimum standard that is set out by the declaration's provisions.

Article 3 states that "indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." It must be read in conjunction with Article 4 which states that:

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

Article 10 prohibits the relocation of indigenous peoples from their lands without their free, prior and informed consent. Furthermore, article 11 requires redress for property taken without the free, prior and informed consent of the affected indigenous people.

Article 18 sets out additional participatory rights for indigenous peoples:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

[160] Tomaselli, Alexandra. The Right to Political Participation of Indigenous Peoples: A Holistic Approach, 401.
[161] UNBISnet, 'Voting Record UNDRIP', UNBISnet [website], 13/9-2007. http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295. (Accessed 15/5–2018).
[162] Ward, Tara. The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law. *Northwestern Journal of International Human Rights.* Vol. 10 no. 2 (2011): 54-84, 58.

The declaration further discusses how the right to participation can be ensured in article 19:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The land and natural resources rights in the UNDRIP are also quite far reaching. [163] Article 26 confirms that indigenous peoples shall have the right to lands, resources and territories which they have traditionally owned, occupied or otherwise used or acquired. Article 28 sets out that indigenous peoples have a right to redress, through restitution or compensation, for lands, territories and resources which they have lost without their free, prior and informed consent. Additionally, article 29 prohibits the storage or disposal of hazardous materials on indigenous land without their FPIC.

The declaration also gives indigenous peoples the right to determine and develop priorities and strategies for the development and use of their lands, territories and resources. States must consult and cooperate in good faith with the affected indigenous peoples to obtain their free and informed consent prior to the approval of any project affecting their lands, territories or resources, particularly in connection with the development, utilisation or exploitation of natural resources.[164]

When voting in favour of the declaration, Sweden added explanations on how they interpreted the provisions of the declaration. The Swedish representative stated that:

> the right to self-determination could be ensured through article 19 of the Declaration, which dealt with the duty of States to consult and cooperate with indigenous peoples. In fact, that article could be implemented in different ways, including through a consultative process between institutions representing indigenous peoples and governments, and through participation in democratic systems, such as the current Swedish system. It did not entail a collective right of veto.[165]

Professor Gudmundur Alfredsson writes that the explanation attached to the Swedish vote, "rendered her vote in favour next to meaningless."[166]

[163] Eide, Asbjörn. Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources, 255.
[164] UNGA resolution 61/295 (13 September 2007), Annex: UN Declaration on the Rights of Indigenous Peoples, art. 32.
[165] UN Doc. GA/10612.
[166] Alfredsson, Gudmundur. Human Rights and the Arctic. *The Yearbook of Polar Law*. Vol. 1 no. 1 (2009): 233 – 243, 240.

The UNDRIP has increasingly been viewed and utilised as a cornerstone of the contemporary international legal standard on indigenous rights.[167] However, it is important to remember that the UNDRIP was adopted as a UNGA resolution and is as such not formally a legally binding instrument. But, argues Åhrén, "if an UNDRIP provision sufficiently mirrors other legal sources, that suggests that the provision reflects an international norm."[168] The robust connection between the provisions of the UNDRIP and existing international law should not be ignored.[169] In 1962, the UN Commission on Human Rights stated that a declaration is "a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected".[170] According to Åhrén, this further supports the claim of UNDRIP's importance and the conclusion that many UNDRIP provisions are reflective or at least indicative of international law.[171] That article 38 includes the use of the word *shall* does, according to Åhrén, "suggest that states, when adopting the Declaration, have undertaken to abide by the UNDRIP."[172] Additionally, the fact the declaration was adopted with almost unanimous support cannot be disregarded and this further supports the notion that the instrument has particular authority within the realm of indigenous rights.[173] As UN Special Rapporteur, James Anaya stated that the "UNDRIP represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law."[174] Anaya decided to measure state conduct towards their indigenous peoples by the yardstick of the UNDRIP throughout his mandate as Special Rapporteur.[175]

The UNPFII argues that the UNDRIP "forms a part of universal human rights law",[176] that it is "almost universally agreed upon"[177] and constitutes a "part of a practice that has advanced a growing 'rapprochement' between declarations and treaties".[178] The UNPFII further suggests that the declaration has a "growing legal status" and that it in its "entirety may have already acquired the status of being part of binding international law."[179]

[167] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 7.
[168] Åhrén, Mattias. *Indigenous People's Status in the International Legal System,* 103.
[169] Ibid.
[170] UN Commission on Human Rights: Report to the Economic and Social Council on the 18th session of the Commission, held at United Nations Headquarters from 19 March to 14 April 1962 inclusive E/CN.4/832, para. 105.
[171] Åhrén, Mattias. *Indigenous People's Status in the International Legal System,* 103.
[172] Ibid*,* 104.
[173] Ibid.
[174] A/HRC/9/9 para. 85
[175] Åhrén, Mattias. *Indigenous People's Status in the International Legal System,* 106.
[176] UNPFII Report on the eighth session to ECOSOC E/C.19/2009/L3, Annex: General comment no 1 2009 on article 42 of the UNDRIP, para. 7.
[177] Ibid, para. 9.
[178] Ibid, para. 10.
[179] UNDRIP, para 12.

There is no scholarly consensus regarding the status of the UNDRIP. Some scholars argue that most, if not all, of the UNDRIPs provisions reflect customary international law.[180] Others are aware that "some states view the UNDRIP as an aspirational political programme rather than as reflecting legal obligations".[181] Saul argues that the fact that the sole binding international treaty on indigenous rights (i.e. the ILO no. 169) only has 20 ratifying states "is a stark reminder that many – if not most – states remain reluctant to assume binding legal obligations that are specific to indigenous peoples, notwithstanding that an overwhelming majority of states support the UNDRIP".[182] Nevertheless, it cannot be ignored that a number of UNDRIP's provisions merely "particularises general human rights law for indigenous peoples and circumstances" and states can therefore "hardly oppose that those articles reflect binding international standards."[183] Saul argues that it is the fact that the UNDRIP is based on "the particularised application, over recent decades, of general human rights law to indigenous peoples by the UN treaty committees, regional bodies and national legal practice" that gives the declaration its normative force.[184]

2.4.1.6 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* was adopted by the United Nations General Assembly in 1992. The declaration is also useful in outlining the obligations concerning indigenous participatory rights since most countries with indigenous peoples, including Sweden, recognize them as minorities.

The declaration's second article states that:

> persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live.

Kristian Myntti interprets this obligation as at the minimum setting out that persons belonging to minorities, have the right to "effectively express their opinion in matters which concern their common identity or the region in which they live, and that due consideration is given to the

[180] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 8 footnote 26.
[181] Ibid, 8 footnote 27.
[182] Ibid, 8.
[183] Ibid.
[184] Ibid.

opinions expressed".[185] He argues that at a concrete level, the principle includes at least the following political rights: The right of the representative institutions to be consulted by the authorities before they take any legislative or administrative measures that may affect the minority directly and a right of the minority to anticipate that the objective of such consultations is to achieve agreement or to receive their consent.[186]

2.4.1.7 International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples

The *International Workshop on Methodologies regarding Free, Prior and Informed Consent* was arranged by *the UN Economic and Social Council* during the UNPFII's 4th session in 2005. The report from the workshop offers very useful definitions of the elements of free, prior and informed consent.

For consent to be considered "free", the process must be free from "coercion, intimidation or manipulation"**.** Consent must be "sought sufficiently in advance of any authorization or commencement of activities" and respect time requirements of indigenous consultation processes for it to be seen as "prior".[187]

To fulfil the requirement of "informed", the information provided to the indigenous party must at minimum include the following aspects:

> a. The nature, size, pace, reversibility and scope of any proposed project or activity;
> b. The reason/s or purpose of the project and/or activity;
> c. The duration of the above;
> d. The locality of areas that will be affected;
> e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
> f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
> g. Procedures that the project may entail.[188]

[185] Myntti, Kristian. The Right of Indigenous Peoples to Self-Determination and Effective Participation, 127.
[186] Ibid.
[187] Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples E/C.19/2005/3, para. 46.
[188] Ibid.

The workshop identified FPIC as relevant in relation to indigenous traditional lands, any treaty or agreements between the State and the indigenous group, any project that could lead to exploration, development or use of their lands and resources and in legislative and policy matters. FPIC should be continuously sought throughout "the full project cycle, including but not limited to assessment, planning, implementation, monitoring, evaluation and closure."[189] All involved parties in a FPIC-process should be allowed "equal access to financial, human and material resources in order for communities to fully and meaningfully debate".[190]

To ensure that the consent was genuinely free, prior and informed, the workshop held that states should establish procedures and mechanisms of oversight and redress.[191] If such a mechanism finds that the consent given did not fulfil the requirements of "free, prior and informed", it should be able to revoke that consent and declare the participatory process null and void.[192]

2.4.1.8 United Nations Convention on Biological Diversity

The *United Nations Convention on Biological Diversity* includes an explicit mention of indigenous peoples. It urges states to:

> "respect, preserve and maintain knowledge, innovations and practices of indigenous […] communities […] relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices".[193]

A decision from the 5th Conference of parties to the Convention clarifies the content of the article: States are required to obtain the prior and informed approval and to ensure the effective involvement of indigenous peoples in decisions relating to the use of their traditional knowledge, innovation or practices relevant to the conservation and sustainable use of biological resources.[194]

In 2004, the secretariat of the Convention on Biological Diversity published the *Akwé: Kon Guidelines* on state conduct regarding development plans on indigenous traditional lands. The purpose of the guidelines was, amongst other things, to "support the full and effective

[189] Ibid, para. 45.
[190] Ibid, para. 48.
[191] Ibid, para. 48(v).
[192] Ibid.
[193] Convention on Biological Diversity, 5 June 1992, art. 8(j).
[194] 5th Conference of Parties to the Convention on Biological Diversity COP 5 Decision V/16.

participation and involvement of indigenous and local communities in screening, scoping and development planning exercises".[195] The guidelines propose that when carrying out an impact assessment for a development project on indigenous traditional land, an effective mechanism should be established to ensure indigenous participation.[196] Through this mechanism, the indigenous community can be given the opportunity to either accept or oppose the development proposal.[197] States are also advised to set up a "review and appeals"-process regarding development plans affecting indigenous peoples.[198]

The Nagoya Protocol[199] attached to the Convention also touches upon indigenous participation in the context of access to genetic resources and traditional knowledge. Article 6(2) states that:

> each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

This is further developed in article 7:

> each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

2.4.1.9 International Law Association Resolution No. 5/2012

In 2012, the 75th Conference of the International Law Association adopted Resolution no. 5/2012 on the Rights of indigenous peoples. According to Conclusion no. 5, states must ensure indigenous peoples rights to autonomy or self-government. As part of these rights, states must also promote the right of indigenous peoples to participate in:

> national decision-making with respect to decisions that may affect them, the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent […].

