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Extractive Industries and Sami in Sweden
An Analysis of the Procedural Safeguards in the Swedish Mineral Framework
and Sweden's International and Regional Obligations

LAGM01 Master Thesis

Graduate Thesis, Master of Laws Programme
30 higher education credits

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Term: Spring 2018

Table of Contents

Summary	1
Sammanfattning	2
Preface	3
Abbreviations	4
1. Introduction	6
1.1. General Background	6
1.2. Purpose	7
1.3. Research Questions	7
1.4. Method and Material	7
1.5. Limitations	9
1.6. Literature overview	10
1.7. Disposition	11
2. Sami and Mining in Sweden	13
2.1. Traditional lives of Sami in Sweden	13
2.1.1. Reindeer husbandry and the use of land	14
2.1.2. Other traditional activities and the use of land	14
2.2. The effects of mining activities on Sami	16
2.2.1. Effects on Sami traditional lives	16
2.2.2. Effects on the environment and the Sami	17
2.3. Conclusion	18
3. Sweden's International Obligations	20
3.1. International Minority Protection	21
3.1.1. People's Right to Self-determination	22
3.1.2. The Right to Participate in Cultural Life	23
3.1.3. The Minority Right to Culture	25
3.1.4. The Sami Minority Right to Culture in the CCPR	27
3.1.5. Right to Information	30
3.1.6. United Nations Declaration on Minorities	31
3.2. International Indigenous Protection	32
3.2.1. United Nations Declaration on Indigenous Peoples	32
3.2.2. Indigenous and Tribal Peoples Convention C169	34
3.3. International Environmental Protection	36
3.3.1. RIO 1992 Declaration	36
3.3.2. Aarhus Convention	38

3.3.3.	Convention on Biological Diversity	39
3.4.	Conclusion	40
4.	Sweden's Regional Obligations	43
4.1.	Framework Convention for the Protection of National Minorities	44
4.2.	European Convention on Human Rights	45
4.2.1.	The Cultural Dimension	46
4.2.2.	Sami cultural rights in the ECtHR	49
4.2.3.	The Environmental Dimension	52
4.2.4.	The Fair Balance in Minority Protection	53
4.3.	Conclusion	54
5.	Swedish Legal Setting	56
5.1.	The Sami Status and Protection	56
5.1.1.	Right to land and natural resources	57
5.1.2.	Right to Reindeer Husbandry, Fishing and Hunting	59
5.2.	The Swedish Mineral Framework	60
5.2.1.	Balance of Rights	61
5.2.2.	Environmental Impact Assessments	61
5.2.3.	Consultation and participation opportunities	63
5.3.	Sami rights in Swedish courts	65
5.3.1.	The legacy of <i>Taxed Mountains</i>	65
5.3.2.	Recent Developments	70
5.4.	Conclusion	70
6.	Critical analysis of the consistency of Swedish mineral safeguards	72
6.1.	Balance of Interests	72
6.1.1.	International Consistency	73
6.1.2.	Regional Consistency	77
6.2.	Environmental Impact Assessments	79
6.2.1.	International Consistency	79
6.2.2.	Regional Consistency	81
6.3.	Consultation and Participation	82
6.3.1.	International Consistency	83
6.3.2.	Regional Consistency	85
6.4.	Conclusions	86
	Bibliography	88
	Table of Cases	95

Summary

The Sami are one of the world's indigenous peoples that live in a land area referred to as *Sápmi* that extends over the north of Sweden, as well as parts of Norway, Finland and Russia. Part of the Sami population in Sweden lives according to their traditional way of life which includes reindeer husbandry, hunting, fishing, and other resource-based activities. It is internationally recognized that indigenous peoples have a special connection to their ancestral land and access to such lands is essential in the practice of their traditional way of life. The Swedish government since the 19th century granted mining concessions to companies to exploit the mineral-rich areas in Sweden that are also part of the land area *Sápmi*. Mining activities adversely impact the traditional Sami way of life, as well as the access to their cultural heritage and spiritual places.

The Swedish mineral framework employs three procedural safeguards in the process surrounding the approval mining concessions; a balance of the competing interest, environmental impact assessments, and public participation in the decision-making process. In Sweden the Sami are recognized as a people, minority and indigenous peoples which entail international obligations for Sweden towards Sami, and also affects the requirements for the formulation of procedural safeguards. Sweden's obligations under international human rights law and European human rights law stipulate specific obligations for Sweden surrounding the protection of the Sami way of life, considerations of Sami interests, Sami consultation and participation.

The balance of rights is not consistent with Sweden's international obligations as it does not give due consideration of the Sami interests and enables an encroaching effect on the Sami way of life. The system for environmental impact assessment is not consistent with Sweden's international obligations as it lacks explicit Sami consultations as well as considerations of reindeer husbandry and social impacts, making it unable to take due account of the Sami interest. The public participation in decision-making processes is further inconsistent with Sweden's international obligations as the legal framework in the approval process for mining concession only stipulates a mere right to information and in the planning framework only indirect consultation opportunities. This system for Sami consultation and participation does not adhere to Sweden's international obligations surrounding effective participation and consultation.

The procedural safeguards in the Swedish mineral framework; the balance of interests, environmental impact assessments and public participation and consultation, are not consistent with Sweden's international obligations, under the international human rights system as well as the European human rights system.

Sammanfattning

Samerna är ett av världens ursprungsfolk som lever i landområdet *Sápmi* som sträcker sig över norra Sverige, så väl som delar av Norge, Finland och Ryssland. En del av samerna i Sverige lever enligt deras traditionella levnadssätt som inkluderar renskötsel, jakt, fiske och andra resurs-baserade aktiviteter. Det är internationellt erkänt att urfolk har en särskild förbindelse till deras förfaders mark- och landområden och att tillgång till sådan mark är grundläggande för praktiserandet av deras traditionella levnadssätt. Sedan 1800-talet har den svenska staten beviljat gruvkoncessioner till företag för att exploatera de mineral-rika landområdena i Sverige som också utgör del av landområdet *Sápmi*. Gruvdrift medför allvarlig påverkan på samernas traditionella levnadssätt så väl som tillgången till deras kulturella arv och spirituella platser.

Den svenska minerallagstiftningen använder sig av tre processuella skyddsåtgärder i tillståndsprocessen kring mineralkoncessioner; en intresseavvägning av konkurrerande markintressen, miljökonsekvensbeskrivningar och allmänhetens deltagande i beslutprocessen. I Sverige är samerna erkända som ett folk, urfolk och en minoritet, vilket innebär internationella skyldigheter för Sverige gentemot samerna och som även påverkar kriterierna för utformningen av processuella skyddsåtgärder. Sveriges förpliktelser enligt internationella mänskliga rättigheter och enligt det europeiska systemet för mänskliga rättigheter uppställer specifika skyldigheter för Sverige angående skydd av samernas levnadssätt, beaktande av samiska intressen, samt samiskt samråd och deltagande.

Intresseavvägningen i minerallagstiftningen är inte förenlig med Sveriges internationella folkrättsliga förpliktelser eftersom den inte tar vederbörlig hänsyn till samiska intressen och möjliggör en inträngande effekt på samernas traditionella levnadssätt. Systemet för miljökonsekvensbeskrivningar är ej förenligt med Sveriges internationella folkrättsliga förpliktelser då det saknar explicita samråd med samer såväl som särskilt beaktande av sociala och renskötselskonsekvenser, vilket inte gör det möjligt att ta vederbörlig hänsyn till samiska intressen. Allmänhetens deltagande i beslutsprocesser är vidare oförenligt med Sveriges internationella folkrättsliga åtaganden då lagstiftningen i beslutsprocessens för beviljandet av mineralkoncessioner endast stipulerar en rätt till information och i planerings regelverket endast indirekta samråds möjligheter. Detta system för samiskt samråd och deltagande följer inte Sveriges internationella folkrättsliga förpliktelser rörande effektivt deltagande och samråd.

De processuella skyddsåtgärderna i den svenska minerallagstiftningen; intresseavvägning, miljökonsekvensbeskrivningar och allmänhetens deltagande och samråd, är inte förenliga med Sveriges internationella folkrättsliga åtaganden som följer utav internationella mänskliga rättigheter och det europeiska systemet för mänskliga rättigheter.

Preface

I would like to especially thank my supervisor Alejandro Fuentes for providing guidance and advice throughout the writing and research process of this thesis. I would also like to give special thanks to my family and Flávia for providing me with constant encouragement and ideas. I would further like to thank my friends and colleagues, Juan, Erlina, Get, Victoria, Ana and Raul, each of whom has given me support throughout the process.

Abbreviations

Aarhus convention	Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 28 June 1998, entered into force 30 October 2001), 2161 UNTS 447; 38 ILM 517 (1999)
C169	International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, (adopted 27 June 1989, entered into force 5 September 1991) C169
CAB	County Administrative Board (Länsstyrelsen)
CBD	Convention on Biological Diversity (adopted 5 June 1992) 1760 UNTS 79; 31 ILM 818
CCPR	Human Rights Committee
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
EIA	Environmental Impact Assessment
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (adopted 4 November 1950, entered into force 3 September 1953), ETS 5.
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157
GJB	Swergies Rikes Lag 1734, Jorda Balk (1734 Real Property Code).
HD	Högsta Domstolen (Supreme Court)
HFD	Högsta Förvaltningsdomstolen (Supreme Administrative Court after 2011)
HovR	Hovrätt (Appellate Court)
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

ICESCR	International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
JB	Jordabalk (1970:995) (1971 Real Property Code)
LNLM	Lag (2009:724) om nationella minoriteter och minoritetsspråk (Law on National Minorities and Minority Languages)
MB	Miljöbalken (1998:808) (The Environmental Code)
MF	Mineralförordning (1992:285) (Mineral Ordinance)
ML	Minerallag (1991:45) (The Swedish Mineral Law)
MÖD	Miljööverdomstolen (Supreme Environmental Court)
PBL	Plan- och Bygglagen (2010:900) The Planning and Building Act)
PCIJ	Permanent Court of International Justice
RF	Kungörelse (1974:152 om beslutad ny regeringsform (Instrument of Government)
Rio 1992	Rio Declaration on Environment and Development (adopted 13 June 1992) UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874
RNL	Rennäringslag (1971:437) (Reindeer Husbandry Act)
RR	Regeringsrätten (Supreme Administrative Court before 2011)
RÅ	Regeringsrättens Årsbok (Yearbook of the Supreme Administrative Court)
UDHR	Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(III)
UN Charter	United Nations, Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI
UNCHR	United Nations Commission on Human Rights
UNDM	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 3 February 1992) A/RES/47/135
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples (adopted 2 October 2007) A/RES/61/295
UNESCO	United Nations Educational, Scientific and Cultural Organization.

1. Introduction

1.1. General Background

Indigenous peoples exist all around the world and throughout history indigenous peoples have been the subject of colonization, oppression, and marginalization. Indigenous peoples are generally characterized as peoples having a historical continuity with pre-colonial populations, are culturally distinct, have their own social, economic and political system, strives to maintain their distinctiveness, and identify as indigenous.¹

The core of indigenous peoples rights lies in their ability to claim the right to self-determination.² Indigenous peoples are often recognized as having a special relationship to their ancestral lands and the access to such ancestral land is essential in the practice of their traditional way of life, culture, and religion.³ The European Sami is one of the world's indigenous peoples, residing in a land area named *Sápmi*, that extends over Norway, Finland, Russia and a majority of the land area in Sweden.⁴ In Sweden, the Sami are recognized as a people, indigenous peoples and as a minority.⁵ Parts of *Sápmi* and lands in the north of Sweden are also rich in natural resources such as minerals. In Sweden, Since the 19th century, the government of Sweden has granted mining concessions to state-owned and private companies in the north mineral-rich lands of Sweden. These mining concessions threaten the traditional livelihoods of the Swedish Sami and their existence as an indigenous people due to competing land use interests.

The enactment of safeguards in national legislation constitutes an important step in the realization of rights and may manifest in forms such as; effective participation in decision-making, consultation, free, prior, and informed consent, consideration of indigenous interests, right to share of reasonable benefits, and the use of EIAs.⁶

¹ UNCHR 'Study of the problem of discrimination against indigenous peoples: Final report submitted by the Special Rapporteur Mr. José R. Martínez Cobo' (1982) E/CN.4/Sub.2/1982/Add.6., see also, Karin Kvarfordt, Nils-Erik Sikku and Michael Teius, *The Sami: an Indigenous People in Sweden* (National Sami Information Centre, Regeringskansliet - Ministry of Agriculture, Food and Consumer Affairs, Sametinget, 2005), p. 9, see also, Martin Scheinin, *What are Indigenous Peoples?*, in Nazila Ghanea & Alexandra Xanthaki (eds.), *Minorities, Peoples and Self-determination*, (Koninklijke Brill NV 2005), p. 3ff.

² Martin Scheinin, *Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights* (2018), p. 9ff.

³ See, C169, article 13, UNDRIP, articles 8, 10, 11, 12, 25, and 26, see also, Martin Scheinin, *What are Indigenous Peoples?*, (n 1) 3f.

⁴ Karin Kvarfordt (n 1) p. 5.

⁵ Regeringens Proposition 1976/77:80: *om insats för samerna* (Government Bill 1976/77:80: *about effort for Sami*), p. 16ff, see also, Kulturutskottets betänkande 1976/77:43: *med anledning av propositionen 1976/77:80: om insats för samerna* (Committee on Culture Report KrU 1976/77: 43: *on account of the government bill 1976/77:80: about effort for Sami along with motions*), p. 4.

⁶ See, UNDRIP arts. 5, 18, 19, 32 and 38, Rio 1992, principle 17, see generally, Alejandro Fuentes, *Judicial Interpretation and Indigenous Peoples' Rights to Lands, Participation and Consultation - The*

1.2. Purpose

The purpose of this thesis is to provide a comprehensive assessment of the compliance of the procedural safeguards in the Swedish mineral framework with Sweden's international obligations towards Sami in the international human rights system and in the European human rights system.

1.3. Research Questions

What constitutes the traditional way of life of Sami in Sweden and how do mining activities affect the traditional way of life of Sami?

What obligations does Sweden have towards Sami in the international human rights system and in the European system of human rights?

What procedural safeguards does the Swedish mineral framework employ?

How do the procedural safeguards in the Swedish mineral framework correspond to Sweden's obligations in the international human rights system and the European human rights system towards Sami?

1.4. Method and Material

This thesis will employ a human rights-based approach, basing itself on a legal comparative and analytical study of the Swedish mineral framework in relation to international and European human rights law. The specific focus lies on the established safeguards in the Swedish mineral framework, which will be discussed in chapter 5.

The chapter of the thesis describing international human rights law will be divided into three international regimes and sub-chapters; international indigenous protection, international minority protection and international environmental protection. Minority and indigenous regimes will be discussed as part of Sweden's obligations due to the Sami status in Sweden's as both indigenous peoples and as a minority. The international environmental law regime will be discussed due to the environmental components of human rights law, the environmentally hazardous characteristic of mining activities and the indigenous relationship to the land, this thesis will bring up international environmental law as part of Sweden's international obligations. International environmental law will be used in the *systematic interpretation* of the indigenous and minority regimes.⁷

Inter-American Court of Human Rights' Approach, in *International Journal on Minority and Group Rights* 23 (2015) 39-79.

⁷ See, *Legal consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp. 16 and 31, compare, Alejandro Fuentes, *Expanding the boundaries of international human rights law. The systematic approach of the Inter-American Court of Human Rights*, in *European Society of*

Under international minority protection the *Bill of Rights*; Universal Declaration on Human Rights, UNGA Res 217 A(III) (UDHR), International Covenant on Civil and Political Rights 999 UNTS 171 (ICCPR) and International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR), will form the basis of the discussion as these comprise the most comprehensive instruments surrounding international minority protection in international law, see further pages 20 – 30. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 (UNDM) will also be used as it contains explicit and important provisions on minorities. In this discussion UN-authoritative interpretations and jurisprudence together with reports and legal scholars will be used to explain the contents of Sweden's obligations under these instruments. Under international indigenous protection, the United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295 (UNDRIP) and the International Labour Organization, Indigenous and Tribal Peoples Convention, C169 (C169) will be discussed as they constitute the most relevant instruments in this situation, see further pages 33 – 38.

Under international environmental protection, the Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (Rio 1992), the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1992) (Aarhus convention) and the United Nations 1992 Convention on Biological Diversity 1760 UNTS 79; 31 ILM 818 (CBD) will be used.

The Rio 1992, Aarhus Convention and the CBD are the most relevant instruments that contain provisions relating to the topic of procedural safeguards and indigenous or minority protection, see further chapter 3.3. The Aarhus Convention and the CBD are ratified by Sweden and their obligations are directly applicable to Sweden. the Aarhus convention and the CBD together with Rio 1992 will be used in the *systematic interpretation* of the regimes of protection; international minority protection and international indigenous protection.

The European human rights chapter will only discuss the minority protection regime as the European system of human rights lacks any explicit standards related to indigenous peoples. The basis for the discussion will be the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (ECHR) and the Framework Convention for the Protection of National Minorities, ETS 157 (FCNM) as these constitute the most comprehensive and relevant standards for minority protection under the European human rights system. The jurisprudence of the European Court of Human Rights (ECtHR) and the European Commission will be used to describe the cultural aspect of minority rights, as well as to describe how the rights of Sami have been actualized in jurisprudence. The jurisprudence of the ECtHR will also describe the environmental dimension of minority rights.

The basis for the discussions in the chapter describing the Swedish legal frameworks will be the Swedish mineral framework; namely Minerallag (1991:45) (The Swedish Mineral Law) (ML), Miljöbalken (1998:808) (The Environmental Code) (MB), and Plan- och Bygglagen (2010:900) (The Planning and Building Act) (PBL).

The thesis will also deal with the Swedish legislation dealing with Sami rights; Kungörelse (1974:152 om beslutad ny regeringsform (Instrument of Government) (RF), Jordabalk (1970:995) (1971 Real Property Code) (JB), Swergies Rikes Lag 1734, Jorda Balk (1734 Real Property Code) (GJB), Lag (2009:724) om nationella minoriteter och minoritetsspråk (Law on National Minorities and Minority Languages) (LNM) and the Rennäringslag (1971:437) (Reindeer Husbandry Act) (RNL).

To fully understand the Swedish legal setting, the preparatory work, as well as legal writings on Sami rights and reports on mining and reindeer herding will be consulted. The jurisprudence of the Swedish courts will be used to see how the Sami rights concerning property and reindeer husbandry, as well as how the mining safeguards have been applied in the Swedish legal system.

1.5. Limitations

This thesis will be limited to analyzing *Sami rights as*; minority rights and indigenous peoples' rights, based on international, European and Swedish definitions. The full extent of *Sami rights* will not be discussed, as only those related to property or cultural rights will be relevant for the scope of this thesis. International environmental law will be used in the *systematic interpretation* of the minority and indigenous rights to interpret the obligations that Sweden have towards Sami. Due to the thesis' focus on the Swedish mineral framework procedural safeguards, the right to information will be discussed as a part of Sami rights.

The focus of this thesis lies on the procedural safeguards in the Swedish mineral framework. This thesis will, therefore, bring up European and international standards in relation to minority and indigenous rights and then relate to how these affect the content of procedural safeguards. The right to property of Sami in Sweden will not be discussed as an individual question but will be used to describe the Swedish legal setting, in which these mining safeguards are placed in. The issue of discrimination will not be discussed individually either, as it constitutes a separate and distinct argument relating to Sami rights, and is not directly relevant to the issue of mining safeguards.

The Espoo convention⁸ will not be dealt with as the focus of this thesis is not on transboundary environmental effects. As the ILO Convention C169 is not ratified by Sweden its obligations will not be treated as directly applicable to Sweden but as part of the *corpus juris* of international human rights law and will be used in the *systematic interpretation*.⁹ Only

⁸ *Convention on Environmental Impact Assessment In a Transboundary Context* (adopted 25 February 1991, entered into force 10 September 1997), UNTS 1989 p. 309.

⁹ See the material in footnote 7.

communications from the Human Rights Committee (CCPR) will be brought up in the international setting of Sami rights, as no Committee on Economic, Social and Cultural Rights (CESCR) communications for Sweden exists and Committee on the Elimination of Racial Discrimination (CERD) communications lie outside the scope of this thesis.

1.6. Literature overview

The issue of indigenous rights and extractive industries have been developed and debated to various degrees in the global setting. European human rights law does not contain any explicit information on this subject, which due to a lack of explicit indigenous rights standards is unsurprising. The Inter-American system of Human Rights and the international human rights system together with international ILO Standards have acted as the vanguard in the promotion of the rights of indigenous peoples.

The Sami right to use land and natural resources as well as the reindeer husbandry right has been debated among Scandinavian academic writers as well as internationally. Sweden has several times been criticized by international supervisory bodies in regard to its stance and policies on Sami rights, as well as the on the mining policy. Environmental effects of mining in the polar environment have been written about by scholars and organizations around the world.

The Swedish Sami parliament has presented their viewpoints on the Swedish mining activities in *Sápmi*.¹⁰ Furthermore, the Swedish Sami parliament has also written their own guideline document on how to implement Sami land use in the EIA process.¹¹ Human rights concerns in relation to extractive industries and indigenous peoples have been reported upon by the former (2008-2014) *Special Rapporteur on the rights of Indigenous peoples, James Anaya*.¹² *James Anaya* as well as the current (2014-) *Special Rapporteur on the rights of indigenous peoples, Ms. Victoria Tauli Corpuz*, have in their reports,¹³ commented on the legal situations of Sami in Norway, Sweden and Finland, specifically on the Swedish framework for mining and the rights to lands, water and natural resources. Sweden have also received stern critique from the CERD committee concerning the rights of indigenous peoples and Sweden's legislation surrounding natural resource extraction.¹⁴

¹⁰ *Minerals and Mines in Sápmi: the Viewpoint of the Swedish Sami Parliament*, 2014, <<https://www.sametinget.se/87915>> accessed 2018-03-20.

¹¹ *Samisk Mark-användning och MKB*, Svenska Samernas Riksförbund, 2010, (*Sami Land-use and EIA*, Swedish Sami National Association, 2010), <<https://www.sametinget.se/26843>>, accessed 2018-03-20.

¹² UNCHR 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - Extractive industries and indigenous peoples' (2013) A/HRC/24/41.

¹³ UNCHR 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya - The situation of the Sami in the Sápmi region of Norway, Sweden and Finland' (2001), A/HRC/18/35/Add.2, and UNCHR 'Report of the Special Rapporteur on the rights of indigenous peoples on the human rights situation of the Sami people in the Sápmi region of Norway, Sweden and Finland' (2016) A/HRC/33/42/Add.3.

¹⁴ UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the combined twenty-second and twenty-third periodic reports of Sweden, CERD/C/SWE/CO/22-23, para. 16.

The environmental aspects of the reindeer husbandry legal framework and the right to land have been commented on by Christina Allard.¹⁵ The Swedish use and process concerning EIA in relation to EIA best practices in the Arctic have been written about.¹⁶ The already written literature have scrutinized the Sami legal situation in Sweden and some have commented on the Swedish mineral framework. The Swedish Sami right to participation and consultation have, in a report concerning physical planning and infrastructure from the Swedish department in the International Commission of Jurists, been examined.¹⁷

The contribution of this thesis to the already written literature will be an in-depth analysis of the specific Swedish mining safeguards as a component in the Swedish legal system, scrutinized under the obligations that Sweden has towards Swedish Sami, from their status as a minority and indigenous peoples.

The approach of this thesis will be to assess the mining safeguards in the Swedish mineral framework as a component in the general protection of Sami rights in Swedish law. Unlike earlier writing, this thesis entails a comprehensive study of Sweden's obligations deriving from Sweden's obligations from both the international and European human rights systems. The focus of this thesis lies on the property and cultural rights in the indigenous and minority regimes, however, this thesis will also in this approach integrate environmental law through *systematic interpretation*.

1.7. Disposition

Chapter 1 will give a brief introduction of the research subject as well as describe the purpose, research questions, method and material, limitations, literature overview and disposition of the thesis.

Chapter 2 gives a better understanding of the Sami traditional way of life and culture, its connection to the land and how mining activities affect the Sami way of life.

Chapter 3 explains the content of indigenous peoples and minorities rights in international human rights law. Chapter 3 maps out the obligations that Sweden has towards Sami in Sweden, as derived from international human rights law.

¹⁵ Christina Allard, *Two Sides of the Coin: Rights and Duties: The Interface between Environmental Law and Saami Law Based on a comparison with Aotearoa/New Zealand and Canada* (Luleå University of Technology, Department of Social Sciences, Division of Social Science, Doctoral Thesis 2006).

¹⁶ Timo Koivurova, Pamela Lesser, Sonja Bickford, Paula Kankaanoää and Marina Nenasheva, *Environmental Impact Assessment in the Arctic: A Guide To Best Practice* (Edward Elgar Publishing Limited. 2016).

¹⁷ The report discusses the general opportunities of Sami to participation and consultation in planning decisions and also discusses the format of Sami parliament. The report focuses on the general Swedish framework and brings up specific cases but is limited to the legal setting before 2007. The report also generally considers Sweden's international obligations towards Sami, see Sia Åkermark Siliopoulou and Miriam Talah, *Samernas rätt till deltagande och samråd - Fysisk planering och infrastruktur*, Svenska Avdelningen av Internationella Juristkommissionen, 2007 (Sami right to participation and consultation - Physical planning and infrastructure, Swedish Department in the International Commission of Jurists).

Chapter 4 discusses the extent of minority protection in European human rights law, as no indigenous peoples' standards exist in European human rights law. Chapter 4 maps out the obligations that Sweden has towards Sami in Sweden, as derived from European human rights law.

Chapter 5 will describe the Swedish legal setting, including the general Sami status and protection of cultural and property rights. The Swedish mineral framework and its procedural safeguards will also be described.

Chapter 6 will provide the analysis of this thesis. The analysis will assess the consistency between the Swedish mineral framework safeguards and Sweden's European and international obligations regarding Sami. Chapter 6 will also provide the conclusions of the thesis.

2. Sami and Mining in Sweden

To understand what the Swedish legislation along with Sweden's international and regional obligations are meant to protect the situation needs to be contextualized in the current Sami situation in Sweden. This contextualization is essential to the thesis analysis since it seeks to scrutinize Swedish legislation in relation to the situation of the Sami in Sweden. This chapter will hereby examine what constitutes the traditional way of life of Sami in Sweden and how this lifestyle is connected to land and resources.

The chapter will then proceed to examine how mining operations affect the Sami traditional way of life as well as the environment. Environmental perspectives will remain important aspect throughout the thesis due to this special relationship between Sami and the environment, see further down. After going through the Swedish factual setting this thesis will then, in chapter 3, stipulate the international obligations that Sweden have regarding Sami.

2.1. Traditional lives of Sami in Sweden

It is recognized that the specific way of life of indigenous peoples is closely intertwined and dependent on the use of land for indigenous peoples' traditional activities.¹⁸ The Sami culture and traditions have developed over thousands of years through such a close connection to nature and land.¹⁹ The Sami in Sweden traditionally practice reindeer husbandry as well as hunting and fishing. These activities, in particular, reindeer husbandry, form a central part of the Sami identity and livelihood.²⁰ Sami livelihoods include many other natural resource-based activities and their cultural identity include everything from language and traditional lifestyle to music and art.²¹

Nowadays, Sami people are involved in a variety of other occupations that exists in a modern society and only a minority of Swedish Sami around 10 % are engaged in traditional reindeer husbandry activities.²² Nevertheless, reindeer husbandry has remained as the unique economic and cultural emblem of the Sami in Sweden and for outside viewers, reindeer husbandry is seen as an inseparable part of Sami culture.²³

¹⁸ Gudmundur Alfredsson, *Minorities, Indigenous and Tribal Peoples, and Peoples: Definitions of Terms as a matter of International Law*, in Nazila Ghanea & Alexandra Xanthaki (eds.), *Minorities, Peoples and Self-determination* (Koninklijke Brill NV 2005), p. 169, see international instruments such as UNDRIP article 25, and C169 article 13.

