THE POLITICAL RECOGNITION AND RATIFICATION OF ILO CONVENTION NO. 169
IN FINLAND, WITH SOME COMPARISON TO SWEDEN AND NORWAY

By TANJA JOONA*

Abstract: The demands of indigenous peoples for self-determination over their traditionally occupied lands have caused new challenges for State sovereignty. Outside pressure from the international community has led States to reconsider their relationship with the indigenous peoples living within their borders and to recognize their historical rights. This article surveys the recent responses in Finland, Sweden and Norway to Sámi demands for protection of land rights pursuant to ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries. While Norway has ratified the treaty, Sweden and Finland have not done so. They are however, aware of the potential impact of the law of the Convention and trying to remove the obstacles before the ratification. The article analyses the interpretation and implementation of the Convention, which has caused disagreement and conflict between the different stakeholders, and where legal concepts have been mixed in different ways and used for political purposes.

Keywords: Sámi land rights, ILO-Convention No.169

A. INTRODUCTION

This article surveys recent responses in Finland, Sweden and Norway to Sámi demands for protection of land rights pursuant to ILO Convention No. 169 of 1989 concerning Indigenous and Tribal Peoples in Independent Countries (hereinafter ILO Convention No. 169, or the Convention). While Norway has ratified the treaty, Sweden and Finland have not done so. As will be shown, however, all three countries, regardless of the ratification question, are acutely aware of the potential impact of the law of the Convention.

Indigenous ownership rights usually have long historical roots. On the land in question, population is mixed, borders poorly defined, and proving ownership rights is intensely problematic. Claims from the Sámi people with regard to land may collide with the equality rights of other members of the States in question, where generous social, cultural and political rights are enjoyed all citizens regardless of status.¹

In the three Nordic countries under discussion the interpretation and implementation of the Convention has caused disagreement and conflict between the different stakeholders. The legal concepts used have been mixed in different ways and used for political purposes; actors look to their own political interests when interpreting texts. This article analyses this situation. It relies heavily on official reports from the three countries in recent years, and also draws on the significantly important guidelines to the treaty emanating from the ILO. 

B. AN OVERVIEW OF ILO CONVENTION NO. 169 IN THE NORDIC CONTEXT

1. SOME WORDS ON PROCEDURE

A fundamental principle of ILO Convention No 169 is that the persons protected by it shall enjoy the full measure of human rights without discrimination. Importantly here, it specifies that indigenous peoples have certain rights to the natural resources of their territories. They have the right to participate in the use, management, protection and conservation of these resources and the right to be consulted before natural resources are explored. Land forms a basis of their existence as such and of all their beliefs, customs, traditions and culture. But the right to land is also in potential conflict with sovereign interests, not just with regard to the allocation of natural resources, their exploration and exploitation, but also with the problems caused by, for example, overgrazing and environmental protection. Article 34 therefore unsurprisingly states that “the nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.” The Convention’s flexibility and the enduring problems of interpretation will be examined later.

The ILO Committee of Experts, which supervises State compliance with the treaty, encourages ratifying states to develop appropriate mechanisms to improve the participation of indigenous peoples in the application of the Convention. Ratification of the treaty marks a start for dialogue and future consultations, where indigenous peoples are given an active role. Indigenous peoples can also use the Convention as a useful tool for negotiating policies or projects affecting them.

Indigenous peoples as such have no formal position within the ILO structure. But they can participate in ILO meetings and other activities as representatives of governments, or of workers’ and employers’ organizations or other non-governmental organizations. ILO’s


The supervisory system does not provide for the filing of complaints by individuals or general NGOs, including indigenous organizations. But it permits complaints from employers’ or workers’ organizations on behalf of or concerning indigenous organizations, communities or individuals.\(^5\)

2. The issue of defining the Convention’s rights-holders

**No clear definition**

ILO Convention No. 169 does not fully define who indigenous and tribal peoples are. Article 1(1) defines indigenous peoples as people who are descendants from the populations which inhabited the country at the time when the present State boundaries were established and who have wholly or partially retained their own social, economic, cultural and political institutions. The full wording of the provision is as follows:

> Article (1) This Convention applies to:
> a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations;
> b) 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 of their own social, economic, cultural and political institutions.