[195] Akwé: Kon Guidelines to the Convention on Biological Diversity, nr. 3(a).
[196] Akwé: Kon Guidelines to the Convention on Biological Diversity, nr. 8(c).
[197] Akwé: Kon Guidelines to the Convention on Biological Diversity, nr. 8(e).
[198] Akwé: Kon Guidelines to the Convention on Biological Diversity, nr. 8(j).
[199] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

2.4.1.10 Expert Mechanism on the Rights of Indigenous Peoples

In 2011, the EMRIP published their *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*,[200] identifying good practices that ensures such participation. The overall aim is that these good practices can assist states, indigenous peoples, international organisations and others in their protection and promotion of indigenous participatory rights.[201]

The report offers a non-exhaustive list of factors that are relevant for the determination on whether a practice is "good" for the purpose of promoting and protecting indigenous participation in decision-making: A good practice for participation is designed with the involvement of indigenous peoples and has their agreement; it allows and enhances indigenous participation in decision-making; it allows indigenous peoples to influence the outcome of decisions that affect them; it realises the right to self—determination of indigenous peoples; and it includes robust consultation procedures that seek the FPIC of indigenous peoples.[202]

The study highlights examples of good practices regarding indigenous participation throughout the world. A Peruvian law on consultation is presented as such an example. This law requires the state to justify their decision when they have failed to achieve consent and the decision in question is subject to judicial review, all with the overarching principle that the decision must still respect the recognized human rights of the indigenous community.[203] A Congolese law on the promotion and protection on the rights of indigenous peoples from 2010 is also discussed. The law generally requires the state to initiate good faith consultations when considering any legislative or administrative measures that concern the indigenous people. The aim of these consultations should be to acquire free, prior and informed consent.[204] In Bolivia, the Ministry of Hydrocarbons and Energy initiated a consultation process with the affected indigenous people when a hydrocarbon exploration project was proposed in the indigenous territories. The consultation process resulted in agreement and prior indigenous consent.[205] In Canada, the national courts have identified a duty of the state to accommodate and consult with its indigenous peoples when proposed activities can affect them and to keep them fully informed

[200] Report of the Expert Mechanism on the Rights of Indigenous peoples: Final Study on indigenous peoples and the right to participate in decisionmaking A/HRC/EMRIP/2011/2.
[201] Ibid, para. 7.
[202] Ibid, para. 13.
[203] Ibid, para. 60.
[204] Ibid, para. 53.
[205] Ibid, para. 65.

throughout the process. If the proposed activity could have a serious impact on an indigenous people, the government must obtain their consent.[206]

In general, EMRIP identifies FPIC of indigenous peoples as an integral part of their self-determination. FPIC constitutes a right to be able to exert genuine influence over the outcome of the decision-making process, not only a right to be involved in the process.[207]

2.4.1.11 UN Special Rapporteur on the Rights of Indigenous Peoples

James Anaya was the UN Special Rapporteur on the Rights of Indigenous Peoples between 2008-2014 and is of Native American descent himself. In his 2009 annual report, Anaya argues that there is a strong presumption that when a measure has a potentially "significant, direct impact" on indigenous rights, the state needs indigenous consent before proceeding.[208] He emphasized the importance of consultation and participatory procedures being developed with the help of the indigenous peoples themselves since:

> in many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples were not adequately included in the discussions leading to the design and implementation of the consultation procedures.[209]

When considering projects affecting indigenous lands, states should carry out environmental and social impact assessments that will ensure that any consent given is informed. Such an assessment allows the indigenous representatives access to independent information on the potential effects on their rights and interests of the proposed project.[210]

In 2010, Anaya stated that consultation should be viewed as a process and not a single event. If an indigenous people have been consulted on a plan and then changes happens to that plan after the consultation, for example in the process of approving environmental licenses, the State must initiate further consultations.[211] In his 2012 report, James Anaya stated that the right to consultation and right to participation are not standalone rights, but rather acts as safeguards for other indigenous rights such as land rights, cultural rights, non-discrimination etc.

[206] Ibid, para. 68.
[207] Report of the Expert Mechanism on the Rights of Indigenous peoples: Final Study on indigenous peoples and the right to participate in decisionmaking A/HRC/EMRIP/2011/2, Annex, paras. 20-21.
[208] UN Doc. A/HRC/12/34, para. 17.
[209] Ibid, para. 51.
[210] Ibid, para. 53.
[211] UN Doc. A/HRC/15/37, para. 64.

Consultation and participation is a way to exercise these rights.[212] Consequently, when states initiate consultation and consent procedures they should identify the rights concerned and use those as the starting point for the processes.[213] He argued that:

> where the rights implicated are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations.[214]

Anaya has further emphasized that an indigenous people can never be forced to partake in a consultation process and that their denial to participate shall be construed as them withholding their consent to the proposed measure.[215] Due to the invasive nature of extractive activities, the general rule is that such activities should not be allowed in indigenous lands without the indigenous people offering their free, prior and informed consent.[216] The only permissible exceptions to this general rule are when extractive projects can be proven to have no substantial effect on any indigenous rights or interests or when a limitation on indigenous rights "are permissible within certain narrow bounds established by international human rights law".[217] These bounds include the well-established tests of necessity and proportionality in the pursuit of a legitimate aim. For extractive activities on indigenous lands, a legitimate aim for the limitation of indigenous rights "is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain."[218] Even where there exists a legitimate aim for the limitation of indigenous rights, the limitation must still be necessary and proportional to that aim. In the proportionality and necessity test, the rights at stake and their significance for indigenous survival must be taken into account.[219]

Consultations should take place before the authorization of "any activity related to the project within an indigenous territory".[220] Anaya has noted with concern that many states do not consider it necessary to carry out consultations and acquire indigenous consent when carrying out explorative activities in search of subsurface resources. Instead, states wait until the question of granting an extraction license is actualized. This course of action is not:

[212] UN Doc. A/HRC/21/47 paras. 49-51.
[213] Ibid, para. 64.
[214] Ibid, para. 65.
[215] UN Doc. A/HRC/24/41, para. 25.
[216] Ibid, para. 27.
[217] Ibid, para. 31.
[218] Ibid, para. 35.
[219] Ibid, para. 36.
[220] Ibid, para. 67.

> compatible with the principle of free, prior and informed consent or with respect for property, cultural and other rights of indigenous peoples, given the actual or potential effects on those rights when extractive activities occur.[221]

He has further been concerned that some states impose time constraints on the consultation procedure as this is detrimental to the ability of the indigenous people to take free and informed decisions on matters of great importance to them. They should not be faced with time pressures in making those decisions and "their own temporal rhythms should be respected".[222]

In a report on the situation of the Sami people in the Nordic countries, Anaya urged Sweden to increase the Sami parliament's autonomy and self-governance authority and strengthen their ability to participate in and genuinely influence decision-making in matters affecting them.[223] Due to the institutional set up of the Nordic Sami parliaments, they hold no guaranteed influence or decision-making power but merely acts as bodies through which the Sami people can express their voices.[224] The Sami parliaments have no decision-making powers or veto rights regarding their traditional lands, waters or natural resources.[225] Anaya expressed concerns over reports from Norway that even though there is a Consultation Act in place, the governments have allegedly entered into consultations only to present and inform the Sami representatives of an already finalized decision. He emphasized that if applied correctly, such a consultation act could be of great importance for the protection and promotion of Sami rights.[226] He recommended the Nordic states to continue to support Sami self-determination and influence by for example introducing effective consultation arrangements that aim at ensuring FPIC on decisions directly affecting Samis.[227] He further recommended them to delimit "certain areas within which the Sami parliaments can act as primary or sole decision-makers, particularly in relation to concerns that affect Sami people in particular".[228] The Nordic states should also review the legislative and administrative mechanisms that handle natural resource extraction from the Sami traditional lands to make sure that these conform with international standards by including requirements of consultation and FPIC.[229]

[221] Ibid, para. 68.
[222] Ibid, para. 69.
[223] UN Doc. A/HRC/18/35/Add.2, para. 37.
[224] Ibid, para. 38.
[225] Ibid.
[226] Ibid, para. 39.
[227] Ibid, para. 76.
[228] Ibid.
[229] Ibid, para. 85.

In his country report on Costa Rica in 2011, Anaya urged the government not to enter consultation processes with the conviction that the proposed project will be carried out as this is something that should be "subject to the outcome of the consultations, irrespective of other considerations of social and national interest."[230] This ensures that the consultation is carried out in good faith. In consultation and participatory procedures, states should also consider the traditional power imbalance between indigenous peoples and the government. To rectify this imbalance, states must provide the indigenous party with extensive and clear information on the proposed measure and its potential consequences and impacts. The state should also support the indigenous people in gaining access to independent experts "in relevant areas such as engineering, law, finance, the environment, development and business."[231]

When it comes to the design of consultations and participatory procedures, Anaya urge states to carry out so called "Consultations on consultations". Indigenous representatives should be involved in the design and set up of the participatory mechanisms in order to promote "a climate of confidence and mutual respect for the consultations" as well as ensuring that the indigenous people is allowed to participate in legislative and administrative actions that may affect their rights.[232] The "consultations on consultations" should be characterized by "an open and comprehensive dialogue" and involve "defining the different steps in the consultations, the corresponding time limits and the specific forms of participation."[233]

After the end of James Anaya's mandate in 2014, he was replaced by Victoria Tauli Corpuz who belongs to an indigenous people in the Philippines. In her annual report from 2017, Tauli Corpuz identified consultation and FPIC as "essential safeguards that help to realize the substantive human rights of indigenous peoples".[234] When states draft laws to provide consultation and participatory processes, indigenous representatives must be able to fully participate in the legislative process.[235] In the report from her mission to the USA, Tauli Corpuz stated that consent and not consultation should be the guiding policy in the relationship between the state and the indigenous representatives.[236] At a minimum level, the state should implement a system across its federal agencies that allows for meaningful consultation with its indigenous

[230] UN Doc. A/HRC/18/35.Add.8, para. 16.
[231] Ibid, para. 36.
[232] Ibid, para. 30.
[233] Ibid, para. 32.
[234] UN Doc. A/72/186, para. 62.
[235] Ibid.
[236] Ibid, para. 87.

peoples.[237] Regarding projects with possible environmental impacts, consultations should be commenced at the earliest possible stage and provide the affected peoples with detailed and adequate information on the scope and impact of the proposed project. The indigenous representatives should also receive the necessary technical assistance and funding so that their participation in the consultation process can be meaningful.[238] The importance of prior consultations for environmental projects is also emphasized in her mission report from Honduras in 2016. Such consultations should include information on social, environmental and cultural impacts and "no project should proceed until guarantees have been honoured and the free, prior and informed consent of all the indigenous peoples affected has been obtained."[239]

In a presentation at the *International Colloquium on the Free, Prior, Informed Consultation*,[240] Tauli Corpuz said that the right to consultation and participation shouldn't, and cannot, be separated from the other rights of indigenous peoples. Rather, consultation and participation should be viewed as safeguards for other indigenous rights such as land rights, cultural rights etc. When states develop legislative measures for participation, this interrelatedness should be taken into account.[241] She agreed with her predecessor James Anaya that consultation alone is not enough when a measure would significantly threaten rights essential to the survival of the indigenous people – in such situations FPIC is also required.[242] Rights that are essential to indigenous survival include rights to their traditional lands and resources, regardless whether the use of that land is officially recognized or is "only" customary in nature.[243] She further emphasized the importance of adequate social, cultural and human rights assessments before approving projects that could jeopardize indigenous rights, and the necessity of this information being accessible to the affected people to ensure that any consent is given on an informed basis.[244]

When a state decides to continue with a measure that has an impact on indigenous rights without their consent, states "must demonstrate compliance with strict international standards

[237] Ibid, para. 87(a).
[238] Ibid, para. 87(d).
[239] UN Doc. A/HRC/33/42/Add.2, para. 98.
[240] Arranged in 2016 by the Office of the High Commissioner for Human Rights in Mexico, the Inter-American Commission on Human Rights and the Universidad del Claustro de Sor Juana.
[241]Tauli-Corpuz, Victoria, 'Consultation and consent: Principles, experiences and challenges', *UN Special Rapporteur Victoria Tauli-Corpuz* [website], 8/11-2016. http://unsr.vtaulicorpuz.org/site/images/docs/special/UNSR_Presentation_OHCHR_MX_Colloquium_Nov2016_ENG.pdf (Accessed 8/5-2018), 4.
[242] Ibid, 5.
[243] Ibid.
[244] Ibid.

on acceptable limitations to human rights",[245] i.e. the rights affected and the importance of those rights to the survival of the indigenous people must be weighed against the public purpose invoked by the state. Tauli Corpuz highlights that since traditional lands and resources are often at the core of indigenous identity and survival, "a finding of proportionality of a State-imposed limitation to such essential rights would be difficult".[246] This line of argument strengthens the claims of a "general rule of indigenous consent for extractive or other types of measures or activities that affect essential substantive rights."[247] She further argues that states should set up judicial review mechanisms that could investigate whether decisions taken without indigenous consent are really fulfilling the requirements of necessity and proportionality. If the decision doesn't fulfil these requirements, the judicial mechanism should be able to stop the activity or measure from proceeding.[248]

2.4.2 Regional Standards

2.4.2.1 The Framework Convention for the Protection of National minorities

The Council of Europe adopted the *Framework convention for the protection of National minorities* in 1994. The Convention identifies the protection of minorities as constituting "an integral part of the international protection of human rights."[249]

Under article 5, state parties are required to "undertake to promote conditions necessary for minorities to maintain and develop their culture, to preserve essential elements of their identity." And most importantly for this discussion, article 15 obliges states to "create conditions necessary for effective participation in cultural, social and economic life and in public affairs, in particular those affecting them." In the Explanatory Report, the Council of Europe more closely outlined the following as possible necessary conditions for effective participation:[250]

- Consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to affect them directly;

[245] Ibid.
[246] Ibid.
[247] Ibid.
[248] Ibid, 6. See also Un Doc. A/HRC/24/41, para. 39.
[249] Council of Europe Framework Convention on the Protection of National Minorities, 1 February. 1995, Article 1.
[250] Council of Europe Framework Convention on the Protection of National Minorities, 1 February. 1995, Explanatory Report para. 80.

- Involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to affect them directly;
- Undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;
- Effective participation of persons belonging to national minorities in the decision-making processes and elected bodies both at national and local levels;
- Decentralised or local forms of government.

The application of the Framework convention is overseen by the Advisory Committee. In their fourth opinion on Sweden, they expressed concern that Sami reindeer herding communities are not always consulted before their traditional lands are exploited. When such prior consultations do take place, "economic interests often outweigh Sami culture and trades."[251] Moreover, these consultation processes are not open for the non-reindeer herding Samis who make up almost 90% of the Sami population. Even though their culture is also closely linked to their traditional lands, their interests are often not taken into consideration.[252]

In 2008, the Advisory Committee issued a *Thematic Commentary No. 2 on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*. In this document, the Committee explicitly mentioned indigenous peoples and their participatory rights. The Advisory Committee requires States to include indigenous representatives in the decision-making process when decisions affect land rights and land usage on indigenous traditional lands.[253]

The Committee further emphasized the need for consultation and involvement of the concerned national minority when implementing and designing cultural policies affecting it.[254] The Committee stated that is not enough to have participation of national minorities as a merely formal step in a decision-making process – States are required to "ensure that their participation has a substantial influence on decisions which are taken, and that there is, as far as possible, a shared ownership of the decisions taken."[255] State parties are also obliged to support the

[251] Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Sweden, ACFC/OP/IV(2017)004, para. 11.
[252] Ibid.
[253] Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs, ACFC/31DOC(2008)001, 5.
[254] Ibid, 6.
[255] Ibid, para. 19.

capacity building and resources of the affected minorities in order to ensure that they can participate effectively.[256] The Committee states that on its own, consultation does not "constitute a sufficient mechanism for ensuring *effective* participation of persons belonging to national minorities".[257]

2.4.2.2 The Lund Recommendations on the Effective Participation of National Minorities

In 1999, the High Commissioner on National Minorities of the OSCE issued the *Lund Recommendations on the Effective Participation of National Minorities*. The Explanatory Report attached to the recommendations stated that "full opportunities for the equal enjoyment of the human rights of persons belonging to minorities entails their effective participation in decision-making processes, especially with regard to those decisions specially affecting them."[258]

Recommendation 12 advises states to:

> establish advisory or consultative bodies within appropriate institutional frameworks to serve as channels for dialogue between governmental authorities and national minorities. Such bodies might also include special purpose committees for addressing such issues as housing, land, education, language, and culture. The composition of such bodies should reflect their purpose and contribute to more effective communication and advancement of minority interests.

The Explanatory Report clarified that "in order to be effective, these bodies should be […] provided with adequate resources and given serious attention by decisionmakers".[259]

Recommendation 13 further outlines the functioning of such bodies. They should amongst other things be able to initiate consultation processes "and provide views on proposed governmental decisions that may directly or indirectly affect minorities". State parties are also urged to consult these bodies on a regular basis on any legislative or administrative matter that concern the minority group. In the Explanatory Report it is advised that:

[256] Ibid, para. 21.
[257] Ibid, para. 106.
[258] Organization for Security and Co-Operation in Europe, The Lund Recommendations on the Effective Participation of National Minorities, 1 September 1999, General principle I.
[259] Organization for Security and Co-Operation in Europe, The Lund Recommendations on the Effective Participation of National Minorities, 1 September 1999, 26.

> good governance requires positive steps on the part of the authorities to engage established advisory and consultative bodies, to refer to them as needs may arise and to invite their in-put. An open and inclusive approach on the part of the authorities vis-à-vis these bodies and their members will contribute to better decisions and to greater confidence of the wider society.[260]

2.4.2.3 Other OSCE Documents

The *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* was adopted in 1990 and outlines the content of human rights and fundamental freedoms within the OSCE system, including provisions regarding state conduct vis-a-vis national minorities.

Paragraph 33 of the document binds states to take measures to "protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory". To do so, states should "create conditions for the promotion of that identity [...] after due consultations, including contacts with organizations or associations of such minorities". Paragraph 35 requires state parties to "respect the right of persons belonging to national minorities to effective participation in public affairs. This participation should include "affairs relating to the protection and promotion of the identity of such minorities".

In the 1991 *Report of the CSCE Meeting of Experts on National Minorities,* the state parties agreed that it is essential to respect the right to effective participation in public affairs of persons belonging to national minorities National minorities should be able to effectively participate when matters concerning them are being discussed as such involvement "in decision-making or consultative bodies constitutes an important element of effective participation in public affairs".[261]

2.4.2.4 Inter-American System

Much of the development and clarification of the content of indigenous participatory rights has come from within the Inter-American human rights system. This can be explained both by the presence of large indigenous groups and the fact that an overwhelming majority of Latin

[260] Organization for Security and Co-Operation in Europe, The Lund Recommendations on the Effective Participation of National Minorities, 1 September 1999, 26.
[261]Organization for Security and Co-Operation in Europe, Report of The CSCE Meeting Of Experts On National Minorities, Geneva. 19 July 1991, section III, para. 1.

American states are state parties to ILO no. 169.[262] While the conventions and jurisprudence of the Inter-American system of course are not binding for Sweden, or other states outside the system, its normative effect and influence cannot be ignored. Ben Saul argues that the system's interpretation of the right to participation has had "a wider, external influence on other regional systems and international law bodies grappling with indigenous issues" and that "horizontal judicial dialogue on indigenous rights, and legal borrowing and adaptation is common".[263]

2.4.2.4.1 The Inter-American Court of Human Rights

In the Saramaka-case,[264] the IACtHR found that Suriname had violated the Saramaka people's rights under the American Convention when granting resource concessions to companies within their traditional lands without prior consultation or acquiring their consent. The Court identified certain conditions that must be upheld by the state to ensure the effective participation of the affected indigenous people: The state has a duty to consult with the indigenous people in a culturally appropriate manner and ensure that there is a constant exchange of information between the parties; the consultation should be held in good faith and with the aim of reaching agreement; the consultation should take place at an early stage of the planning process and not be put off until it is time to obtain consent on an already finalized proposal; and the state should also provide information on possible environmental and health risks so that any agreement is given on an informed basis.[265] When the consultation regards a project with a potentially major impact on indigenous traditional lands, the state has a duty to acquire the free, prior and informed consent of the affected people to ensure their effective participation.[266]

In the Sarayaku-case,[267] the safeguards from Saramaka were reiterated. The verdict clarified that consultation processes should be set up in a way that allows for "sustained, effective and reliable dialogue with the indigenous communities."[268] Furthermore, the state has a duty to ensure consultation and participation at "all stages of the planning and implementation of a project that may affect the territory on which an indigenous […] community is settled, or other

[262] Ward, Tara. The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 66.
[263] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 4.
[264] Saramaka v Suriname (Preliminary Objections, Merits, Reparations and Costs) (2007) IACtHR (ser C) No 172 (28 November 2007).
[265] Saramaka v Suriname, para. 133.
[266] Saramaka v Suriname paras. 134, 137.
[267] Kichwa Indigenous People of Sarayaku v. Ecuador (Merits and Reparations) (2012) IACtHR (ser C) No 245 (27 June 2012).
[268] Sarayaku v Ecuador, para. 166.

rights essential to their survival as a people".[269] The consultation and participatory processes "must be conducted from the first stages of the planning or preparation of the proposed measure, so that the indigenous peoples can truly participate and influence the decision-making process".[270]

2.4.2.4.2 Inter-American Commission on Human Rights

In its 1997 report on the human rights situation in Ecuador, the Commission urged the state to "take the measures necessary to ensure the meaningful and effective participation of indigenous representatives in the decision-making processes about development and other issues which affect them and their cultural survival". The Commission defined "meaningful" as processes where the "indigenous representatives have full access to the information which will facilitate their participation".[271]

Three years later in *Maya Communities of the Toledo District v. Belize,* the Commission once again discussed indigenous participatory rights. The case dealt with resource concessions granted to foreign companies by Belize within lands that traditionally belonged to the Maya Communities, without their consent. The Commission found that Belize had violated the property rights of the indigenous communities by granting the concessions within the lands "without effective consultations with and the informed consent of the Maya people."[272] The Commission held that

> the duty to consult is a fundamental component of the States obligations in giving effect to the communal property rights of the Maya people in the lands that they have traditionally used and occupied.[273]

With this ruling, the Commission found that in order to protect the communal property rights of indigenous peoples, consultation with the goal of obtaining consent is required.[274]

In *Mary and Carrie Dann v. US*, the Commission found that the state had failed to:

[269] Sarayaku v Ecuador, para. 167.
[270] Sarayaku v Ecuador, para. 167.
[271] Report on the Situation of Human Rights in Ecuador OEA/Ser.L/V/II.96.Doc.10 rev.1. chapter IX.
[272] Maya Indigenous Communities v Belize (Merits), IACHR Report 40/2004, Case No 12.053 (12 October 2004), para. 153.
[273] Maya communities v Belize, para. 155.
[274] Page, Alex. Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System. *Sustainable Development Law & Policy.* Vol. 4 no. 2 (2004): 16-20, 19.

> fulfil its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole.[275]

According to Alex Page, the Commission's interpretation recognises that any determination regarding indigenous land rights must "be based on fully informed consent of the whole community, meaning that all members be fully informed and have the chance to participate."[276]

2.4.2.4.3 American Declaration on the Rights of Indigenous peoples

Adopted by the *Organization of American States* in 2016, the *American Declaration on the Rights of Indigenous Peoples* is the most recent document setting out indigenous rights. The declaration "expands the scope of indigenous rights and their conceptualization".[277] The IAComHR has stated that it constitutes an:

> important source of principles that have to guide all those states actions in the Americas that are aimed at respecting and guaranteeing the rights of indigenous peoples. It is also a significant standard for the interpretation of the content of other Inter-American instruments.[278]

Article 21(2) sets out a right of indigenous peoples to participate in decision-making in matters which would affect their rights. This right is developed in article 23 which outlines the framework for such participation. The participation must be full and effective and through representatives chosen by the indigenous people themselves. The right is actualized on matters "which affect their rights, and which are related to the development and execution of laws, public policies, programs, plans, and actions related to indigenous matters." Before implementing legislative or administrative measures that may affect an indigenous people, states are required to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent".

Article 28(3) requires states to ensure effective participation through consultation with the aim of obtaining FPIC when they "adopt measures necessary to ensure that national and international agreements and regimes provide recognition and protection for cultural heritage

[275] Mary and Carrie Dann v United States, IACHR Report No 75/2002, Case No 11.140 (27 December 2002), para. 141.
[276] Page, Alex. Indigenous Peoples' Free Prior and Informed Consent in the Inter-American Human Rights System, 18.
[277] Tomaselli, Alexandra. The Right to Political Participation of Indigenous Peoples: A Holistic Approach, 423.
[278] Ibid, 423-424.

of indigenous peoples". Furthermore, FPIC is required by article 29(4) "prior to the approval of projects affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.".