¹⁹ A/HRC/33/42/Add.3 (n 13), para. 5.

²⁰ Randall S. Abate and Elizabeth Ann Kronk, *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar Publishing Limited 2013), p. 290f, see also Kvarfordt (n 1), p. 36.

²¹ Randall S. Abate (n 20), see also, Mattias Åhren, *Indigenous Peoples Culture, Customs and Traditions and Customary Law - The Saami People's Perspective*, 21 *Ariz. J. Int'l & Comp. L.* 63-112 (2004).

²² Koivurova, et al., *Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States* (Arctic Review on Law and Politics Vol. 6, No. 1, 2015, pp 11-51) p. 12ff.

²³ *Ibid.*

2.1.1. Reindeer husbandry and the use of land

Reindeer husbandry, a significant cultural and economic part of the essence of the Sami way of life, is highly dependent on access to ‘vast and undisturbed’ land areas due to reindeer migration between seasonal grazing pastures.²⁴ Because of differing properties, locations, and suitability some pastures are used during summer and others during winter and autumn. Reindeer in Sweden spend the summer on tundra or in coastal areas where they feed on green vegetation, and then during winter, they migrate to boreal forests or taiga to feed on lichens.²⁵

Reindeer husbandry requires access to seasonal pastures: both summer grazing pastures and winter grazing pastures. Old and new migration routes are used to transport reindeers between the seasonal pastures. During summer grazing the reindeers put on a lot of weight to get through the winter and the layer of fat built up during summer grazing has a direct impact on the reindeers’ calf percentage, calf mortality, and calf weight.²⁶ The extent of access to winter grazing pastures directly affects the size of reindeer herds and the sustainability of reindeer husbandry.²⁷

To limit reindeer husbandry to summer grazing pastures will make reindeer husbandry unsustainable as the reindeer population will lose access to important feeding grounds in the boreal forests.²⁸ The Sami reindeer husbandry needs access to high-quality contiguous lands to enable reindeer seasonal migration and to serve as winter grazing pastures.²⁹ Reindeer husbandry is greatly conditioned by the weather and grazing conditions of the land areas and is particularly sensitive to disturbances or interference from other land users.³⁰ The semi-domesticated reindeers constitute a keystone species that shape the circumpolar socio-ecological systems and is intrinsically linked to the cultural identity and socio-economic well-being of the northern communities like the Sami in Sweden.³¹

2.1.2. Other traditional activities and the use of land

Not all Sami in Sweden are exclusively semi-nomadic reindeer-herders and use the lands in many other ways. Some Sami referred to as the “Sami fisher-folk” by the Swedish government, are permanent settlers near the northern lakes of Sweden who support

²⁴ S. Abate (n 20).

²⁵ S. Abate (n 20), see also, Kvarfordt (n 1), p. 39.

²⁶ S. Abate (n 20), p. 293.

²⁷ Nanna Borchert and Kenyon Fields (eds), *Land is Life: Traditional Sámi Reindeer Grazing Threatened in Northern Sweden*, (2001), p. 2

²⁸ Ibid.

²⁹ Nanna Borchert (n 27), p. 47.

³⁰ Kvarfordt (n 1), p. 39.

³¹ Thora Martina Herrmann, Per Sandström, Karin Granqvist, Natalie D’Astous, Jonas Vannar, Hugo Asselin, Nadia Saganash, John Mameamskum, George Guanish, Jean- Baptiste Loon & Rick Cuciurean, *Effects of mining on reindeer/caribou populations and indigenous livelihoods: community-based monitoring by Sami reindeer herders in Sweden and First Nations in Canada* (2014 *The Polar Journal*, 4:1), p. 28.

themselves through hunting and fishing.³² The traditional livelihood of the Sami fisher-folk is dependent on their ability to fish within the reindeer-herding territory.³³ The landscape and its environment traditionally used by the Sami in the north of Sweden constitute a part of the Sami cultural heritage.

Part of the landscape where the Sami conduct reindeer husbandry constitutes the United Nations Educational, Scientific and Cultural Organization (UNESCO) world heritage site *Laponia* due to its rich biodiversity, historical value for the Sami culture and its value as a Sami cultural environment.³⁴ Many Sami handicrafts and traditional tools, and cultural dresses are made with material deriving from the reindeer husbandry activities or from other sources found throughout the land.³⁵

The Sami cultural heritage constitutes of several parts; the material cultural heritage; physical remnants in the landscape, the immaterial cultural heritage; traditional knowledge, tales, places with special meanings, Sami names for places, and the biological and cultural heritage; remnants showing how humans have utilized the nature such as grazing mires or bark pits.³⁶

Sami history and traditions are often not written down but upheld through oral traditions and the old semi-nomadic life of Sami makes the cultural heritage difficult to observe.³⁷ Moreover, the Sami cultural heritage must be viewed as a whole, as sites, items or objects may form integral components of the heritage and must be interpreted together. During land exploitation, it is important that all cultural parts that are present in the same environment are protected.³⁸

The Sami also have a spiritual connection to their land, specifically to their sacred sites; *sieidi*, throughout Sápmi.³⁹ Sami sacred sites, *sieidi*, due to their often personal and secret nature following the prior criminalization of the *sieidi* cult, are often not identifiable for non-indigenous and located on land owned by others makes the Sami access to sacred sites highly problematic.⁴⁰ The *sieidis* location and spiritual use are closely connected to the other traditional activities of the Sami; such as reindeer herding, hunting, and fishing.⁴¹ The spiritual connection to the environment and the animals residing there is a prominent feature in Sami traditions, culture, and religion.

³² Christina Allard and Susann Funderud Skogvang, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (Ashgate Publishing Company 2015), p. 120f.

³³ Christina Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 120.

³⁴ Kvarfordt (n 1), p. 31.

³⁵ Kvarfordt (n 1), p. 44f.

³⁶ *Samisk Mark-användning* (n 11), p. 27.

³⁷ *Samisk Mark-användning* (n 11), p. 28.

³⁸ *Ibid.*, at 28f.

³⁹ Leena Heinmämäki and Thora Martina Herrman, *Experiencing and Protecting Sacred Natural Sites of Sámi and other Indigenous Peoples: The Sacred Arctic* (Springer Polar Series, Springer International Publishing AG 2017), p. 16 ff.

⁴⁰ *Ibid.*

⁴¹ Leena Heinmämäki (n 39), p. 76ff.

2.2. The effects of mining activities on Sami

One of today's major threats to reindeer husbandry is the increasing mining boom and the trend of granting mining concessions in the Arctic landscape.⁴² Mine operation also has a significant effect on the environment, in particular, the Arctic environment due to its unique and fragile ecosystems and special human-nature relationships.⁴³ The largest source of land-based pollution of the marine environment in the Arctic is the mining-metallurgical complexes.⁴⁴ Most of Sweden's mineral deposits can be found in the land traditionally used by the Sami for reindeer husbandry, thus causing conflicting land claims.⁴⁵ The mining business in Sweden is growing⁴⁶ and so are its impacts on its surroundings.

2.2.1. Effects on Sami traditional lives

The most obvious effect of mining activities on the traditional lives of Sami is the expropriation of land for mining concessions and operations. The mining operations and the generated mining waste claims significant local land areas for an extended period of time and inevitably affects the landscape and environment in a way which makes it incompatible with other economic operations or interest such as reindeer husbandry.⁴⁷ The use of vast land areas in reindeer husbandry to accommodate seasonal migration is under threat by the expanding mining businesses. The loss of grazing lands will not only constrain the traditional reindeer husbandry practices but will also make the livelihood less capable of handling future challenges such as the effects of climate change.⁴⁸

The exploitation of land and establishment of mines entails several cumulative effects, apart from the transformation of the land by the mine itself, such as the development of infrastructure, construction of roads, buildings, and power lines along with the establishment of other exploitations.⁴⁹ These changes often entail a permanent transformation of the landscape.

⁴² Koivurova, et al. (n 22), p. 14.

⁴³ Timo Koivurova (n 16), p. 9.

⁴⁴ Davor Vidas, *Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention* (The Fridtjof Nansen Institute Norway, 2000), p. 178.

⁴⁵ Koivurova, et al. (n 22), p. 13.

⁴⁶ Timo Koivurova (n 16), p. 57.

⁴⁷ *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag (Proposition for a Strategy for the Treatment of Mining Waste: Reporting on a Government Mission)* (Naturvårdsverket (Swedish Environmental Agency) and Sveriges Geologiska Undersökning, SGU (Sweden's Geological Survey), NV-03195-16, SGU: 311-888/2016, 2017-09-14), p. 110.

⁴⁸ Ingunn Vistnes et al., *Reindeer Husbandry and Barents 2030 - Impacts of Future Petroleum Development on Reindeer Husbandry in the Barents Region* (International Centre for Reindeer Husbandry (ICRH) 2009), p. 5.

⁴⁹ Rasmus Larsen Kløcker, Kaisa Raitio, Per Sandström, Anna Skarin, Marita Stinnerbom, Jenny Wik-Karlsson, Stefan Sandström, Carl Österlin and Yann Buhot, *Kumulativa Effekter av Exploatering på Renskötelsen: Vad behöver göras inom tillståndsprocesser (Cumulative Effects of Exploitation on Reindeer*

Mining operations and the race for resources in the Arctic leads to a motorization and development of real estate and infrastructure, transforming the environment and encroaches upon the migration routes, calving grounds and the tundra itself that the reindeers rely on for survival.⁵⁰ The specific diets and migratory patterns of reindeers are often disrupted by mines and their supporting infrastructure as they cut off migratory routes and affect grazing areas.⁵¹ Even relative limited actions may severely obstruct the reindeer husbandry practice.⁵²

Mining operation and the treatment of mining waste, especially during transport and stockpiling, generates dust and noise.⁵³ Mining operations have two effects on reindeer husbandry: it creates an effect of avoidance; through the creation of disturbance zones, and also creates obstacles in the migratory reindeer routes.⁵⁴ Disturbance zones and landscape obstacles both have the effect of decreasing reindeer usage of the affected area.⁵⁵ Disturbance zones from mining may extend up to 10 km, some say even up to 15 km⁵⁶, from outside the mine.⁵⁷

The loss of grazing land interacts together with other types of land intrusions or disturbances which have a straining effect on the practice of reindeer husbandry both economically and socially.⁵⁸ This prevention of access to traditional land that the mining operations presents for the Sami not only affect the traditional reindeer husbandry but also affect their ability to exercise other cultural activities such as fishing, hunting, and gathering. Mining also effectively prevents Sami access to parts of their cultural heritage.

2.2.2. Effects on the environment and the Sami

Environmentally hazardous activities are defined as discharges of wastewater, solids or gases,⁵⁹ use of land, buildings or facilities in such a way as to cause harm to human health or

Husbandry: What needs to be done within permit processes) (Naturvårdsverket (Swedish Environmental Agency) 2016), p. 11.

⁵⁰ S. Abate (n 20), p. 292f.

⁵¹ Kristina Sehlin MacNeil, *Shafted - A Case of Cultural and Structural Violence in the Power Relations between a Sami Community and a Mining Company in Northern Sweden*, in Kristina Sehlin MacNeil, *Extractive Violence on Indigenous Country: Sami and Aboriginal Views on Conflicts and Power Relations with Extractive Industries* (Umeå University 2017), p. 74.

⁵² Regeringens Proposition 1985/86:3: *med förslag till lag om hushållning med naturresurser m.m.* (Government Bill 1985/86:3: *with a proposition for a law on the housekeeping with natural resources etc.*), p. 161.

⁵³ *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 110.

⁵⁴ Rasmus Larsen Kløcker, *Kumulativa Effekter av Exploatering på Renskötelsen*, (n 49), p. 33.

⁵⁵ Kløcker, *Kumulativa Effekter av Exploatering på Renskötelsen*, (n 49), p. 33f.

⁵⁶ Rasmus Kløcker Larsen and Rebecca Lawrence, "Då är det inte renskötelse": Konsekvenser av en gruvetablering i Laver, Älvsbyn, för Semisjaur Njarg sameby, ("*Then it is not Reindeer Husbandry*": *Consequences of a mine establishment i Laver, Älvsbyn, for Semisjaur Njarg Sami-village*), Stockholm Environment Institute, Project report 2016-01, p. 49ff.

⁵⁷ Kløcker, *Kumulativa Effekter av Exploatering på Renskötelsen*, (n 49), p. 34.

⁵⁸ Rasmus Kløcker Larsen (n 56), "Då är det inte renskötelse", p. 51 f.

⁵⁹ Discharges into land, water or groundwater from land, buildings or facilities; MB, chapter 9, section 1, point 1.

the environment,⁶⁰ and as the use of land, buildings or facilities in a manner that may cause environmental inconvenience.⁶¹ Mining operations constitute environmentally hazardous activities in Sweden.⁶² Mining operations may create toxic leachate with high levels of metals and heavy metals such as; arsenic, cadmium, cobalt, copper, nickel, lead, uranium and zinc, as well as other substances such as; sulfate, phosphate and nitrogen compounds, that may leak into the surrounding water and groundwater sources.⁶³

Extracted metals that are spread or leaked into the environment cannot be broken down naturally but remains in the soil, meaning that high levels of heavy metals will remain in the environment for a long time even after the cessation of mining activities.⁶⁴ The environmental impact of abandoned or closed mines is even in some circumstances bigger than other existing businesses that emitting hazardous substances.⁶⁵ Toxic substances exist in all types of soil and rocks and exposure to such substances are known to cause long-term damage to human health, ecosystems and the environment.⁶⁶

2.3. Conclusion

Mining operations often entail permanent changes of the arctic landscape and make it very hard to co-exist alongside reindeer husbandry due to their differing characteristics. Reindeer husbandry requires the use of vast, untouched, and undisturbed lands and mining operations not only permanently change the area of operations and the surrounding areas but also creates noise and waste pollution that affects both the environment and the inhabitants residing there.

Mining operation creates disturbance zones that effectively prevents reindeer husbandry and outside these zones access to land may be heavily restricted for reindeer husbandry migratory routes as well as to other traditional Sami activities such as fishing, hunting, gathering, and access to the Sami cultural heritage. Mining activities may not only affect the present Sami's access to land and traditional activities but may also through the permanent change and pollution of the environment affect future access to traditional Sami land, heritage, culture, and traditions.

The substantial environmental degradation that mining operations cause through emissions and discharges, together with its long-lasting arctic impacts even after the cessation of the

⁶⁰ By means of emission other than those referred to in MB, chapter 9, section 1, point 1, or by contamination of land, air, water or groundwater; MB, chapter 9, section 1, point 2.

⁶¹ By noise, shaking, light, ionizing or non-ionizing radiation or the like; MB, chapter 9, section 1, point 3.

⁶² *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 102, see MÖD 2003:135 and MÖD 2005:15, see also, *Handledning Miljöfarlig Verksamhet: Ge oss kraft att förändra (Tutoring Environmentally Hazardous Activities: Give us power to change)*, (Naturskyddsföreningen (Swedish Society for Nature Conservation), PG. 90 1909-02), p. 6, see also MB, chapter 9, section 1.

⁶³ *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 102.

⁶⁴ *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 104.

⁶⁵ *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 108f.

⁶⁶ *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 104ff.

mining operation, makes mining operations a very real threat towards the survivability of Sami culture and land usage. With the risks of leakage, spills, and contamination of hazardous substances in mind, the damaging effects on the landscape, ecosystem and human health might make the landscape unusable or hazardous for future use.

3. Sweden's International Obligations

In the previous chapter, the factual setting in Sweden has been laid out to provide the context that the international and regional obligations in relation to the Swedish legal framework will be applied to. This chapter will now go on to examine what international obligations Sweden have toward Sami from the viewpoint of minority protection, indigenous protection, and international environmental protection. These international obligations will then be interpreted together and will form the basis for the consistency test for the Swedish mineral framework procedural safeguards in chapter 6. Chapter 4 will describe Sweden's regional obligations under the European human rights system and will look at the ECHR and the FCNM.

As a member of the international community and the UN, Sweden has certain rights and obligations such as state responsibility for its internationally wrongful acts and the obligation to refrain using force against other states.⁶⁷ Sweden also has human rights obligations following declaration and other documents published by the UN as well as its ratification of human rights treaties and conventions.⁶⁸

Ratification of human rights treaties implies the consent of the ratifying state to be bound to that treaty,⁶⁹ implying international responsibility for departing from the provisions it consented to be bound to.⁷⁰ Sweden has ratified several human rights treaties such as the ICCPR and the ICESCR, which together with the UDHR forms the *Bill of Rights*. The *Bill of Rights* contains several provisions surrounding minority protection.

The UN has also adopted a specific declaration on indigenous rights, UNDRIP, that Sweden voted in favour of. Although not directly legally binding, just like the UDHR, the UNDRIP represent the “*dynamic development of international legal norms and reflect the commitment of states to move in certain direction, abiding by certain principles*”⁷¹, and may provide an authoritative interpretation of treaties.⁷² The UN has also adopted a specific declaration regarding minorities, the UNDM. The Rio 1992 declaration was adopted by the UN and sets out several important principles in relation to indigenous peoples, minorities as well as sustainable development and environmental protection.

⁶⁷ See, International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted November 2001) Supplement No. 10 (A/56/10), see also, Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, article 1 & 2.

⁶⁸ See as an example the UDHR, UNDRIP, ICESCR and ICCPR.

⁶⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969) UNTS vol. 1155, p. 331, arts. 2(1)(b), 14(1) and 16.

⁷⁰ See for example, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (n 67), p. 202. Several supervisory bodies; like the CCPR, exists to observe the compliance of ratifying states.

⁷¹ United Nations Permanent Forum on Indigenous Issues, *Frequently Asked Questions - Declaration on the Rights of Indigenous Peoples*, <<http://www.un.org/esa/socdev/unpfi/documents/FAQsindigenousdeclaration.pdf>> accessed 2018-03-01.

⁷² Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (Oxford University Press 2014), p. 90f.

This chapter will examine the protective safeguards applicable to Sami as a minority and indigenous people in general, derived from Sweden's obligations under the Bill of Rights, specifically the right to self-determination, the right to participate in cultural life, the minority right to culture and the right to information. This chapter will then examine the international normative standards that exist in relation to indigenous and minority rights, namely the UNDRIP and the UNDM. The ILO C169 will also be treated as a normative standard due to it not being ratified by Sweden and therefore not being directly applicable. In relation to this, international environmental standards, such as the Rio 1992, Aarhus convention and CBD will also be addressed.

3.1. International Minority Protection

The Universal Declaration on Human Rights, UNGA Res 217 A(III) (UDHR) stands as a universal beacon for human rights protection and provides the fundamental basis and common standard for human rights. The UDHR sets out the baseline of the fundamental rights, inherent in all human beings, to life, liberty, equality, family, nationality, expression, religion, property, culture, assembly, association, adequate standard of living, education and more.⁷³ The UDHR later culminated in two international legally binding covenants; the International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); covering civil and political rights, and the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (ICESCR); covering economic, social and cultural rights. These instruments, as developed by the general comments and the jurisprudence of the Human Rights Committee (CCPR), will be analysed in order to understand the full scope of Sami rights and safeguards applicable.

Common article 2 of the international covenants define the legal scope of obligations that can be imposed on state parties.⁷⁴ Common article 2 stipulates that state parties undertake to respect the ICESCR and ICCPR rights and to ensure them to all individuals within their territory and jurisdiction.⁷⁵ State parties also undertake to take the necessary steps to adopt legislative and other measures that may be necessary to give effect to the rights under the ICESCR and the ICCPR.⁷⁶ The obligations enshrined under the international covenants are binding upon state parties as a whole and are applicable to all branches of government at all levels.⁷⁷

The obligations under the covenant are both of a negative and positive nature, requiring states to *respect, protect and fulfil* their obligations. Apart from the obligation to refrain from violating covenant rights, states are also required to adopt legislative, judicial, administrative, educative and other appropriate measures.⁷⁸ Restrictions on covenant rights may not impair

⁷³ See UDHR preamble and articles 1 - 30.

⁷⁴ UN Human Rights Committee (HRC), 'General Comment no. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*' (26 May 2004), CCPR/C/21/Rev.1/Add.13, para. 3.

⁷⁵ See ICCPR & ICESCR, common article 2(1).

⁷⁶ See ICCPR & ICESCR, common article 2(2).

⁷⁷ General Comment No. 31 [80] (n 74), p. 4.

⁷⁸ General Comment No. 31 [80] (n 74), pp. 5, 6 and 7.

the essence of such right and restriction applied by state parties must be necessary, proportionate and pursue a legitimate aim.⁷⁹ Failure to give effect to Covenant rights cannot be justified by the states own political, social, cultural or economic considerations.⁸⁰

Sweden, as a state party to both the ICCPR and the ICESCR, has an obligation to give effect to the Covenant rights in its domestic legislation, and must thus ensure its laws and practices are in conformity with the rights under the international covenants.⁸¹

3.1.1. People's Right to Self-determination

The UDHR does not specifically refer to a right to self-determination as it was in its two following international covenants; the ICCPR and the ICESCR, that the right to self-determination was crystallized. The ICCPR and the ICESCR state that; “*All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*”⁸² The right to self-determination was first envisioned as a right in relation to colonized people but was after its inclusion in the *Bill of Rights* it developed into a universal right applicable to all peoples.⁸³

As the right of self-determination refers to the free economic, social and cultural development of peoples, people’s right to self-determination is not limited to only a degree of political autonomy. Moreover so, it is held that sovereign equality and the combating of the legacy of colonialism requires will only be achieved through development, namely economic as well as social and cultural development.⁸⁴ The right to self-determination was also, by UN Special Rapporteur *Aureliu Cristescu*, suggested to include the right of all peoples to “*choose their cultural system and freely purpose their cultural development*” and to “*regain, enjoy and enrich their cultural heritage.*”⁸⁵

Cristescu also held that the right to self-determination was an “*insurance and safeguard of the cultural development of peoples*”⁸⁶ and pointed out the importance of the realization of the

⁷⁹ This follows from the continuous and effective protection of covenant rights, see General Comment No. 31 [80] (n 74), p. 6.

⁸⁰ General Comment No. 31 [80] (n 74), p 14.

⁸¹ General Comment No. 31 [80] (n 74), p 13.

⁸² ICCPR & ICESCR, common article 1(1).

⁸³ See, Francesco Francioni and Martin Scheinin, *Cultural Human Rights* (Koninklijke Brill NV 2008), p. 52f, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.136, Separate Opinion of Judge Rosalyn Higgins, paras. 29-30.

⁸⁴ *Preservation and Further Development of Cultural Values*, Note by the Secretary-General 24 August 1976, UN Doc.A/31/111, para. 66.

⁸⁵ A. Cristescu, *The Historical and Current Development of the Right to Self-Determination on the basis of the Charter of the United Nations and Other Instruments adopted by the United Nations Organs, with particular reference to the Promotion and Protection of Human Rights and Fundamental Freedoms* (Preliminary Report, UN Doc.E/CN.4/Sub.2/L625), para 31.

⁸⁶ A. Cristescu, *The Historical and Current Development of the Right to Self-Determination on the basis of the Charter of the United Nations and Other Instruments adopted by the United Nations Organs, with particular reference to the Promotion and Protection of Human Rights and Fundamental Freedoms* (Final Report, 3 July 1978, UN Doc.E/CN.4/Sub.2/404), para. 584.

right to self-determination, as all cultures constitute a part of the “*common heritage of all mankind*”.⁸⁷ In relation to this, the ICCPR and the ICESCR stipulate a right for all people to freely dispose of their natural wealth and resources.⁸⁸ This right also means that a people in no case may be deprived of their own means of sustenance and states have an obligation to respect as well as to promote the realization of the right to self-determination.⁸⁹ People’s right to self-determination and disposal of natural resources is an essential condition for the effective guarantee of their individual rights of the members of the community.⁹⁰

As cultural rights became universal rights, the promotion of cultural rights became linked to minority protection in international law.⁹¹ The promotion of cultural rights as minority rights have been envisioned as individual rights; see UDHR art. 27 and ICESCR art. 15, and as collective rights article 27 ICCPR.

3.1.2. The Right to Participate in Cultural Life

The right to participate in cultural life is enshrined in both the UDHR and the ICESCR stipulating that everyone has the right to freely take part in the cultural life of the community and that the state shall recognize everyone this right to take part in cultural life.⁹² This right to take part in cultural rights is a right as equal and indivisible as all the other rights protected under the UDHR,⁹³ and the inclusion of this right into the ICESCR renders it binding upon states. The right to take part in cultural life is also interdependent on several rights shined under the ICESCR, notably the right to self-determination (article 1) and the right to an adequate standard of living (article 11).⁹⁴

The content of this right has been interpreted and expanded upon by UNESCO to provide an obligation for states to ensure that minorities have “*full access to and participating in the cultural life...in order to enrich with their specific contribution, while safeguarding their right to preserve their cultural identity.*”⁹⁵ The UN monitoring body for the implementation of the ICESCR treaty obligations, the CESCR, has further expanded upon the content of this right, providing that culture, especially for indigenous peoples, entailed a way of life.⁹⁶ Right to

⁸⁷ UN Doc.E/CN.4/Sub.2/L625 (n 85), para. 48.

⁸⁸ See, ICCPR and ICESCR, art. 1(2).

⁸⁹ See, ICCPR and ICESCR, arts. 1(2) and 1(3).

⁹⁰ *Chief Bernard Ominayak and Lubicon Lake Band v. Canada* (26 March 1990), UN Human Rights Committee, CCPR/C/38/D/167/1984, para. 13(3).

⁹¹ Francesco Francioni (n 83), p. 56f.

⁹² See, UDHR art. 27(1) and ICESCR art. 15(1)(a).

⁹³ Francesco Francioni (n 83), p. 56f.

⁹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 21: Right of everyone to take part in Cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights* (21 December 2009), UN Doc.E/C.12/GC/21, para. 2.

⁹⁵ 1976 UNESCO Recommendation (adopted on 26 November 1976 by UNESCO General Conference, 19th Session, Nairobi), article 4(f).

⁹⁶ *General Discussion on the Right to Take Part in Cultural Life as recognized in Article 15 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc.E/1993/22, Chapter VII, paras. 210, 212 and 213, see also General Comment 21 (n 94), p. 13.

access to culture was also explained to be a group right and to entail protection of cultural heritage and natural and man-made environments.⁹⁷

The right to take part in cultural life entails both negative obligations; non-interference of with the exercise of cultural practice as well as access to cultural goods and services, and positive obligations; to ensure the preconditions necessary for participation, facilitation and promotion of cultural life as well as the access to and preservation of cultural goods.⁹⁸ The cultural choice to exercise or to abstain the right to take part in cultural life individually or in association with others, is especially important to indigenous peoples, who are the beneficiaries of “*the full enjoyment, as individuals or as a collective*”, of all human rights stated in the United Nations, Charter of the United Nations, 1 UNTS XVI (UN Charter), UDHR and UNDRIP.⁹⁹

States have an obligation to ensure that the exercise of the right to take part of cultural life takes due account of the values of cultural life, which in the case of indigenous peoples entails considering the strong communal dimension of their cultural life.¹⁰⁰ For indigenous peoples, this dimension is; “*indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*”¹⁰¹ In the case of indigenous peoples, individual cultural rights are of a mere functional or secondary character, since they are conditioned by the actual ability of the community’s collective cultural rights.¹⁰²

In order to prevent the degradation of indigenous peoples way of life, means of subsistence, natural resources and cultural identity, states have a positive obligation to take measures to recognize and protect indigenous peoples rights to own, develop, control and use their communal lands, territories and resources.¹⁰³ It has also been interpreted that states have an obligation to respect the principle of “*free, prior and informed consent of indigenous peoples “in all matters covered by their specific rights*”, and to take steps to return lands or territories inhabited or used without such consent.¹⁰⁴

The collective elements of the rights to take part in cultural life have been interpreted to place positive obligations upon States in relation to indigenous peoples to *recognize, respect, protect, and fulfil; facilitate, provide and promote*, their specific way of life and cultural identity.¹⁰⁵ The progressive aspect of such rights imposes a specific and continuing obligation

⁹⁷ UN Doc.E/1993/22 (n 96), pp. 204 & 205, see also General Comment 21 (n 94), p. 13.