This definition correlates with the definition used for the purposes of what may be said to amount to general international law in this area. The Convention adopts an approach based on objective and subjective criteria, whereby the objective criterion means that a specific indigenous or tribal group or people meets the requirements of Article 1(1) and recognizes and accepts a person as belonging to their group or people. The subjective criterion implies that the person in question identifies himself or herself as belonging to this group or people; or the group considers itself to be indigenous or tribal under the Convention. The treaty seems to focus on the present situation, though historical continuity is important too. The challenge is how to improve the living and working conditions of indigenous and tribal peoples so they can continue to exist as distinct peoples, if they wish to do so.\(^6\)

**Nordic definitions of indigenous Sámi**

It is commonly agreed that the Sámi people are a “people” for the purpose of Article 1(1). But that is not to say there is universal acceptance of what makes a person a Sámi for the purpose of domestic or international law. In spite of the fact that the Sámi, at least for the purpose of political speech making, consider themselves one nation in four States (Sámi people also


inhabit parts of Russia), there is a lack of a joint or common definition. This is one of the basic problems in regard to land rights from a property law perspective and the recognition and implementation in these countries of the international Convention.

In Finland, Sweden and Norway the Sámi elect representative bodies, Sámi Parliaments, which have advisory functions vis-à-vis the national governments. According to the laws regulating the right to vote in these parliamentary elections people are Sámi if they regard themselves as such and have learnt Sámi as their first language, or have at least one grandparent (in Norway even a great-grandparent) who has learnt the language. In Sweden, spouses of Sámi meeting these criteria are entitled to Sámi status. In Finland’s Sámi Parliament Act, the term Sámi also refers to a person who is a descendant of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp (an old term for the Sámi).

THE SÁMI POPULATION

It is estimated that approximately 100 000 Sámi persons live in Northern Fennoscandia and on the Kola Peninsula; areas that cover parts of Finland, Norway and Sweden. The figures presented in table 1 below are based on information presented by the Sámi parliaments.

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<th>FINLAND</th>
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<td>Sámi population</td>
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<td>Sámi Homeland in Northernmost</td>
<td>51 Sámi village from Karesuando (north) to Idre (south)</td>
<td>County of Finnmark in Northern Norway to Røros (south)</td>
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3. IMPORTANT PROVISIONS IN THE CONVENTION

L AND R IGHT A RTICLES

In the following this article introduces the central land right provisions of ILO Convention No. 169. They are of special importance in Norway, Sweden and Finland (but also in many other countries). The provisions caused significant problems to countries in a process of ratification or implementing an already ratified Convention.

10 These estimations are based on official documents, literature, Internet etc. There is no, however, any information detailing where these figures were obtained or on what they are based, who these people are, where they live etc.
Two parts of the treaty deal with land rights. They include Articles 13 through 19, of which Articles 14 and 15 contain the most concrete obligations for the ratifying States. According to Lee Swepston, the Convention was framed in such a way to provide for the possibility of a separate land rights regime within the context of the national legal system. Indigenous peoples have land rights even when they are different from those recognized by the national legal system. At the same time, the national legal system is the framework within which land rights must be realized.11

ARTICLE 14
Article 14 is the most important provision on land rights in the treaty. It states:

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

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

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

The provision requires State parties to recognize the rights of ownership and possession of the peoples concerned over lands they traditionally occupy. In addition, governments shall take measures to safeguard the rights of the peoples concerned to use lands not exclusively occupied by them, but to which they traditionally had access for their subsistence and traditional activities.

In order to recognize and protect indigenous and tribal peoples’ rights to the lands they traditionally occupy, it is necessary to know which these are. The identification of indigenous and tribal peoples’ lands is therefore crucial. This is an ongoing process in Finland and in Sweden.12

When drafting the Convention, the International Labour Conference concluded that in some circumstances the right to possession and use of the land would satisfy the provision’s conditions as long as there was a firm assurance that these rights would continue. This may be the case, for instance, in situations where isolated indigenous and tribal peoples live on reserves or where there is shared use of certain lands.13 The Convention also requires States to esta-