2.5 Legal force of Soft law instruments

Many of the instruments and sources outlined above are not in the form of hard convention law but rather take the form of "normatively influential soft law" [279]. It is therefore important to discuss the legal force of such documents for Sweden.

Treaty body mechanisms such as the CESCR, HRC and the CERD have increasingly dealt with indigenous participatory rights in their work, despite their founding instruments not once mentioning indigenous peoples. Nevertheless, that there can be an evolution of the interpretation of human rights instruments is very much in line with the international law on legal sources.[280] The jurisprudence of bodies like the CESCR, HRC and CERD are all examples of such subsequent practice that the VCLT[281] identifies as appropriate sources of treaty interpretation.[282] The general comments, concluding observations and other output of these bodies are not strictly legally binding but rather recommendatory. However, according to Ben Saul, their output constitutes "highly authoritative interpretations of states' convention obligations, both at a standard setting level and in the resolution of particular factual and legal disputes in individual cases".[283]

In HRC's General Comment no 33, the Committee stated that its views "represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument".[284] The Committee further stated that their views "derive their character, and the importance which attaches to them from the integral role of the Committee under both the Covenant and the Optional Protocol".[285] This statement applies equally to the other UN treaty bodies as well, according to Ben Saul.[286]

[279] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 6.
[280] Åhrén, Mattias. *Indigenous People's Status in the International Legal System,* 100.
[281] Vienna Convention on the Law of Treaties, 23 May 1969, art. 31.2(b).
[282] Åhrén, Mattias. *Indigenous People's Status in the International Legal System,* 100.
[283] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 2.
[284] UN Doc. CCPR/C/GC/33, para. 13.
[285] Ibid.
[286] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 2.

Tara Ward recognizes that UNDRIP, UN treaty body commentaries, the ILO Convention and IACtHR jurisprudence doesn't yet constitute customary law in its entirety. [287] However, "given that international customary law is both developed and evidenced by the practice of States, what these human rights instruments and mechanisms can do is continue to challenge and guide State practice."[288] Soft law such as this can over time "crystallise into customary international law, given sufficiently widespread and representative state practice accompanied by the requisite legal intention".[289]

The views of these bodies and the other documents outlined above therefore constitute authoritative interpretations of the right to participation under international human rights law and further clarify what states actually have to do to ensure that indigenous participation is both genuine and effective.

2.6 Conclusion: Identified Elements of the Right to Participation

As shown in the above sections, the right to participation of indigenous peoples has been included in, and interpreted by, almost all major human rights treaties and institutions. The exact content and scope of the right varies depending on what source is consulted and it is difficult to offer a definite conclusion on what the resulting duties actually are. The Inter-American system is the regime that offers the most advanced and generous interpretation of the right to participation. It requires states to initiate extensive consultation procedures when any development project on indigenous land is proposed. The system further demands that states obtain free, prior and informed consent if a project risks the survival of an indigenous people. Ward argues that while the norms of the Inter-American system "might not yet represent a customary international legal principle, […] they are contributing to the development of such a norm by slowly shaping and challenging State practice".[290]

On the other hand, the fact remains that the only convention signed by Sweden where indigenous rights are explicitly mentioned is the UN Convention on Biological Diversity. Through this convention, Sweden is required to obtain consent and to ensure effective

[287] Ward, Tara. The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 83.
[288] Ibid.
[289] Saul, Ben. *Indigenous Peoples and Human Rights: International and Regional Jurisprudence,* 6 footnote 15.
[290] Ward, Tara. The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 66.

involvement of its indigenous people in decisions relating to the use of their traditional knowledge, innovations or practices relevant to the conservation and sustainable use of biological resources. The Framework Convention on the Protection of National Minorities also has a distinct status as it creates binding obligations for Sweden vis-à-vis the Sami people as a national minority. Sweden is bound to "create conditions necessary for effective participation in cultural, social and economic life and in public affairs, in particular those affecting them". The state should do this by involving the national minority in preparations, implementation and assessment of development plans and programmes likely to affect them. Beyond these two conventions, the nature of the obligations is less clear, and it becomes much more an issue of what value is attached to soft law documents and authoritative interpretations made by treaty body mechanisms.

Since the Swedish government has declared that it aims to strengthen and promote Sami influence, it seems more valuable to discuss what states actually have to do to ensure effective indigenous participation rather than pin pointing exactly what aspects have attained a status of customary law and therefore are binding upon the state.

While their exact content varies and whether they are considered to be mandatory or simply "best practice" differs depending on the source, there are certain common elements that are identified in the above survey:

2.6.1 Consultation

The main element of participation is consultation. Through consultation, participation can be ensured. Consultation on issues that concern the indigenous people ensures that they are able to participate in the decision-making processes.

2.6.2 Pursued in Good Faith

One obligation that is mentioned across instruments and institutions is that states are bound to consult with indigenous peoples in good faith on matters that concern them and that these consultations should aim at obtaining agreement or consent. It doesn't seem too farfetched to argue that states are obligated to fulfil at least this aspect of the right.[291]. It is also evident that consultations should not merely be an administrative procedure or a formal step in project

[291] Ibid.

planning. Consultations are a means through which indigenous participatory rights can be exercised. [292] In order for this right to be meaningful, any concerns or oppositions raised by the indigenous people during the consultation process must be allowed to influence the final decision.[293] It is therefore not enough that a consultation process is merely an exchange of information as that will not make it a mechanism for effective participation.

2.6.3 Free

Whether consent or only consultation is required, the participatory process should be carried out in a manner that is free from coercion. There should not be any threats or other pressures on the indigenous people to take a particular stance. Attention must be given to "political, economic and social context of a consultation process in order to ensure that it is truly free from coercion."[294]

2.6.4 Prior

Most sources agree that the participation must be carried out before any decision is made and at the earliest possible stage. In many of the instruments outlined above, it is advised that consultations should take place before the initiation of any stage of a proposed project. When the proposed measure involves exploration and exploitation of natural resources on indigenous lands, it is not enough to initiate consultation "when issuing an exploration or exploitation license, but at the moment a State is considering opening up an area to exploration and throughout the various stages of resource exploitation".[295]

2.6.5 Informed

To ensure that the participation is informed, all parties to the procedure "must have access to and share accurate information regarding potential impacts of a project, demonstrating the need for technically accurate environmental and social impact assessments."[296] There is a rather overwhelming consensus that for participation to be meaningful and genuine, the indigenous people must have access to relevant information and must have access to support and expertise that enables them to understand this information.

[292] Ibid, 83.
[293] Ibid, 84.
[294] Ibid, 83.
[295] Ibid, 84.
[296] Ibid, 83-84.

2.6.6 Consent

Some sources identify a consent or veto requirement as part of the right to participation. The consent/veto-requirement would ensure that the indigenous people's opinions are actually taken into consideration and can affect the outcome of the decision-making process. The only explicitly legally binding consent-requirement is found in the UN Convention on Biological Diversity, but most sources agree that when rights implicated by a measure or plan are essential to the survival of the indigenous people, their FPIC is needed.

2.6.7 Justifying going against the Wishes of the Sami people

Several sources also suggest that states must clearly justify in their documentation why they go against the wishes of the indigenous people after consultations. It also seems as if states are required to carry out a balancing of interests in accordance with principles of necessity and proportionality in pursuance of a legitimate aim when considering a decision against the wishes of the indigenous people. Pure economic reasons don't seem to be acceptable as a legitimate aim in this context.

2.6.8 Judicial Review and Appeals Mechanism

Several sources also mention an independent judicial review and appeals mechanism as an essential part in ensuring meaningful indigenous participation.

2.6.9 Consultations on Consultations

So-called "consultations on consultations" are also mentioned in several of the documents. The "Consultation on consultations" is needed to ensure that the consultation and the participatory-process in itself is set up in cooperation and agreement with the indigenous people concerned. Through this the state can create a climate of confidence and increase the support for the upcoming consultation and any following decisions.

3. The Proposed Consultation Act

3.1 Introduction

In September 2017, the Swedish government introduced their proposal for a new Consultation Act that would require the state and state agencies to consult with the Sami people on matters of special importance to them. The aim of the proposal is to promote and strengthen the influence of the Sami people over their own affairs in decision-making processes. The Consultation Act concerns the part of the right to participation that provides for effective participation of indigenous peoples in all decisions affecting them that are left to the larger institutions of decision-making.[297] The proposal is inspired by the Consultation Act already in place in Norway and has been developed to ensure that Sweden is in compliance with the recommendations issued by international treaty body mechanisms as well as the not yet ratified Nordic Sami Convention. If the proposal fulfils its aim, this law could be a ground-breaking development in a long history of non-influence in Sami-state relations. On the other hand, if the law falls short of its aim, it will be another document in a long line that has disappointed Sami expectations and the exclusion of the Sami people from decision-making will continue uninterrupted.

The chapter's first section will outline the background of the proposal. First the reasoning behind introducing this proposal will be discussed. What is the aim of the proposal? What does it endeavour to accomplish? What are the motivations behind the proposal? The international obligations and agreements that the inquiry recognizes will also be outlined as this further explains why the proposal was introduced. The current law on consultation will be briefly discussed to see to what extent existing legislation already allows for Sami participation. The Norwegian Consultation Act and the Nordic Sami convention will also be briefly outlined as the Swedish proposal is said to be inspired by these instruments. The closing section will introduce the actual legal framework set out by the proposal by outlining the Consultation Act's content. This section outlines what duties and corresponding rights the proposal will give rise to if accepted by the Swedish parliament.

[297] Anaya, James. *Indigenous Peoples in International Law*, 151.

3.2 Background

3.2.1 Previous Proposal for a Consultation Act

In 2009, the Swedish government published an inquiry that proposed several changes to the state's Sami policy. Most notably it advocated for the introduction of an obligation for the Swedish Government Offices to consult with the Sami parliament in their role as representatives of the Sami people. The aim of these changes was to strengthen the influence of the Sami people and to increase their participation in decisions that concerned them.[298] While such an obligation would have signified an improvement in the standing of the Sami people, the inquiry was met with fierce criticism and the government never presented the proposal for voting before the Swedish parliament. The major glaring deficiency was that even though the inquiry spoke warmly about increasing Sami influence and hailed the importance of the Sami people being able to participate in decision-making, no representatives of the Sami people had been involved with or even consulted by the inquiry. In other words: Not even when the state recognized and emphasized the importance of Sami participation, not even then were the Sami invited into the process. In her official opinion on the inquiry, the Equality Ombudsman wrote that she found it:

> remarkable that the inquiry proposes a Consultation Act at the same time as Sami participation, Sami voices and perspectives are notably absent from the preparation of the inquiry's problem description and its proposals. The lack of Sami participation has the effect that the Equality Ombudsman not only has serious objections to the proposal of the inquiry in general but also that the proposal of increased Sami influence cannot be seen as credible neither by the Sami people nor by the majority society.[299]

3.2.2 The Reasoning behind the Proposal

The inquiry behind the proposal for a new Consultation Act concludes that "there is a need to take further measures to secure Sami influence on matters of special importance to them".[300] The reason is the repeated critique Sweden has received from international treaty body mechanisms as well as the critique from the Sami people itself. The inquiry also identifies a flaw in the current consultation-legislation as most of the existing consultation-duties are connected to the status of Sami people as property owners through their right to reindeer

[298] Ds 2009:40. *Vissa Samepolitiska frågor,* 101.
[299] DS 2009:40 *Diskrimineringsombudsmannens yttrande över Vissa samepolitiska frågor,* 4.
[300] Ds 2017:43, 33.

husbandry. Only a small section of the Sami people has a de facto right to reindeer husbandry, meaning that currently the non-reindeer herding Samis have little to no say on any matters concerning their rights and interests.[301] Additionally, the consultation rights set out in the law on national minorities only requires consultation "as far as possible" which leaves the threshold for neglecting consultation at a rather low level.[302]

The consultation available for the Sami people today is also quite sparse as a duty to consult is only included in a few select laws. This leaves large areas of interest to the Sami people not covered by any right to consultation. Furthermore, the existing consultation is usually offered at a late stage of a decision-making process, something that considerably lowers the possibility of the Sami people to exert genuine influence.[303] The inquiry concludes that the existing legislation "doesn't ensure that consultation with the Sami people is carried out in an uniform and comprehensive manner".[304] The proposed Consultation Act could rectify the flaws in the current legislation and promote the ability of the Sami people to have a say on decisions that affect them.[305] Consultation under the Consultation Act should be understood to mean negotiations and deliberations.[306]

Through the Consultation Act, the Sami people could be given an increased insight into decision-making processes at an early stage.[307] Increased influence and insight into decision-making processes could also promote the acceptance and understanding by the Sami people of the state's decision and in turn, promote the state's understanding of the Sami people's point of view.[308] As is emphasized in the proposal, the main aim and the central fundament of the proposed law is to strengthen and secure the influence of the Sami people by allowing them to be part of decision-making processes in matters that concern them.[309] The proposed act would ensure that Sami representatives are consulted as representatives of the public interests of an indigenous people, rather than as mere property owners or otherwise "regular" parties to a process.[310]

[301] Ibid, 34.
[302] Ibid.
[303] Ibid.
[304] Ibid, 35.
[305] Ibid.
[306] Ibid, 41.
[307] Ibid, 39.
[308] Ibid, 39-40.
[309] Ibid, 40.
[310] Ibid.