⁹⁸ General Comment 21 (n 94), p. 6.

⁹⁹ General Comment 21 (n 94), p. 7.

¹⁰⁰ General Comment 21 (n 94), p. 36.

¹⁰¹ Ibid.

¹⁰² Francioni (n 83), p. 122f.

¹⁰³ General Comment 21 (n 94), p. 36.

¹⁰⁴ General Comment 21 (n 94), p. 36f.

¹⁰⁵ See, General Comment 21 (n 94), pp. 36, 37, 44, 48, 49, 51 and 52.

upon Sweden to take concrete measure aimed at the full implementation of the right to take place in cultural life and as such, regressive measures are not permitted.¹⁰⁶

Specifically, the positive obligation on Sweden requires Sweden to respect the rights of the Sami to access their cultural heritage, maintain and strengthen their spiritual relationship with their ancestral lands and natural resources and to in a free, active and informed way take part in important decision-making processes that may impact their way of life.¹⁰⁷ Moreover, this requires Sweden to adopt “*appropriate legislation and effective mechanisms*” allowing persons, individually, in association with others or within a community or group, to “*participate effectively*” in decision-making processes, to claim the protection of their right to take part of cultural life, or to receive compensation for rights violations.¹⁰⁸

3.1.3. The Minority Right to Culture

The UDHR provides a provision for non-discrimination but contains no explicit provisions protecting the right to self-determination or any explicit regime for minority protection.¹⁰⁹ The first universally applicable protection regime for minorities is found in the ICCPR, stipulating that persons belonging to ethnic, religious or linguistic minorities shall “*not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*”¹¹⁰ Unlike the UDHR, the ICCPR contains a provision concerning the right to self-determination and cultural rights of minorities.

Article 27 of the ICCPR encompasses a broad understanding of minorities and minority rights when compared with other instruments that refer to the notion of ‘national minorities’.¹¹¹ Article 27 does not refer to the concept of ‘indigenous peoples’, however, most of the case-law from the Human Rights Committee (CCPR) concerns claims related to indigenous peoples, see pages 27 – 30 for further discussion. The existence of a minority in a state is a matter of fact not law and does not depend on a state decision but can be defined by an objective criterion.¹¹²

¹⁰⁶ If regressive measures are deliberately taken the state must carefully consider all alternatives and that the measure is justified, with the full set of rights recognised in the ICESCR in mind, see, General Comment 21 (n 94), pp. 46f.

¹⁰⁷ See, General Comment 21 (n 94), p. 49(d) and 49(e).

¹⁰⁸ General Comment 21 (n 94), p. 54(a).

¹⁰⁹ See UDHR art. 2 and 7.

¹¹⁰ See ICCPR, art. 27.

¹¹¹ Article 27 is not limited to well-established groups that are citizens within a nation but also applies to minorities that have recently arrived or are temporarily based in that county, see Joshua Castellino and Niamh Walsh, *International Law and Indigenous Peoples* (The Raoul Wallenberg Institute Human Rights Library, Koninlijke Brill NV, Leiden, The Netherlands 2005), p. 5.

¹¹² See, UN Human Rights Committee, *CCPR General Comment No. 23: Article 27(Rights of Minorities)*, 8 april 1994, CCPR/C/21/Rev.1/Add.5, para 5(2), see, *Rights of Minorities in Upper Silesia (Minority Schools)*, (1928) PCIJ Series A, No. 15, p. 29, see also, *Lovelace v. Canada*, Communication No. 24/1977, (30 July 1981) UN Doc. CCPR/C/OP/1, para. 14.

Apart from the general obligations under article 2(1) ICCPR to respect and ensure, promote and protect, as well as to, fulfil the rights under the covenant, states also have specially tailored obligations under article 27.¹¹³ Non-discrimination provisions are different from a regime for minority protection. A minority protection regime suggests permanent instruments to protect a community identity by the placing of positive obligations upon states to create “institutions for non-dominant groups to protect and develop their language, culture and religion.”¹¹⁴

The collective dimension of article 27 ICCPR is conferred from the words; “in community with other members of their group”, and the cultural, religious and linguistic rights protected in article 27 can only be realized meaningfully when exercised as a collective right; as a group.¹¹⁵ Just like the state obligations under the right to take part in culture the obligations under article 27 are both negative and positive in nature. The obligations under the ICCPR are interpreted, although not explicitly, by the CCPR to also operate under the principle of effectiveness.¹¹⁶ The CCPR reasoning in relation to cultural rights of minorities maintains that for ICCPR rights to have any real and concrete meaning they must be interpreted in light of the cultural traditions of the affected minorities.¹¹⁷

This entails that the state must not only refrain from violating minorities right to enjoy their culture but must also take such positive protective measures in its legislative, judicial and administrative authorities to ensure the existence and the exercise said right.¹¹⁸ Although the rights conferred from article 27 ICCPR are fundamentally individual rights, the exercise of such rights depends on the ability of a minority group to maintain its culture, language or religion, entailing state obligations of a positive nature.¹¹⁹

In the same vein as people’s right to self-determination and disposal of natural resources, the effective participation in decision-making related to land and resources within may be crucial for the protection of a specific way of life.¹²⁰ This right to enjoy a particular culture consisting of a specific way of life associated with land and its natural resources is especially relevant in the case of indigenous peoples.¹²¹ Such a right to a particular way of life may include

¹¹³ ICCPR art. 2(1) and 2(2), see also General Comment No. 31 [80] (n 74), pp. 5 - 7.

¹¹⁴ See, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities: Mr. Francesco Capotorti* (20 June 1977) UN Doc.E/CN.4/Sub.2/384/Add.5, paras. 29ff.

¹¹⁵ See *Ivan Kitok v. Sweden* (27 July 1988) UN Human Rights Committee, CCPR/C/33/D/197/1985/1988, paras. 9(1)ff, see also *Chief Bernard Ominayak and Lubicon Lake Band v. Canada* (n 90), para. 13(4)ff.

¹¹⁶ Julie Ringelheim, *Integrating Cultural Concerns in the Interpretation of General Individual Rights - Lessons from the International Human Rights Case Law*, in Committee on Economic, Social and Cultural Rights, Fortieth session, Geneva 28 April - 16 May 2008, UN Doc.E/C.12/40/4, 9 May 2008, p. 4ff.

¹¹⁷ *Francis Hopu and Tepoaitu Bessert v. France*, (29 December 1997). UN Human Rights Committee, CCPR/C/60/D/549/1993/Rev.1., para. 10.3, see also Julie Ringelheim (n 116), p. 5f.

¹¹⁸ General Comment No. 23 (n 112), para. 6.1.

¹¹⁹ The state must take positive measures necessary to protect the identity of a minority as well as the rights of its members to enjoy and develop their culture and language as well as to practice their religion, see General Comment No. 23 (n 112), p. 6.2.

¹²⁰ *Chief Bernard Ominayak and Lubicon Lake Band v. Canada* (n 90), para. 13(3).

¹²¹ General Comment No. 23 (n 112), para. 3.2.

traditional activities such as fishing and hunting, or the right to live in reserves protected under domestic laws.¹²²

As already indicated, when interpreting article 27 the right to self-determination enshrined under article 1 of the ICCPR may be of particular relevance.¹²³ Sweden, as an ICCPR state party, has an obligation to ensure that the Sami exercise of these cultural rights is “*fully protected*”.¹²⁴ Positive legal protective measures surrounding effective participation of minority community members in decision-making affecting them may be required to ensure the minority’s enjoyment of these cultural rights.¹²⁵

In its case-law, the Human Rights Committee (CCPR) have stressed that the acceptability of economic measures that affect or interfere with culturally significant economic activities of a national minority is dependent on the positive obligations that the state has with taken under article 27.¹²⁶ The CCPR have in its case-law emphasized prior consultation, opportunity to participate in decision-making processes, considerations of minority interests, and continued profit from the minorities traditional economy as positive obligations under article 27.¹²⁷ In relation to the consultation process, the CCPR have also emphasized that special considerations shall be paid to the cultural and religious significance of the traditional economic minority activity and to pay specific attention to the sustainability of such activities.¹²⁸

3.1.4. The Sami Minority Right to Culture in the CCPR

The Human Rights Committee (CCPR) have dealt with Sami rights under article 27 several times. This chapter will explain how the minority right to culture under article 27 ICCPR, as described on pages 24 – 26, have been applied in relation to Sami.

The first case was *Ivan Kitok v. Sweden* where a Swedish citizen of Sami ethnic origin claimed a right to reindeer breeding based on ancestry.¹²⁹ The exercise of the reindeer husbandry right in Sweden is bound to the membership in Sami villages, which the applicant had lost due to engaging in other professions for three years. The Swedish law only allowed for re-admittance in Sami villages with special permissions and the applicant, therefore,

¹²² General Comment No. 23 (n 112), para. 7.

¹²³ *Apirana Mahuika et al. v. New Zealand* (16 November 2000) UN Human Rights Committee, CCPR/C/70/D/547/1993, para. 9.2.

¹²⁴ General Comment No. 23 (n 112), para.9.

¹²⁵ General Comment No. 23 (n 112), para.7.

¹²⁶ Specifically, the opportunity to participate in decision-making processes, prior consultation and the continuation of the minority to benefit from their traditional economy, see *Ilmari Länsman et al. v. Finland* (8 November 1994), UN Human Rights Committee CCPR/C/52/D/511/1992, paras. 9.6 and 9.8. Further discussion in chapter 4.14: Sami Rights in the CCPR.

¹²⁷ *Apirana Mahuika et al. v. New Zealand* (n 123), paras. 9.5, 9.6 and 9.9.

¹²⁸ Compare, *Apirana Mahuika et al. v. New Zealand* (n 123), para. 9.8.

¹²⁹ *Ivan Kitok v. Sweden* (n 115).

claimed he arbitrarily had been denied his immemorial Sami minority right to reindeer husbandry.¹³⁰

The Committee observed that when the state regulates economic activity that also constitute an essential element in the culture of an ethnic community the application in relation to an individual may fall under article 27 of the ICCPR.¹³¹ The right to enjoy one's own culture in community with others under article 27 cannot be determined *in abstracto* but must be placed within a context.¹³²

In this case, the statutory restrictions on the right of an ethnic Sami to become a member of a Sami village were to be determined by the committee. The case before the Committee concerned the conflict between legislation, protecting the Sami minority as a whole, and its application to a single member of that Sami minority.¹³³

The Committee was guided by the *ratio decidendi* in the *Lovelace v. Canada* case stipulating that statutory restrictions must have reasonable and objective justification, be consistent with other provisions of the Covenant, and be necessary for the viability and welfare of the minority as a whole.¹³⁴ In the case context, the committee found no violation of article 27 as Kitok was “permitted, albeit not as of right, to graze and farm his reindeer, to hunt and fish.”¹³⁵

The Committee later again dealt with the right to enjoy one's culture of Sami in the case of *Ilmari Länsman et al. v. Finland*, concerning the current and future quarrying of stone on Sami sacred land and land used for reindeer husbandry.¹³⁶ Following the same line of reasoning in *Kitok v. Sweden*, the Committee also observed that article 27 does not only protect the traditional means of livelihood of national minorities.¹³⁷

The impact of the economic activity upon the way of life of the minority community is central in the discussion of the Committee. Limited impacts do not necessarily amount to a denial of the right to enjoy one's culture, as only interference that is so substantial that it effectively denies the right in that region will amount to a violation of article 27.¹³⁸ The Committee further notes that the discretion of the state to allow economic activities by enterprises or encourage development is to be assessed by reference to the obligations undertaken in article 27 and not by reference to a margin of appreciation.¹³⁹ The obligation “to ensure the effective

¹³⁰ *Ivan Kitok v. Sweden* (n 115), paras. 2.1 & 2.2.

¹³¹ *Ivan Kitok v. Sweden* (n 115), para. 9.2.

¹³² *Ivan Kitok v. Sweden* (n 115), para. 9.3.

¹³³ *Ivan Kitok v. Sweden* (n 115), para. 9.8.

¹³⁴ *Lovelace v. Canada* (n 112), para. 16 and 17, and *Kitok v. Sweden* (n 115), para. 9.8.

¹³⁵ *Ivan Kitok v. Sweden* (n 115), para. 9.8.

¹³⁶ *Ilmari Länsman et al. v. Finland* (n 126).

¹³⁷ The fact that the methods of reindeer husbandry have been modernized with modern technology does not interfere with their rights under article 27. Similarly, sacred sites still continue to bear spiritual significance in the present day, see *Ilmari Länsman et al. v. Finland* (n 126), paras. 9.1, 9.2 and 9.3.

¹³⁸ *Ilmari Länsman et al. v. Finland* (n 126), paras. 9.4. and 9.5.

¹³⁹ *Ilmari Länsman et al. v. Finland* (n 126), para.9.4.

participation of members of minority communities in decisions which affect them”, is explicitly referred to by the Committee.¹⁴⁰

No violation of article 27 was found in relation to the already present quarrying based on three grounds; firstly, the interests of the Sami had been taken into account during the quarrying permit proceedings, secondly, the Sami were consulted during the proceedings and thirdly, the reindeer herding area did not appear to be adversely affected by the quarrying.¹⁴¹ The Committee found no violation of article 27 in regard to future quarrying that was approved by the State. The Committee considered that the State authorities in the quarrying permit had an intention to minimize the impacts of stone extraction on the reindeer husbandry area and the environment.¹⁴² The Committee concluded that future economic activities, in order to comply with article 27, must be carried out in a way that the Sami continue to benefit from reindeer husbandry.¹⁴³

The Committee further concluded that if future mining activities in the region were to be approved on a large scale and significantly expanded by the exploiting companies, then this may constitute a violation of article 27.¹⁴⁴ The Committee proclaimed that the State has an obligation to keep this in mind when extending existing mining contracts or issuing new ones.¹⁴⁵

This Committee-developed approach; of assessing whether state interference in Sami reindeer husbandry is so substantial that the state has failed to properly protect the individual’s right to enjoy their culture, was applied and developed in the case of *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*.¹⁴⁶ The case concerned logging activities in an area used by Sami for reindeer grazing. The Committee found no violation of article 27 as the Sami applicants and stakeholders were consulted in the evolution of the logging plans and the fact that the area was only of secondary importance and that the logging would partially contribute to the long-term sustainability of the reindeer husbandry in the area.¹⁴⁷

This Committee approach was then later again applied in another Sami case in Finland, *Jouni Länsman et al. (2) v. Finland*.¹⁴⁸ The case built on another earlier communication, *Jouni*

¹⁴⁰ *Ilmari Länsman et al. v. Finland* (n 126), para. 9.5.

¹⁴¹ *Ilmari Länsman et al. v. Finland* (n 126), para. 9.6.

¹⁴² The Committee noted that the quarrying activities was agreed to be carried out mainly outside the period used for reindeer pasturing as well as that the change in herding methods could be accommodated by local forestry authorities and the company, see *Ilmari Länsman et al. v. Finland* (n 126), para. 9.7.

¹⁴³ *Ilmari Länsman et al. v. Finland* (n 126), para. 9.8.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, (7 November 2001) UN Human Rights Committee CCPR/C/73/D/779/1997.

¹⁴⁷ The logging plans were altered due to the Sami applicant’s criticism. Despite its short-term interference the logging would allow ground lichen to regenerate, thus contributing to the long-term sustainability of the reindeer herding in the area, see *Anni Äärelä and Jouni Näkkäläjärvi v. Finland* (n 146), para. 7.6.

¹⁴⁸ *Jouni E. Länsman et al (2) v. Finland* (15 April 2005.) UN Human Rights Committee CCPR/C/83/D/1023/2001.

*Länsman et al. v. Finland*¹⁴⁹, where the committee found no violation of article 27 regarding the current and proposed logging of an area used by Sami for reindeer husbandry.¹⁵⁰ In the prior *Jouni* case, just like in the *Ilmari Länsman et al v. Finland* case, the Committee also proclaimed that future logging plans might violate article 27 due to it, taken together, might amount to more serious effects.¹⁵¹

In the latter *Jouni* case, concerning further logging plans in the area disputed in the prior communication, the Committee stipulated that:

“*[T]he infringement of a minority’s right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture.*”¹⁵²

In the specific case it was not shown that the impact on the reindeer husbandry was serious enough to amount to a denial of the Sami applicants right.¹⁵³

3.1.5. Right to Information

The right to information is enshrined in article 19(2) of the ICCPR as well as article 19 of the UDHR. Article 19 in the UDHR proclaims the right to “*seek, receive, and impart information and ideas through any media and regardless of frontiers.*” Article 19(2) in the ICCPR have an almost identical formulation adding “*information and ideas of all kinds*” and stipulates that the form of the information may be oral, in writing, in art or other media of the applicant's choice. Article 19(3) sets out that this right to information may be restricted by laws when necessary for the respect of rights of others, for the protection of national security, public order or public health.

Article 19(2) of the ICCPR sets out a right to access to information held by public bodies, regardless of its form, storage, source, or date.¹⁵⁴ Public bodies include all branches of the State, all public or governmental authorities on a national, regional and local level that are in a

¹⁴⁹ *Jouni E. Länsman et al v. Finland* (22 November 1996) UN Human Rights Committee CCPR/C/58/D/671/1995.

¹⁵⁰ The applicant Sami were consulted in the logging plan process and the state authorities did balance the Sami interests against the general public economic interests when deciding on the most appropriate measures of forestry management, see *Jouni E. Länsman et al v. Finland* (n 149), para. 10.5.

¹⁵¹ See, *Jouni E. Länsman et al v. Finland* (n 149), para. 10.5 and *Ilmari Länsman et al. v. Finland* (n 126), para. 9.8.

¹⁵² *Jouni E. Länsman et al (2) v. Finland* (n 148), para. 10.2.

¹⁵³ *Jouni E. Länsman et al (2) v. Finland* (n 148), para. 10.3.

¹⁵⁴ UN Human Rights Committee, *General comment no. 34: Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para. 18.

position to engage state responsibility as well as other entities that carry out public functions.¹⁵⁵

To give effect to the right of access to information, states shall not only proactively put government information of public interest into the public domain but also take every effort to ensure “*easy, prompt, effective and practical access to such information.*”¹⁵⁶ This entails the enactment of necessary legislation where one may gain access to such governmental information.¹⁵⁷ Under article 27 of the ICCPR, the right to information entails a process of information-sharing and consultation with affected communities of minority groups when the state's decision-making may “*substantively compromise the way of life and culture*” of that minority group.¹⁵⁸

3.1.6. United Nations Declaration on Minorities

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135 (UNDM) was adopted by the UN General Assembly in 1992 and was inspired by the by article 27 in the ICCPR concerning the rights of persons belonging to ethnic, religious, and linguistic minorities.¹⁵⁹ Just like UDHR and UNDRIP, UNDM is a legally non-binding instrument that has a normative value.¹⁶⁰

The UNDM refers to the right of individuals belonging to ethnic, religious and linguistic minorities and sets out the right to enjoy their culture, as well as to efficiently participate in cultural, religious, social, economic and public life.¹⁶¹ The right to efficiently participate also includes a right for persons to participate in the decision, on a national and regional level, that concerns the minority to which they belong or the regions in which they live.¹⁶² Minority rights and the rights under the UNDM might refer to individual rights but just like the art. 27 of the ICCPR the rights have a collective dimension, due to the wording: “*as well as in community with others.*”¹⁶³

The UNDM stipulates the obligations for states to take measures to ensure that persons belonging to minorities can “*exercise fully and effectively*” all their human rights and fundamental freedoms in full equality and without discrimination before the law.¹⁶⁴ States have an obligation to protect the existence and cultural identity of minorities, as well as to

¹⁵⁵ General Comment no. 34 (n 154), paras. 7 and 18.

¹⁵⁶ General Comment no 34 (n 154), para. 19.

¹⁵⁷ Ibid.

¹⁵⁸ General Comment no. 34 (n 154), para. 18.

¹⁵⁹ UNDM, preamble, sections 3 & 4.

¹⁶⁰ See, chapter 5.

¹⁶¹ UNDM, art. 2(1) and 2(2).

¹⁶² See, UNDM, art. 2(3), this shall not be done in a way incompatible with national legislation.

¹⁶³ See, UNDM, art. 3(1).

¹⁶⁴ UNDM, art. 4(1).

“encourage conditions for the promotion of that identity”.¹⁶⁵ Moreover, the states have an obligation create favourable conditions to give persons belonging to minorities the ability to develop their culture, language, religion, traditions and customs.¹⁶⁶ Furthermore, states have an obligation to plan and implement national policies and programs with due regard to the interests of persons belonging to minorities.¹⁶⁷

3.2. International Indigenous Protection

The United Nations Declaration on the Rights of Indigenous Peoples A/RES/61/295 (UNDRIP) is hailed as being “*the most authoritative expression*” of the common understanding of the content of indigenous rights.¹⁶⁸ The International Labour Organization, Indigenous and Tribal Peoples Convention, C169 (C169) constitute the most comprehensive instrument in international law for the protection of indigenous peoples.¹⁶⁹ This chapter will, therefore, focus on the UNDRIP and ILO C169 as they are the most relevant sources of international human rights law on the subject. Due to the absence of a Swedish ratification of the ILO C169, it will be used in the systematic interpretation of other international human rights treaties.¹⁷⁰

3.2.1. United Nations Declaration on Indigenous Peoples

In a General Assembly resolution, the UN adopted the in international law legally non-binding UNDRIP, governing the rights of indigenous peoples around the world.¹⁷¹ UNDRIP has a normative effect that is not restricted to the UN but also extends and influences the actions of regional human rights bodies, such as the bodies under the American, African and European human rights systems.¹⁷²

UNDRIP states that indigenous peoples have both an individual and collective right to “*the full enjoyment*” of all human rights and fundamental freedoms as recognized in the UDHR, UN Charter and in international human rights law.¹⁷³ Under UNDRIP indigenous peoples have extensive rights relating to self-determination, culture, property and land use, religion, non-discrimination and education. UNDRIP also envisages extensive positive obligations for states and several safeguards for the protection and promotion of the indigenous peoples’ rights.

¹⁶⁵ UNDM, art. 1(1). To achieve these ends the state is required to adopt appropriate legislative and other measures, see UNDM, art. 1(2).

¹⁶⁶ UNDM, art. 4(2).

¹⁶⁷ UNDM, art. 5(1).

¹⁶⁸ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, S. James Anaya, A/HRC/9/9, 11 August 2008, Human Rights Council, para. 62.

¹⁶⁹ *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, 1999, 87th Session ILO Conference, Geneva (Ilolex No. 041999), para. 99.

¹⁷⁰ See, *Vienna Convention on the Law of Treaties* (n 69), arts. 31(1), 31(2) and 31(3)(c).

¹⁷¹ General Assembly Resolution 61/295, 107th plenary meeting, 13 September 2007.

¹⁷² A/HRC/9/9 (n 168), para. 64.

¹⁷³ See, UNDRIP, art. 1.

Indigenous peoples have a right to self-determination and to freely pursue their economic, social and cultural development, and in the exercise of self-determination, a right to self-autonomy in relation to their internal or local affairs and the financing thereof.¹⁷⁴ This right to self-determination also includes the right to “*maintain and strengthen*” their own political, legal, economic, social and cultural institution, while at the same time retaining the right to fully participate in the political, economic, social and cultural life of the State.¹⁷⁵ This also includes the right to be secure in the enjoyment of their own means of subsistence and development, and to engage in both traditional and other economic activities.¹⁷⁶

In relation to their culture indigenous peoples have a right not to be assimilated or have their culture destroyed, which also includes positive obligations for the state to put in place effective mechanisms to prevent and redress.¹⁷⁷ Indigenous peoples also have a right to practice and revitalize their culture tradition and customs including the right to maintain, protect, and develop past, present and future manifestations of their culture.¹⁷⁸ In relation to spiritual and religious tradition and customs indigenous peoples have a right under UNDRIP to manifest, practice, develop and teach as well as a right to maintain, protect and access their religious and cultural sites and heritage.¹⁷⁹

UNDRIP envisages extensive land rights for indigenous peoples and state obligations. Indigenous peoples not only have a “*right to the lands, territories and resources which they have traditionally owned, occupied, or otherwise used or acquired*”, but also have a right to “*own, use, develop, and control*” these lands, territories and resources.¹⁸⁰ In relation to these lands indigenous peoples also have a right to maintain and strengthen their spiritual relationship.¹⁸¹

In relation to the extensive land rights of indigenous peoples under the UNDRIP, states have a legal obligation to not only recognize these indigenous lands, territories and resources but also to protect them.¹⁸²

The state also has protective environmental obligations in relation to indigenous lands and must put in place effective measures to ensure that no storage or disposal of hazardous materials take place there.¹⁸³ Specifically, in relation to cultural assimilation or destruction, states have a positive obligation to provide effective measures to prevent and redress “[a]ny

¹⁷⁴ UNDRIP, arts. 3 & 4.

¹⁷⁵ UNDRIP, art. 5.

¹⁷⁶ See further, UNDRIP, art. 20(1).

¹⁷⁷ UNDRIP, art. 8.

¹⁷⁸ UNDRIP, art. 11(1).

¹⁷⁹ UNDRIP, art. 12(1), see also art. 31 and 34.

¹⁸⁰ UNDRIP, art. 26.

¹⁸¹ UNDRIP, art. 25.

¹⁸² UNDRIP, art. 26(3).

¹⁸³ UNDRIP, arts. 29(1) and 29(2).

*action which has the aim or effect of dispossessing them [indigenous peoples] from their lands, territories or resources.*¹⁸⁴

Several indigenous human rights safeguards are explicitly set out in UNDRIP, apart from those already following from the positive obligations of other specific articles. One of those safeguards are the right to participation stipulating that; indigenous peoples have a right to participation in decision-making in matters which affect their rights.¹⁸⁵ Another safeguard is the right to consultation stating that; states shall consult and cooperate in good faith with concerned indigenous peoples to “*obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*”¹⁸⁶ The right to consultation to obtain the free, prior and informed consent of indigenous peoples also applies in relation to “*the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*”¹⁸⁷

Sweden voted in favour of the adoption of the UNDRIP and also provided an explanation of the vote as well as an interpretation of the instrument.¹⁸⁸ In its explanation and interpretation Sweden declared that it was of the firm opinion that the individual rights prevailed over the collective rights in the declaration. Sweden also interpreted the right to self-determination to not give a right to *cessation*, as well as that the right to consultation do not give a collective veto right in decision-making.¹⁸⁹

3.2.2. Indigenous and Tribal Peoples Convention C169

In 1957 the International Labour Organization (ILO) adopted the C107 - Indigenous and Tribal Populations Convention 1957 (No. 107)¹⁹⁰ Considering the international developments in law that had taken place since 1957 and the adoption of the C107 convention, the ILO decided to drop the assimilationist approach in earlier standards and to adopt the International Labour Organization, Indigenous and Tribal Peoples Convention, C169 (C169).¹⁹¹

C169 applies to both indigenous¹⁹² and tribal people and stipulates that indigenous peoples shall fully enjoy human rights and fundamental freedoms without any hindrance or

¹⁸⁴ UNDRIP, art. 8(2)(b).