12 In Finland the Ministry of Justice has appointed a historical-legal research group to investigate among other things the identification of historical land right areas. See http://www.om.fi/16860.htm (visited 12 January 2004).
lish adequate procedures within the national legal system to resolve land claims by the peoples concerned. In some situations, problems may arise out of these land claims. These can be with other indigenous communities, or with outside settlers or other stakeholders.\textsuperscript{14}

**ARTICLE 13**

Article 13(1) states that governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. The Convention recognizes both individual and collective aspects of the concept of land. It thus encompasses land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g. for home or dwelling. Land can also be shared among different communities or even different peoples. This means that a community or people lives in a certain area and also has access to, or is allowed to use, another. This is especially the case with grazing lands, hunting and gathering areas and forests.\textsuperscript{15}

**ARTICLE 15**

Article 15 concerns the rights of these peoples to the resources pertaining to their lands. This has been considered to be an especially difficult provision to interpret. It is drafted in terms which are far from specific because it is intended to apply to many different national situations. There are many cases in which the State constitution provides that the State alone owns mineral and other resources. In such cases, Article 15(2) provides that, when a government retains the ownership of mineral or subsurface resources, it has to consult these peoples in order to determine whether and to what degree their interests would be prejudiced, before it allows any programmes for the exploration or exploitation of the resources to be undertaken. The consultation has to be undertaken before allowing these acts.\textsuperscript{16}

**OTHER PROVISIONS**

It is widely recognized that traditional economies in many countries constitute the basis of indigenous and tribal peoples’ economical survival. In regard to traditional livelihoods and land use of indigenous peoples, Articles 16–19 and 23 of the Convention are also of relevance.\textsuperscript{17} These traditional livelihoods are based on detailed knowledge of the environment, and

\textsuperscript{14} Article 14(3). See, e.g., the Swedish Taxed Mountain Case, Supreme Court Judgement 1981. In Finland such claims have never been taken to court.


\textsuperscript{16} See also 2000 Manual 34–41.

\textsuperscript{17} Indigenous and tribal peoples should not be removed from their lands (Article 16). Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them (Article 17). Article 18 provides that adequate penalties shall be established by law for unauthorised intrusion upon, or use of, the lands of the peoples concerned. National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population (Article 19).
originate from generations of experience of caring for and using their traditional lands. In Norway, Sweden and Finland Sámi reindeer herding (as well as fishing and hunting) forms a traditional livelihood which is treated very differently in the national legislations.

But the traditional economies are not attractive to the young generations. In Finland, for example, about 1,000 Sámi are reindeer herders (of total 7,500 Sámi). This development can be a result of many different factors. The Convention, however, highlights the need to recognize indigenous and tribal peoples’ specific knowledge, skills and traditional technologies as basic factors in traditional economies and the need to strengthen and promote these economies with the participation of indigenous and tribal peoples. The Convention also requires States to provide enough land for the peoples concerned for their means of subsistence and to provide them with the necessary financial and technical assistance to enable them to maintain and develop their traditional economies in a sustainable way. According to the 2000 Manual, emphasizing the importance of traditional activities does not mean that indigenous and tribal peoples cannot seek work outside their communities, or take on new economic opportunities. It means that traditional activities are recognised as a very important part of indigenous and tribal peoples’ economies and cultures, and the Convention stresses the need for their protection.18

FLEXIBILITY AND ITS PROBLEMS

Many of the provisions in the Convention are qualified by terms such as “as appropriate”, “as necessary”, “wherever practicable” or “to the extent possible”. These terms provide flexibility to the Convention, although critics say that they may have the effect of limiting or obscuring the obligations of ratifying Governments.

The flexibility has lead to difficult questions of interpretation. In the Nordic countries there are conflicts of interest in many areas that touch upon difficult issues of treaty interpretation. The Sámi right to use land for reindeer herding, hunting and fishing in certain areas is poorly defined or not defined at all. In many cases these rights apply to land owned and used by other people. In Sweden, for example, ownership rights to parts of the mountain areas are a controversial issue. Sámi ownership rights to parts of this reindeer breeding area have only been examined by the courts in a few cases.