The inquiry believes that the Consultation Act will be in line with the international duty of states to consult with indigenous peoples on matters that concern them and that it will be complying with the principles of the Nordic Sami convention.[311] When presenting the proposal, the Minister for Sami affairs Alice Bah Kuhnke said she hoped that a potential new law would lead to "increased Sami influence and self-determination".[312]

3.2.3 Recognized International Instruments

The inquiry acknowledges that Sweden has certain international obligations concerning the right to participation of the Sami people. The proposal claims to be based both on certain international provisions and recommendations as well as having the aim to be in compliance with those obligations. The inquiry quotes CERD General Recommendation no 23 which states that no decisions that are directly related to the rights and interests of indigenous peoples can be made without their informed consent. However, in the next sentence the inquiry emphasizes that the General Recommendation is "not legally binding for the state parties".[313] CERD's concluding observations on Sweden from 2013 are also referenced, where Sweden received critique for conducting extensive activities concerning Sami interests without giving Sami representatives the possibility to influence those decisions.[314] The inquiry also brings up HRC's General Comment 23 where state parties are urged to "ensure the effective participation of members of minority communities in decisions which affect them"[315] in order to fulfil their obligations under Article 27 of the ICCPR.

The inquiry also mentions HRC's critique in several concluding observations on Sweden's shortcomings in allowing the Sami people the possibility to influence decisions on matters that concern them.[316] The existence of the ILO no. 169 and its importance for the promotion of indigenous rights is also acknowledged, but it is concluded that Sweden is not bound by its provisions due to not having ratified the convention. The obligation under the UN Convention on Biological Diversity to maintain traditional indigenous knowledge "with the approval and involvement of the holders of such knowledge"[317] is also recognised. Additionally, the inquiry references article 15 of the European Council's Framework Convention for the Protection of

[311] Ibid, 41.
[312] Heikki, Jörgen, 'Regeringen föreslår särskild konsultationsordning med samerna', *Sveriges radio* [website], 21/9–2017. https://sverigesradio.se/sida/artikel.aspx?programid=2327&artikel=6782911 (Accessed 8/5–2018).
[313] Ds 2017:43, 13.
[314] UN Doc. CERD/C/SWE/CO/19-21.
[315] UN Doc. CCPR/C/21/Rev.1/Add.5.
[316] See for example Un Doc. CPPR/CO/74/SWE.
[317] Convention on Biological Diversity, 5 June 1992, art. 8(j).

National Minorities that requires state parties to create the necessary conditions for people belonging to national minorities to be able to efficiently participate in decision-making processes concerning them. It further mentions the UNDRIP and its provisions on self-determination and participation but emphasizes that it is not binding and merely constitutes a "political declaration of intent" that offers guidance on indigenous questions.[318] The inquiry argues that the statements made by Sweden when voting for the adoption of the UNDRIP are still applicable when considering implications of the declaration.[319] The inquiry emphasizes that the Swedish view that FPIC in no way constitutes a veto right, but that it is rather "an important principle with the aim of ensuring genuine consultation and dialogue", is still valid.[320] The Nordic Sami Convention is also introduced and the proposal is said to be "designed to be in agreement with the provisions in the Nordic Sami Convention".[321]

3.2.4 Norwegian Consultation Act

The inquiry states in its summary that the proposed Consultation Act is "similar to the act that exists in Norway".[322] The Norwegian Sami Parliament has a right to be consulted on matters that may have a direct importance for the Sami people.[323] The act uses the word "may" which indicates that a right to consultation exists also on matters that are only potentially of importance to the Sami people. Therefore, the importance of the issue must not be completely clarified. This broadens the scope of application of the right to consultation considerably.

The aim of the Norwegian consultations must always be to obtain unity. The Consultation Act applies to the government, state departments, government agencies and functions but does not apply to municipalities.[324] Government agencies are required to relay accurate information on current affairs that may have a direct effect on the Sami people and on relevant circumstances throughout the entire process.[325] Twice a year, there shall be a meeting between the Norwegian minister for Sami Affairs and the president of the Sami parliament. These meetings will cover issues of fundamental principal character, on-going processes as well as questions of the situation and development needs of the Sami society.[326]

[318] Ds 2017:43, 15.
[319] See more on these voting declarations in section 2.4.1.5.
[320] Ibid, 17.
[321] Ibid, 19.
[322] Ibid, 1.
[323] Ibid, 19.
[324] Ibid, 20.
[325] Ibid, 21.
[326] Ibid.

The consultation should be genuine and pursued in good faith with the aim to achieve consensus and agreement on the matters at hand. Governmental agencies are required to inform the Sami parliament of current affairs that could have a direct effect on the Sami people as soon as possible. This information should include which Sami interests and conditions are at stake.[327] The Sami Parliament can initiate consultation on matters that they themselves believe could affect the Sami people.[328] Consultations should not be ended if the Sami parliament and the state still believe that consensus can be reached.[329]

When consultation between the state and the Sami Parliament has not ended in agreement, the state must include information on the Sami opinion in any proposition or document presented to the Norwegian parliament.[330]

3.2.5 Nordic Sami Convention

Since 2011, representatives from the Swedish, Norwegian and Finnish governments and the respective Sami parliaments have been in negotiations over a joint *Nordic Sami Convention* that would streamline the laws and rights of the Sami people in the three countries. A final proposal from the negotiation committee was presented in 2017 but no final decision on ratification has come from either of the parties.

Article 4 of the convention states that the Sami people have a right of self-determination and therefore have a right to determine its own political status and its economic, social and cultural development. Their right to self-determination can be exercised through self-government in internal affairs and through consultation in matters that are of special importance to the Sami people. Article 9 requires states to show respect for the legal traditions and customs, especially when developing legislation where such Sami customs exist.

The consultation rights of the Sami people are set out in article 17. When the state is considering legislation, decisions or other measures that may be of special importance for the Sami people, they must consult the Sami parliament in question. The state is obliged to inform the Sami parliament as soon as possible when they are working on questions of this nature. The

[327] Ibid.
[328] Ibid.
[329] Ibid, 22.
[330] Ibid.

consultation should be held in good faith and aim at obtaining the agreement or consent of the Sami parliament before a decision is made. According to article 18, states should consult other Sami representatives as well when legislation, decisions or measures could be of special importance for other Sami parties, if there is cause for this.

Article 32 identifies the respect for Sami land rights as especially important for the preservation of their culture. With this in mind, states should as far as possible involve the Sami people in questions concerning the administration of their natural resources when this isn't otherwise required by article 17. Since access to their traditional lands is crucial for the continued existence of the Sami people, this article can potentially cover for all eventualities. The aim of the convention is to protect the interests in need of protection – this article allows for a flexible application of the law that could do just that.

3.2.6 Consultation with the Sami people Today

There are already several legal provisions pertaining to Sami participation and consultation – some directly and some indirectly. The Instrument of Government[331] stipulates that "the opportunities of the Sami people […] to preserve and develop a cultural and social life of their own shall be promoted."[332] The Instrument of Government further requires the government to obtain information and opinions from concerned public and local authorities when preparing government business.[333] This is a general provision but it includes a duty to obtain information and opinions from the Sami parliament when matters concern Sami interests and rights.[334] The law on national minorities and minority languages sets out a general consultation duty for state agencies to give the national minorities (including the Sami people) influence over questions concerning them and to "as far as possible" consult with them on such matters.[335]

When Sami interests are connected to property rights, they are also covered by the general consultation rights found in environmental and real estate law. There is also a duty in the Forestry Act to consult with the concerned Sami village when logging is planned on their traditional lands.[336] The Mineral Act requires that those with a right to reindeer husbandry are presented with a plan for exploration of mineral deposits and given the opportunity to express

[331] Regeringsformen in Swedish. Part of the Swedish Constitution.
[332] SFS 1974:152. *Regeringsformen,* 1 kap. 2 §.
[333] SFS 1974:152. *Regeringsformen,* 7 kap. 2 §.
[334] DS 2017:43, 24.
[335] SFS 2009:724 *Lagen om nationella minoriteter och minoritetsspråk,* 5 §.
[336] SFS 1979:279 *Skogsvårdslagen,* 20 §.

their opinions on that plan.[337] There are also special reindeer husbandry delegations in the regions of traditional Sami lands where consultations are held between the County Administrative Board and representatives of the Sami people on questions regarding reindeer husbandry.[338]

3.3 The Content of the Proposed Consultation Act

Now that the reasoning behind the proposal has been introduced, this section will outline the content of the Consultation Act and the rights and duties contained therein.

3.3.1 Who Is Covered by the Duty to Consult?

The inquiry proposes that the government, state agencies, county board and municipalities shall have a duty to consult with Sami representatives on matters that may be of special importance to the Sami people. The duty to consult is not applicable to courts or any organs with court like duties.[339] The inquiry justifies that the duty to consult encompasses all these institutions by limiting the duty to "decisions that can be presumed to be of special significance just for the Sami".[340]

3.3.2 Which Sami Representatives Should Be Consulted?

The consultation should be carried out with the Sami Parliament as the representatives of the Sami people.[341] If the matter could be of special significance to another Sami organization or a Sami village, they should also be consulted "if there is reason to do so".[342] There should not be a duty to consult with all potential representatives of different Sami interests. To introduce a compulsory consultation duty with every Sami organisation with interests in the matter would lead to a "overly heavy and time-consuming system".[343]

3.3.3 What Is the Scope of the Consultations?

The duty to consult should apply to matters that may be of special significance to the Sami as a people. The inquiry doesn't want to list potential matters in the legal text as this might

[337] SFS 1991:45 *Minerallagen*, 3 kap. 5a §.
[338] SFS 2007:825 *Förordning med länsstyrelseinstruktion,* 31–35 §§.
[339] Ds 2017:43, 43.
[340] Ibid, 45.
[341] Ibid, 46.
[342] Ibid.
[343] Ibid, 53.

"exclude important questions".[344] It states that "a prerequisite of such a far-reaching consultation duty as a consultation act is that it only regards decisions of greater significance to the Sami".[345] The issue should also have implications on Sami subsistence and culture to be encompassed by the duty to consult. When a matter is of a more trivial nature, consultation cannot be demanded.[346] This does not exclude that a state agency on their own initiative can initiate a consultation with Sami representatives on matters of lesser significance.[347] When a decision is of a more local nature and significance, the consultation duty can still be applicable if the consequences for the Sami in the area are likely and of an invasive nature.[348]

The inquiry does not find it necessary to introduce an independent right of Sami representatives to demand consultations on their own initiative.[349] It is argued that the state and other involved organisations will probably accept that a consultation is needed if such circumstances are pointed out to them by the Sami representatives.[350] This means that the initiative to consultations lies entirely with the state and non-Sami parties.