¹⁸⁵ UNDRIP, art. 18.

¹⁸⁶ UNDRIP, art. 19.

¹⁸⁷ UNDRIP, art. 32(2).

¹⁸⁸ See, GA/10612, 13 September 2007, Plenary, 107th & 108th Meetings, <<https://www.un.org/press/en/2007/ga10612.doc.htm>> accessed 2018, 03 - 29.

¹⁸⁹ Ibid.

¹⁹⁰ International Labour Organization (ILO), *Indigenous and Tribal Populations Convention*, C107, 26 June 1957, C107.

¹⁹¹ See, C169 preamble paras. 4, 9 and 10.

¹⁹² Indigenous peoples under the C169 are in article 1(1)(b) defined as “*peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all*

discrimination.¹⁹³ Indigenous peoples have a right to self-determination but not *cessation*.¹⁹⁴ Indigenous and tribal peoples also have a right to decide their own priorities in the process of development in relation to its effect on their lives, beliefs, institutions, spiritual well-being, the lands they occupy or otherwise use, as well as to exercise control over their own economic, social and cultural development.¹⁹⁵

Extensive lands rights for indigenous peoples are envisaged under the C169, which encompasses the “*total environment of the areas which the peoples concerned occupy or otherwise use.*”¹⁹⁶ Indigenous peoples under the C169 have a right to ownership or possession over lands which they traditionally occupy, a right to the natural resources that reside within these lands, a right to not be removed from these lands, a right to return to these lands and a right to compensation for any land loss.¹⁹⁷

States have obligations to respect the special importance for the cultures and spiritual values of the indigenous peoples relating to their relationship to the lands or territories which they occupy or otherwise use.¹⁹⁸ States furthermore have obligations to recognize the property rights of indigenous peoples to their traditional lands and to take measures to safeguard the right of indigenous peoples to use lands not exclusively occupied by them, but where they have traditionally had access for traditional activities and sustenance.¹⁹⁹ Here, states shall not only take steps to identify the traditional lands of indigenous peoples but also to guarantee the effective protection of their property rights.²⁰⁰

In relation to the natural resources within the traditional lands of indigenous peoples, these shall be specially safeguarded and indigenous peoples have a right to participate in the use, management and conservation of these resources.²⁰¹ In the specific case where the state retains ownership of mineral resources in traditional indigenous lands, the state has obligations to establish procedures for the consultation with indigenous peoples before the undertaking or permitting such exploration or exploitation programmes.²⁰² In this situation, indigenous peoples concerned shall also have a right to participate in the benefits of such mining activities as well as to receive compensation for any damages as the result of these

of their own social, economic, cultural and political institutions.” Self-identification as indigenous or tribal is a fundamental criterion for the determination of the peoples that the C169 applies to, see C169, art. 1(2).

¹⁹³ See, C169, article 1(1) and 1(2) as well as 3(1).

¹⁹⁴ C169, art. 1(3).

¹⁹⁵ C169, art. 7(1).

¹⁹⁶ See, C169, art. 13(2).

¹⁹⁷ See, C169, art.s 14(1), 15(1), 16(1), 16(3) and 16(5).

¹⁹⁸ This is especially relevant from the collective aspect of this relationship, see C169, art. 13(1).

¹⁹⁹ C169, article 14(1).

²⁰⁰ C169, art. 14(2). Additionally, states shall establish adequate procedures in their national system to resolve land claims by indigenous peoples, see C169, art. 14(3).

²⁰¹ C169, art. 15(1).

²⁰² See, C169, art. 15(2).

activities.²⁰³ Consultation and consent, as well as compensation, shall also be prevalent in cases of relocation.²⁰⁴

Generally, states have obligations to develop, with the participation of indigenous peoples, co-ordinated and systematic actions to protect the rights of indigenous peoples, including the promotion of the full realization of social, economic and cultural rights with respect for their social and cultural identity, customs, traditions and institutions.²⁰⁵ States shall also adopt special measures for the safeguarding of persons, institutions, property, labour, cultures and environment of indigenous peoples.²⁰⁶

In the application of the provisions under the C169 states shall recognize and protect the social, cultural, religious and spiritual values of indigenous peoples and take due account of the individual and collective nature of problems they are faced with.²⁰⁷ In the application of the C169 provisions, states shall also consult, in good faith, with indigenous peoples whenever consideration of legislative or administrative measures that may affect them directly are at hand.²⁰⁸ Furthermore, C169 stipulates obligations to establish means for the free participation of indigenous peoples in elective and administrative institutions and other bodies for policies and programmes which may affect them.²⁰⁹

3.3. International Environmental Protection

International standards on a specific area of law are not only essential for the understanding of that specific area of law but also forms an important element of the overarching area of law that it is part of. Specific international standards are used in the interpretation of other international standards on the same area of law or in the subject matter.²¹⁰ Due to the nature of the situation that is at the scope of the thesis, specifically the indigenous Sami and extractive industries, international environmental law will be used in the *systematic interpretation* of indigenous and minority rights.

3.3.1. RIO 1992 Declaration

As a result of the United Nations conference on environment and development in Rio de Janeiro, Brazil in 1992 the Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (Rio 1992), was proclaimed by the UN. The Rio 1992

²⁰³ Ibid.

²⁰⁴ C169, art. 16(2) and 16(4).

²⁰⁵ C169, art. 2(1) and 2(2)(b).

²⁰⁶ C169, art. 4(1).

²⁰⁷ C169, art. 5(a).

²⁰⁸ C169, art. 6(1)(a).

²⁰⁹ C169, art. 6(1)(b).

²¹⁰ See, *Vienna Convention on the Law of Treaties* (n 69), arts. 31(1), 31(2) and 31(3)(c).

Declaration builds upon the prior Stockholm Declaration of 1972 and proclaims that “[h]uman beings are at the centre of concerns for sustainable development.”²¹¹

The human rights approach to environmental protection provided for the broadening of existing rights, the assertion of substantive and procedural environmental rights and affects both civil and political rights as well as economic, social and cultural rights.²¹² This phenomena of international environmental law broadening civil and political rights have been demonstrated by the progressive interpretation of article 8 of the ECHR.²¹³ The same broadening has occurred in relation to the economic, social and cultural rights to health, adequate food and water.²¹⁴

The right to information is also protected under the Rio 1992 declaration in principle 10, stating that environmental issues are best handled with the participation of all concerned citizens at relevant levels. At the national level, individuals shall also have a right to access to information regarding the environment and hazardous materials and activities in their communities, as well as an “*opportunity to participate in decision-making processes*”.²¹⁵

States have in relation to this, obligations to facilitate and encourage public awareness and participation by widely making such information available and to provide effective access to administrative and judicial proceedings encompassing redress and remedy.²¹⁶

States have an obligation to enact effective environmental legislation and environmental standards, management, objectives and priorities shall “*reflect the environmental and developmental context to which they apply*.”²¹⁷ In this environmental and developmental context, both economic and social costs are reflected upon.²¹⁸ EIAs, as a national instrument subject to the decision of competent authority, are stipulated by the Rio 1992 declaration to be used when proposed activities are likely to have a significant adverse impact on the environment.²¹⁹

Indigenous peoples, indigenous communities and other local communities are specifically mentioned in the Rio 1992 declaration where it is stated that they have a critical role in environmental management and development due to their knowledge and traditional

²¹¹ Rio 1992, preamble and principle 1.

²¹² Stéphanie Chuffart and Jorge E. Vinñadales, *From the Other Shore - Economic, Social and Cultural Rights from an International Environmental Law Perspective*, in Eibe Riedel, Gilles Giacca and Christophe Golay, *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014), p. 287f.

²¹³ Stéphanie Chuffart (n 212), p. 288, as an example see, *Guerra and Others v. Italy*, App No 14967/89, (ECtHR, 19 February 1998), para. 57.

²¹⁴ Stéphanie Chuffart (n 212), p. 288, as an example see, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food (Art. 11)*, 12 May 1999, UN Doc. E/C.12/1999/5, para. 7.

²¹⁵ Rio 1992, principle 10.

²¹⁶ *Ibid.*

²¹⁷ Rio 1992, principle 11.

²¹⁸ *Ibid.*

²¹⁹ Rio 1992, principle 17.

practices.²²⁰ Relating to this, states have obligations to recognize, duly support their identity, culture and interests as well as to enable their effective participation in the achievement of sustainable development.²²¹ Moreover, states have an obligation to protect the environment and natural resources of people under oppression, domination and occupation.²²²

3.3.2. Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447; 38 ILM 517 (1992) (Aarhus convention) recalls principle 10 of the Rio 1992 Convention as well as the needs for transparency public participation in environmental decision-making.²²³ The object of the Aarhus convention is to “*contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*”.²²⁴ The State shall guarantee the right of access to information, public participation in decision-making and access to justice in environmental matters.²²⁵

The *Aarhus convention* is ratified by Sweden and thus provides direct obligations for Sweden, however, as the convention does not contain any specific provisions relating to indigenous peoples or minorities’ participation, consultation or right to information it will mainly but not exclusively be dealt with as a normative part of the international human rights system. The Aarhus convention does not limit states to provide broader protection in their legislation and does not either derogate from other existing rights concerning information, participation in decision-making and access to justice.²²⁶

States have obligations to take the necessary legislative, regulatory and other measures to establish and maintain, transparent, and consistent framework to implement the provisions of this convention.²²⁷ States must also ensure that officials and authorities assist and provide guidance in the facilitation of participation in decision-making and access to justice.²²⁸ The Aarhus convention provides for obligations surrounding access to environmental information as well as public participation in decisions on specific activities.

The concerned public shall be informed early in environmental decision-making procedures, in an adequate, timely and effective manner and the state has an obligation to provide for this early participation.²²⁹ The State also has an obligation to in the decision to take due account of

²²⁰ Rio 1992, principle 22.

²²¹ Ibid.

²²² Rio 1992, principle 23.

²²³ Aarhus convention, see preamble.

²²⁴ Aarhus convention, art. 1.

²²⁵ Ibid.

²²⁶ Aarhus convention, art. 3(5) and 3(6).

²²⁷ Such measures include; measures to achieve compatibility between information, public participation and access to justice, as well as proper enforcement mechanisms, see Aarhus convention art. 3(1).

²²⁸ Aarhus convention, art. 3(2).

²²⁹ Aarhus convention, arts. 6(2) and 6(4).

the outcome of the public participation.²³⁰ Additionally, the state has obligations to make appropriate and practical provisions for public participation in environmental plans, programmes and policies, as well as to promote public participation during the preparation of executive regulations and other legally binding rules.²³¹

3.3.3. Convention on Biological Diversity

The United Nations 1992 Convention on Biological Diversity 1760 UNTS 79; 31 ILM 818 (CBD), is ratified by Sweden and as such presents specific obligations on Sweden. The CBD will be used as a ratified instrument but also as a normative international standard due to its influence on other obligations, notably Sweden's obligations under article 8 ECHR.²³² The CBD does recognize the dependence of the traditional lifestyle of many indigenous peoples on biological resources and diversity, as well as the sustainable use of such biological components.²³³ Biological resources are defined as “*genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.*”²³⁴

States have obligations to establish systems of protected areas where special measures for the conservation of biological diversity are taken, to promote the protection of ecosystems, natural habitats and viable population of species, and to promote environmentally sound and sustainable development in adjacent areas.²³⁵ States also have an obligation, subject to national legislation and for the conservation and sustainable use of biological diversity, to respect, preserve and maintain knowledge, innovations and practices from indigenous communities stemming from their traditional way of life.²³⁶

States have obligations to implement considerations of conservation and sustainable use of biological resources in their national decision-making and to encourage and protect the customary use of biological resources in accordance with traditional cultural practices.²³⁷ Further, states have obligations to use EIAs in proposed projects that are likely to have significant adverse effects on biological diversity, to allow for public participation in EIAs, as well as to create appropriate arrangements to be able to take due account of the environmental impact of projects.²³⁸ EIA use and the minimizing of the environmentally harmful project in accordance with the CBD are central to the protection of biological diversity.²³⁹ However,

²³⁰ Aarhus convention, art. 6(8).

²³¹ Aarhus convention, arts. 7 and 8.

²³² See, chapter 5.3.4.

²³³ See, CBD, preamble.

²³⁴ CBD, article 2, para. 2.

²³⁵ CBD, articles 8(a), 8(d) and 8(e).

²³⁶ CBD, article 8(j).

²³⁷ CBD, articles 10(a) and 10(c).

²³⁸ CBD, articles 14(a) and 14(b).

²³⁹ *Sweden and the Convention on Biological Diversity: Summary of Sweden's third National Report to the Secretariat of the Convention on Biological Diversity* (Naturvårdsverket (Environmental Protection Agency), Report 5693, May 2007), p. 19.

CBD guidance is rarely used in EIAs in Sweden due to inadequate cooperation, failure by government agencies to take initiatives, and lack of commitment from the general public.²⁴⁰

3.4. Conclusion

Sweden's international commitments entail several obligations in relation to the specific way of life and cultural identity of Sami in Sweden. The right to take part in cultural life has been interpreted to entail both negative and positive obligations and requires Sweden to recognize, respect, protect and fulfil; facilitate, provide and promote the special way of life and cultural identity of the Sami. The progressive aspect of this right imposes a specific and continuing obligation upon Sweden to take concrete measure aimed at the full implementation of the right, where regressive measures are prohibited. This includes the continuing obligation of Sweden to ensure the preconditions necessary for participation, facilitation, and promotion of cultural life as well as the access and preservation of cultural goods.

Further, in relation to the Sami way of life, Sweden must protect the Sami cultural identity and ensure the existence and exercise of the Sami minority's right to enjoy their own culture. This has been interpreted to require Sweden to take positive measures in its legislative, judicial and administrative authorities to ensure the existence of the specific way of life of Sami in Sweden. Relating to this the UNDM stipulates that Sweden must ensure the Sami minority's full and effective exercise of human rights and fundamental freedoms in full equality under the rule of law. Here, Sweden must protect the Sami cultural identity and encourage conditions for the promotion of that identity. This requires Sweden to create favourable conditions for persons of the Sami minority to be able to develop their culture, language, religion, traditions and customs. When implementing and planning national policies and programmes this requires Sweden to take due regard to the interests of persons belonging to the Sami minority.

The right to take part in cultural life has been interpreted as providing an obligation to take measures to recognize and protect indigenous peoples' rights to own, develop, control and use their communal lands, territories and resources, in order to prevent the degradation of indigenous peoples' way of life, means of subsistence, natural resources and cultural identity. The right to take part in cultural life requires Sweden to respect the Sami access to their cultural heritage, to maintain and strengthen their spiritual relationship with their ancestral lands and resources. The right is also interpreted to require Sweden to take steps to return lands or territories inhabited or used without the consent of Sami.

In relation to this, the ILO C169 stipulates the obligation to respect the special importance for the cultures and spiritual values of Sami stemming from their relationship to the lands and territories which they traditionally occupy or otherwise use. Both ILO C169 and UNDRIP recognises an obligation to recognize and protect the Sami lands, territories and resources.

²⁴⁰ *Sweden and the Convention on Biological Diversity: Summary of Sweden's third National Report to the Secretariat of the Convention on Biological Diversity* (n 239), pp. 19 & 27.

ILCO C169 further stipulates the need for Sweden to recognise Sami property rights, to take steps to identify Sami traditional lands, and to take measures to safeguard the Sami right to use land where there are competing land uses.

The ILO C169 also stipulates the safeguarding of natural resources within Sami land and the Sami right to participate in the use, management and conservation of these resources. UNDRIP requires Sweden to provide effective measures to prevent and redress action which has the aim or effect of dispossessing Sami from their lands, territories or resources. UNDRIP also demands that Sweden ensure that no storage or disposal of hazardous materials takes place on land traditionally used by Sami.

Further relating to the protection of the Sami way of life, Rio 1992 obliges Sweden to recognize and support the identity, culture and interests of Sami and protect the environment and natural resources of Sami. The CBD furthermore demands that Sweden implement considerations of conservation and sustainable use of biological resources in its national decision-making. Sweden has obligations under the CBD to respect, preserve and maintain Sami knowledge, innovations and practices stemming from their traditional way of life for the conservation and sustainable use of biological resources. In the CBD Sweden must also encourage and protect customary Sami use of biological resources according to their traditional cultural practices.

Sweden's international commitments further stipulate obligations regarding the participation of Sami in decision-making processes that affect them. Sweden must accordingly to the right to take part in cultural life respect the Sami right to in a free, active and informed way take part in important decision-making processes that may impact their way of life. This is interpreted to include the obligation of Sweden to adopt appropriate and effective mechanisms to allow Sami to participate effectively in decision-making processes. In the exercise of the Sami right to enjoy their own culture, Sweden is required to ensure the protection, which involves the effective participation of Sami in decision-making processes related to decisions affecting them and their way of life, in particular, decisions on land and resource use. The UNDM also stipulates the effective participation of persons belonging to the Sami minority in relation to decisions that concern the Sami minority or the region in which the Sami minority resides.

Furthermore, the UNDRIP prescribes the participation of Sami in decision-making in a matter which affects Sami rights. The ILO C169 further stipulates that Sweden shall develop, with the participation of Sami, co-ordinated and systematic actions to protect Sami rights. This includes the promotion of the full realization of social, economic and cultural rights with respect for Sami social and cultural identity, customs, traditions and institutions. Sweden shall also adopt special measures for the safeguarding of persons, institutions, property, labour, cultures and environment of Sami.

Additionally, the Rio 1992 declaration sets out several obligations for Sweden to enable public access to information, to facilitate participation and awareness and to enact effective legislation and the effective participation of Sami in decision-making. The Aarhus convention

also obliges Sweden to provide, promote and facilitate early public participation in decision-making, and to take necessary legislative, regulatory or other measures to ensure and maintain a transparent and consistent framework for public participation. In environmental matters, Sweden must also in the decision-making take due account of the outcome of public participation which extends to plans, programmes, policies, executive regulations and legally binding rules. The CBD also requires Sweden to provide for public participation in decision-making and The Rio 1992 as well as the CBD both requires Sweden to use EIAs to minimize environmentally harmful effects. In order to protect biological diversity, the CBD guidelines in article 14 must be followed and the cooperation with indigenous communities as well as the public participation is required.

Sweden's international commitments also stipulate obligations to consult with the Sami in decisions affecting them. In relation to the right to take part in cultural life, it has been interpreted to provide an obligation for states to respect the principle of free, prior and informed consent of Sami in all matters covered by their specific rights. The Sami minority right to enjoy their own culture also specifies the importance of prior consultation, that takes due account of minority interests and culture, as well as the continued profit of minorities traditional economies. The right to information further emphasises consultation and information-sharing in decision-making that substantially affects the Sami way of life and cultural identity. The ILO C169 requires in the application of its provisions that Sweden recognizes and protect the social, cultural, religious and spiritual values of Sami and take due account of the individual and collective nature of problems they are faced with. Sweden shall according to ILO C169 in good faith consult with Sami whenever considering taking legislative or administrative measures that may affect Sami. The UNDRIP further requires that Sweden consult and cooperate in good faith with Sami to obtain their free, prior and informed consent before adopting such measures that may affect them.

The UNDRIP specifically emphasises the need for such consultation in the approval of projects affecting Sami land, territories or other resources, and particularly in connection with the activities such as mining. ILO C169 specifically requires Sweden to establish procedures for Sami consultation before undertaking or permitting mining exploration or exploitation programmes, in the case where the state retains ownership over mineral resources in traditional Sami land. In this situation, it is also required that Sami participate in the benefits of mining activities and receive compensation for any resulting damages.

4. Sweden's Regional Obligations

After looking at the international obligations Sweden has towards Sami the regional European standards will now be addressed. In this chapter Sweden's regional obligations (European human rights obligations) towards the Sami, derived from their status as a minority, will be explained. These regional obligations will form the basis for the consistency test of the Swedish mineral framework procedural safeguards in chapter 6. The Swedish membership in the Council of Europe and its position in the European system of human rights, creates both rights and obligations for Sweden, in relation to other states as well as for and to its population.

This thesis will address the ECHR and the FCNM together with the jurisprudence of the ECtHR. As no EC-law or EU legislation exists²⁴¹ that regulates extractive industries and the relationship to minorities or indigenous peoples, the focus will remain on the rights stipulated in the ECHR and the FCNM. The ECHR has been adopted into the Swedish legal system and is applicable as a normal statute.²⁴² The Swedish constitution does not allow for Swedish laws or ordinances to be enacted in contradiction to the obligations under ECHR.²⁴³ As part of the Swedish legal system, the ECHR has a direct effect in Sweden and its obligations on Sweden have been developed by the ECtHR.

As no explicit protective safeguards relating to indigenous peoples or minorities exists within the ECHR, these will be analysed through the ECtHR jurisprudence and references to soft law. The ECtHR has developed a cultural as well as an environmental dimension of convention rights that will be used to illuminate Sweden's obligations towards Sami people. In chapter 5 the Swedish legal mineral framework, as well as the legal framework surrounding Sami rights, will be laid out.

No agreed international definition of minorities exists but in general minorities are described as an ethnic, religious or linguistic group, being nationals of a state, in a numerically inferior and non-dominant position, that due to their group characteristics differ from the majority, and show a sense of solidarity to preserve their culture, religion or language.²⁴⁴ Indigenous peoples, such as the Sami, with their unique yet somewhat overlapping set of rights²⁴⁵, may

²⁴¹ A directive on waste management of extractive industries exists, but it does not deal with this issue, see, *Directive 2006/21/EC of the European Parliament and of the Council, of 15 March 2006, on the management of waste from extractive industries and amending Directive 2004/35/EC*, 2006L0021-EN-07.08.2009-001.001-3.

²⁴² See, Lag (1994:1219) om den Europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna (Act (1994:1219) on the European convention for the protection of human rights and fundamental freedoms).

²⁴³ RF, chapter 2, section 19.

²⁴⁴ Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities: Mr. Francesco Capotorti, UN Doc.E/CN.4/Sub.2/384/Rev.1, paragraph. 568.

²⁴⁵ Gudmundur Alfredsson (n 18), p. 163ff.

constitute a minority and thus benefit from minority protection, regardless of the recognition of indigenous rights in the state.²⁴⁶

No instrument exists within the European human rights frameworks that explicitly mention indigenous peoples. In the European human rights system, indigenous peoples' rights are realized within the framework of minority protection. Two Council of Europe conventions concerning minority rights exist; the Framework Convention (FCNM) and the European Convention on Human Rights (ECHR), which forms the basis for the European minority protection. The FCNM concerns the protection of national minorities and the ECHR strives to provide universal protection of minorities.

4.1. Framework Convention for the Protection of National Minorities

The protection of national minorities and the rights and freedoms of those belonging to minorities “*forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.*”²⁴⁷ Sweden ratified the Framework Convention for the Protection of National Minorities, ETS 157 (FCNM) on the 9th of February in the year 2000 and entered into force for Sweden on the 1st of July that same year. The minority rights laid down in the FCNM may be exercised and enjoyed individually as well as in community with others²⁴⁸, and undertakes to adopt adequate measures in order to promote “*in all areas of economic, social, political and cultural life,*” full and effective equality between the minority and majority.²⁴⁹

One of the main obligations for Sweden under the FCNM is to promote the necessary conditions for persons belonging to national minorities in order to maintain and develop their culture, as well as to preserve the essential elements of their identity; religion, language, traditions and cultural heritage.²⁵⁰ Sweden also has an obligation to encourage tolerance and intercultural dialogue and in the fields of education, culture and media, to take “*effective measures to promote mutual respect and understanding and co-operation*” among those living in Sweden²⁵¹ Additionally minorities have rights concerning religion, language, non-discrimination, association and assembly.²⁵² Furthermore, the convention stipulates and obligation for Sweden to create the conditions necessary for minorities to effectively participate in “*cultural, social and economic life and in public affairs, in particular those affecting them.*”²⁵³

²⁴⁶ Scheinen, *What are Indigenous Peoples?* (n 1), p. 3ff.

²⁴⁷ FCNM, article 1.

²⁴⁸ FCNM, article 3, section 2.

²⁴⁹ FCNM, article 4, section 2.

²⁵⁰ FCNM, article 5, section 1.

²⁵¹ FCNM, article 6, section 1.

²⁵² See, FCNM, articles 3, 4, 7, 8, 9, 10 and 14.

²⁵³ FCNM, article 15.

The rights enshrined under the FCNM does not give rights to *cessation*, nor do they limit any other human right or fundamental freedom, and are considered, where applicable, to correspond to the content of the provisions of the ECHR.²⁵⁴ The FCNM mostly employs objective type provisions, not being directly applicable, and does not envision collective rights as the emphasis for the convention lies on the protection of persons belonging to minorities, who may exercise their rights individually and in community with others.²⁵⁵ The content of the FCNM rights and obligations are inspired by the ECHR as well as the UNDM.²⁵⁶

The underlying concept of the FCNM is the protection of individual rights, nevertheless, the FCNM presents a progressive protection system which possesses collective elements.²⁵⁷ Specifically, the obligation for states under article 5 possesses collective elements, in the form of the preservation of group culture and the protection of cultural diversity.²⁵⁸ The collective elements of article 5, as remarked by the Advisory Committee on the FCNM, primarily concerns the traditional way of life of indigenous peoples like the Sami.²⁵⁹

The Committee of Ministers in the monitoring of the implementation of art. 5 of the FCNM in Sweden recommended that Sweden “*clarify and improve the legal situation of the Sami people in relation to land right and pursue efforts to preserve their right to their traditional way of life*”.²⁶⁰ The Committee further points to the major importance and necessity of consultations with organisations representing national minorities, such as the Sami parliament, in order to attain the objective of the policy are under article 5.²⁶¹

4.2. European Convention on Human Rights

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (ECHR) rights, as stated in its preamble, are based on the universal rights stipulated in the UCHR. The focus of this sub-chapter will be the right to respect for family and private life, as it is the most evident illustration of a general universal right having a cultural dimension and is the most relevant right in the ECHR for the scope of this thesis.²⁶²

²⁵⁴ See, FCNM, articles 21, 22 and 23.

²⁵⁵ Explanatory Report to the Framework Convention for the Protection of National Minorities, Council of Europe, Strasbourg, February 1995, H (95) 10, sections 11 and 13.

²⁵⁶ Ibid., at 23 & 24.

²⁵⁷ Dieter Kugelmann, A. Von Bogdandy and R Wolfrum., *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, in Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 223-263 (Koninklijke Brill N.V 2007), p. 253.

²⁵⁸ Ibid., at 253f.

²⁵⁹ Ibid., at 254.

²⁶⁰ Council of Europe, *Fourth Report submitted by Sweden pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities*, ACFC/SR/IV(2016)004, 1 June, p. 30.

²⁶¹ Ibid., at 30f.

²⁶² Ringelheim (n 116), p. 6.