The conflicts that have arisen between the Sámi and landowners are a result of a series of circumstances for which neither party can be blamed. In Sweden, Finland and Norway the State has – from the mid 18th century and late 20th century – actively encouraged settlers and others to cultivate areas used exclusively by the Sámi for reindeer herding, fishing and hunting. The politicization of the Sámi question from the 1960s onwards has also led to stronger demands towards the nation states such as the demand to have their rights investigated and recognized, and not to be treated as a despised minority. The following chapters will shortly introduce the solutions realized and planned in Norway, Sweden and Finland in regard to ILO Convention No. 169.

C. THE FINNISH PLAN\textsuperscript{19}

1. A SLOW PROCESS

Rights of the Sámi people as an indigenous people and minority are limited in Finland. The law does not currently recognize any special rights to traditional livelihoods: reindeer herding, fishing and hunting, and they say little regarding their use of traditional lands and waters. About 90 per cent of the land in the Sámi homeland of northernmost Finland, where Sámi cultural autonomy is secured by law, is presently owned by the State; private owners own the rest. In the late 1980s new information was retrieved affecting the historical land right question. Kaisa Korpijaakko argued that the Lapps may have had an ownership to the land and water areas in northern part of Sweden-Finland in the 17\textsuperscript{th} and early part of the 18\textsuperscript{th} century.\textsuperscript{20} The Constitution Committee of the Finnish Parliament mentioned the same possibility in 1990. To clarify the situation, a State committee recommended in 1990 resolving unsettled questions by amending the law – unsuccessfully as it turned out. In 1993, the task of clarifying Sámi rights was given to the Sámi Delegation (the predecessor of the Sámi Parliament), and later passed on to the present Sámi Parliament.

A process to clarify the position was, however, initiated in the late 1990s. Progress has been slow and controversial. The State’s intention was to solve the question by political consensus through establishing bureaucratic organs to administrate the northern lands, which would remain in State hands. As consultations got under way, however, very few stakeholders had anything positive to say about it. After several reports and committee deliberations, the Ministry of Justice in 2003 appointed an academic research group to investigate the historical and current legal position of those State lands.

2. THE VIHERVUORI REPORT

In order for Finland to proceed towards ratifying the Convention, the Ministry of Justice decided in 1999 to invite Dr Pekka Vihervuori to prepare a report clarifying issues of land, waters, natural resources and traditional livelihoods in the Sámi homeland. The purpose of the report was not, however, to deal with the issue of land ownership. It report pays special attention to the obligations of the Convention and examines also the provisions of the national legislation in force. Finally, the report proposes modifications of the legislation concerning land use, but, as such, it does not advise on whether Finland should ratify the Convention.\textsuperscript{21}


\textsuperscript{20} Kaisa Korpijaakko: Saamelaisten oikeusasemasta Ruotsi-Suomessa (Helsinki: Lakimiesliiton kustannus 1989).

The report proposed, however, the founding of a Land Rights Council of the Sámi Homeland in connection with the Sámi Parliament. Four of the members of the Council would be nominated by the Sámi Parliament and four by the four municipalities of the homeland. In practice, the Sámi would have a leading role in the Land Rights Council. The Council would supervise the respect of the rights and interests of the Sámi and of the other local population relating to the use of the lands and waters in the homeland. The Council would have the right to speak and appeal in matters concerning the application of the laws on the use of the land and waters.

The report also proposed that a Land Rights Fund should be established and overseen by the Land Rights Council. A part of the income earned by the National Board of Forestry, the Forest Research Institute and the State’s Real Estate Office for their activities in the homeland would be given to the Fund. The resources of the Fund could be used for the development of the traditional livelihoods, for repairing damages caused by the use of the lands, and for the promotion of the interests of the Sámi. Between at least third and a half of annual revenues would be forwarded to the Sámi Parliament and at least a third to the municipalities in the homeland.

Introducing different kinds of provisions on new rights and limitations would modify the legislation on the use of the land and natural resources. The Reindeer Husbandry Area would be divided into two parts. In the part located in the Sámi Homeland, only what is termed ‘minor harm’ to reindeer husbandry interests would be tolerated, less, that is, than in the other part. In areas managed by reindeer-grazing associations, where at least half of the reindeer owners are Sámi, the right to graze reindeers would be granted only to the Sámi and other reindeer owners living in the area. The report could be criticized for not elaborating the meaning of ‘minor harm’.