3.3.4 What Are the Permitted Exceptions to the Consultation Duty?

The inquiry sets out several situations where the consultation duty can be waived. The consultation duty can be renounced if there are extraordinary reasons considering the urgent nature of the matter. This exception is applicable only if the delay resulting from the consultation would cause very great inconveniences from a public point of view. Additionally, if the law that regulates the procedure of that particular decision-making process sets out a deadline, consultation can be waived if it cannot be carried out within this time frame.[351] Consultation can also be waived if the matter is appealed or handed over to the government or a state agency and a consultation on the same matter has already been carried out in a lower instance. The proposal says that there are no obstacles for the higher instance to set up a new consultation with Sami representatives if new important circumstances in the matter arises.[352] This phrasing indicates that higher instances have the possibility to *not* initiate a new consultation, even if new and important circumstances have been added to the matter.

[344] Ibid, 54.
[345] Ibid.
[346] Ibid.
[347] Ibid, 55.
[348] Ibid.
[349] Ibid, 57.
[350] Ibid, 62.
[351] Ibid, 58.
[352] Ibid.

If the Sami parliament or another Sami organisation or Sami village finds it unnecessary to carry out a consultation, it doesn't have to take place. The consultation duty can also be side stepped if it in other ways is deemed as "obviously unnecessary".[353] This can be actualized in situations where laws are applied simultaneously on the same issue and when decisions on the same issue are made by different agencies. In such instances, consultation should not take place if consultation has already been held on essentially the same question.[354]

Neither should the consultation duty apply to matters regarding the total defence or Sweden's security in general. The term "Sweden's security" encompasses its defence capabilities, political independence, territorial sovereignty and protection of its democratic order.[355] Matters that concern the total defence and Sweden's security in general are often subject to secrecy provisions. Consultation should be able to be waived if the matter involves such secret information or "affects safety-sensitive operations in general".[356] Consultation can also be waived on matters that pertain to public order and security. When a matter concerns interventive measures towards an individual and a consultation would be manifestly inappropriate, the duty to consult is not applicable.[357]

3.3.6 Preparations?

An agency that works with a matter of special significance to the Sami, shall as soon as possible inform the Sami parliament of the nature of the matter and ask whether the Sami Parliament wants to be consulted. The consultation should take the form that is requested by the Sami parliament but can be held in another form if the one that is requested would cause considerable inconvenience for the processing of the matter, for example by considerably hindering the fast and efficient administration of a matter.[358] The state can also decide on another form if the aim of the consultation (i.e. increasing Sami influence over their own matters) could still be realized.[359]

[353] Ibid, 57.
[354] Ibid, 59.
[355] Ibid.
[356] Ibid, 61.
[357] Ibid, 57.
[358] Ibid, 66-67.
[359] Ibid, 66.

Since the government decides its own methods of working, it will be allowed to decide the form of consultation when it is the consulting party.[360] The inquiry does however claim that it can be "presumed that the government in general will consider requests from the Sami party to the consultation".[361] The inquiry suggest that "consultation on consultations" should be carried out with the Sami parliament, but it is no strict requirement.[362]

Before an oral consultation is carried out, the Sami parliament should receive written documentation on the relevant aspects of the matter that is up for consultation. The Sami parliament shall also be given reasonable time to gather necessary information and to prepare for the consultation.[363]

3.3.7 How Should the Consultation Be Carried Out?

The inquiry does not want to introduce detailed rules on how the consultation should be carried out. However, some fundamental aspects should be set down in the law to guarantee that the consultation leads to genuine influence and does not only consist of an exchange of information.[364]

The consultation should be carried out in good faith and the aim should be to obtain agreement or consent.[365] These requirements are included in order to guarantee that the consultation does not only consist of the state relaying information or only of the Sami Parliament stating an opinion that is not discussed any further.[366] During the consultation process, both sides should give their opinion on the matter and comment on the other party's opinion.[367] At what stage, in what situations or at what time consultation should be initiated, is something that should be decided on a case to case basis.[368]

When the consultation is concluded, the consulting party shall consider the Sami point of view when making their decision. When the decision at hand concerns Sami culture, subsistence or

[360] Ibid, 66 & 68.
[361] Ibid, 68.
[362] Ibid.
[363] Ibid, 66.
[364] Ibid, 65-66.
[365] Ibid, 68.
[366] Ibid, 70.
[367] Ibid, 68.
[368] Ibid, 69.

other conditions, the state party should award it significant importance in their balancing of interests.[369]

The inquiry further concludes that the Consultation Act does not need specific provisions requiring the consulting party to give "full information on current issues that may affect the Sami directly and about relevant conditions at all stages of the processing of the matter".[370] This "information duty" is instead argued to follow from the "nature of the consultation duty and general principles of administrative law".[371]

3.3.8 How Should the Consultation Be Concluded?

Consultation should continue until agreement or consent is obtained or when one of the parties declares that neither agreement nor consent can be reached. This means that the consultation can be unilaterally ended by the state party against the wishes of the Sami representatives. Consultations should furthermore always be concluded in time before the matter according to other laws and regulations needs to be decided on by the consulting party.[372]

3.3.9 How Should the Results of the Consultation Be Presented?

The process and outcome of a consultation should be documented. Information on when the consultation took place, who was in charge, and who participated should all be included in the documentation. The documentation should show that consultation has taken place and how it progressed.[373] The inquiry also refers to 20 § of the Administrative Procedure Act[374] which sets out situations where an explanation of the rationale behind a decision is required. If a matter up for consultation falls under 20 §, the inquiry says that such an explanation should include information on the viewpoint of the Sami party.[375] The same is suggested for legislative matters where it is proposed that the government should include the opinion of the Sami in the law proposition. The inclusion of the Sami opinion is thus not required by the proposal, but only encouraged. The inquiry concludes that a separate duty to explain the rationale of a decision should not be included in the Consultation Act. Instead general principles of administrative law should be applied.

[369] Ibid.
[370] Ibid, 72.
[371] Ibid.
[372] Ibid, 68-69.
[373] Ibid, 73.
[374] Förvaltningslag (1986:223).
[375] Ds 2017:43, 73.

3.3.10 Decisions against the Wishes of the Sami People

The inquiry concludes that under no circumstances should Sami consent be necessary for the legality of a decision.[376] The aim of the Consultation Act is to "first and foremost get an appreciation of the Sami point of view and opinions on the current matter".[377] When the state party then considers this point of view in their decision-making, the Sami has been allowed to influence the process. That the Sami is allowed to divulge their opinion on the matter is a way in which they can exert influence. The consultation "increases the possibility of the Sami to contribute with their knowledge on the question and highlight the consequences of the decision on the Sami people".[378]

The inquiry argues that if consent should be required for a decision's legality, it might result in "invasive socioeconomic consequences when larger projects are considered" since such projects "may often have harmful effects on reindeer husbandry or other Sami interests".[379] The inquiry says that the "duty to consult is not aimed at making decisions' legality dependent" on Sami consent, but rather to "more closely highlight the issue's effect on the conditions of the Sami and thereby give the Sami influence over the process".[380] When taking this into consideration, it would not be "reasonable that a decision in violation of the Sami stand should be grounds for repealing that decision".[381] The inquiry does however emphasize that the Sami opinion should be taken into account in the decision-making and that if the matter concerns Sami subsistence, culture or other conditions, it should be deemed very important.[382] The aim of the consultation is to increase Sami influence over their own matters, and it should therefore be "clear that the Sami opinion may have a great impact on the balancing of reasons for and against a decision".[383] In the documentation of the consultation, information on a possible opposing view of the Sami representatives should be included.[384]

[376] Ibid, 74.
[377] Ibid.
[378] Ibid.
[379] Ibid.
[380] Ibid, 74-75.
[381] Ibid, 75.
[382] Ibid.
[383] Ibid.
[384] Ibid.

3.3.11 Right to Appeal and the Legal Effect of Deficient Consultation

If a state representative neglects to conduct a consultation in accordance with the provisions in the Consultation Act, this circumstance can be claimed as a "defect in the administration" in an appeal of the decision.[385] The inquiry does not propose an independent right to appeal for the Sami representatives and does not see a need to introduce special rules for appeal and legal effect in the Consultation Act.[386] An independent right of appeal on consultations would, according to the inquiry, be a "new and complicating feature in the system of administrative law".[387] Instead, the right to appeal a decision shall be decided by the law according to which the matter is administered under (for example the Administrative Procedure Act or the Environment Act).[388] The inquiry emphasizes that the main rule in 22 § of the Administrative Procedure Act is applicable to consultations and that administrative decisions can thus be appealed if the law allows for it and the decision has gone against that party.[389] Additionally, the inquiry therefore argues that a special appeals provision would not fill "any independent function".[390] The main rule in the Swedish system of governance is that it is not possible to appeal regulations or decrees.[391]

The legal effect of a deficient or omitted consultation shall also be decided by the law according to which the matter is administered. In non-Sami settings, a consultation that has not fulfilled the formal requirements has been found to be reason enough to reverse that decision.[392] However, if the omitted consultation has had no bearing on the final decision, the inquiry states that the omitted consultation alone should not be enough to reverse the decision.[393]

If consultation has been omitted without any of the acceptable exceptions being applicable, the decision should be reversed. Even when a consultation has taken place, but the consultation form is not in accordance with the act's requirements, that decision should be possible to overturn.[394] However, the discrepancies must be of an essential nature for this to be applicable. For example, if the Sami parliament has not been given enough time to prepare for the consultation, this fact alone should not be enough to overturn the resulting decision. Neither is

[385] Ibid.
[386] Ibid.
[387] Ibid, 77.
[388] Ibid, 79.
[389] Ibid, 78.
[390] Ibid.
[391] Ibid, 78-79.
[392] See Miljööverdomstolen dom 2002-02-13 i mål M4563-01 and Miljööverdomstolen dom 2003-09-16 i mål M3554-02.
[393] Ds 2017:43, 81.
[394] Ibid.

it reason enough for overturning if the Sami party still thinks a consultation could lead to agreement while the state party has declared it to be completed because they do not believe agreement is possible.[395]

The inquiry discusses whether to introduce an explicit provision that dictates that "decisions made in violation with the duty to consult shall be eliminated after appeal and remitted back to the state party".[396] The inquiry recognizes the distinct nature of the rights of the Sami as an indigenous people and that this could be reason enough to introduce such an explicit provision. However, since the duty to consult will be applied to such a wide array of matters with different formal rules, such a provision would have invasive consequences on the system of administrative law. The inquiry therefore concludes that no special rules regarding the legal consequences of omitted or deficient consultation should be introduced into the Consultation Act. Instead, the legal enforcers should have the final say on what the legal effect of omitted or deficient consultation should be, based on the formal requirements provided for by the law that the matter is otherwise administered under.[397]

3.3.12 Limitations to the Application of the Law

During situations of military heightened alert, the Consultation Act shall not be applicable. Situations of heightened alert are situations where Sweden is at war, or at risk of war, or if there are certain extraordinary circumstances due to war outside of Sweden's borders or if Sweden has recently been at war or at risk of war. Fulfilling the duty to consult during such times could delay the administration of matters in a way that is not acceptable.[398]

[395] Ibid.
[396] Ibid, 82.
[397] Ibid, 83.
[398] Ibid.

4. Analysis: Comparing the Consultation Act with the International Legal Standard on the Right to Participation of Indigenous Peoples

4.1 Introduction

Before initiating the comparative analysis, it feels appropriate to include a reminder of exactly what will be used as the comparative standard. As outlined in the second chapter, it is not possible to give an exact definition of the right to participation or say what aspects are strictly legally binding. However, there were several common elements identified in the chapter and these will be used as the basis for the comparative standard.

These elements include:

- Consultation is a possible mechanism for ensuring effective participation.
- Such consultations should be free from coercion, prior to any decision being taken and initiated at the earliest possible stage. The consultation should be informed, i.e. the indigenous party should have access to relevant information and any expertise required to understand it.
- The consultation and any participatory process should be carried out in good faith with the aim of obtaining consent or agreement.
- When going against the wishes of the Sami people, the state party should follow the principles of necessity and proportionality and should include a written justification in their decision.
- Introducing an independent judicial review mechanism is also identified as a way to ensure effective and genuine participation.
- Consent might be required in certain cases and should also fulfil the principles of free, prior and informed.
- States should hold “consultations on consultations” to ensure that the participatory processes are designed with the wishes of the indigenous people in mind.