Article 8(1) of the ECHR stipulates that “[e]veryone has the right to respect for his private and family life, his home and correspondence”. Article 8(2) of the ECHR states that there shall be no interference by a public authority with the exercise of this right unless it is in accordance with the law and is necessary in a democratic society and follows legitimate aims.²⁶³

The main purpose for article 8 is primarily to protect against arbitrary interference with private and family life, home or correspondence and thus, the main obligation for states under article 8 is to refrain from interfering with such right and is of a negative character.²⁶⁴ Article 8 also imposes obligations of positive character on states, inherent in an effective respect for private life, which may require them to adopt measures designed to secure the respect for private life.²⁶⁵

The ECHR was not drafted with indigenous peoples or their special relationship to the land in mind.²⁶⁶ The cultural rights of minorities are not explicitly recognised under the ECHR but have been gradually developed through the jurisprudence of the ECtHR through its dynamic interpretation of various ECHR rights.²⁶⁷

4.2.1. The Cultural Dimension

The cultural dimensions of ECHR rights are only protected to the extent that it affects an individual's ability to effectively enjoy the rights under the ECHR.²⁶⁸ The ECtHR and the CCPR when implementing cultural considerations into their interpretative process follow three distinct rationales; the principle of effectiveness, the recognition of a cultural dimension inherent to some rights, and the promotion of substantive equality.²⁶⁹

Repeatedly in its jurisprudence the ECtHR have applied and stressed the importance of the principle of effectiveness, proclaiming that the ECHR is “*intended to guarantee rights that are not theoretical or illusory, but practical and effective.*”²⁷⁰ The principle of effectiveness derives from the specific object and purpose of human rights treaties; the protection of

²⁶³ Legitimate aims in article 8(2) ECHR are listed as; national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals or the protection of rights and freedoms of others.

²⁶⁴ *Kroon and Others v. The Netherlands*, App No 18535/91 (ECtHR, 27 October 1994), para. 31.

²⁶⁵ *Evans v. The United Kingdom*, App no 6339/05 (ECtHR, 10 April 2007), para. 75.

²⁶⁶ Heinmämäki (n 39), p. 16f.

²⁶⁷ As an example, see; *Christine Goodwin v. The United Kingdom*, App No 28957/95 (ECtHR Grand Chamber, 11 July 2002), *Connors v. The United Kingdom*, App No 66746/01 (ECtHR 27 May 2005) and *Cyprus v. Turkey*, App No 25781/94 (ECtHR Grand Chamber Rep. 2001-IV10, May 2001).

²⁶⁸ Ringelheim (n 116), p. 6.

²⁶⁹ Ringelheim (n 116), p. 4. As this thesis will not discuss the matter of discrimination, the promotion of substantive equality will only briefly be mentioned.

²⁷⁰ See, for instance, *Airey v. Ireland*, App No 6289/73 (ECtHR, Judgement, 9 October 1979), para. 24, and *Soering v. The United Kingdom*, App No 14038/88 (ECtHR, Judgement, 7 July 1989), para. 87.

fundamental rights of individual human beings, applied by the ECtHR.²⁷¹ The ECHR is proclaimed as a ‘living instrument’ which must be interpreted in light of ‘present-day conditions.’²⁷²

This evolutive interpretation, used in human rights instruments including the ECHR, applies alongside the principle of effectiveness, as they are used together to seek the most appropriate interpretation to achieve the object and purpose of a treaty.²⁷³ These effective and evolutive interpretations have been influenced and validated by ‘a continuing international trend’ and has been applied in relation to the ECHR right to private and family life.²⁷⁴

This trend in the ECtHR jurisprudence to recognize the cultural dimension of the right to private and family life started with the recognition by the European Commission relating to Norwegian Sami and the use of land.²⁷⁵ The Commission ultimately declared the application admissible as the interference was deemed justifiable. However, the Commission pointed out one of importance, that “*a minority group is, in principle, entitled to claim the right to respect for their particular life style [sic!] it may lead as being ‘private life’, ‘family life’ or ‘home’*”.²⁷⁶

The Commission also stressed that such traditional Sami use of vast land does not constitute a property right as stated in article 1 of the first protocol to the ECHR²⁷⁷ Article 1 of the first protocol to the ECHR stipulates that; “*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*”²⁷⁸

This idea of respect to a particular lifestyle being part of the cultural dimension to the right to private and family life in article 8 ECHR was adopted by the ECtHR,²⁷⁹ and later further

²⁷¹ *Austria v. Italy*, App No 788/60 (European Commission of Human Rights, Decision on Admissibility, 11 January 1961), p. 19, *Wemhoff v. Germany*, App No 2122/64 (ECtHR, 27 June 1968), para. 8, and *Loizidou v. Turkey*, App No 15318/89 (ECtHR Preliminary Objections, 23 March 1995), para. 71ff.

²⁷² *Tyrer v. The United Kingdom*, App No 5856/72 (ECtHR, 25 April 1978), para. 31.

²⁷³ *Wemhoff v. Germany* (n 271), para. 8.

²⁷⁴ See, *Christine Goodwin v. The United Kingdom* (n 267), para. 85, see also, *Ünal Tekeli v. Turkey*, App No 29865/96 (ECtHR, 16 November 2004), para. 61ff.

²⁷⁵ See *G. and E. v. Norway*, App Nos. 9278/81 & 9415/81 (European Commission of Human Rights, 3 October 1983, Decision of 3 October on the admissibility of the applications). The Sami alleged that the building of a hydraulic dam on land the Sami traditionally used for reindeer-herding, fishing and hunting would interfere with their rights under article 8.

²⁷⁶ See *G. and E. v. Norway* (n 275), pp. 30 and 35.

²⁷⁷ See *G. and E. v. Norway* (n 275), paras. 30 and 36. Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.

²⁷⁸ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20.III.1952, article 1, section 1.

²⁷⁹ See, *Noack and Others v. Germany*, App No 46346/99 (ECtHR, Decision on admissibility, 25 May 2000), p. 9, referring to *G. and E v. Norway* (n 275), and *Buckley v. The United Kingdom*, App No 20348/92 (ECtHR, 29 September 1996), para. 74ff.

developed relating to the Roma minority in a series of cases dated the 18th of January 2001.²⁸⁰ The cases all concern the Roma traditional lifestyle under article 8 ECHR and planning and enforcement measures taken against them by the state in regard to the stationing of their caravans.²⁸¹

The ECtHR proclaimed that; “*the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy [sic!], reflecting the long tradition of that minority of following a travelling lifestyle.*”²⁸² The ECtHR further maintained that any measures affecting the stationing of the applicant’s caravan have an impact not only the applicant’s right to respect for their home but also their ability to maintain their Roma identity and to lead their private and family life according to the Roma tradition.²⁸³

The fact that only a portion of the Roma community lives according to the traditional lifestyle does not affect their cultural identity²⁸⁴, like the Sami in Sweden where only a minority live according to the traditional lifestyle.

The ECtHR took into account recent international developments; such as the FCNM, and observed that there was an emerging international consensus to recognise the special needs of minorities and an obligation for states to “*protect their security, identity and lifestyle,*” for the purpose of safeguarding the interests of the minority and to “*preserve a cultural diversity of value to the whole community.*”²⁸⁵ According to the Court, this entails that the state should give special consideration to the vulnerable position of minorities and to their needs and their different lifestyle, both in regulatory planning frameworks as well as in the reaching of decisions in particular cases.²⁸⁶ Here the ECtHR declared that a positive obligation for states to “*facilitate the Gypsy [sic!] way of life*” exists.²⁸⁷ This sets the standards for the application to other minorities.

The Court also took into account the legal and social context in which the measures of planning and enforcement was taken against the applicant, taking into account the adequacy of procedural safeguards protecting the applicant's interests under article 8.²⁸⁸ In the planning and enforcement measures, the ECtHR examined the applicant's opportunity to appeal and present material for their appeal, consideration of the applicant’s arguments and view of the

²⁸⁰ See, *Chapman v. The United Kingdom*, App No 27238/95 (ECtHR, 18 January 2001), *Beard v. The United Kingdom*, App No 24882/94 (ECtHR, 18 January 2001), *Coster v. The United Kingdom*, App No 24882/94 (ECtHR, 18 January 2001) *Lee v. The United Kingdom*, App No 25289/94 (ECtHR, 18 January 2001), and *Jane Smith v. United Kingdom*, App No 25154/94 (ECtHR, 18 January 2001).

²⁸¹ Ibid.

²⁸² *Chapman v. The United Kingdom* (n 280), para. 73.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ *Chapman v. The United Kingdom* (n 280), para. 93.

²⁸⁶ *Chapman v. The United Kingdom* (n 280), para. 96.

²⁸⁷ Ibid.

²⁸⁸ *Chapman v. The United Kingdom* (n 280), paras. 101 and 114.

sustainability of alternative sites, as well as to the personal conditions of the applicant.²⁸⁹ In a later case also regarding the Roma traditional lifestyle under article 8 ECHR and planning and enforcement measures, the Court placed special importance and weight on the prevalence of adequate procedural safeguards in planning regulatory framework.²⁹⁰

The court emphasised that the adequacy of procedural safeguards in the planning regulatory framework will be especially important for the determination of the proportionality of the interference and the width of the margin of appreciation afforded states²⁹¹, see further pages 55 – 56. Referring to its previous case-law of *Buckley* and *Chapman* in relation to the adequacy of procedural safeguards, the Court asserted that the decision-making process preceding the intrusive measure must be fair and afford due respect to the interest safeguarded to the individual.²⁹²

4.2.2. Sami cultural rights in the ECtHR

The ECtHR and European Commission cases dealing with Sami will now be examined to assess how the European human rights system deals with the cultural dimension of rights. This subchapter will describe how the obligations described on pages 48 – 50 have been applied relating to Sami in the ECtHR

Sami rights were first litigated under the European human rights system in the *G. and E. v. Norway* case from the European Commission, where the Commission proclaimed that there was no violation of the right to private or family life or the right to property.²⁹³ In 1991 the commission dealt with another Sami case concerning reindeer husbandry, hunting and fishing rights for Sami who were denied membership into a Sami village.²⁹⁴ The applicants claimed they were holders of hunting and fishing rights by immemorial prescription and that they had a right to reindeer husbandry as members of a Sami village. The applicants were prosecuted in the Swedish courts for unlawful hunting and reindeer grazing on the land of the Sami village and the case then went up to the Commission.²⁹⁵

²⁸⁹ *Chapman v. The United Kingdom* (n 280), para. 106ff.

²⁹⁰ *Connors v. The United Kingdom* (n 267).

²⁹¹ *Connors v. The United Kingdom* (n 267), paras. 83, 84 and 92.

²⁹² *Connors v. The United Kingdom* (n 267), para. 83.

²⁹³ See pp. 49 - 50, the issue revolves around the establishment of a hydroelectric power plant on land which was used by Norwegian Sami for reindeer husbandry, fishing and hunting. The Commission decided that the vast use of land for grazing, hunting and fishing did not constitute a property right under the protocol and did not interfere on article 8, respect to private and family life, See, *G. and E. v. Norway* (n 275), on footnotes 276 & 277. The Commission was the forum for individual complaints until 1998.

²⁹⁴ *Östergren and Others v. Sweden*, App No 13572/88 (European Commission of Human Rights, 1 March 1991). In 1971 the new reindeer husbandry law (RNL), containing the requirements for Sami village membership, was enacted. In September 1982 the applicants, in a letter from the County Administration, were denied membership in a Sami village and were informed that they had no land rights in the region.

²⁹⁵ *Östergren and Others v. Sweden* (n 294), para. 2.

The Commission did not find any violation of the right to property under article 1 of the first protocol as the case proceedings did not deprive the applicants of any property rights.²⁹⁶ In a case from 1996, the Commission once again decided on a case concerning Sami, this time addressing the issue of the exclusiveness of the Sami right to fishing and hunting.²⁹⁷ The Commission did not decide upon the exclusiveness of the Sami right to fishing and hunting but nevertheless expressed that if there was such an exclusive right, that right might have been infringed upon by the new system of licensing.²⁹⁸

In the last case of the Commission on Sami rights the question of double hunting licenses came up, and the Commission expressed that it is in the general interest that the “*special culture and way of life of the Sami be respected, and that it is clear that reindeer herding and hunting are important parts of that culture and way of life.*”²⁹⁹ The ECtHR then decided upon a case regarding the right to a fair trial, in the determination of a Sami village’s reindeer husbandry right, that however ended in a friendly settlement without addressing the question.³⁰⁰

In a case very similar to that of *KÖNKÄMÄ and 38 other Saami Villages v. Sweden*, also touching upon the exclusiveness of Sami fishing rights concerning a decision to extend the public fishing right to all inhabitants, the ECtHR did not find any violation of neither the right to property or the right to respect to private and family life.³⁰¹

The most recent big case from the ECtHR regarding Sami property rights was decided in 2009, originating from the *Härjedalen Case* in Sweden regarding Sami right to winter grazing

²⁹⁶ The Commission proclaimed that if any deprivation of property occurred it would have been at the time of the enactment of the 1971 Reindeer Husbandry Act. However, the time limit for lodging a complaint the Reindeer Husbandry Act had expired and that question was therefore not tried, see *Östergren and Others v. Sweden* (n 294), para. 8.

²⁹⁷ With the enactment of the Reindeer Herding Ordinance a new system of licensing hunting and fishing rights to the public in land used by Sami was established. This system was then implemented by regional rules by the County Administration. The affected Sami claimed this system infringed upon their exclusive fishing and hunting right in the area, see *KÖNKÄMÄ and 38 other Saami Villages v. Sweden*, App No 27033/95 (European Commission of Human Rights, Decision as to the admissibility, 25 November 1996), p. 7f.

²⁹⁸ The Commission noted that the issue of the existence of any such right was still in dispute by the parties, and that the Swedish courts were competent to decide this on this. Some of the Sami villages had been involved in the *Taxed Mountains Case* and had their right expanded upon there, but due to time limit for complaints being exceeded this was not discussed. As the Sami had not exhausted their national remedies the Commission did not answer the question of exclusivity, see *KÖNKÄMÄ and 38 other Saami Villages v. Sweden* (n 297), p. 8.

²⁹⁹ The Commission also observed that the applicant could exercise his hunting rights and with the margin of appreciation in mind did not find the decision disproportionate, see *Halvar FROM v. Sweden*, App No 34776/97 (European Commission of Human Rights, 4 March 1998), p. 3.

³⁰⁰ See *Muonio Saami Village v. Sweden*, App No 28222/95 (ECtHR 9 Januari 2001).

³⁰¹ The Sami feared the decision would weaken their legal position by making their culture more vulnerable, however, the Court concluded that the Sami were not adversely impacted by the decision, as it aimed to protect Sami rights and did not change their rights in substance, see *Johti Sappmelacat and Others v. Finland*, App No 42969/98 (ECtHR Decision of Admissibility, 18 January 2005), p. 17ff.

on private land.³⁰² The Court expressed that the right to winter grazing on private lands do not constitute an ‘existing possession’³⁰³ as the right was not available to them without the intervention of Swedish courts, as it was of the nature of a claim to a right.³⁰⁴ Referring to its earlier case-law regarding the concept of ‘legitimate expectation’³⁰⁵ as well as to the ambiguity of the requirements for immemorial prescription laid down in the *Taxed Mountains Case*, the ECtHR found that the right to winter grazing did not constitute an ‘asset’.³⁰⁶ As the Court found that article 1 Protocol No.1 was not applicable it then turned to the question of the burden of proof.

The ECtHR found that the burden of proof for immemorial prescription fully resting on the Sami as the claimants to such right was legitimate and reasonable, as the Swedish courts decisions were well-founded in law, thoroughly examined, regarding the special features of reindeer husbandry and the Sami had been able to produce an extensive body of evidence.³⁰⁷ The parts not deemed admissible was later decided upon by the ECtHR in its judgement on the merits, and the Court did find a violation of the right to a fair trial in relation to the length of the proceedings.³⁰⁸ Article 8 was never alleged to be in violation as the case concerned the court proceedings that followed from a dispute between private parties.

The findings of the Court in regards to the burden of proof was criticized by the dissenting judge Ziemele who pointed to recent international legal developments regarding indigenous peoples rights and asserted that the Chamber based its reasoning on false premises.³⁰⁹ The dissenting judge expressed that it was wrong to accept as incontestable that the plaintiffs in the domestic proceedings had a valid title to the disputed land and that it was wrong to apply the old Swedish land code (GJB) that were drafted long before any recognition of indigenous

³⁰² The Swedish courts decided against the Sami and ordered them to pay the private landowners. In the ECtHR the Sami complained under article 6 ECHR the right to a fair trial, concerning the length of the proceedings, the burden of proof and the legal costs, and under article 1 Protocol 1 the right to property; claiming that the land used for winter grazing constituted a possession, see *Handölsdalen Sami Village and Others v. Sweden*, App No 39013/04 (ECtHR, Decision on the Admissibility, 17 February 2009), paras. 3 - 33 and 40 - 44. Only the burden of proof along with the right to property will be discussed.

³⁰³ ‘Possessions’ within the meaning of protocol 1 to the ECtHR may either be “existing possessions” or “assets”. A claim to a possession counts in the case where the applicant at least has a legitimate expectation of obtaining effective enjoyment of a property right, see *Handölsdalen Sami Village and Others v. Sweden* (2009) (n 302), para. 48.

³⁰⁴ *Handölsdalen Sami Village and Others v. Sweden* (2009) (n 302), para. 51.

³⁰⁵ See, *Kopecký v. Slovakia*, App No 44912/98 (ECtHR, 1 February 2001), paras. 50; “no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts”, and 52; “where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.”

³⁰⁶ *Handölsdalen Sami Village and Others v. Sweden* (2009) (n 302), paras. 55 - 65.

³⁰⁷ *Handölsdalen Sami Village and Others v. Sweden* (2009) (n 302), paras. 60 - 66.

³⁰⁸ See, *Handölsdalen Sami Village and Others v. Sweden*, App 39013/04 (ECtHR, Judgement, 30 March 2010), para. 66.

³⁰⁹ *Partly Dissenting Opinion of Judge Ziemele, Handölsdalen Sami Village and Others v. Sweden*, Application 39013/04 (ECtHR, 30 March 2010), paras. 1 - 5.

rights in Sweden.³¹⁰ This type of approach “*excluded considerations relating to the specific context of the situation and rights of indigenous peoples in so far as it could be relevant to the issue of effective access to court.*”³¹¹

4.2.3. The Environmental Dimension

The human rights approach to international environmental rights have been discussed earlier in pages 39 – 43 and will now be further expanded upon in the setting of the European human rights system. The ECtHR has in its case-law surrounding article 8 developed an environmental dimension to the right to family and private life. Article 8 of the ECHR does not encompass every type of environmental deterioration or pollution, as the ECHR or its protocols does not include a right to nature preservation.³¹² The ECtHR has in several cases considered how pollution may trigger the protection under article 8.

In *López Ostra v. Spain*, the ECtHR proclaimed that “*severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.*”³¹³ The environmental pollution must be regarded as affecting adversely to a sufficient extent the quality of the applicants private and family life in order to violate article 8.³¹⁴

In *Guerra and Others v. Italy*, it was held that “[t]he direct effect of toxic emissions on the applicant’s right to respect for their private and family life means that Article 8 is applicable”.³¹⁵ A general deterioration of the environment does not amount to a violation of article 8 as the existence of a harmful effect of a person’s private or family sphere is required.³¹⁶ The impact of each case is relative and depends on the circumstances of the case where the general context of the environment also plays a part.³¹⁷

In the environmental setting article 8 does not only require states to refrain from interfering with a person’s private and family life but the state is required to take necessary steps to ensure the effective protection of the rights under article 8.³¹⁸ In cases concerning State decisions affecting environmental issues, the ECtHR will assess two things; the consistency between article 8 and the substantive merits of national authorities’ decision, and the decision-making process to ensure it pays due regard to the interests of the individual.³¹⁹ In the

³¹⁰ *Partly Dissenting Opinion of Judge Ziemele* (n 309), para. 5.

³¹¹ *Ibid.*

³¹² *Hatton and Others, v. The United Kingdom*, App No 36022/97 (ECtHR, 8 July 2003), para. 96, see also *Ivan Atanasov v. Bulgaria*, App No 12853/03 (ECtHR, 11 April 2011), para. 66.

³¹³ *López Ostra v. Spain*, App No 16798/90 (ECtHR, 9 December 1994), para. 51.

³¹⁴ *Ivan Atanasov v. Bulgaria* (n 312), para. 66.

³¹⁵ *Guerra and Others v. Italy* (n 213), para. 57.

³¹⁶ *Kyrtatos v. Greece*, App No 41666/98 (ECtHR, 22 August 2003), paras. 52 and 53.

³¹⁷ *Fadeyeva v. Russia*, App No 55723/00 (ECtHR, November 2005), para. 69.

³¹⁸ *Guerra and Others v. Italy* (n 213), para. 58.

³¹⁹ *Taşkin and Others v. Turkey*, App No 46117/99 (ECtHR, 30 March 2005), para. 115.

substantive aspect, the state has a wide margin of appreciation.³²⁰ All procedural aspects of the process will be considered by the ECtHR, including; the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making procedure, and all procedural safeguards available.³²¹

In a case concerning the granting of a gold mining permit, *Taşkin and Others v. Turkey*, the ECtHR asserted that when the State must decide on issues of complex environmental and economic policies, the decision-making process must involve appropriate investigations and studies of the environmental and health impacts of the activities in order to be able to strike a fair balance of interests.³²² Moreover, the public access to such reports or impact studies is crucial as well as the public ability to appeal to courts against decision, act or omission where they consider that their interests or comments have not been given proper weight in the decision-making process.³²³ The *Aarhus convention* was mentioned by the ECtHR in its decision as the convention formed part of the relevant international texts on the right to a healthy environment.³²⁴

Procedural safeguards enjoyed by a litigant may be rendered void if administrative authorities delay, refuse or fail to comply with judicial decisions or when decisions against the litigant are not made public. In *Taşkin and Others v. Turkey*, the procedural guarantees enshrined in the Turkish legislation was deprived of any meaningful effects due to the contradicting actions by the Turkish government.³²⁵

4.2.4. The Fair Balance in Minority Protection

Minority protection under the ECHR requires states to strike a balance between different competing interests in a society which enables the achievement of a fair treatment of minorities and to prevent any abuse of a dominant position.³²⁶ This fair balance must be struck between the competing interests under article 8(2) irrespective of the type of obligation, negative or positive, that the state is bound by.³²⁷

Restrictions on ECHR rights are not regarded as ‘necessary in a democratic society’ under article 8(2) unless it is proportionate to the legitimate aims pursued.³²⁸ In the determination of

³²⁰ *Hatton and Others v. The United Kingdom* (n 312), para. 100, and *Taşkin and Others v. Turkey* (n 319), para. 116.

³²¹ *Hatton and Others v. The United Kingdom* (n 312), para. 104, and *Taşkin and Others v. Turkey* (n 319), para. 118.

³²² *Taşkin and Others v. Turkey* (n 319), para. 119.

³²³ *Ibid.*

³²⁴ *Taşkin and Others v. Turkey* (n 319), paras. 99 and 100.

³²⁵ *Taşkin and Others v. Turkey* (n 319), paras. 122 - 125.

³²⁶ *Young, James and Webster v. The United Kingdom*, App Nos. 7601/76 & 7806/77 (ECtHR, 13 August 1981), para. 63, and *Gorzelik and Others v. Poland*, App No. 44158/98 (ECtHR, 17 February 2004), para. 90.

³²⁷ *Hämäläinen v. Finland*, App No. 37359/09 (ECtHR, 16 July 2014), para. 65, for an earlier case see also *Gaskin v. The United Kingdom*, App No. 10454/83 (ECtHR, 07 July 1989), para. 42.

³²⁸ *Dudgeon v. The United Kingdom*, App No. 7525/76 (ECtHR, 22 October 1981), paras. 51 - 53.

such necessity of an interference, the ECtHR will consider the margin of appreciation afforded state authorities.³²⁹ Interferences on ECHR rights must be provided by law, follow legitimate interests, and be necessary in a democratic society where the proportionality and afforded margin of appreciation plays a role. If interference passes this test it will be considered justified and not be considered a violation of the affected ECHR right.

4.3. Conclusion

Under article 8 of the ECHR as developed by the ECtHR not only does Sweden have the obligation to refrain from interfering with the right to private and family life but also have positive obligations as derived from the inherent principle of effectiveness that follows from the special character of human rights treaties. Specifically, under article 8 ECHR Sweden has an obligation to respect the culture and way of life of Sami which among others includes reindeer husbandry and hunting.

Sami claims to land rights relating to reindeer husbandry, hunting and fishing have been brought to the European Commission and later the ECtHR multiple times, but has only been tried in its substance a handful of times. No case-law by the European Commission or the ECtHR that deals with extractive industries and Sami people exists and many of the litigated cases relate to the practice of reindeer husbandry on private lands.

In relation to the Sami, the ECtHR does stipulate the obligation for Sweden to respect the special culture and way of life of Sami and that reindeer husbandry and hunting constitute important parts of that special culture and way of life. The ECtHR has not been able to apply the findings of the Roma cases in relation to Sami situations as most of the Sami cases in the ECtHR took place before the jurisprudence of the Roma cases. In the latter Sami cases the obligations stemming from the Roma cases such as the emerging international consensus to consider the vulnerable position of minorities in the regulatory framework and the need to protect their security, identity and traditional way of life, or the obligation to facilitate that specific way of life. None of the requirements surrounding adequate procedural safeguards has been applied either in relation to Sami cases. The dissenting judge in the *Handölsdalen Case* did mention the lack of specific consideration of the situation and rights of indigenous peoples in the case, but this had no effect on the outcome of the judgement itself. A future ECtHR case concerning Sami land issues in Sweden that concerns article 8 will be the true mark for the consistency of the ECtHR case-law surrounding cultural minority rights.

By applying the ECtHR Roma case-law findings to the Sami, Sweden also has obligations to protect the security, identity and traditional lifestyle of the Sami in order to safeguard the interests of the Sami minority and to preserve cultural diversity. This entails the obligations of Sweden to also facilitate the Sami traditional way of life. Following this, Sweden must give special considerations to the vulnerable position of the Sami minority, their needs and special

³²⁹ *Piechowicz v. Poland*, App No. 20071/07 (ECtHR, 17 July 2012), para. 212.

lifestyle in both the regulatory planning framework and in the reaching of the decision in individual cases.

Importantly, the ECtHR Roma jurisprudence stipulates obligations for Sweden to take into account legal and social context where planning and enforcement measures are taken, as well as to take into account the adequacy of the procedural safeguards protecting the Sami interests. The availability of adequate procedural safeguards in regulatory planning framework is of special importance and is part of the assessment whether the decision-making process is fair and takes due account of Sami minority interests. The environmental dimension further requires Sweden to in the decision-making process employ appropriate investigations into both environmental and health impacts as well as to properly consider Sami interests.

The progressive protection system of the FCNM stipulates obligations for Sweden to promote the necessary conditions for persons belonging to the Sami minority to maintain and develop their culture, as well as to preserve the essential elements of their cultural identity and way of life. Sweden must also take effective measures to promote mutual respect, understanding and co-operation between the Sami minority and the majority. Sweden must also create the necessary condition for the effective participation of Sami in cultural, social and economic life as well as in public affair that affects them. Consultation with the Sami parliament or Sami representatives is interpreted to be a necessity for the achievement of the goal under article 5.

5. Swedish Legal Setting

After understanding the international and European rights relating to Sami and the obligations conferred upon Sweden, this thesis will explain the Swedish legal setting that these obligations are applicable upon. The thesis will first go on to explain the general level of protection that is afforded Sami people in Sweden, specifically focusing on the rights to land and natural resources, as well as the reindeer husbandry right. Following this, the thesis will then explain the Swedish mineral framework and what safeguards are enshrined within. Lastly, the thesis will explain how the Swedish Sami rights and the procedural safeguards in the mineral framework have been applied and developed by Swedish courts.

As the Swedish legal setting ultimately provides the framework and content in which Sami may assert their rights in Sweden, understanding of such setting is necessary to analyse its consistency with international obligations. As the central question for Sami traditional lives as well as for mining operations both relate to the use of land, the focus of chapters 5.2 and 5.3. will be the Swedish legal frameworks surrounding Sami property rights and cultural rights.