3. Other reports

The Ministry of Justice requested opinions on the Vihervuori report from 57 different instances. The response covers a wide variety of viewpoints. There were also many proposals on how to proceed further. As a comment to the requested opinions the Ministry of Justice decided there was a need for more work before Finland could ratify the Convention. In that light, the Ministry in 2000 commissioned another legal expert, Dr Juhani Wirilander, to prepare a legal assessment from the perspective of real estate law on analyses so far made on the land ownership issues in the Sámi homeland.22 The Ministry also appointed a Sámi Commission with the task to assess whether it would be advisable to realize the proposals of the Vihervuori report, or whether they should be modified. The Sámi Commission’s proposals were to meet the minimum criteria of the Convention. The Governor of the Province of Lapland, Ms. Hannele Pokka, was appointed chairperson of the Commission.23

23 With members from the Ministries of Justice, Agriculture, Forestry and Finance, the National Board of Forestry, the four municipalities of the Sámi Homeland, the Sámi Parliament, the Skolt Sámi and the reindeer-grazer associations in the Sámi Homeland.
Wirilander’s study found no clear evidence of Lapp villages having owned the areas used by them in the mid-18th century. The report does say, however, that single families evidently had ownership over the special areas as fishing and hunting sites and herding areas in the mid-18th century. The Sámi Commission recommended continued State ownership of the land, but that an eleven-strong Directorate of Sámi Homeland should be established. The chairperson of this Directorate would be elected by the Government, five members each by the Sámi Parliament and the municipalities. Decision making would be made by a simple majority. This Directorate would have competence to decide on general guidelines on the use of State-owned land in the Sámi Homeland.

These proposals were not unanimous, and several dissenting opinions were submitted, including a joint dissenting opinion. The Sámi members of the Commission did not want to see the proposals implemented. The Ministry of Justice, however, proceeded to draft a Government Bill in 2002 to set up the Sámi Homeland Consultative Committee. Two alternative committee structures were suggested: One that was similar to the that of the Commission, and another where an extra member would be nominated by the reindeer-herding associations of the Sámi Homeland and where a two-third majority would make decisions.

Most comments on the proposals were critical, including those from the Sámi Parliament. Calls were made for thorough historical and legal research to clarify the unclear legal and historical situation. Given this response, the Ministry ‘buried’ its draft.

4. THE HISTORICAL AND LEGAL RESEARCH PROJECT

The Ministry of Justice then decided in early 2003 to commission a research project to study from a historical and legal perspective the settlement patterns, population history, land use and land ownership in the area of historical Lapland which at present is part of Finland. The research would concentrate on the period 1750–1923 and study 1) the legal situation of land use rights and land ownership in Finnish Lapland, 2) historical developments after Finnish settlers’ arrival to Lapland and 3) historical developments concerning the position of mountain and forest Sámi.

Source materials include legislation, court verdicts, and tax material, administrative materials (decisions of Governors, tax authorities, etc.); correspondence of authorities, and decisions made in connection of the establishment farms by the settlers. The research group consists of experts from the Universities of Oulu (history) and Lapland (law) and the work is estimated to be finished in the fall of 2005. The question of ratification of the Convention will be reconsidered after the project has submitted its findings.

D. RATIFICATION OF NORWAY IN 1990

I. AN EARLY PROPONENT FOR RATIFICATION

The Sámi rights process in Norway dates from the controversy of the Alta river power plant of the 1970s. A Sámi Rights Commission has been operative since 1980 with a task of clarifying and creating a basis for consolidation of the legal position of the Sámi in Norway. The Com-
mission’s report of 1984 included an extensive assessment of relevant international law, and led to the establishment of Sámi Parliament, elected for the first time in 1989, and the inclusion in the Constitution of Article 110a on the rights of the Sámi in 1988. Norway was the first country to ratify the Convention, and did so in 1990. When ratifying the Convention, there was an examination to make sure that there was no contradiction with Norwegian law. At the same time, ILO was informed that matters of Sámi land rights remained partly disputed and unsettled, and were under consideration by the Commission, with a view to possible changes in legislation.