The chapter will compare the proposed Consultation Act with the standards and elements identified in the second chapter to assess whether the proposal satisfies the international standard on the right to participation.

4.2 Analysis

4.2.1 Scope of the Duty to Consult

The fact that the duty to consult encompasses the government, state agencies, county board and municipalities is a very positive aspect. This means that almost all entities that can be involved in projects and decisions that have an effect on the Sami people will be obliged to initiate consultations with them.

The scope of the consultation is first said to be matters of special significance to the Sami people and then "decisions of greater significance to the Sami". The fact that the inquiry doesn't want to list potential matters where the consultation duty would apply leaves the applicability of the duty to consult rather vague. This vague legal element might leave too much leeway to the state to decide when the duty applies. Consider this in combination with the fact that the Sami people cannot initiate consultations and that there is no judicial review/appeals mechanism to challenge when a state party has deemed consultation unnecessary – these factors could give rise to uncertainty on when consultations are required and heightens the risk of arbitrary decisions.

4.2.2 Exceptions to the Duty to Consult

The fact that consultations can be waived due to extraordinary reasons due to the urgent nature of the matter, opens for the possibility to waive consultation on issues that might even require FPIC under the current standard of the right to participation. At the same time, most laws do include an exception for extraordinary reasons. The question is then if the right to participation should be viewed as an absolute right where no derogations are ever allowed.

The exception allowing for waived consultation if the consultation cannot be carried out within the time frame set by another law is also questionable. Most sources discussing indigenous participatory rights agree that the indigenous people should be allowed the time they need to gather and analyse relevant information to take an informed stance on the issue. It is an even more interesting aspect as the proposal in a later part requires the Sami parliament to be given

reasonable time to gather necessary information and to prepare for the consultation. How can these two provisions be reconciled?

Consultation can also be waived if consultation on the same issue has already been carried out. The Consultation Act does not require higher instances to initiate new consultations if new circumstances are added, but these institutions are allowed to do so on their own initiative. The phrasing indicates that higher instances have the possibility *not* to initiate a new consultation, even if new and important circumstances have been added to the matter. This contradicts the principle identified as part of the current standard that consultation and participation is not a single event but should rather be viewed as an ongoing process. It also seems to be in contradiction to the principle that any agreement, consultation or consent should be given on an informed basis. If the Sami people are not informed and consulted on new circumstances, any previous consultation or given consent can no longer be said to have been made on an informed basis.

Additionally, consultations can be waived if they are deemed to be "obviously unnecessary". The question here is who decides what is "obviously unnecessary"? The state and the Sami people might have very different opinions on when a consultation is necessary or not. The inquiry mentions instances where consultation has already been carried out through requirements in a separate law. The risk is here that earlier consultation might have been made with for example a Sami village due to their status as a property owner and not in their role as representatives of an indigenous people. It is clear that a duty to consult under indigenous rights is distinct from, and goes further than, "regular" consultation with property owners. The indigenous right to participation includes an aspect of actually being allowed to have influence on the final decision, this is not present in regular non-indigenous consultation. If the Consultation Act is sidestepped because of previous regular consultation that has not fulfilled the criteria demanded by the international standard, the Sami people risk being denied their right to participation.

The fact that the consultation duty can be waived on military and defence issues raises the question if this allows for a very large area of exception to the duty of consultation. There have been many instances where military facilities and operations have been built and carried out on Sami traditional lands. Are such scenarios exempt from the duty to consult? Consultation can also be waived on matters that pertain to public order and security. Is "public order" admissible

as a "public interest" in the tests of necessity and proportionality that many sources on indigenous rights demand? These are two aspects of the proposal that need to be clarified.

The inquiry suggests that the Consultation Act should not be applicable during times of military heightened alert (i.e. when Sweden is at war or at risk of war). This limitation of course is very understandable and identical limitations are found in many other laws. The question then again becomes if the right to participation should be seen as an absolute right. It seems that a right to participation that is founded on the right to self-determination of the Sami as a separate people gives less room for manoeuvre, even during times of heightened alert.

4.2.3 A Right to Initiate Consultations?

The inquiry doesn't find it necessary to introduce a right of Sami representatives to initiate consultations on their own. This means that the initiative to consultations lies entirely with the state and other organisations. The argument that such an "initiation-right" is not needed is based on the belief that the state and its agencies have good intentions and that they will start consultations out of good-will when asked to do so. But historically speaking, the state has not had those good intentions and has not acted in good faith concerning the Sami people. The state has historically both ignored and actively worked against the Sami and their interests. The Sami people have not been allowed influence and decision-making power – that is the reason for even introducing the Consultation Act in the first place. The argument seems both arbitrary and ignorant concerning the shared Sami-state history. It is worth keeping in mind that UN Special Rapporteur James Anaya has criticized the Norwegian government for entering consultations with the Sami people with an already prepared decision, making the meetings only of an informative nature, even though Norway has a Consultation Act setting out rules to avoid precisely such conduct.[399] This indicates that it is naïve to rest the right to participation upon the good will and good intentions of the state.

4.2.4 Consultations on Consultations

The proposed law gives the consulting party the possibility to set up the consultation in a form that goes against the wishes of the Sami, if the underlying aim of the consultation can still be reached. This makes it possible for the state to reject a Sami proposal on the form of consultation even though the form suggested does not constitute a considerable inconvenience

[399] UN Doc. A/HRC/18/35/Add.2, para 39.

for the general public. It is hard not to see traces of a "state knows best"-attitude here. It is also worth raising the question whether a process whose design the Sami themselves have had no influence over, whether that process in itself can really fulfil the aim of "increased Sami influence". Also, is it the state that decides if another form of consultation will still fulfil the aim of increasing Sami influence, not the Sami representatives? This set up seems rather flawed. Isn't it also contradictory to ignore the Sami parliament's request of consultation form while saying that their influence will be promoted? Through this provision Sami influence is in fact being limited by the state with the justification that their influence will still be intact and secured.

Furthermore, there seems to be international consensus that consultations should always be held in appropriate forms and that indigenous peoples should be involved in the design. Special Rapporteur James Anaya as well as the EMRIP urge states to undergo consultations on consultations, partly to create a climate of confidence but also to ensure that the processes allow for genuine participation. The Consultation Act states that the government is always allowed to decide the form of consultation when they are the consulting party. The inquiry does not require that consultation on consultation should be carried out by the government but presumes that they will consider Sami wishes in the design of the process. Once again, this gives leave to the possibility of ignoring Sami wishes regarding the consultation process. The inquiry once again relies on a belief in the good intentions of the state concerning the Sami people, while such good intentions have historically not been present.

The Sami Parliament has officially opposed the Consultation Act as they don't believe it will promote and strengthen Sami influence.[400] Additionally, the Sami Parliament argue that the proposal is not in line with the current standard of the right to participation under international law. They believe that the Consultation Act must allow for a flexible application of a consent requirement to be in compliance with Sweden's international obligations. Mere consultation would be enough when decisions have a minimal effect on the Sami but when a decision have considerable effects on them, FPIC is required.[401] They acknowledge that the Consultation Act will provide an extension of "regular"/non-indigenous consultation but argue that it does not

[400] Sametinget, 'Remissvar Sametinget Departementspromemorian Konsultation i frågor som rör det samiska folket', *Regeringen* [website], 28/11-2017. http://www.regeringen.se/4ae3df/contentassets/8f4e22a24d8841c1bc1e15817ee4b28c/sametinget.pdf. (Accessed 8/5-2018), 1.
[401] Ibid, 2.

provide for the kind of participation that is required under international law.[402] It is also of value to read the Sami parliament's critique in light of EMRIP's study on the right to participation. To fulfil EMRIP's requirements for a good practice concerning participation, the process itself must have been designed with the involvement of the concerned indigenous people and the final set up of the process must have their agreement. The fact that the publicly elected representatives of the Sami people do not see the current proposal as adequate puts the whole document into question and, if passed as law, any consultation that is held in accordance with it.

4.2.5 In Good Faith

The consultation should be carried out in good faith and the aim should be to obtain agreement or consent.[403] These requirements are included to guarantee that the consultation does not only consist of relaying of information by the state and that the Sami opinion is heard and taken into consideration.[404] This is very much in line with the participation-requirement found in ILO 169.

The inquiry suggests that the time at which a consultation should be initiated shall be decided on a case to case basis and not explicitly regulated in the Consultation Act. However, the international consensus seems to be that consultations should be carried out at the earliest possible stage, before the initiation of any of the steps of the project or measure. It can very well be argued that an explicit requirement of this nature should be included in the Consultation Act for it to be in compliance with the current standard of the right to participation.

4.2.6 Absence of a Consent Requirement

The consulting party is required to consider the Sami point of view when making their decision and to award it significant weight when the decision concern essential Sami matters. It is clear that the Consultation Act under no circumstances offers a right to veto, and it can be questioned if this set up actually results in any genuine participation and influence for the Sami people. The inquiry argues that a veto right of the Sami is not possible as this could lead to "invasive socioeconomic consequences". However, Special Rapporteurs James Anaya and Victoria Tauli Corpuz as well as the HRC have all explicitly excluded commercial interests and the economic

[402] Ibid, 1.
[403] Ds 2017:43, 68.
[404] Ibid, 70.

wellbeing of the majority population as legitimate aims when limiting the rights of indigenous peoples, especially when projects risk essential rights of the indigenous people or their very cultural survival. The legitimacy of the socio-economic argument for not introducing any veto rights or consent requirements is therefore quite questionable.

The fact that the Consultation Act doesn't require Sami consent on any matter or under any circumstances seems to be in contradiction with the current standard of the right to participation in other ways as well. Most sources on indigenous rights identify at least a few instances where indigenous consent is required. For example, ILO 169 requires consent before relocation of an indigenous people and several treaty body mechanisms have identified large projects that risk the very survival of the indigenous people as instances were consent is required. HRC requires FPIC when measures substantially compromise indigenous economic activities, the storing of hazardous material on indigenous lands requires consent according to UNDRIP et cetera, et cetera. At the very least, Sweden is bound by the consent-requirement concerning the use of indigenous traditional knowledge in the UN Convention on Biological Diversity, and this should be reflected in the Consultation Act.

Furthermore, the inquiry only mentions the principle of FPIC in passing when discussing the international instruments that might be applicable. The actual proposed law only states that consultations should be carried out with the "aim to obtain consent or agreement" but doesn't define consent or agreement further. Even if it is concluded that the international standard doesn't include a definitive consent requirement, the law should still include a definition of what the legislator identifies as "agreement or consent". Overall, the proposal lacks a discussion on what different elements of consent and agreement is required and what is needed for the consent to reach the standard of free, prior and informed consent.

4.2.7 Informed Participation

The inquiry doesn't see the need to include a specific duty for the consulting party to provide the Sami with relevant information and that this should be done at all stages of the process. This is instead argued to follow from general principles of administrative law. The question is if this is enough. The current standard of the right to participation indicates that consultation should not be viewed as a "one-off"-event but instead as an ongoing process. Shouldn't this be explicitly mentioned in the Consultation Act as well? Precisely to ensure that a consultation is

not only a meeting where the state relays information. Additionally, there seems to be a rather strong international consensus that states are required to provide their indigenous people with relevant information and preferably also in the form of environmental and social impact assessments. This far reaching duty under the current standard of the right to participation cannot really be met with this general reference to general principles of administrative law.