After understanding the Swedish factual and legal contexts together with Sweden's international and European obligations towards Sami, the thesis will analyse the consistency between the Swedish mineral framework safeguards and Sweden's obligations towards Sami. This analysis will take place in chapter 6.

5.1. The Sami Status and Protection

In 1977 the Swedish government declared that the Sami are an ethnic minority and indigenous peoples with a special status and a right to differential cultural treatment.³³⁰ The Sami status as indigenous as well as a minority was acknowledged in 2000³³¹ and the minority status was further enhanced in 2009 and 2010, giving Sweden obligations to protect and promote Sami culture and language in Sweden.³³² Children's right to develop a cultural identity and to use the minority language is recognized as in need of special promotion.³³³

Since 2011 in Sweden, the Sami are recognized as a people³³⁴ in the Kungörelse (1974:152 om beslutad ny regeringsform (Instrument of Government) (RF). The reason for the change in the Instrument of Government to include the Sami as a people, different from other

³³⁰ Regeringens Proposition 1976/77:80 (n 5), p. 16ff, see also, Kulturutskottets betänkande 1976/77:43 (n 5), p. 4.

³³¹ Regeringens Proposition 1998/99:143: *Nationella Minoriteter i Sverige* (Government Bill 1998/99:143: *National Minorities in Sweden*), p. 21f.

³³² Lag (2009:724) om nationella minoriteter och minoritetsspråk (Law on National Minorities and Minority Languages) (LNM), sections 2 & 4.

³³³ LNM, section 4, paragraph 2.

³³⁴ RF, chapter 1, section 2, para. 6.

minorities, was due to their special status as recognized indigenous peoples in Sweden.³³⁵ Indigenous peoples often reject the categorization as minorities as they argue that their distinct historical situation makes them different and provides them with another set of rights, that a minority status cannot provide protection for.³³⁶

5.1.1. Right to land and natural resources

Due to the special relationship that Sami, indigenous peoples, have to their ancestral lands and the importance of access to these lands for the practice of the Sami traditional way of life and culture, the question of Sami rights to land is essential to discuss. Furthermore, the understanding of Sami land rights in Sweden, as they form the body that the mineral framework operates together with, is needed to be able to assess the mining safeguards consistency with Sweden's obligations towards Sami. The right to property constitutes one of the fundamental rights under the Swedish Constitution.³³⁷

In Sweden, the rights of Sami to land and natural resources are regulated under the doctrine of immemorial prescription. The doctrine of immemorial prescription is codified in the *Sveriges Rikes Lag 1734, Jorda Balk (1734 Real Property Code) (GJB)* chapter XV, sections 1 to 4, where there is an emphasis on the continuation of the careful and respectful use of land. The GJB in section 1 also refers to the unhindered use of land, meaning to oppose the claim of immemorial prescription one must actively defend one's land rights.

The doctrine of immemorial prescription presumes that someone else owns the land and that through a long unhindered possession the other user, through gradual transformation, would acquire such land.³³⁸ In the Swedish landmark case; *Taxed Mountains* (NJA 1981 s. 1), a number of Sami villages disputed the presumption in the 1886 Reindeer Herding Act of state ownership of the Taxed mountains in the county of Jämtland, and instead claimed ownership over these mountains due to long-lasting Sami use. In the *Taxed Mountains* case the Sami reindeer husbandry right was held to be based on the doctrine of immemorial prescription and thus, not being dependent on statutory regulation.³³⁹

The customary Sami right to use the land for reindeer herding may, despite its independence from statutory regulation, be subject to regulation.³⁴⁰ The customary right, however, is elastic, in the sense that when restrictions are lifted the husbandry right re-assumes its original

³³⁵ Regeringens Proposition 2009/10:80: *en reformerad grundlag* (Government Bill 2009/10:80: *a reformed constitution*), p. 189.

³³⁶ Francioni (n 83), p. 71.

³³⁷ Expropriation or similar restriction on property may only be justified by pressing public interests. A right to compensation for lost property due to expropriation or similar is stipulated, see RF, chapter 2, section 15.

³³⁸ Maria Ågren, *Att hävda sin rätt - Synen på jordägandet i 1600-talets Sverige, speglad i institutets urminnes hävd (To assert one's right - The view on land ownership in 1600-hundreds Sweden, mirrored in the institutes immemorial prescription)*, (Institutet för Rätthistorisk Forskning (Research Institute for Legal History), 1997), p. 50.

³³⁹ Christina Allard, *Two Sides of the Coin* (n 15), p. 258ff.

³⁴⁰ Allard, *Two Sides of the Coin* (n 15), p. 291f.

form.³⁴¹ The Court also held that the reindeer husbandry right as well as its associated sub-rights, resting on immemorial prescription, were exhaustively regulated under the 1886 Reindeer Husbandry Act.³⁴²

The Sami lost the *Taxed Mountains* case in all courts, due to the presumption of state ownership over unclaimed land and the inability of the Sami to prove sufficient use of the land.³⁴³ Immemorial prescription can in relation to land usage establish property rights but requires that the land usage have a certain intensity, continuity and exclusivity.³⁴⁴ Denial of Sami ownership of land does not exclude the Sami enjoyment of limited rights; such as reindeer husbandry, hunting or fishing, in these lands.³⁴⁵ The reindeer husbandry right is generally regarded as a strong usufruct right (*bruksrätt*) that burdens the state and private lands.³⁴⁶

The Court held in the *Taxed Mountains* case that the question of land ownership at hand only concerned the disputed taxed mountains in Jämtland and not the legal position of other disputed areas.³⁴⁷ This position in the *Taxed Mountains* case, as no private landowners were involved, reveal that immemorial prescription as a justification of Sami reindeer husbandry rights on privatized land remains unclear.³⁴⁸ Despite different positions of strength for Sami rights in separate regional areas, the grounds of the judgement in the *Taxed Mountains* case have been interpreted by the Swedish government to be valid for the whole of Swedish *Sápmi*.³⁴⁹ The Swedish law now recognizes an exclusive usufruct Sami reindeer herding right over territories shared with the Swedish population as well as ownership rights to the land where the land use is dominated.³⁵⁰

The new Jordabalk (1970:995) (1971 Real Property Code) (JB) from 1971 does not include the doctrine of immemorial prescription, however, already existing rights that originate from the doctrine were still valid.³⁵¹ Sami claims to land ownership, reindeer husbandry, fishing and hunting, via immemorial prescription, are thus still valid.³⁵² The qualification time period needed to prove immemorial prescription is estimated to be around 90 years of unhindered usage or utility.³⁵³

³⁴¹ Bertil Bengtsson, *Samerätt: En Översikt (Sami Law: an Overview)* (Norstedts Juridik 2004), p. 87f.

³⁴² Allard, *Two Sides of the Coin* (n 15), p. 261.

³⁴³ NJA 1981 s. 1, (*Skattefjällsmålet, Taxed Mountains Case*), p. 197ff.

³⁴⁴ NJA 1981 s. 1 (n 343), p. 190f.

³⁴⁵ Compare with NJA 1981 s. 1 (n 343) and see, Allard, *Two Sides of the Coin* (n 15), p. 274.

³⁴⁶ Allard, *Two Sides of the Coin* (n 15), p. 262, see also NJA 1981 s. 1 (n 343), p. 229f.

³⁴⁷ Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 98f.

³⁴⁸ Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 101ff.

³⁴⁹ Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 102ff.

³⁵⁰ Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 183ff, see NJA 1981 s. 1 (n 343) and NJA 2011 s. 109, (*Nordmalingmålet, Nordmaling Case*).

³⁵¹ Lag 1970:995 om införande av nya jordabalken (Act (1970:995) on Promulgation of the new Real Property Code), section 6.

³⁵² Allard, *Two Sides of the Coin* (n 15), p. 266ff.

³⁵³ Bertil Bengtsson (n 341), p. 79.

Regarding immemorial prescription, it is not necessary to know who originally occupied the land as the law has no fixed time frame but is decided on evidence from modern times.³⁵⁴ Disputes regarding whether a piece of land traditionally has been used for reindeer husbandry seasonally, giving grazing rights, is to be decided by Swedish courts on the basis of the evidence presented.³⁵⁵

The application of the doctrine of immemorial prescription to Sami customary land use is problematic. The presumption of a previous owner inherent in the doctrine is ill-suited to be applied to the traditional customary Sami land usage, as the Sami were the first settlers of these disputed lands before the existence of any national borders. Due to the seasonal and vast usage of lands in reindeer husbandry, the possession and continuous use of a delimited land area needed under the doctrine of immemorial prescription are difficult to assess. The concept of possession is also problematic due to lack exclusivity and visibility of intensive use along with the burden of proof resting on Sami to prove claims of immemorial prescription.³⁵⁶

5.1.2. Right to Reindeer Husbandry, Fishing and Hunting

The traditional Sami activities of reindeer husbandry, fishing and hunting are regulated in Swedish law; the Rennäringslag (1971:437) (Reindeer Husbandry Act) (RNL). The customary based Sami reindeer husbandry right was first codified in the 1886 Reindeer Herding Act and has been passed on to the current Reindeer Husbandry Act from 1971. The applications of the RNL are geographically restricted to specifically designated land areas.³⁵⁷ The current Act confirms the reindeer husbandry right as an exclusive Sami right, based on immemorial prescription, that allows the usage of land and water to support themselves and their reindeers.³⁵⁸

Under the RNL some county land areas have explicitly been specified as areas where reindeer husbandry may take place (renskötselområdet). The Act has designated some of these specific reindeer husbandry areas as areas where reindeer husbandry may take place all year around.³⁵⁹ Apart from the all-year areas the Act also gives a right to winter grazing that may be conducted on the remaining designated grazing lands below the cultivation line.³⁶⁰ Outside

³⁵⁴ Allard, *Two Sides of the Coin* (n 15), p. 272ff.

³⁵⁵ Kungl. Maj:ts Proposition med förslag till en ny rennäringslag, m.m.; given Stockholms slott den 26 Februari 1971 (Government Bill 1971:51: *a proposition for a new reindeer husbandry law*), p. 158, and, *En ny rennäringspolitik - öppna samebyar och samverkan med andra markanvändare, (A new reindeer husbandry policy - open sami villages and cooperation med other landowners)* (Report of the Reindeer Husbandry Policy Committee, Department of Culture, SOU 2001:101), p. 169.

³⁵⁶ Allard, *Two Sides of the Coin* (n 15), p. 276f.

³⁵⁷ Allard, *Two Sides of the Coin* (n 15), p. 326 f and RNL, section 3.

³⁵⁸ RNL, section 1, the exclusive Sami right to reindeer husbandry accrue to the Sami people and in order to exercise that right membership in a Sami village is required.

³⁵⁹ Above and in some cases below the cultivation line in the counties of 'Norrbotten' and 'Västerbotten', in the reindeer grazing mountains of the county of 'Jämtland', and in some by the state specifically designated lands in the counties of 'Jämtland' and 'Dalarna', see RNL section 3, subsection 1.

³⁶⁰ RNL, section 3, subsection 2.

these specifically designated land areas, the right to seasonal reindeer husbandry is determined by the Sami customary use of these lands.³⁶¹

The reindeer husbandry right is a generally much stronger right than other customary rights, such as the right to public access to land, and is considered to constitute a specific right to real property.³⁶² Three types of reindeer husbandry are envisioned in the Reindeer Herding Act; and includes mountain husbandry, forest husbandry and concession husbandry.³⁶³ The reindeer husbandry rights include collective rights for the Sami village to use the whole pasture area for the reindeers, for members of the Sami village to hunt and fish within the pasture areas, to build fences and structures necessary for reindeer husbandry and to collect timber for various purposes.³⁶⁴

Reindeer husbandry is a pre-requisite for the Sami culture and the survival of the Sami culture must be guaranteed. This entails that within every Sami village fundamental conditions for the practice of reindeer husbandry must exist, meaning a consistent access to such areas, within the all-year-grazing areas and the winter grazing areas, of crucial importance to the practice of reindeer husbandry.³⁶⁵ In 1992 it was expressed that the Sami reindeer husbandry land use as protected in the Swedish law, constitutes a much stronger protection than what follows from Sweden's human rights obligations.³⁶⁶ The recent developments in the international human rights law have now changed that relation.

5.2. The Swedish Mineral Framework

Minerallag (1991:45) (The Swedish Mineral Law) (ML) is the tool used by the Swedish government to grant mining concessions to willing actors. Mining concessions may include an exploration permit or an exploitation concession.³⁶⁷ An exploitation concession may be approved if a mineral deposit that is likely to be economically viable has been found, and the location and nature of the deposit do not render it inappropriate for the applicant to obtain it.³⁶⁸ In such matters of granting an exploitation concession under ML, chapters 3 and 4 and 5 section 15 Miljöbalken (1998:808) (The Environmental Code) (MB), shall be applied.³⁶⁹ An exploitation concession may not contradict any detailed development plans or area regulation

³⁶¹ RNL, section 3, subsection 2, immemorial prescription may be the foundation of the right, but it does not limit the ability to justify winter grazing through other statutory sources, see NJA 2011 s. 109 (n 350), p. 65ff, a claim to a customary right to winter grazing may just like a claim to immemorial prescription be hindered by prior objections, as the use also needs to be unhindered.

³⁶² Allard, *Two Sides of the Coin* (n 15), p. 327.

³⁶³ See, RNL sections 3 and 85 - 89.

³⁶⁴ See, RNL, sections 16, 17, 18, 20 and 25.

³⁶⁵ This could entail access to migration routes, calving areas as well as access to good grazing lands, see, Regeringens Proposition 1985/86:3 (n 52), p. 57ff.

³⁶⁶ Regeringens Proposition 1992/93:32: *om samerna och samisk kultur m.m.* (Government Bill 1992/93:32: *about Sami and Sami culture etc.*), p. 105.

³⁶⁷ As described in ML, chapter 1, paras. 1 & 3.

³⁶⁸ See ML, chapter 4, section 2, para. 1.

³⁶⁹ ML, chapter 4, section 2, para. 3 see also ML, chapter 1, section 7, para. 1.

for the municipality, as regulated by the Plan- och Bygglagen (2010:900) The Planning and Building Act) (PBL).³⁷⁰

5.2.1. Balance of Rights

Environment and land areas important for reindeer husbandry, as well as areas important for mineral processing, are both protected land interests under the environmental code.³⁷¹ In such cases of incompatible land interests, preference to the interest that in the most appropriate way promotes the long-term housekeeping of the land, water and physical environment in general.³⁷² The fact that an area in its entirety constitutes a national interest does not prohibit mineral exploitation if special reasons exist.³⁷³ During such an assessment of two conflicting and incompatible national interests, such as reindeer herding and mining, Sweden's international obligations must be considered.³⁷⁴ When choosing between preserving or using natural resources, a social-economic assessment must be made, using the economic policy as a starting point and giving weight to the effects on employment and economic growth.³⁷⁵

These type of balance considerations between Sami interests and other national interests also constitute an important safeguard for the protection of Sami rights. Three safeguards are laid down in the Swedish mineral framework; the balance of Sami interests and other national interests, the use of EIAs and participation in decision-making. The use of EIAs and Sami participation in decision-making will be dealt with under chapters 5.1.1 and 5.1.2. The balance between the two incompatible interests of Sami reindeer husbandry and mining have been developed by the Swedish courts in their jurisprudence in chapter 5.3 and will further be discussed there.

5.2.2. Environmental Impact Assessments

One of the specific safeguards envisioned in the ML is the need to conduct an EIA. An EIA may be described as a “*governmentally controlled procedure by which scientific studies are made of the potential harmful environmental impacts of a proposed activity.*”³⁷⁶ EIAs are legal procedures and all the eight Arctic states have implemented and frequently use them.³⁷⁷

As described, two types of mining activities are envisaged under the ML: mineral exploration/prospecting work and mining exploitation concessions.³⁷⁸ Mineral exploration and

³⁷⁰ ML, chapter 4, section 2, para. 6.

³⁷¹ MB, chapter 3, sections 5 & 7.

³⁷² See MB, chapter 3, section 10.

³⁷³ See MB, chapter 4, section 1, para. 2.

³⁷⁴ Regeringens Proposition 1997/98:45: *Miljöbalk* (Government Bill 1997/98:45: *Environmental Code*), part 2, p. 35.

³⁷⁵ Regeringens Proposition 1985/86:3 (n 52), p. 150ff.

³⁷⁶ Timo Koivurova (n 16), p. 2f.

³⁷⁷ *Ibid.*, the eight Arctic states are; The Russian Federation, Canada, The United States, Denmark, Norway, Iceland, Finland and Sweden.

³⁷⁸ See, ML, chapter 1, sections 3 & 4.

prospecting as well as mining exploitations generally require an application for a permit but may in some cases be done without them.³⁷⁹ Prospecting and exploration can be carried out without the need to do an EIA but the application for a mining concession (permit) requires it.³⁸⁰

The Swedish mining law in its chapter 4, section 2, para. 5 stipulates that in mining matters a specific environmental assessment shall be carried out in accordance with MB chapter 6, sections 28-46. Sweden's EIA system has several stages; project screening, scoping, drafting and presentation as well as post-decision monitoring, and starts in the screening process with stakeholder consultations.³⁸¹

A specific environmental assessment requires that the applicant, before conducting an EIA regarding the operation or measure, first consult regarding the area limitation of the EIA, which must then be submitted.³⁸² The agency or whoever defined by the law to assess the EIA must then provide an opportunity for comments before finalizing the environmental assessment.³⁸³

The consultation in the EIA scoping process aims to discuss the operation or measures location, scope and design, the possible environmental effects as result of external events, as well as the content and design of the EIA itself.³⁸⁴ The consultation shall be carried out together with the County Administrative Board (Länsstyrelsen) (CAB), the supervisory authority, individuals that may be considered to be particularly affected, as well as with other state authorities, municipalities and the public that may be expected to be affected by the operation or measure.³⁸⁵

The EIA shall contain information about; the location, extent, scope and other characteristics that may be relevant regarding the operation/measure, alternative solutions, current environmental conditions and their estimated change without the commencement of the operation/measure. The EIA shall, more importantly, further identify, describe, and assess the environmental impacts that the operation/measures due to external events may entail, contain information about how to prevent, stop, counteract or remedy the negative environmental impact. The EIA shall also contain information about what measures that will be taken to prevent any exceeding of environmental quality norms and what consultations that have taken place and what they expressed.³⁸⁶

³⁷⁹ MB, chapter 1, section 4, and chapter 5, sections 2 & 3.

³⁸⁰ See, MB, chapter 3, as well as MB chapter 4, section 2.

³⁸¹ Community consultations are not necessary but sometimes initiated by developers, see, Timo Koivurova (n 16), p. 63ff.

³⁸² MB, chapter 6, sections 28, point 1.

³⁸³ MB, chapter 6, section 28, point 2.

³⁸⁴ MB, chapter 6, section 29, para. 1.

³⁸⁵ MB chapter 6, section 30, para. 1.

³⁸⁶ The needed contents of an EIA are described in MB, chapter 6, section 35.

The scoping process along with its commentaries does not contain any social impact assessment beyond the aspect of human health impacts. Some developers and companies have themselves adopted such measures and is often referred to as obtaining a social license to operate.³⁸⁷ EIAs in the scoping process does not need to contain any reindeer husbandry analysis, something done on a voluntary basis by some companies.³⁸⁸

5.2.3. Consultation and participation opportunities

Another safeguard established under the mining law framework is the opportunity for the Sami to participate in the decision-making outside the EIA; including to be heard, informed or give opinions in matters concerning their interests such as mining decisions on land traditionally used by them. No explicit Sami consultation is established under the Swedish mineral framework.

An application for an exploitation permit and the accompanying EIA shall be sent to affected property owners and affected holders of special rights such as affected Sami villages, possessing the special reindeer husbandry right.³⁸⁹ When an exploitation permit is approved it shall be sent to the CAB, the Cadastral Authority and the affected municipalities, as well as the Sami parliament when affecting designated reindeer herding areas.³⁹⁰ During the drafting of a work plan in the exploration process, holders of special rights such as the Sami right to reindeer husbandry shall be informed of the work plan and may object to it.³⁹¹ If such objections persist then the applicant of the work plan may request that the mining inspector (Bergmästaren) assess the work plan.³⁹²

After the approval of an application for an exploration permit concerning areas used for reindeer husbandry, the Sami parliament has a right to be informed and to give their opinion regarding the permit.³⁹³ The Sami parliament may have additional possibilities outside the mineral framework to influence state policies but within this mineral framework the possibilities are limited. Sami villages may have some opportunities to oppose decisions on new mine openings, but Sami villages have no right in Swedish law to decide on or veto any opening.³⁹⁴ It is not unusual that Sami villages themselves enter into agreements with mining companies in order to receive compensation for consultations or loss of land.³⁹⁵

³⁸⁷ Timo Koivurova (n 16), p. 66.

³⁸⁸ Ibid.

³⁸⁹ Mineralförordning (1992:285) (Mineral Ordinance), section 21, and ML, chapter 17, section 1.

³⁹⁰ MF, section 22.

³⁹¹ ML, chapter 3, section 5(a) and ML, chapter 17, section 1.

³⁹² The mineral inspector will approve the working plan if it fulfils the content requirements in ML chapter 3 section 5, its necessary exploration activities does not entail inconveniences for the property owner or holder of certain right that outweigh the permit holders' interests to conduct the work, and the permit holder have informed the property owner or holder of certain right in accordance with ML chapter 3 section 5(a) and (b), see ML, chapter 3, section 5(d).

³⁹³ MF, section 3, para. 4.

³⁹⁴ Kristina Sehlin MacNeil (n 51), p.73.

³⁹⁵ Kristina Sehlin MacNeil (n 51), p. 74.

The regulatory planning framework is also important and provides opportunities for consultation, due to the mining concessions need to conform to it.³⁹⁶ When demanded, the CAB shall provide the planning material for the area to the municipal and the agencies that are to apply the environmental code, as well as to those who have a duty to do an EIA.³⁹⁷ Every Swedish municipality has a comprehensive plan for the long-term development of the physical environment that, although not legally binding, covers the whole municipality.³⁹⁸

Among other things, the comprehensive plan must indicate the fundamental envisaged usage of land and water areas in the municipality, the municipalities view on how the built environment is to be used, developed and preserved, how the municipality will safeguard the specific national interests and the applicable environmental quality standards, as well as how the municipality intends to streamline the comprehensive plan with goals, plans and programs of sustainable development.³⁹⁹ The plan must specifically indicate how it will national interests in MB chapters 3 and 4, and when a strategic EIA shall be conducted the plan must indicate the environmental impacts in accordance with MB chapter 6, sections 11, 12 and 16.⁴⁰⁰

During the drafting of the comprehensive plan, the municipality must consult with the CAB, affected municipalities, regional planning bodies, municipal bodies. Others who may be affected; members of the municipality, other government authorities, associations and individuals who have an essential interest in the proposal, only needs to be given an opportunity to participate in the consultation.⁴⁰¹ The purpose of such consultation is to the furthest extent get an adequate basis for the decision-making, and during the consultation, the CAB shall specifically address and ensure that national interests and environmental security norms are accommodated for.⁴⁰² The results of the consultations shall by the municipality be presented in a report that accompanies the comprehensive plan.⁴⁰³

Within a municipal, the land and water areas, buildings and constructions may be regulated through a detailed development plan or area regulation.⁴⁰⁴ During the drafting of a detailed development plan, the municipality before any consultation has been conducted the municipality may request a planning decision from the CAB. When such planning decision is requested affected municipalities, agencies, associations, individuals and the Cadastral Agency may give their comments.⁴⁰⁵

³⁹⁶ MB, chapter 4, section 2, para. 5.

³⁹⁷ MB, chapter 6, section 12.

³⁹⁸ PBL, chapter 3, sections 1,2 & 3.

³⁹⁹ PBL, chapter 3, section 5, points 1 - 4.

⁴⁰⁰ PBL, chapter 3, section 4, paras. 1 and 3.

⁴⁰¹ PBL, chapter 3, section 7, point 2, see also section 8.

⁴⁰² PBL, chapter 3, section 8, para. 2 and section 10, point 3.

⁴⁰³ PBL, chapter 3, section 11.

⁴⁰⁴ PBL, chapter 4, section 1.

⁴⁰⁵ PBL, chapter 5, sections 10(a), 10(b) and 10(f). Special provision for environmentally hazardous activities are stipulated in PBL, chapter 5, sections 7, 11(a), 11(b) and 11(c).

Before adopting a detailed development plan the municipality must consult with the CAB, the Cadastral Authority and the affected municipalities, as well as to provide the opportunity for consultation with associations and individuals that have an essential interest in the proposal.⁴⁰⁶ The same rules of consultation apply to the adopting of area regulations.⁴⁰⁷ The municipality may state the detailed development plan's starting points or specific goals in a program but must then consult with CAB, the Cadastral Agency, and affected municipalities. Known property owners, and agencies, associations and individuals that have an essential interest in the proposition shall be given the opportunity to participate in the consultations.⁴⁰⁸

5.3. Sami rights in Swedish courts

Swedish courts have dealt with Sami rights relating to property rights and the reindeer herding right multiple times including but not limited to the granting of mining concessions. The *Taxed Mountains Case* still remains the fundamental and most extensive case concerning Sami rights in Sweden. Nevertheless, the legal situation has since been developed and specific case law regarding mining concession in reindeer husbandry areas have emerged, specifically the cases relating to the permit for the establishment of the Rönnbäck mine.⁴⁰⁹

5.3.1. The legacy of *Taxed Mountains*

The Swedish Supreme Court has in several cases dealt with civil damage from intrusions into the Sami reindeer husbandry right and sub-rights due to the expropriation of land for the expansion of water energy projects.⁴¹⁰ The Court dealt with the reindeer husbandry right as a collective, not individual, right that should be taken into consideration when taking actions or establishing energy plants within such areas.⁴¹¹ Despite being deemed as a significant intrusion on reindeer husbandry activities in important reindeer husbandry areas and constituting a considerable inconvenience to the reindeer herding interest, the expansion of water energy plants remains prioritized.⁴¹²

The legacy of the landmark case for Sami property and usufruct rights, the *Taxed Mountains Case*, has been further commented upon by one of the appellate courts.⁴¹³ The Sami reindeer husbandry right applies independently of who owns the land area and have real property

⁴⁰⁶ PBL, chapter 5, section 11.

⁴⁰⁷ PBL, chapter 5, section 39.

⁴⁰⁸ PBL, chapter 5, section 11.

⁴⁰⁹ See, specifically HFD 2012 not 27 (*Rönnbäck Mine Case*, Judicial Review) and HFD 2014 not 65 (*Rönnbäck Mine Case*, Judicial Review).

⁴¹⁰ See, NJA 1979 s. 1, NJA 1979 not A 2, NJA 1981 s. 610, NJA 1988 s. 684 and NJA 1989 s. 581.

⁴¹¹ NJA 1979 s.1, at 9f., NJA 1979 not A 2, NJA 1981 s. 610, at 620, NJA 1988 s. 684, at 690 and NJA 1989 s. 581, at 591ff.

⁴¹² NJA 1989 s. 581, at 594ff.