2. Issues of Discussion

At the time of ratification, the Ministry of Justice did not question that there were areas in Norway that were “traditionally occupied” by the Sámi, and where their rights of “ownership and possession” should be recognised. However, contrary to the demands of Article 14(2), the Ministry did not identify the areas. Moreover, it interpreted the phrase “ownership and possession” narrowly, and concluded that a “protected right to use” was also covered by the phrase. As a result of this, the view in Norway in 1990 was that current regulations on the rights to land and natural resources fulfilled the requirements of the Convention. Norway’s understanding of the Convention has not been criticized by the ILO. In a comment on Norway, the ILO Committee of Experts has stated that

[it] does not consider that the Convention requires title to be recognised in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership by these peoples over the lands they occupy would always be consistent with the Convention.

The ILO organisation has shown an active interest in Norway’s process and asked to be kept informed of its progress. Thus, ILO has not given the Norwegian Government reason to doubt its interpretation of the land right articles of the Convention; it is rather their own Sámi rights process that has brought forward arguments and different points of view regarding the understanding of the Convention compared to alternative proposed changes in land administration and rights, especially in the county of Finnmark.
3. Recent Developments

The legal opinion of Norway’s ratification has been questioned, not only by the Sámi Parliament, but also by a number of legal experts, as well as the Sámi Rights Commission, which released two reports in January 1997. The first was compiled by the Commission itself. The second was a review by sub-committee of the Commission. This latter report points out that even if Article 14(1) does not require Sámi to be given title to the land they traditionally have occupied, they have to be given at least most of the powers enjoyed by an “ordinary” land owner. The sub-committee estimates that at least the Sámi heartland of Inner Finnmark (the Karasjok, Kautokeino and Upper Tana areas) was “traditionally” occupied by the Sámi, and perhaps also other areas where there were Sámi settlements and Sámi dominance of natural resources and their exploitation.

The Sámi Rights Commission recommended 1) transferring the land and non-renewable resources from the State to a newly established governmental council, Finnmark grunnforvaltning (Finnmark Land Management), with equal representation from the county council and the Sámi Parliament (four from each of them); 2) transferring most of the renewable resources from the State to the municipalities; and 3) giving the Sámi Parliament a delaying veto when Sámi interests are at stake. According to the sub-committee, it is not clear that even these proposals go far enough in recognizing Sámi rights of “ownership and possession”.

Consultation on the proposals set out in NOU 1997:4 continued to the end of 1999. Finnmark county assembly and the Sámi Parliament both pursued vigorous and thorough review. After a legal analysis and political discussions, legislative action was recommended. A bill was therefore prepared setting out the rights to and management of land and natural resources in Finnmark county. The bill was published in April 2003, and the Act passed 24 May, 2005.

The purpose of the Finnmark Act is to facilitate the management of land and natural resources in a balanced and ecologically sustainable manner in the best interests of the Sámi people, their culture, reindeer husbandry, economic and community interests, and of people in the country in general. The Act establishes the Finnmark Land Management Commission, an independent body stationed in Finnmark to oversee management of land and natural resources. The Commission will be governed by a Board of seven. Finnmark County Council and the Samediggi (Sámi Parliament) shall each elect three persons and their alternates. These members and their alternates must be resident in Finnmark. Among the members elected by the Samediggi, at least one (or his or her alternate) shall be a representative of the reindeer-herding industry. The seventh member and his or her alternate shall be appointed by the King in Council. Many criticized the bill. For example, the Sámi Parliament rejected it out

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28 E.g., Otto Jebens: Om eiendomsretten til grunnen i Indre Finnmark (Oslo, 1999.)
30 NOU 1997:5 Urfolks landrettigheter etter folkeretten og utenlandsk rett.
right, claiming it violated Norwegian legal precedent and national and international law on the rights of indigenous peoples.33

In the summer of 2003 the Norwegian Parliament commissioned Professors Hans Petter Graver and Geir Ulfstein of the University of Oslo to prepare a legal opinion on human rights and the proposed Finnmark Act.34 The proposed Finnmark Act, they say in their report, does not meet human rights legislation and commitments. Representatives of the Labour Party and the coalition in the Storting Justice Committee agreed however Monday 9 on May on a compromise for the wording of the Finnmark Act. A 25-year-long battle over the right to land and water in Norway's biggest county may have come to an end when the Act was discussed and approved in the Odelsting on 24 May 2005. This means that 96 percent of Finnmark's land area, an area the size of Denmark, will be transferred from the State to the citizens of the county.