4.2.8 Concluding Consultations

The proposed law allows for consultations to be unilaterally terminated by the state against the wishes of the Sami representatives. Civil Rights defenders have criticized this provision, saying that the duty to consult "is not suitable for such blanket restrictions" and that there should at least be a closer and more "detailed regulation of the legal elements" and that these should include clear administrative routines. They further urge that such a provision should be "phrased as an exception and not as a general rule".[405] The proposal further sets out that consultations should be concluded in time before deadlines set by other laws. This lets other laws – laws with no indigenous perspective – set the time frame for Sami consultations. These two provisions regarding the conclusion of consultations does once again raise the question whether the Consultation Act will actually allow for genuine participation and increased self-determination. It once again leaves the final say and decision-making power with the state. The Sami people must be given enough time to prepare and gather information on the issue at hand to be able to adequately assess potential consequences and risks. Without this possibility, the consultation will not be meaningful, and any consent or agreement given cannot be said to have been informed. In this context it is also worth remembering that on most issues that will be up for consultation, the large bulk of information will be in the hands of the state, making it even more important to give the Sami people the time they need to gather such information.

Later on in the proposal, the inquiry states that the aim of the consultations is to "get an appreciation of the Sami view point and opinions on the current matter" and allow them to "contribute with their knowledge and highlight consequences for the Sami". This is not even by a generous interpretation the same as the earlier mentioned aim of "ensuring Sami influence over matters of importance to them". Neither can this additional aim be what is considered as

[405] Civil Rights Defenders, 'Yttrande över Promemorian Konsultation i frågor som rör det samiska folket (Ds 2017:43)'. *Regeringen* [website], 21/11-2017. http://www.regeringen.se/4ae3dc/contentassets/8f4e22a24d8841c1bc1e15817ee4b28c/civil-right-defenders.pdf. (Accessed 8/5-2018), 6.

genuine participation and influence under the current standard of the right to participation. This constitutes a watering down of the term "participation" and paves the way for a "We hear what you are saying, but it doesn't matter"-attitude. Consultation would be a useless tool for self-determination and participation if the Sami opinion could be ignored in this way.

4.2.9 Justifying Decisions against the Wishes of the Sami people and a Judicial Appeals and Review Mechanism

The conclusion that no separate duty to explain the rationale of a decision should be included in the Consultation Act is questionable when considering the current standard of the right to participation. For example, Special Rapporteur James Anaya's interpretation of the right to participation includes a duty on states to clearly justify and explain why, when they have taken a decision against the wishes of an indigenous people.

Neither does the proposal include an independent right to appeal for the Sami people and does not include any special rules regulating the legal effect of decisions. However, both the EMRIP and Victoria Tauli Corpuz urge states to introduce an independent and general right of appeal for indigenous peoples to ensure that participation is both genuine and meaningful. The inquiry further argues that a special appeals provision does not fill any independent function. However, one can argue that the independent function would be that the Sami could appeal when the state organ has decided that a matter is not of special significance to the Sami and therefore not encompassed by the consultation duty. If the Sami are not allowed to appeal a decision on the material content, is the consultation really providing an opportunity for genuine and meaningful participation? Does not the absence of the possibility to appeal on the material content yet again leave the consultation entirely on the terms of the state? Additionally, the proposal notes that the main rule in the Swedish system of governance is that it is not possible to appeal regulations or decrees. The question is then how the Sami can claim formal deficiencies in the consultation process when the government or Swedish parliament has been the consulting party? Under such circumstances, it can be argued that a special right to appeal would definitely fill an independent function.

The inquiry allows for decisions to be overturned if the preceding consultation has not been in accordance with the formal requirements discussed earlier, but only if the discrepancies are of an essential nature. The question is then, who gets to decide what is of an essential nature? This interpretation might differ between the Sami representatives and the state. "Essential nature"

is also a rather steep requirement; A discrepancy that doesn't reach the threshold of "essential nature" can still be significant to the Sami people and reduce the effectiveness and genuine nature of the participation. As an example of when a discrepancy is not of an essential nature, the inquiry mentions instances where the Sami parliament has not been given enough time to prepare for a consultation. It is a very interesting choice to use this as an example since the current standard of the right to participation, as previously discussed, seems to demand that indigenous representatives be given sufficient time and information to prepare for consultations for these to be meaningful and result in genuine participation.

Additionally, the inquiry refrains from including an explicit provision that delegitimizes decisions made in violation with the duty to consult. As the inquiry itself recognizes, it can be argued that such an explicit provision follows from the distinct rights of indigenous peoples. Such a provision would signal that the duty to consult is a cornerstone of Sami rights and participation and that there must be a strict adherence to formal requirements to ensure that the participation is both genuine and meaningful. If the participation provided for is neither genuine nor meaningful, the Consultation Act doesn't really fill a purpose. The inquiry refers to the legal enforcers to decide on the legal effect of deficient and omitted consultations which opens up for both arbitrary interpretations as well as legal uncertainty of what the consequences are. It further means that the Sami people will have to take their cases to court to have the value of the consultation assessed, something that will be associated with excessive costs and lengthy processes.

The fact that the Consultation Act doesn't include a distinct right to appeal decisions and is rather unclear regarding legal consequences of omitted or deficient consultation has to be assessed together with the fact that it does not set out any consent requirements.[406] This heightens the risk of the right to participation and the Consultation Act not being taken seriously and of the consultations becoming simply a formal step in decision-making processes – the consultations run the risk of being reduced to mere window-dressing.

[406]Front Advokater, 'KU2017/01905/DISK.', *Regeringen* [website], 21/11-2017. http://www.regeringen.se/4ae3dd/contentassets/8f4e22a24d8841c1bc1e15817ee4b28c/front-advokater.pdf. (Accessed 8/5-2018), 4.

4.2.10 Cumulative Effects

Another interesting line of critique against the Consultation Act is one raised by Civil Rights Defenders. They question the lack of discussion on how the Consultation Act will guarantee "real and effective influence regarding the cumulative effects of actions" that are up for consultations.[407] The fact is that "actions on their own can have a small impact but together result in great negative consequences".[408] An example of this are projects on nature exploitations. Such projects include a wide array of aspects, stages and elements that are all subject to different administrative processes, deadlines and actors. How can the Consultation Act guarantee that a consultation on for example the opening of a mine on Sami land also takes into account the building of roads to and from the mine? The inquiry doesn't discuss this problem, even though these scenarios are quite common on Sami traditional lands, and the proposal doesn't include any provisions tackling the issue.

This silence becomes even more notable when considering that the proposal aims to be in line with the Nordic Sami Convention. Article 30 of the Nordic Sami Convention requires the state party to acknowledge and take into consideration the accumulative effects of any proposed measure or project in the consultation process. The government should therefore include a provision matching this article to fulfil its aim of both promoting Sami influence but also of being in compliance with the Nordic Sami Convention.

4.3 Conclusion

In this thesis I have established that there is an international standard on the right of indigenous peoples to participate in decision-making processes on matters that concern them. The current standard of the right to participation seems to require the following elements: consultation; held in good faith; free from coercion; prior; providing information, consent requirement in certain situations; justification for decision against indigenous wishes; judicial review and appeals mechanisms; and consultations on consultations.

I then proceeded to compare this international standard with the content of the proposed Consultation Act. While certainly a step in the right direction, the discrepancies between the identified international standard and the proposal are considerable. Even more so if soft law

[407] Civil Rights Defenders, 'Yttrande över Promemorian Konsultation i frågor som rör det samiska folket (Ds 2017:43)', 7.
[408] Ibid.

instruments are awarded greater weight as the elements set out in those documents require much more than the Consultation Act presently offers. There are instances where the proposal is clearly not in line with Sweden's international legal obligations (e.g. the consent requirement included in the UN Convention on Biological Diversity). However, more obvious is the fact that the proposal doesn't satisfactorily fulfil its own aims of increasing and promoting the influence of the Sami people over their own affairs and increasing their self-determination. The Consultation Act completely lacks some of the identified elements, e.g. consent, judicial review, an appeals mechanism, justification for going against Sami wishes etc. Regarding other elements the Consultation Act is only partly in compliance, e.g. the right to be informed at all stages of a process and consultations on consultations. Considering the historic Sami-state relationship, the Consultation Act is of course a step in the right direction but read in the context of the recent developments in international law it is very much "the minimum standard" that is suggested in this proposal. The decision-making power still lays solely with the state.

What is then needed for the proposed Consultation Act to satisfy the international standard on the right to participation of indigenous peoples?

Firstly, a right to initiate consultations should be granted to the Sami people to ensure effective and genuine participation on all matters that concern them. This would increase Sami influence and emphasize that it is after all the Sami people themselves who best can determine whether an issue is of importance to them.

The law should be clearer on how to ensure that the consultation-process is carried out in a satisfactory manner by introducing consultations on consultation. The way that the law is now phrased, the State can circumvent Sami wishes on the form of consultation on several different grounds. A possibility that doesn't rhyme well with the aim of promoting and securing Sami influence. It is also essential for the legitimacy of the Consultation Act that it has the approval of the Sami people. The Sami Parliament has, as previously mentioned, dismissed the proposal in its entirety for not adequately fulfilling the current standard of the right to participation. The government should make a considerable effort to revise the Consultation Act to be in line with the wishes of the Sami people, otherwise its ability to ensure participation and influence will be rather limited.

The Consultation Act should also include a separate judicial review mechanism to ensure that the Sami people have a suitable outlet where they can raise issues of deficient or omitted consultation and appeal decisions of consultations where the state has decided against them. This would seem to be in line with minimum principles of the rule of law as well as the current standard of the right to participation.

The law should introduce a requirement for consent, at least when it comes to matters covered by the UN Convention on Biological Diversity which Sweden is bound by under international law. To be in compliance with the international standard, the law should also include a consent requirement when decisions and projects risk the very survival of the Sami people. Ideally it should also include a consent requirement concerning any exploration or exploitation projects of natural resources on traditional Sami lands. It is important that the Consultation Act includes some sort of consent-requirement since the current standard of the right to participation seems to suggest that consultation on its own does not ensure effective participation.

The Consultation Act should include more clearly defined provisions that ensure that the participation and the consultations are carried out in a manner that is free, prior and informed. It must also be made clearer that consultations should be initiated at the earliest possible stage of a decision-making process. Especially when those decision concern Sami traditional lands and resources. The law should also explicitly express that the Sami people should be given enough time, resources and information to be able to make an informed decision on the matter at hand.

There is also a need to clarify several aspects of the proposal to be able to draw definitive conclusions when comparing with the identified standard of the right to participation. There is for example a need to clarify if "socio-economic consequences" and "public order" can really be invoked as legitimate aims when the state wants to limit any indigenous rights. Several of the exceptions to the consultation duty also need to be clarified. For example, should consultation under the Consultation Act really be possible to sidestep because regular, non-indigenous consultation on the same issue has already been held?

All in all, my conclusion is that you can view the right to participation and the Consultation Act from two angles. Either you view consultation and participation as something that the state "grants" the Sami people out of good will. Or you view participation and consultation as

something the Sami have a right to due to their status as an indigenous people. The state seems to view it as the former, while the international standard certainly sees it as the latter.

It is important to remember that the aim of the Consultation Act is not only to be in line with Sweden's international legal obligations. The aim is also to secure and promote Sami influence over their own affairs – this sets the bar much higher. Had the aim only been to secure compliance with the 100% certain legal obligations, my conclusions might have been different. The aim puts a higher pressure on Sweden to behave in accordance with the current standard of the right to participation.

On an international level, the Swedish state has made efforts to appear as if it is serious about protecting indigenous rights. Supporting the adoption of the UNDRIP was one of those instances and as recently as in April 2018, the Swedish Minister for Sami affairs addressed the UNPFII and stated that "promoting and protecting the rights of indigenous peoples remain longstanding priorities"[409] for the Swedish state. Sweden has also condemned abuses against indigenous peoples in other countries and constantly preaches values of tolerance, human rights and equality – it is now time for Sweden to show that her ambitions are equally as high within her own borders and that her concern extends to her own citizens as well.

There is still time to improve the proposed Consultation Act as it hasn't yet been presented to the Swedish Parliament for voting. If the Swedish Government is serious about its aim to strengthen and promote the influence of the Sami people over their own affairs, they should consider revising the proposal.

[409] Government Offices of Sweden, 'Speech by Alice Bah Kuhnke at the 17th Session of the UN Permanent Forum on Indigenous Issues', *Government* [website], 17/4–2018.
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