⁴¹³ RH 2001:56, the judgements of appellate courts are not considered to be precedential but may nevertheless be of considerable value when no judgements from the Supreme Court exists that deal with the specific question.

rights under all circumstances.⁴¹⁴ The Sami reindeer husbandry right does not give the right to the natural resources of mineral or hydroelectric power.⁴¹⁵

The Appellate court dealt with the question of property rights when someone else takes the land in possession and there, alongside Sami reindeer husbandry, conducts business that from an outside perspective appears dominant, and without any substantial protest from Sami villages or Sami, behaves and is generally accepted as the property owner. This was the situation in the Appellate court and despite the recognition that passivity does not in itself remove any emerged right to property the overall circumstances led to the decision that the state was the property owner.⁴¹⁶

The legacy of the *Taxed Mountains Case* was once again commented on by an appellate court in the *Härjedalen Case*.⁴¹⁷ The case concerned the Sami right to winter grazing on privately owned land and the claim was based on four grounds; immemorial prescription, a statutory right vested in RNL, customary right or convention-based rights.⁴¹⁸

Referring to the *Taxed Mountains Case*, and its findings that the Sami usufruct right to reindeer husbandry is exhaustively regulated through the Reindeer Husbandry Act, the Court found that a customary right had to be examined in accordance with the rules on immemorial prescription.⁴¹⁹ As the customary right is to be assessed in accordance with the rules on immemorial prescription, the court found that the customary right is limited by the same limitation in time: no customary right may arise after 1971.⁴²⁰

The court found no right to winter grazing based on immemorial prescription or statutory regulation as the Sami was unable to prove any recurring use of the lands without any contesting claims.⁴²¹ The Court thus found no right to reindeer husbandry on the basis of a customary right, as there were no grounds for a customary right to reindeer husbandry that does not adhere to the doctrine of memorial prescription.⁴²²

The appellate court then found that no convention-based rights, grounded on the Swedish constitution or the invoked article 27 of the ICCPR, was applicable in the case as the situation

⁴¹⁴ RH 2001:56, p. 11.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid, at 21ff.

⁴¹⁷ *Härjedalsmålet*, HovR 58-96 (Mål nr T 58-96), Hovrätten för Nedre Norrland, DOM, 2002-02-15. (*Härjedalen Case*, HovR 58-96 (Case nr T 58-96), Appellate Court for Lower Norrland, Judgement, 2002-02-15.)

⁴¹⁸ HovR 58-96 (n 417), p. 6.

⁴¹⁹ HovR 58-96 (n 417), p. 15f.

⁴²⁰ HovR 58-96 (n 417), pp. 16 - 18.

⁴²¹ After assessing the situation in Härjedalen since the year 1500 hundreds up until 1900 the court did not find enough proof for the Sami land claim. The longest proof produced by the Sami was 50 years, see HovR 58-96 (n 417), p. 62f.

⁴²² HovR 58-96 (n 417), p. 63.

governed a dispute between two individuals.⁴²³ The Court found no right for the Sami to winter grazing on the private lands and the case was not tried by the Supreme Court.

In the *Nordmaling Case*⁴²⁴ private property owners applied to Swedish courts claiming a declaratory judgement that three Sami villages did not have any customary right to reindeer grazing within the property of the private owners. The Supreme Court begins to explain that the outcome in the *Taxed Mountains Case* is the reason for the change in RNL adding that the reindeer husbandry right is based on immemorial prescription.⁴²⁵ However, the Court then goes on to express that statement in *Taxed Mountains*; that the reindeer husbandry right is ultimately based on the doctrine of immemorial prescription, merely seeks to highlight the origin and legal position of the reindeer husbandry right and has no legal consequences connected to the change in RNL.⁴²⁶

The Court proclaims that a right to winter grazing has never been prescribed by law to only be invoked under the doctrine of immemorial prescription as there are references to ‘old custom’ in RNL section 3(1).⁴²⁷ The Court thus found that a Sami right to winter grazing shall be decided as a customary right, not under immemorial prescription and that the court may be inspired by the immemorial prescription doctrine but is able to do a more open assessment.⁴²⁸ The customary winter grazing right is inspired by the 90-year time threshold as well as the unhindered and uncontested requirement in the doctrine of immemorial prescription and cannot due to passivity cease to exist.⁴²⁹

The burden of proof in the doctrine of immemorial prescription that falls on the Sami to prove their claim was also applied by the Court in the current case of the right to winter grazing.⁴³⁰ The Sami claimed that they should have a reduced burden of proof due to their specific characteristics as a people that lacks any written sources and whose history is built upon oral traditions.⁴³¹

The Sami further pointed to their national and international rights stemming from their status as a minority and indigenous peoples, as well as the fact that other current exploitation in the

⁴²³ The rules laid down in RF and the ICCPR govern the relationship between individuals and the state, and as such it is the state that has any human rights obligations towards the Sami not state individuals, see, HovR 58-96 (n 417), p. 64.

⁴²⁴ *NJA 2011 s. 109* (n 350).

⁴²⁵ *NJA 2011 s. 109* (n 350), p. 91.

⁴²⁶ *Ibid.*

⁴²⁷ *NJA 2011 s. 109* (n 350), p. 91f.

⁴²⁸ *NJA 2011 s. 109* (n 350), p. 92.

⁴²⁹ The customary winter grazing right is not affected by the immemorial prescription limitation concerning the new property code in 1971, as a customary right to winter grazing may arise after 1971. Once a right to customary winter grazing is established contesting it will not make it disappear. The passivity of a Sami village can only remove that individual Sami village’s right to grazing not the collective right in an area, and such cessation requires that it is clear that the village really intended for such right to cease. Moreover, the private property owners have the burden of proof to show that the Sami village really intended to cease such right, see *NJA 2011 s. 109* (n 350), p. 92f.

⁴³⁰ *NJA 2011 s. 109* (n 350), p. 93.

⁴³¹ *Ibid.*

county encroaches on their abilities to practice reindeer husbandry in the traditional way where they usually have in the region. However, the Court did not take into account any shortcomings from the state in this aspect regarding the current case between the dispute between the Sami and private landowners.⁴³² In the case, the Sami were able to prove that they had a customary right to winter grazing on the disputed property.⁴³³

Two cases regarding the right to a fair trial⁴³⁴ relating to the decision of land grants, on land used by Sami for reindeer husbandry, for other interests; local hunting⁴³⁵ and tourism⁴³⁶ have been decided. In these cases, due to the immemorial prescription-based reindeer husbandry right being regarded as a specific right to real property, Sami villages are considered as a party in cases of land grants on land used for reindeer husbandry.⁴³⁷ Sami villages hereby also have a right to apply for judicial review of the government's decision in these cases.

In both cases, the CAB after consulting both parties rejected the applications for land grants due to infringements on the reindeer husbandry rights.⁴³⁸ In both cases, the CAB decision was appealed, and the government then approved the land grant. However, the Swedish government then failed to communicate and hear the Sami village in this matter that contradicts the position previous presented by the village, which was deemed as inconsistent with the constitution.⁴³⁹

The two cases in the Supreme Administrative Court regarding the *Rönnbäck Mine*; HFD 2012, not 27 and HFD 2014 not 65, very well illustrates the position of the Swedish government regarding the national interests of mining and reindeer husbandry. In the case from 2012, without consulting the affected Sami village, the government found that the two national interests of mining and reindeer husbandry were compatible.⁴⁴⁰ The Supreme Administrative Court made it clear that the interest of mining and reindeer husbandry were incompatible, due to the adverse effects of mining operation upon reindeer husbandry, and that a balance-decision giving precedence to one of the interest must be made.⁴⁴¹

After the court decision, another application for an exploitation concession was granted by the mining inspector in 2012. The application was appealed by the Sami village to the

⁴³² Ibid.

⁴³³ *NJA 2011 s. 109* (n 350), p. 99.

⁴³⁴ Government decisions that concerns individuals' civil rights or obligations may be subject to legal review in accordance with ECHR art. 6(1), see *Lag (2006:304) om rättsprövning av vissa regeringsbeslut* (Law 2006:304 about legal review of certain government decisions), section 1.

⁴³⁵ RÅ 2008 not 110.

⁴³⁶ RÅ 2008 not 111.

⁴³⁷ RÅ 2008 not 110, p. 2, and RÅ 2008 not 111, p. 2.

⁴³⁸ RÅ 2008 not 110, p. 2f. and RÅ 2008 not 111, p. 2f.

⁴³⁹ Ibid.

⁴⁴⁰ The government based this finding on the decision of the mine inspector (Bergmästare) that the exploitation will negatively affect the reindeer husbandry interest but was in line with the mineral law and the opinion of the Västerbotten County Administration that the mineral interest should be given precedent, see HFD 2012 not 27, p. 1f.

⁴⁴¹ HFD 2012 not 27, p. 4.

government and all three concession permits were jointly decided by the government who gave precedence to the mining interest.⁴⁴² In the latter case from 2014, the Supreme Administrative Court was tasked with the judicial review of the government's decision to prioritize the national interest of mining over the national interest of reindeer husbandry. The government accepted the mineral inspectors (Bergmästarens) judgement that the concession due to its location was not unsuitable to grant and that the EIA was properly done. The government also observed that the area in question was not regulated by any detailed development plans or area regulation.⁴⁴³

In their interest balance the government gave precedent towards the mining interest based on the fact that, despite its negative effects, it will provide considerable economic effects to the municipality along with the fact that the mining operation was temporary and would not completely eliminate the possibility of reindeer husbandry.⁴⁴⁴ The affected areas constituted migration routes and valuable all-year-round land and have would force 5 out of 7 Sami villages to completely stop the reindeer husbandry practice.⁴⁴⁵

The mining inspector (Bergmästaren) in its decision instructed the mining company to consult with the affected Sami village annually during the mining operations and to minimize the negative effect on the reindeer husbandry. The government further justified its decision by pointing to the possibility of the two parties contacting each other to work out how to minimize the intrusion of the mining operations in the reindeer husbandry.⁴⁴⁶

The Court deemed the decision to be in accordance to the law, as the government based their decision on the assumption that powerful measures of harm reduction would be employed and enough to allow the Sami village to continue their reindeer husbandry.⁴⁴⁷ Further, the Court does not consider what harm reduction measures that must be taken and instead refers to the future authorization and review of the environmentally hazardous activity by the Supreme Environmental Court.⁴⁴⁸ The Court acknowledged the uncertainty of the legality that this approach leads to but deemed the decision to be legal, due to the large margin of appreciation, the legitimate grounds and the assumption of harm reduction and of compliance with human rights.⁴⁴⁹

⁴⁴² The first two concessions, Rönnbäcken K nr 1 & 2, were the object of HFD 2012 not 27 and in HFD 2014 not 65 the third Rönnbäcken K nr 3, was added, see HFD 2014 not 65.

⁴⁴³ See, HFD 2014 not 65, p. 2ff.

⁴⁴⁴ The mining operation was estimated to last for 27 years and would put a stop to the constitutionally protected Sami reindeer husbandry for that time in the current and surrounding areas. It was assumed that after the cessation of mining activities, the environment would be cleaned-up and reindeer husbandry would resume. The government was of the view that the granting of the concession does not violate Sweden's human rights obligations, see HFD 2014 not 65, p. 3ff.

⁴⁴⁵ HFD 2014, not 65, p. 5.

⁴⁴⁶ HFD 2014 not 65, p. 5f.

⁴⁴⁷ HFD 2014 not 65, p. 7.

⁴⁴⁸ Ibid.

⁴⁴⁹ Ibid.

5.3.2. Recent Developments

In the wake of recent developments in both Swedish and international law, two interesting Sami cases have emerged. The first case concerned an application for review of the *Härjedalen Case*, and the other was a recent case that builds on the legacy of *Taxed Mountains* and development its development since *Nordmaling*.

In 2017, after the judging on the merits in the *Nordmaling Case* along with recent scientific developments in the history of reindeer herding in the municipality of Härjedalen, an application for a review of the *Härjedalen Case* was submitted to the Supreme Court. The arguments of the application were that the appellate court had a faulty historical viewpoint and that the judgement rests on such faulty historical grounds.⁴⁵⁰ However, as the existing legal position and available materials at the time of the *Härjedalen Case* are to be applied in the review, the Supreme Court did not find it likely that the findings would have changed the outcome in the case and thus rejected the application.⁴⁵¹

A recent case from a Swedish appellate court, concerning a better claim than the state to fishing and hunting rights within a specific area in ‘Norrbotten’ county, was decided in the favour of the Sami.⁴⁵² The court found that since the state for at least a hundred years neglected asserting any claims to hunting and fishing rights in the area used by the Sami, the state has no right to the area. The Court found that through the RNL stated right the Sami have a usufruct right to use the lands and thereby a *better claim* to the land.⁴⁵³

The court did not, however, find any right for the Sami to *exclusively* use the area either on grounds of immemorial prescription, referring to the *Taxed Mountains Case*, or on grounds of custom, referring to the *Nordmaling Case*.⁴⁵⁴ The case remains to be tried by the Supreme Court.

5.4. Conclusion

The Swedish mineral framework employs three procedural safeguards, namely a balance of interests, environmental impact assessments (EIA), and consultation and participation opportunities.

⁴⁵⁰ The main argument was that the appellate court did not believe that winter grazing could not take place outside the reindeer grazing mountains until the enactment of the 1886 Reindeer Husbandry Act, see, HD 3617/14 (Mål nr Ö 3617/14), Resning, Högsta Domstolen, Beslut, 2017-02-23, Stockholm. (HD 3617/14 (Case nr Ö 3617/14), Review, Supreme Court, Decision, 2017-02-23), paras. 1 - 8.

⁴⁵¹ HD 3617/14 (n 450), pp. 28 - 41.

⁴⁵² HovR 214-16 (Mål nr T 214-16), Hovrätten från Övre Norrland, rotel 4, DOM, 2018-01-23. Umeå. (Case Nr T214-16, Appellate Court from Upper Norrland, division 4, Judgement, 2018-01-23, Umeå. Cases from appellate courts are not prejudicial. The district Court also decided in favour of the Sami.

⁴⁵³ HovR 214-16 (n 452), p. 6ff.

⁴⁵⁴ HovR 214-16 (n 452), p. 8 ff.

Regarding the balance of rights, the jurisprudence of the Swedish courts together with the Swedish government's policies regarding property rights, environmental protection and the interaction between national interests enables a regime of expansive land expropriation or grants. Moreover, the jurisprudence concerning land disputes, despite its recent developments favourable to the Sami, sets a steep threshold for Sami interests to be successful. The trend of subordinating the reindeer husbandry right and interest in relation to economic growth interests is prevalent in the Swedish approach created by court jurisprudence, law and state policy. For land disputes concerning this balance of interests the special characteristics of the Sami, as a minority or indigenous peoples, their specific way of life, customs or traditions are not specifically considered in the balance.

The Swedish case-law dealing with extractive industries and reindeer husbandry does not in depth examine the role and application of preventive safeguards. The permissive Swedish approach relies heavily on the assumption of the corporate promise and use of harm reduction measures for any intrusions in the Sami reindeer husbandry right, as well as the afterwards compensation and clean-up of contaminated sites.

The Swedish EIA system has several stages and generally applies for both exploitation and exploration concessions. The EIA system provides indirect consultation opportunities for the Sami to be consulted in the scoping process. The scoping process does not contain any obligations to assess social impacts or reindeer husbandry impacts as it only concerns impacts on the environment and human health. Companies may on their own initiative conduct social impact assessments. In the mineral framework the Sami have a right to be informed of different decisions or applications, however, no right to consultation exists. The only option for Sami consultation and participation exists within the regulatory framework where Sami may indirectly be consulted as affected parties.

6. Critical analysis of the consistency of Swedish mineral safeguards

Now that the thesis has described the Swedish context as well as all relevant obligations that Sweden have towards Sami this thesis will go on to examine the consistency between the mining safeguards and Sweden's obligations towards Sami. The three safeguards in the Swedish mineral framework; the balance of interests, EIA, and participation in decision-making, will be analysed in this chapter. The analysis will start with the balance of interests, then address EIA usage and lastly consultation and participation in decision-making.

In the analysis, each procedural safeguard will be tried against Sweden's international commitments, including the international human rights system (Sweden's international obligations under chapter 3) and the European human rights system (Sweden's regional obligations under chapter 4). The analysis will on each procedural safeguard begin the analysis with consistency with international obligations and then separately analyse the consistency with regional obligations.

6.1. Balance of Interests

Reindeer husbandry and mineral processing both constitute national interests on equal standing under the Swedish Environmental Code. Reindeer husbandry and mining are two incompatible interests and the interests that in the most appropriate way promotes the long-term housekeeping of the land, water and physical environment, in general, shall be given precedence. It is stipulated that Sweden's international considerations also shall be considered in such a balance. It is also stipulated that the balance shall be a social-economic assessment where the economic policy, specifically considering effects on employment and economic growth, is the starting point.

Two Swedish cases; *HFD 2012 not 27* and *HFD 2014, not 65*, have further explained the Swedish approach to this balance. The 2012 case made it clear that the two national interests; reindeer husbandry and mining, are incompatible and that one must be given priority. The Swedish government gave priority to the mining interests and the 2014 case assessed whether the government's choice was compatible with Swedish law.

The government justified the choice of the mining interests on economic grounds, despite the fact that 5 out of 7 Sami villages would be forced to completely stop practising reindeer husbandry in the region. The government argued that the mining would not completely eliminate the possibility of reindeer husbandry. The government further justified the mining interests on the assumption that future significant harm reduction measures would be taken in cooperation with the Sami.

6.1.1. International Consistency

One of the major problematics that the Swedish balance of interests' approach creates in relation to Sweden's international obligations is regarding the Sami way of life and the accompanying cultural rights. Article 15 ICESCR and art. 27 ICCPR both stipulate positive obligations for Sweden regarding the protection of the Sami way of life.

Reindeer husbandry constitutes a crucial part of the Sami cultural identity and way of life and has remained as the essential cultural emblem of the Sami identity. Fishing, hunting and other traditional activities, as well as the Sami religious, spiritual and cultural heritage connection to *Sápmi* all form an important part of the Sami cultural identity and way of life. All of these resource-based traditional Sami activities, as well as many of the Sami traditions and religious or spiritual practices, have a strong connection to the land of *Sápmi*. It is recognized that the specific way of life of indigenous peoples, such as Sami, is closely intertwined and dependent on the use of land for indigenous traditional activities. Reindeer husbandry is one of the essential parts for the survival of the Sami cultural identity.⁴⁵⁵

Specifically, reindeer husbandry specifically requires access to vast, undisturbed lands where for the seasonal migratory reindeer grazing. Reindeer husbandry is a practice that is specifically susceptible to disturbances and where a direct link exists between the sustainability of the practice and environmental conditions and the accessibility of land. Mining activities negatively affect reindeer husbandry as well as other Sami traditional activities in several ways. Mining activities cut off Sami access to land that may be vital for the reindeer husbandry practice as well as the ability of Sami population to enjoy their cultural heritage as well as their spiritual and religious connection to the land. The noise pollution from mining activities creates disturbance zones where reindeer husbandry cannot be practised.⁴⁵⁶

Further, the cumulative effects of mining not only permanently change the arctic landscape and environment through the construction of roads and infrastructure but also creates material obstacles that disturbed reindeer migratory routes and grazing. Due to cumulative effects, the impact of mining activities on reindeer husbandry is even broader. Generated mining waste has the same effect of cutting of Sami land access and creates environmental pollution. The pristine arctic landscape is especially susceptible to environmental pollution where the consequences for the biodiversity may be adverse. The effects of mining activities on the pristine Arctic environment, as described on pages 16 - 19, often imply permanent changes to the landscape and to the possibilities for Sami to practice their traditional activities.

The Swedish balance of interest creates legal uncertainty in relation to the level of protection for the environment as well as the Sami reindeer husbandry. The land interests of mining and

⁴⁵⁵ See the discussion on pages 13 – 14 and 18 – 19. Reindeer husbandry has remained as the cultural emblem of the Sami in Sweden despite it now only being a minority practice.

⁴⁵⁶ See the discussion on pages 16 – 19, see also, *Förslag till Strategi för Hantering av Gruvavfall: Redovisning av ett Regeringsuppdrag* (n 47), p. 110. The loss of grazing lands has both economic and social effects on the Sami people, see Rasmus Kløcker Larsen (n 56), "Då är det inte renskötsel", p. 51 f.

reindeer husbandry are known and recognized by Swedish courts to be incompatible with each other. With this knowledge, Swedish courts adopt a legally uncertain approach where economic interests justify the precedent of the mining interests over the reindeer husbandry interest. This approach is based on assumptions of the exploitive company's future obligation to take harm reduction measures, which contents are undefined, as well as to cooperate and consult with affected Sami during the operations.⁴⁵⁷

The legal setting surrounding Sami land claims further increases this legal uncertainty regarding the protection of the Sami reindeer husbandry. This Swedish balance of rights approach exists within a setting where the Sami right to property as well as the usufruct right to reindeer husbandry, that includes hunting and fishing, is also to an extent legally ambiguous. In the Swedish system, both the Sami land claims and the claim to reindeer husbandry rests on or is based on the legal framework of immemorial prescription. The reindeer husbandry right is seen as a usufruct right that burdens either state or private property, where Sami land use may be subject to dispute unless already settled. This has been shown to be especially prevalent in relation to the Sami right to winter grazing.

Further, the legal framework of immemorial prescription places the entire burden of proof on the Sami as claimants of land rights. The application of the neutral approach of the framework of immemorial prescription to Sami land claims is problematic, as it not only neglects the essence of what it means to be indigenous by the presupposition that someone else owns the disputed lands but also does not take into account Sami traditions of not having a written history. The weak position of Sami in the land claim approach developed by Swedish courts further enables and makes it easier for competing land-claims such as mining to prevail over Sami interests. Moreover, such a weak Sami position makes it more difficult and uncertain for Sami to use substitute lands for the survival of the reindeer husbandry practice.

To sum up, mining is incompatible with reindeer husbandry and while mining is conducted reindeer husbandry cannot be practised in that area.⁴⁵⁸ Mining dispossesses the Sami of lands traditionally used for their resource-based activities, such as reindeer husbandry, hunting, fishing and gathering, and prevents their access to their cultural heritage and sacred sites. Furthermore, the permanent changes of mining to the arctic landscape deteriorate the conditions for the practice of reindeer husbandry, namely the access to vast and undisturbed land suitable for reindeer grazing. These permanent effects on the landscape and environment as well as the dispossessing effects of mining threaten the very existence of reindeer husbandry, the Sami way of life, means of subsistence and cultural identity.

Further summing up, the permissive Swedish balance of interest together with the restrictive legal setting for Sami land claims creates a system where it is difficult for Sami to claim land for their traditional way of life but where it is easy for the government to give it away. This

⁴⁵⁷ See the discussion on pages 70 – 72, see also HFD 2014 not 65, p. 7, where the Swedish Supreme Administrative Court not only acknowledges but also uses this uncertainty as part of the case reasoning.

⁴⁵⁸ See, the discussion on pages 16 – 18, as well as on 70. See specifically, HFD 2012 not 27, p. 4, where the Swedish Supreme Administrative Courts rules on this incompatibility.

system creates an encroaching effect upon the conditions for the existence of the Sami way of life.⁴⁵⁹

This type of approach to the balance of interest created by the Swedish Courts when placed within the Swedish legal setting cannot be seen as consistent with Sweden's obligation under article 15 ICESCR. This approach constitutes a regression in the overall protection afforded to Sami in Sweden as it effectively overrides any protective considerations or safeguards already in place. This opportunistic approach where predicted significant economic benefits give authorization to mining activities creates a legally uncertain situation where Sami interests are set aside. Other efforts to encourage the conditions for the promotion of the Sami cultural identity will be rendered void, with no impact or meaning, when such strivings may simply be disregarded.

The overall effects of this balance of interests are that it continuously erodes away at the preconditions necessary for Sami to participate in and promote the Sami cultural life; namely, the Sami possibilities to access and use land used for their traditional activities. The preservation and maintaining of Sami knowledge, innovations and practices that stem from the Sami way of life will also eventually be lost when the existence of the Sami way of life is at risk. This encroaching effect cannot be consistent with Sweden's continuous obligations under art 15 of the progressive ICESCR to protect and fulfil; facilitate, provide and promote the Sami way of life.⁴⁶⁰

These same eroding effects are applicable in relation to the ability of the Sami to maintain their culture and to be able to exercise their cultural rights as a minority under article 27 of the ICCPR. Due to the special relationship between Sami land use and their culture and identity, this Swedish balance of rights approach placed in the restricting Swedish system of Sami land claims has the effect of slowly chipping away at the Sami ability to maintain their culture.

Article 27 has emphasized that activities must be carried out while ensuring the continued profit of the minority traditional economies, such as the Sami reindeer husbandry, hunting or fishing.⁴⁶¹ Due to the incompatibility, reindeer husbandry is effectively suspended by mining in the affected region.⁴⁶² The prioritizing of the mining interest over the reindeer husbandry

⁴⁵⁹ See, the discussion on pages 13 – 18, 58 – 61 and 70 – 72, see specifically NJA 1981 s. 1 (n 343), p. 190f, and, Allard, *Two Sides of the Coin* (n 15), p. 276f, regarding the restrictive land claim system.

⁴⁶⁰ Compare, General Comment 21 (n 94), pp. 13, 36, 37, 44, 48, 49, 51 and 52, which stipulates the authoritative interpretation of the obligations under the right to take part in cultural life.

⁴⁶¹ See, *Ilmari Länsman et al. v. Finland* (n 126), para. 9.8.

⁴⁶² The Swedish Supreme Administrative Court decided to give precedence to the mining interest despite the fact that reindeer husbandry would effectively cease to exist in the region, as well as be hindered in adjacent regions. The Court deemed that as the mining would not completely eliminate the possibilities of Sami reindeer husbandry the decision was justified, see, HFD 2014 not 65, p. 2ff, however, the CCPR has deemed such a situation where the possibility of practicing reindeer husbandry in a region is eliminated as a violation of art. 27 ICCPR, see, *Ilmari Länsman et al. v. Finland* (n 126), paras. 9.4 and 9.6. The CCPR approach allows for a justification of such intrusive mining measures depending on the employment of prior procedural safeguards such as consultation and participation. The Swedish Supreme Administrative Courts approach to such intrusive measures are a permissive approach based on damage mitigation during and after the commencement of the mining.

interest enables authorities to effectively dispossess Sami of protected land used by them for reindeer husbandry. The dispossessing effect of mining and its permanent environmental changes has a deteriorating effect on the conditions for the protection and promotion of the Sami cultural identity, which reindeer husbandry and other resource-based activities forms an integral part of.

The dispossessing effect will also similarly threaten the Sami right to access their cultural heritage and to strengthen and maintain their spiritual relationship with their ancestral land. The permanent changes in landscape and environmental effects of mining may also have a destructive effect on Sami sacred sites, that due to their secretive nature might elude protection.

This is inconsistent with the obligation to protect the Sami way of life and to encourage the promotion of that lifestyle, under the UNDM. This also equates to the opposite of creating favourable conditions for the Sami minority to develop their culture, religion, traditions and customs, mandated by the UNDM. The effects of this balance of interests cannot be seen as ensuring the Sami minority's full and effective exercise of human rights and fundamental freedoms under the UNDM, nor as enabling the Sami minority to maintain their culture and exercise their rights under article 27 ICCPR.

Further, the recognition and protection of Sami lands, territories and resources are crucial for the safeguarding of Sami interests, as described by both the ILO C169 and the UNDRIP. The importance of the recognition of the Sami property rights, the identification of Sami lands and the taking of measures to safeguard Sami land use in areas with competing interest, such as mining and reindeer husbandry, are proclaimed by the ILO C169. The balance of interest that authorizes mining activities in land traditionally used by Sami cannot be seen as consistent with the UNDRIP requirement to provide effective mechanisms to prevent or redress any actions that have the aim or effect of dispossessing indigenous peoples of their lands.

Any storage or disposal of mining waste on Sami land would also be in contradiction with UNDRIP. Not only is such storage or disposal of hazardous waste expressly prohibited by UNDRIP, but it would also affect the surrounding environment and ultimately the reindeer population and the biological diversity of the region. Damage to the arctic environment and biological diversity may cause both direct and long-term effects on the viability of reindeer husbandry and thus further indicate the inconsistency of the balance of interest with ICCPR art. 27 and ICESCR art. 15.