E. INVESTIGATIONS IN SWEDEN

1. THE HEURGREN REPORT

In Sweden the Convention has been under consideration in the National Assembly (the Riksdag) for more than ten years. In 1997, the Government decided to appoint a one-man Commission with the task of examining whether Sweden should ratify ILO Convention No. 169 and the measures necessary for Sweden to be able to live up to its provisions. The Heurgren Report of 1999 – entitled “The Sámi – an indigenous people in Sweden”35 – concluded that Sweden fulfilled the treaty requirements in most respects, but that the land right articles might be problematic. The report also pointed out that, despite the fact that the Convention uses the expression “rights of ownership and possession”, this does not necessarily involve a formal title to the land. However, the Convention assumes that these land rights satisfy certain minimum requirements. In the Heurgren Report’s estimation, this minimum level corresponds to a right of use and possession of the land with strong protection under the law.36

The report also states that the rights to land enjoyed by the Sámi today do not meet these minimum requirements, since the Sámi are forced to tolerate serious infringements of their reindeer husbandry rights. For Sweden to fulfil these minimum requirements, the Sámi must enjoy the same protection against such infringements as applies to other land use rights. The report concluded that Sweden may ratify the ILO Convention No. 169, but that this should not occur before a number of measures relating to Sámi land rights were implemented:

First, the land to which the Sámi have rights under the Convention must be identified. This applies partly to land which, under the terms of the Convention, has traditionally been occupied

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33 Some the comments are found in English at http://www.samediggi.no/default.asp?selNodeID=313&lang=no. See, for example, Counsellor Sara’s speech to the UN, a statement by the Sámi Council, and a press release about the Finnmark Act (visited 11 November 2003).
34 Folkrettslig vurdering av Forslaget til ny Finnmarkslov.
by the Sámi, and partly land to which they have traditionally enjoyed right of usage jointly with others. A boundary commission should therefore be appointed to solve these issues. Second, a survey should decide the scope of Sámi hunting and fishing rights on land traditionally occupied by them. Third, the Sámi should be protected against infringements of their reindeer husbandry rights. On land traditionally occupied by the Sámi, they should be granted the right to transmit their hunting and fishing rights to others in exchange for payment. On land traditionally used by them together with others, greater protection against limitations on the right to reindeer husbandry is necessary. The Heurgren Report also suggested measures to ensure that the Sámi have enough land to sustain reindeer husbandry and that a mechanism be put in place that ensures compensation from the State for legal expenses in important cases of principle with respect to Sámi land claims. As an additional initiative, the report proposed a national information campaign on the Sámi as an indigenous people and on Sámi culture. Information specifying the effects of Swedish ratification on the parties involved was also needed.\(^{37}\)

2. Disputed issues

After the Commission’s report, statements from 60 different bodies were submitted. While they accepted the majority of the assessments and interpretations, many were critical of the Commission’s proposal to protect reindeer husbandry rights, which they considered too extensive and possibly, moreover, in contravention of the Swedish Constitution. It was maintained the proposed amendment would affect landowners unreasonably severely and impair or completely inhibit their ability to manage their forestry interests. Many also pointed out the lack of clarity in the interpretation of the Convention and that this would lead to uncertainty about the effects of implementing the Convention in Sweden.\(^{38}\)

Regarding the establishment of a boundary commission to define the geographical boundaries of land rights and a commission to survey the extent of hunting and fishing rights, most opinions were positive. There was agreement on the necessity of a definition of the legal position on these issues. Those who were critical of Swedish ratification believed it would have serious consequences for the majority of the population because there would be more intensive protection of Sámi land rights and the Sámi would have proportionately greater influence over hunting and fishing than other groups. Stronger protection of Sámi reindeer husbandry rights and increased influence over hunting and fishing would lead to serious long-term difficulties for the forestry and agriculture sectors and reduce the opportunities for hunting and fishing for the majority of the population. Reindeer-owning Sámi would be favoured at the cost of the rest of the population. It was feared that such a development would create conflicts between reindeer-owning Sámi and others. It was also felt that a more detailed analysis should be made on how ratification would affect tourism and opportunities for mineral extraction. Even Sámi groupings requested more extensive impact analyses, particularly on the impact on non-reindeer owning Sámi.\(^{39}\)

