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ON THE FRINGES OF EUROPE: EUROPE'S LARGELY FORGOTTEN INDIGENOUS PEOPLES

*Dr. Rainer Grote**

I. Introduction

The concept of “indigenous peoples” or “indigenous minorities” is rarely used with regard to the original inhabitants of certain territories in Europe which, at a later stage in history, were invaded, either belligerently or peacefully, by groups of different ethnic origin whose descendants today form the politically, economically and culturally dominant majority population of the respective territories. The reason for this absence of the indigenous peoples from the European discussion is not hard to detect. The plight of indigenous peoples in many parts of the world, especially in the Americas, Australia and New Zealand, is the result of the conquest and colonization of overseas territories by Europeans and their descendants from the late fifteenth century onward, a process which in some cases continued until the late nineteenth century. A similar process of internal colonization took place in Europe a long time ago. European nations emerged in a complex historical process which was characterized by the reception of important elements of Roman and Greek legal and political thinking, the adherence to Christianity and the protracted power struggles between competing feudal lords and dynastic rivals which were later replaced by the intense rivalry between sovereign nation states.

Most European nations and states trace their early origins to the end of the Roman Empire and the invasion of formerly Roman territories by Germanic tribes, which then started their slow transformation into Christian kingdoms and principalities. While conquest and exchange of territories continued to take place between European rulers and states for a long time, they occurred against a background of considerable political, religious and cultural

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homogeneity which made the criteria of indigenous and non-indigenous seem largely irrelevant. Although problems could, and did, result from the redrawing of political boundaries which took place from time to time as a result of war and conquest, these problems were not viewed in terms of protecting an "indigenous" way of life of the conquered population against the pervasive influence of their new rulers, but rather were viewed as protecting the existence and certain rights of religious minorities and, since the nineteenth century increasingly, of national minorities.¹ While colonial expansion still took place in modern Europe, it was largely limited to the far north and the far east of Europe, such as the border areas of Norway, Sweden and Finland and to eastern ranges of Russia and later the Soviet Union.²

It is therefore highly uncommon to speak of "indigenous peoples" when referring to certain native populations living in the center, the west and the south of Europe, even if some of them might *prima facie* fit the description of indigenous peoples in International Labor Organization Convention 169 (ILO Convention No. 169).³ In Germany, for example, "[t]he Sorbs have lived in Lusatia [a region which today forms part of the federal state of Saxony,] since 600 A.D., when Slavic tribes settled in the area between the Baltic Sea and the Erz Mountains, which had been largely depopulated by the out-migration of Germanic tribes."⁴ Since the Sorbs' settlement area was placed under German rule in the tenth century and the way was paved for the German colonization of the area, "the Sorbs — a West Slavic people — have been living together with the German population for about one thousand years."⁵ Although they have managed to retain some elements of distinct Sorbian culture, most importantly the Sorbian language which is written and spoken by 35,000, out of an estimated 60,000, Sorbs,⁶ it would be highly unusual to speak of these, or other, minorities living in Central Europe as "indigenous" populations or peoples. They are subsumed under the broader

1. For an historical overview, see PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* 25-37 (1991); STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 76-96 (1999).

2. *See infra* Part II.

3. International Labor Organization [ILO] Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, art. 1(a), June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

4. Council of Europe, *Report Submitted by Germany*, ACFC/SR(2000)1, at pt. I.4.2 (Feb. 24, 2000), available at <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/StateReports/2000/germany/german.html>.

5. *Id.*

6. *Id.*

heading of “national minorities,” which in Europe has become the central — although vaguely defined — conceptual focus for different attempts at protection.

This development has also had important consequences for the concepts and procedures which are commonly used in legal debate to address the problems related to the definition of the status and rights of indigenous peoples. While the protection of ethnic, national, linguistic, and other minorities has received increasing attention from European politicians, lawyers and scholars after the end of the Cold War, and has even been made the object of a specific regional framework convention drafted under the auspices of the Council of Europe,⁷ the situation and the needs of indigenous minorities have not been identified as a separate matter for concern in this debate. Since there is a widespread consensus today that the recognized principles and standards of minority protection do not adequately reflect the specific needs and concerns of indigenous peoples, this means that there is a lack of adequate rules and procedures with regard to the protection of indigenous peoples at the European level.⁸ A genuine prospect for a change for the better seems to exist only at the regional level.⁹

Part II of this essay examines existing relationships between European states and recognized indigenous groups in those regions, with particular emphasis on the Saami people of Sweden, Finland, Norway and Russia. It will also examine the current limitations of existing European Union law and policies regarding indigenous peoples. Part III provides a survey of current regional instruments with regard to the protection of indigenous rights, noting how Europe's history of protection of national minority rights, which was ultimately subsumed by national sovereignty concerns, created a paradigm that led to a limited recognition of minority rights to individuals, rather than to groups. Thus, existing regional instruments have limited relevance and are woefully inadequate in addressing the needs of European indigenous peoples. Part IV presents the Nordic Saami model as a potential model for creating an international monitoring body to effectively implement indigenous rights in Europe.

7. Rainer Hofmann, *The Framework Convention for the Protection of National Minorities: An Introduction*, in *THE RIGHTS OF MINORITIES IN EUROPE: A COMMENTARY ON THE EUROPEAN FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES* 1, 2-3 (Marc Weller ed., 2005) [hereinafter *RIGHTS OF MINORITIES IN EUROPE*]; Patrick Thornberry, *The Framework Convention on National Minorities: A Provisional Appraisal and a Memory of the Baltic States*, 2 *BALTIC Y.B. INT'L L.* 127 (2002).