The consequences of mining activities for the Sami way of life as well as for the environment does not have a sufficient impact on the balance of interests in the mineral framework. This follows not only from the obligations to protect, promote, provide and facilitate the Sami way of life but also from the obligations to take due account of Sami interests and to prevent any dispossessing activities. The special importance for the cultural and spiritual values that Sami have in relation to their traditionally used lands that are described in the ILO C169 needs to be given a more prominent place in the balance of interests to better protect Sami land use in areas of competing land interests.

To conclude, the prioritizing of the mining interest over the reindeer husbandry interest not only enables the dispossession of Sami from lands traditionally used by them but also due to the permanent effects of mining on the Arctic environment also deteriorates the conditions for the existence of the Sami way of life. The Sami interest is not given due considerations and in conjunction with the restrictive legal setting for Sami lands claims, this creates an encroaching effect on the Sami way of life. These effects that the balance of interest enables are not consistent with Sweden's obligations under art. 15 ICESCR or art. 27 ICCPR regarding the protection of the Sami way of life when interpreted together with international indigenous standards and international environmental standards. This balance of interest is also inconsistent with the obligations under UNDRIP and ICO C169 independently.

6.1.2. Regional Consistency

Similarly, under the European human rights system the Swedish balance of rights actualises the same problems relating to the Sami way of life and cultural identity. The cultural identity and Sami way of life are protected under FCNM art. 5 as well as the ECHR art. 8 through the jurisprudence on its cultural dimension. The environmental dimension of ECHR is also relevant for the discussion of mining activities. The same factual description on pages 74 – 76, and the explained effects on the Sami way of life are also applicable to this discussion surrounding the European human rights compliance.

One of the striking issues that the Swedish balance of rights is its lack of due and appropriate consideration of Sami interests and the impact of mining activities on the Sami way of life. More importantly, is the lack of impact of such considerations upon the Swedish balance of right, as economic considerations may completely override any Sami interests when profitable enough. The fair treatment of minorities and the due and appropriate consideration of their interests constitute a key aspect of the afforded protection under article 8 ECHR. This lack of impact is more serious and apparent due to the principle of effectiveness, intertwined in the cultural dimension of article 8 ECHR.

Following from the special purpose of human rights instruments; the protection of fundamental rights of individual human beings, the ECHR rights are intended to be practical and effective, not theoretical or illusory. Considerations of minority interests where the impact of such considerations are easily overridden by more profitable economic interests cannot be considered as being effective and practical.⁴⁶³ With this and the cultural and environmental dimensions of the ECHR in mind, the considerations to the Sami minority interests in the Swedish balance of rights are not due and appropriate.

Through the disregard of any impact of Sami interest on the balance of interest, it renders other procedural safeguards void, such as EIA use, consultation, and participation in decision-making. The other procedural safeguards, EIA use, Sami consultation, and Sami participation in decision-making, all have a contributing effect to the understanding of the Sami interests as

⁴⁶³ See, *Soering v. The United Kingdom* (n 270), para. 87, see also *Chapman v. The United Kingdom* (n 280), para. 93, see further, and *Gorzelik and Others v. Poland* (n 326), para. 90.

well as to the ability to make an informed and well-founded decision in mining cases. However, when the outcome of such safeguards has no real impact on the decision-making then they are rendered void and does not achieve their aims.⁴⁶⁴

This also follows from the overall effects that the Swedish balance of rights has on the Sami way of life and the ability of the Sami minority to maintain it, as protected by the ECHR art. 8. The ECHR art. 8 obligations in relation to the Roma jurisprudence to protect the security, identity and lifestyle of that minority, as well as to facilitate such lifestyle has not yet been properly implemented and applied to the Sami minority in the ECtHR. The only articulated obligations in respect to the Sami minority is to respect the Sami special culture and way of life.

However, the international human rights system and the discussion on pages 75 – 78 form an important part of the discussion under the European human rights system due to its basis on the international system as well due to its interpretative tools. The European human rights system forms a part of the international human rights *corpus* and other international standards are used as part of its interpretation. The ability of the Sami minority to maintain their way of life, as part of their cultural identity, forms a crucial part of the rights under ECHR art. 8. Likewise, as in the discussion on pages 75 - 76 the overall effect of the permissive balance of rights, when placed in the restrictive Sami land claims framework, is the continuous encroaching on the conditions necessary for the survival of the Sami way of life.

Reindeer husbandry, hunting, fishing and other resource-based traditional activities all constitute important parts of the Sami cultural identity and way of life. These resource-based activities all require access to land and the indigenous Sami culture and traditional activities have a special connection to these lands and the survival of this way of life depend on such land access. From this follows that when a legal framework makes it easy to discard land access rights and hard to claim them, the protection, promotion and facilitation of that minority way of life that is dependent on land access become impaired. This is particularly true for a minority that also constitutes indigenous peoples such as the Sami, as the question of access to land constitutes an essential part of the survival of the cultural identity of that minority.

The progressive character of the protection in the FCNM just like in the ICESCR prohibits any backtracking and imposes continuous obligations upon Sweden. The FCNM is based on the UNDM and the discussion on pages 77 – 78 concerning the consistency with the UNDM is to be considered concerning the discussion on the consistency with the FCNM. The ability to completely bypass the established Sami interests constitutes a regression in the protection otherwise afforded the Sami.

Mining effectively dispossesses Sami of their traditionally used lands and also deteriorates the conditions for their way of life. The necessary conditions for the Sami minority to maintain

⁴⁶⁴ Compare, *Taşkin and Others v. Turkey* (n 319), paras. 122 – 125, see also *Chapman v. The United Kingdom* (n 280), para. 96.

and develop their culture and to preserve the essential elements of their culture, reindeer husbandry and other traditional resource-based activities, are through this balance system being taken away.

To conclude, the balance of rights does not take due account and appropriate consideration of the Sami interest and the overall effects of such affects the ability of the Sami to maintain their cultural identity and way of life. The balance of rights is not consistent with the obligation to respect, protect and facilitate the Sami way of life and cultural identity under art. 8 of the ECHR. The balance of interest is neither consistent with the FCNM progressive obligation to promote the necessary conditions for persons belonging to the Sami minority to maintain and develop their culture, as well as to preserve the essential elements of their cultural identity and way of life.

6.2. Environmental Impact Assessments

In Sweden, Environmental Impact Assessments (EIA) are generally employed in relation to environmentally hazardous activities, such as mining. Mining prospecting or exploration generally require an EIA to be conducted but may be done without it. For mining exploitation, a specific EIA in accordance with the Environmental Code (MB) shall be carried out. Sweden's EIA system has several stages; screening, scoping, drafting, presentation and post-decision monitoring.

In the screening process, the area limitation shall be consulted with the CAB, the supervisory authority, individuals that may be particularly affected, as well as with other state authorities, municipalities and the public that may be expected to be affected by the operation or measure. Opportunities for public comments must also be provided when the screening is done. In the Swedish legal setting Sami are seen as holders of special rights, namely the reindeer husbandry right, and are therefore generally considered to be affected by the decision and usually needs to be consulted or given opportunity to comment in this stage.

Mining EIAs generally contain information about location, extent, scope and other characteristics that may be relevant regarding the operation, alternative solutions, environmental conditions and their estimated change without the mining operations. EIAs also identifies, describes and assesses the environmental impacts and contain information about how to prevent, stop, counteract or remedy the negative environmental impact. Compliance with environmental quality norms is also listed. No reindeer husbandry impact assessments are explicitly listed and apart from the impact on human health, no other social impacts are generally considered. Assessments of the adequacy of conducted EIAs are not part of the tasks of Swedish courts.

6.2.1. International Consistency

The Swedish EIA system does not have any explicit obligations for the parties to consult with Sami when the mining activities take place on land or territories that are also used for reindeer

husbandry. Through their position as holders of special rights, Sami is generally viewed as a concerned party to such proceedings and may thus be consulted or provided the opportunity to give comments. Governmental agencies have in their guidelines also generally interpreted Sami communities or other land users to constitute affected parties in these situations. The problematic with such an approach is the uncertainty of the EIA consultation rights.

To qualify for consultation the Sami must fulfil the legal requirement of being considered as a concerned party, namely through their holding of the special reindeer husbandry right. Due to the legal uncertainty that follows the extent and availability of the reindeer husbandry right, the right to consultation in the EIA procedure remains equally ambiguous. The findings apart from the legal principles of general application, of cases such as *Taxed Mountains* remain applicable for only the adjudicated region⁴⁶⁵. As the legal status and extent of other regions and areas remain unknown so does the Sami positions in relation to participation.

Further, the legal setting of Sami land claims places high thresholds for the Sami to prove their claims under the doctrine of immemorial prescription as the entire burden of proof rests on the Sami. Failing to prove their claims in court will settle the legal status for the concerned area and thus, also any accompanying rights and following possibilities to be consulted and to participate in the EIA procedure. This uncertain legal situation of Sami consultation and participation in the EIA procedure is problematic relating to Sweden's international obligations. This uncertainty surrounding Sami consultations in EIAs is problematic due to the consultation and participation obligations itself but also due to the potential effects lacking EIAs might have on the Sami cultural heritage or *sieidis*.

The Swedish EIA system dealing with mining on Sami lands does not include any explicit obligations for the one conducting the EIA to include considerations regarding effects on reindeer husbandry or social considerations. The ILO C169 emphasises the need to recognise the special importance for the cultures and spiritual values of Sami that originates from their traditional lands and territories. In order for EIAs to be able to, as a special measure, properly protect the Sami interests they need to give due consideration of the Sami interest which would include considering impacts on reindeer husbandry or other Sami resource-based traditional activities. This also follows from ICCPR art. 27 and international environmental protection.⁴⁶⁶ For the EIA to properly assess reindeer husbandry impacts it would need to consider cumulative effects as well as the overall effects of multiple mining projects.⁴⁶⁷ The lack of Sami consultations in the EIA process further substantiates the current EIA systems lack of due consideration of the Sami interest.

The lack of explicit obligations to consult with Sami and only providing legally uncertain indirect consultation in the regulatory framework is not consistent with the interpreted obligation to respect the principle of free, prior and informed consent. This also neglects the indigenous status as indigenous peoples and their special way of life connected to ancestral

⁴⁶⁵ See, Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 98f

⁴⁶⁶ See, *Ilmari Länsman et al. v. Finland* (n 126), para. 9.5 and 9.6, see also *Francis Hopu and Tepoaitu Bessert v. France* (n 117), para. 10.3, and *Julie Ringelheim* (n 116), p. 5f.

⁴⁶⁷ See, *Jouni E. Länsman et al (2) v. Finland* (n 148), para. 10.2.

lands, which is prescribed by both art. 15. ICESCR and the ILO C169. The obligation to recognise indigenous peoples' rights to control and develop their ancestral lands under ICESCR art. 15 cannot be fulfilled without the Sami having an opportunity to impact the decision-making processes concerning such lands.

The including of reindeer husbandry impacts in EIAs and the compliance of the EIA system with CBD EIA requirements are of special importance for the protection of biological diversity and the protection of the Sami way of life. Severe environmental pollution on the pristine Arctic environment will have direct effects on both the current and future health of reindeer populations and the viability of Sami reindeer husbandry. EIAs that take due account of Sami interests, such as reindeer husbandry are thus also critical to the protection of the Sami way of life as protected under the international minority protection.

To conclude, the lack of any explicit Sami consultation obligations together with the lack of any considerations of reindeer husbandry or social impacts in the EIA system does not allow it to take due consideration of the Sami interest. This is not consistent with Sweden's obligations under ICCPR art. 27 interpreted together with ILO C169 and the CBD. Neither is it consistent with ICESCR art. 15 interpreted together with the ILO C169 as it does not recognise the indigenous characteristic nor respects the principle of free, prior and informed consent.

6.2.2. Regional Consistency

The ambiguity described on pages 76, 81 and 82, concerning the legal obligation to consult with Sami in the EIA process is also troublesome from the view of the FCNM and the ECHR. Sami consultations during the EIA process are one of the ways of ensuring that Sami interests are considered and safeguarded. Consultation with Sami representative organisations is declared to be a necessity for the achievement of the goals under FCNM art 5. The goals under FCNM art. 5 are the promotion of necessary conditions for the maintaining and development of Sami culture and preservation of the Sami cultural identity.

EIA usage forms an important part of the mining exploitation process and directly affects the available protection concerning Sami land usage and cultural life. The UNDM forms the basis for the FCNM and stipulates in art. 2(3) the effective participation of persons belonging to the Sami minority in decisions concerning the minority to which they belong or the region in which they live. Resolving any ambiguity concerning Sami EIA consultation would contribute to the fulfilling of Sweden's obligations under FCNM art. 5 as well as the obligation under FCNM art. 15 concerning the effective participation of Sami in public affair that affects them. Effective participation of Sami in public affair affecting them would require the Sami to be consulted in the EIA process.⁴⁶⁸

⁴⁶⁸ See, ACFC/SR/IV(2016)004 (n 260) p. 30, as well as FCNM arts. 15, 21, 22 and 23. The FCNM is supposed to mirror the content of the rights under the ECHR, including the protection under art. 8 ECHR of the special way of life of minorities.

The same discussion concerning the EIA effects on the Sami way of life is applicable to Sweden's obligation to respect, protect and facilitate the Sami way of life under ECHR art. 8. The uncertainty concerning Sami consultations together with the lack of any legal requirement for reindeer husbandry or social impact considerations in the EIA will fail to properly safeguard the Sami minority interests. Further, a lack of Sami consultations or considerations concerning reindeer husbandry or social impacts during the EIA process cannot be seen as consistent with Sweden's obligation to give special considerations to the Sami vulnerable position as a minority. When such special considerations are not the present the EIA as a procedural safeguard does not contribute to the establishment of a fair balance of interest.⁴⁶⁹

Both the cultural and environmental dimension of ECHR art. 8 requires the procedural safeguards available to be adequate. Adequate safeguards must employ appropriate investigations into both environmental and health effects, as well as taking due account of Sami interests and their special way of life. EIAs that concern proposed mining activities on land traditionally used by Sami and that do not require any reindeer husbandry impact or social impact considerations are not adequate in the sense of the ECHR art. 8. Reindeer husbandry constitutes an essential part of the Sami cultural identity and way of life and not considering the impact on reindeer husbandry for activities on Sami land does not properly take due account of the Sami minority interests.⁴⁷⁰

To conclude, the lack of explicit Sami consultations in the EIA process is not consistent with the FCNM art. 15 obligation to effectively participate in decision-making processes affecting them. The lack of Sami consultations together with the lack of reindeer husbandry or social impact studies is also inconsistent with art. 8 of the ECHR as it does not take due account of the Sami interest.

6.3. Consultation and Participation

Few explicit opportunities in the mineral framework for the Sami to be consulted or to participate in the decision-making process exist. Primarily consultation or participation opportunities are stipulated for those who are considered affected by the decision or have an essential interest in the matter, thus indirectly may encompass the Sami. Opportunities for Sami consultation and participation are found in the mineral framework as well as in the regulatory planning framework.

Sami are holders of special rights and are generally seen or interpreted to be considered as affected or as having a material/essential interests when the mining concessions encompass designated reindeer husbandry areas. Affected holders of special rights in the drafting of a work plan in the exploration process have a right to be informed of the work plan and to

⁴⁶⁹ See, *Soering v. The United Kingdom* (n 270), para. 87, see also *Chapman v. The United Kingdom* (n 280), para. 93, see further, and *Gorzelik and Others v. Poland* (n 326), para. 90.

⁴⁷⁰ See, *Hatton and Others v. The United Kingdom* (n 312), para. 104, and *Taşkin and Others v. Turkey* (n 319), paras. 118 and 119, together with the earlier discussion in *Gorzelik and Others v. Poland* (n 326), para. 90, and *Chapman v. The United Kingdom* (n 280), para. 93.

object to it. Such objections may lead to a further assessment of the work plan by the mining inspector but do not include a veto right. Special holders of rights also have a right to be sent the application for an exploitation permit. When an application for an exploitation permit has been approved there is an explicit obligation to send the approved application to the Sami parliament if it affects designated reindeer husbandry areas.

During the drafting of a comprehensive plan, the municipality must consult with certain governmental bodies and agencies. The municipality must also provide the opportunity for others who may be affected; municipality members, individuals and associations with an essential interest in the proposal, to participate in the consultation. The purpose of the consultation is to the furthest extent provide an adequate basis for the decision-making and the subjects of accommodating national interest or environmental security norms are specifically debated.

During the drafting of a detailed development plan affected individuals or associations may give their comments when a planning decision from the CAB is requested by the municipality. Before the adoption of a specific development plan or area regulations, associations and individuals that have an essential interest in the proposal must be given the opportunity to participate in the consultations. Associations and individuals with an essential interest must also be given the opportunity to participate in the consultations relating to the specific goals of a detailed development plan.

6.3.1. International Consistency

There exist no explicit or mandatory obligations in the mineral framework to consult with Sami during the different stages of the approval of a mining concession. In the stages of the approval of mining concession, the Sami as holders of special rights only have a right to be informed. The Sami as holders of special rights may object to a work plan but cannot effectively stop or influence the approval of mining concessions. The Sami parliament also has a right to be informed of approved exploitation permits but has no special opportunity to contest it.

The only opportunities that the Sami must be consulted are indirectly stipulated in the regulatory planning framework. In the regulatory framework, the Sami may during the drafting stages of a municipality's comprehensive or detailed development plan as well as area regulations are given an opportunity to participate in the consultations. In general, the only mandatory obligation to consult that the municipalities have is in regard to other governmental bodies, such as the CAB. As mining concessions need to conform to the provisions in the planning regulatory framework the Sami consultations allow for Sami interests to be considered in the establishment of the foundation that the mining concessions have to comply with.

The lack of any obligations to consult with Sami in relation to the approval of mining concessions are not consistent with Sweden's international obligations. Effective participation of Sami in decision-making processes that affect them and their way of life is prescribed by

the cultural rights of the *Bill of Rights*, the right to information, the UNDM, UNDRIP and ILO C169. Public participation in decision-making processes also forms an important part of international environmental protection. The importance of prior consultation in these matters is also emphasised by these international instruments.

The right to take part in cultural life under the ICESCR is interpreted to require the adoption of appropriate and effective mechanisms to allow for such effective participation in decision-making processes. In connection to this, the UNDM stipulates that when implementing and planning national policies and programmes Sweden must pay due regard to the interests of persons belonging to the Sami minority. The right to enjoy one's own culture under the ICCPR is interpreted as emphasizing prior consultation that takes due account of the minority interest and culture.⁴⁷¹

In relation to effective participation, the prior consultations with Sami constitute a necessity. To properly take due account of the minority interest and culture in relation to specific actions the Sami must be consulted. Drawing on general knowledge about Sami interests is insufficient as each individual action may differently affect the Sami way of life and cultural identity. Moreover, naturally, it follows that the ones who are best equipped to properly illuminate the full range of difficulties that proposed actions may impose on the traditional way of Sami are the Sami themselves.

The need for consultation is specifically emphasized by the UNDRIP and the ILO C169 in relation to the approval, undertaking or permitting of mining exploration or exploitation by the State. The right to take part in cultural life is even interpreted as requiring the states to respect the principle of free, prior and informed consent, which is also prescribed by UNDRIP. The ILO C169 further stipulates the participation of Sami in the benefits of mining activities and the right to compensation for any resulting damage, another feature which is absent in the Swedish mineral framework.

The lack of any obligations to consult with Sami in the process of approving mining concessions is not consistent with Sweden's obligations. Mere obligations to inform Sami of concession applications, approval of concession applications, and drafting of work plans where the Sami have no real ability to impact is not sufficient considering Sweden's international obligations.⁴⁷²

The indirect obligations to consult with Sami in the regulatory planning framework does not in themselves offer sufficient protection. These indirect consultation opportunities only concern the overall foundation that the approval process operates within and the obligations to consult does not extend to the individual decision. Furthermore, the indirect consultation obligations in the regulatory planning framework suffer from the same legal uncertainty that is described on pages 75, 81 and 82. Apart from the general legal principles, the specific

⁴⁷¹ See, *Ilmari Länsman et al. v. Finland* (n 126), paras. 9.4, 9.5. and 9.6.

⁴⁷² Compare, *Anni Äärelä and Jouni Näkkäläjärvi v. Finland* (n 146), para. 7.6, *Ilmari Länsman et al. v. Finland* (n 126), paras. 9.4 – 9.6, as well as, *Apirana Mahuika et al. v. New Zealand* (n 123), paras. 9.5, 9.6, 9.8 and 9.9.

usufruct right to reindeer husbandry that was adjudicated in cases such as *Taxed Mountains* or the *Härjedalen Case* remains applicable only to the concerned regions. The legal status and the Sami position remains legally uncertain in other parts as it has not yet been adjudicated. Despite the general interpretation of Sami as affected parties the Sami status and qualification or consultation thus becomes inconsistent and sometimes uncertain. The legal uncertainty that concerns the indirect Sami consultations in the regulatory planning framework takes away from the transparent and consistent framework for public participation that Sweden in the CBD has an obligation to ensure and maintain.⁴⁷³

To conclude, a mere right to information in the process for concession approvals is not consistent with Sweden's international obligations as consultation is not only explicitly prescribed but also constitutes an important part of effective participation and the need to take due account of the Sami interests. The indirect consultation opportunities are not sufficient as they only concern the general framework that the process operates within and not the actual decision in its full. The indirect consultations do not provide a transparent and consistent system for public participation in decision-making.

6.3.2. Regional Consistency

The lack of any consultations with Sami during the procedure of concession approval is not consistent with Sweden's obligations under the FCNM. Sweden must take effective measures to promote mutual respect, understanding and co-operation between the Sami minority and the majority. Sweden must also create the necessary conditions for the effective participation of Sami in cultural, social and economic life as well as in public affair that affect them. In relation to such participation, it is interpreted that consultations with the Sami parliament or Sami representatives are a necessity in order to achieve these goals.

A one-way interaction between Sami and government authorities in public affairs that affect Sami, such as the approval of mining concessions on traditionally, does not promote mutual respect, understanding and co-operation between the minority Sami and the majority. On the contrary, such one-way interactions may have the opposite effect as the process, without trying to understand the Sami position through consultations, impose the decision on the Sami further cementing their weak position in the relation of power. Such one-way interaction neither alone or together with the indirect consultations in the regulatory planning framework provides a sufficient level of participation for the Sami minority for the participation to be considered effective, see pages 82 – 83.

This follows from the fact that the Sami minority has no real opportunities to impact the specific approval process. The Sami may have opportunities to convey their interests in the regulatory framework which constitutes the overall foundation that the mining concession approval process must adhere to, however, a general consideration of Sami interests is not

⁴⁷³ See, See, Allard, *Indigenous Rights in Scandinavia: Autonomous Sami Law* (n 32), p. 98f, see also *Sweden and the Convention on Biological Diversity: Summary of Sweden's third National Report to the Secretariat of the Convention on Biological Diversity* (n 239), pp. 19 & 27.

sufficient. Each concession concerns different area with differing circumstances where mining may have different effects and thus require specific approaches.

To fulfil the ECHR art. 8 obligations to facilitate the Sami way of life Sweden must give special considerations to the vulnerable position of the Sami minority, their needs and special lifestyle in both the regulatory planning framework and in the reaching of the decision in individual cases. The lack of any consultations in the approval process itself is not consistent with this obligation. Sweden must consider the specific legal and social context where planning and enforcement measures are taken and take due account of the Sami interests in the decision-making.⁴⁷⁴

Sami consultation is a necessity for the understanding of the mining effects on the Sami way of life in specific cases and without consultations, Sweden may be unable to properly take due account of the Sami interests in specific cases. Only providing Sami consultation opportunities in the regulatory framework is not sufficient as the ECHR requires Sweden to give special considerations in both the regulatory framework and in the reaching of decisions in individual cases. Due to the lack of appropriate safeguards Sweden does not properly take due account of the Sami interest in the decision-making.

To conclude, the Sami participation is not consistent with Sweden's obligations under the FCNM due to its lack of effectiveness and available consultations. Only providing consultation in the regulatory framework is not consistent with the ECHR art. 8 obligation to facilitate the Sami way of life and to take due account of the Sami interests in the decision-making.

6.4. Conclusions

The Swedish mineral framework employs three procedural safeguards. These procedural safeguards are a balance of interest of competing land interests, environmental impact assessments for proposed mining activities, and public participation and consultation throughout the decision-making process. However, these established safeguards are problematic in its application relating to Sami. The Sami constitute indigenous peoples and a minority in Sweden and thus possess specific protection under international human rights law. The established procedural safeguard in the Swedish mineral framework needs to be consistent with such protection to properly fulfil their protective function in relation to Sami.

Relating to Sweden's international obligations, the balance of interest together with the restrictive legal setting for Sami land claims enables an encroaching effect on the Sami way of life, through land dispossession and environmental deterioration. The consequences of mining activities for the Sami way of life as well as for the environment does not have a sufficient

⁴⁷⁴ See, *Soering v. The United Kingdom* (n 270), para. 87 for the principle of effectiveness, see also *Chapman v. The United Kingdom* (n 280), para. 93, and *Gorzelik and Others v. Poland* (n 326), para. 90 for the fair balance the pays due account to the minority interest and the need to implement special considerations of the vulnerable position and special lifestyle of minorities in regulatory planning frameworks as well as in the reaching of individual decisions.

impact on the balance of interests in order to protect the Sami way of life. The Sami interest is not given due considerations in the balance of interest in the mining framework. This balance of interest is not consistent with Sweden's under art. 15 ICESCR or art. 27 ICCPR when interpreted together with the UNDM, international indigenous standards and international environmental standards. This balance of interest is also inconsistent with the obligations under UNDRIP and ILO C169 on its own.

In relation to Sweden's regional obligations, the balance of interest further does not take due account and appropriate consideration of the Sami interest. Together with the encroaching effect on the Sami way of life the balance of interest is not consistent Sweden's obligations under art. 8 of the ECHR when interpreted together with international standards on minority and indigenous protection. The balance of interest constitutes a regression in the afforded Sami protection and is not consistent with the progressive obligations under FCNM art. 5.

The EIA system in the Swedish mineral framework lacks any explicit obligations to consult with Sami in the EIA process. The EIA system further does not require any considerations of the mining activities social impact or impact on reindeer husbandry. The Swedish EIA system does not allow it to take due account of the Sami interest, which is not consistent with Sweden's obligations under ICCPR art. 27 interpreted together with ILO C169 and the CBD. The EIA system further neglects the status of the Sami as indigenous peoples and does not recognise their special way of life connected to the land and their following rights prescribed by ICESCR art. 15 and the ILO C169.

The lack of explicit consultations with Sami in the EIA process is not consistent with the FCNM art. 15 obligation to effectively participate in decision-making processes affecting Sami, when interpreted with the UNDM. The lack of Sami consultations together with the lack of reindeer husbandry or social impact studies is also inconsistent with art. 8 of the ECHR as it does not take due account of the Sami interest.

A mere right to information in the approval process of mining concessions, even together with the indirect consultation opportunities in the regulatory planning framework, does not provide effective participation of Sami in decision-making that affects them. A mere right to information in the approval process of mining concessions is not consistent with ICESCR art. 15, ICCPR art. 27, as well as UNDRIP art 18 and 32(2), and ILO C169 15, when interpreted together with international environmental protection.

The Sami participation is not consistent with Sweden's obligations under the FCNM due to its lack of effectiveness and consultation opportunities. Only providing consultation in the regulatory framework is not consistent with the ECHR art. 8 obligation to facilitate the Sami way of life and to take due account of the Sami interests in the decision-making.

All three procedural safeguards in the Swedish mineral framework are not consistent with Sweden's obligations towards Sami under the international system of human rights nor the European system of human rights.

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