\(^{38}\) Unpublished seminar paper by Göran Ternbo, Department Secretary in the Swedish Ministry of Agriculture, Rovaniemi, Finland 5 May 2001.
\(^{39}\) Ibid.
Arguments against ratification were informed primarily by the ongoing controversies surrounding the use of land in parts of the reindeer husbandry area. For the Convention to be ratified, it was thought necessary to define at least the outer reindeer husbandry boundaries more clearly than they are at present. If these boundaries were not clearly defined, it would be difficult to establish exactly where the Convention’s provisions for protection of land rights should apply. One must also emphasize that boundary identification by a boundary commission will not preclude a person’s right to bring the dispute before a court of law. Against this background the Swedish Government appointed a boundary commission consisting of a group of experts specialized in law (property law), land surveying and legal history. It is estimated that this commission will be able to complete its assignment within a three-year period. After this survey the Government will return to the issue of ratification of ILO Convention No. 169.40

In a recently published book, Bertil Bengtsson summarizes the situation in Sweden at the moment.41 He goes through the historical issues of land ownership, the meaning of reindeer herding and the immemorial rights in the area. He also examines the environmental questions related to reindeer herding and finally gives comments of ILO Convention.

F. CONCLUSION

The Governments of Finland, Norway and Sweden have progressed in their investigations into Sámi rights in recent years. While this is perhaps the result of national and international pressure from the indigenous peoples themselves, it also a result of improved and wider knowledge of the issues. It is reasonable to ask whether these solutions, planned or implemented so far in these countries, actually fulfill the requirements set down in the Convention. The legal status of the Convention’s core provisions is still unclear on the matter of special indigenous land and self-determination rights and a system for their management.

It seems that countries have taken steps to establish new political bodies with representation from the indigenous communities and other local interests before the basic legal questions have been solved and the rights recognized. Shouldn’t it be vice versa? Solutions thus far adopted have an ethno-political purpose and perspective. They would not necessarily entail protection for the traditional livelihoods practiced in the area. Members of land right councils may have very disparate interests. Ratification of an international treaty such as ILO Convention No. 169 should, it could be argued, not be an absolute value but a benchmark for rights that have already been fulfilled.

In the Nordic countries governmental and Sámi representatives have firmly supported ratification of the ILO Convention No. 169, seeing it as an important step towards international standards of indigenous rights, although there is disagreement between the them on the interpretation of land rights. There was little cooperation between the Nordic countries when preparing ratification of the ILO Convention. The States in question have wanted to find their

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40 SOU 1999:25; and unpublished Seminar paper by Göran Ternbo, Department Secretary in the Swedish Ministry of Agriculture, Rovaniemi, Finland 5 May 2001.
own ways to solve the issues, although each country has closely followed proceedings in the others. The main problem remains the same in every country: how to solve the question of land rights? Taking advantage of the flexibility of the Convention, each country has taken different approach to ratification. The questions are difficult, they concern many people, they generating strong feelings and political views.

Critics of ILO Convention No. 169 are concerned with how the Convention was drawn up: Indigenous peoples were not officially represented at the negotiations so they had no rights to speak or voting rights on the rules being drawn up. They were also denied the right to self-determination under international law (Art. 1.3). However, according to the ILO Manual, the Convention No. 169 does not place any limitations on the right to self-determination. It is compatible with any future international instruments which may establish or define such a right. Indigenous peoples also argue that, under Article 8, indigenous customs and institutions can be too easily overridden by the government in the name of other laws of the country. And finally, it is interpreted that the land right articles only recognise rights over land currently used and occupied by indigenous peoples; they don’t recognise rights over land which they used to occupy and but were taken from them through colonisation. The primary argument in favour of ratification is that, while the Convention may not be the best solution, it is better than anything else available. This is because it actually identifies indigenous peoples’ rights which are not specified anywhere else in international law, nor indeed in many countries’ domestic laws, either. Ratification by a country could therefore give the indigenous peoples in that country more rights than they have at present.