8. See *infra* Part III.

9. See *infra* Part IV.

II. Indigenous Peoples in Europe

When the term “indigenous peoples” is used in the current European debate, it is mainly restricted to the native populations living at the far ends of Europe:¹⁰ the Saami people, who live in the far north of Finland, Norway, Sweden and Russia;¹¹ the Inuit living in Greenland;¹² and the forty or so indigenous groups living in the Russian North and Siberia, which form part of the “Common List of Indigenous Small Peoples of Russia” approved by the government of the Russian Federation in March 2000.¹³ In those European countries where indigenous peoples live, national governments have sometimes found ways to side-step international obligations concerning the treatment of those groups and to escape international scrutiny. Finland, Sweden and Russia have not yet ratified ILO Convention No. 169, thus avoiding any obligations which might result from the Convention with regard to the treatment of their indigenous peoples. Denmark and Norway, on the other hand, have both ratified the Convention, but seem to have interpreted its provisions in a manner which has deprived their indigenous populations of the full enjoyment of its benefits, particularly with regard to land rights.

While Norway and Finland have acknowledged the status of the Saami people as indigenous peoples of their countries in their reports to international human rights bodies like the Committee on the Elimination of Racial Discrimination (CERD), Sweden continues to deal with these indigenous people under the heading of “national minorities.”¹⁴ In Norway, the Saami

10. See Asbjørn Eide, *The Framework Convention in Historical and Global Perspective*, in *RIGHTS OF MINORITIES IN EUROPE*, *supra* note 7, at 25, 43.

11. See Lauri Hannikainen, *The Status of Minorities, Indigenous Peoples and Immigrant and Refugee Groups in Four Nordic States*, 65 *NORDIC J. INT'L L.* 1 (1996); Gudmundur Alfredsson, *The Rights of Indigenous Peoples with a Focus on the National Performance and Foreign Policies of the Nordic Countries*, 59 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 529 (1999), available at http://www.zaoerv.de/59_1999/59_1999_2_a_529_542.pdf.

12. See Isi Foighel, *Home Rule in Greenland: A Framework for Local Autonomy*, 17 *COMMON MKT. L. REV.* 91 (1980); Hannikainen, *supra* note 11; Alfredsson, *supra* note 11.

13. Council of Europe, *Second Report Submitted by the Russian Federation*, Annex 3, ACFC/SR/II(2005)003 (Apr. 26, 2005), available at <http://www.coe.int/t/e/human%5Frights/minorities/> (follow “State Reports” hyperlink under “Framework Convention (Monitoring)” subhead; then follow “Second Cycle” hyperlink) [hereinafter *Second Russian Report*].

14. CERD, *Sixteenth Annual Reports Submitted by States Parties Under Article 9 of the Convention: Addendum: Sweden*, ¶ 42, U.N. Doc. CERD/C/452/Add.4 (Sept. 24, 2003).

have been granted a constitutional right to preserve their culture¹⁵ and special statutory property rights in the northernmost province of Finland. Similarly, “[t]he Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties of the Russian Federation.”¹⁶ The right of these peoples “to preserve and develop their native language, traditions and culture is enshrined in the Federal Laws on the Languages of the Peoples of the Russian Federation and on National and Cultural Autonomy.”¹⁷ However, each State continues to apply its own national laws to the indigenous peoples living within its boundaries, which are administered by its respective domestic court systems. This makes it difficult to find and to apply coherent solutions for those indigenous groups who live and reside in different national territories, like the Inuit, who have settled in the Arctic regions of Alaska, Canada and Greenland, or the Saami, whose places of settlement are divided among Norway, Sweden, Finland and Northern Russia.

At the level of the European Union (EU), a policy on indigenous peoples has only recently been developed. The starting point was a May 1998 working document of the European Commission on support for indigenous peoples. This was rapidly followed by the adoption of a Council Resolution calling for concern for indigenous peoples to be integrated into “all levels of development cooperation”¹⁸ and encouraging full participation of indigenous peoples in the democratic processes of their respective countries in accordance with an approach that recognizes their own diverse concepts of development and “the right to choose their own development paths.”¹⁹ However, this policy aims principally at integrating indigenous concerns into EU development policies and cooperation with third countries. The policy does not, yet, have an internal dimension. In particular, it does not authorize

15. CONST. OF THE KINGDOM OF NOR. art. 110a, *available at* http://www.servat.unibe.ch/law/icl/no00000_.html (“It is the responsibility of the authorities of the State to create conditions enabling the Saami people to preserve and develop its language, culture and way of life.”).

16. Konstitutsiia Rossiiskoi Federatsii [Konst. RF] [Constitution] art. 69 (Russ. Federation), *available at* <http://www.russian.embassy.org/RUSSIA/CONSTIT/chapter3.htm>.

17. *See Second Russian Report, supra* note 13, at 7.

18. Council of Ministers, European Union, Council Resolution of 30 November 1998: Indigenous Peoples Within the Framework of the Development Cooperation of the Community and the Member States ¶ 6, *available at* http://ec.europa.eu/comm/external_relations/human_rights/ip/res98.pdf.

19. *Id.* ¶ 5.

the EU to intervene in the domestic affairs of its Member States to improve or extend the protection of indigenous rights at the national level.

Protocol No. 3 to the Accession Treaty of Sweden and Finland with the European Union explicitly mentions Saami rights linked to their traditional means of livelihood, most notably their right to reindeer husbandry.²⁰ However, the aim of the Protocol is to provide a legal basis for the modification of the European Community Treaty,²¹ especially with regards to the chapters on free trade in goods and services and on agriculture. Such modification, or amendment, may become necessary as a result of new members granting the Saami certain exclusive economic rights in order to sustain their traditional way of life, such as in the field of reindeer husbandry. It does not try to impose a certain minimum standard of treatment of the Saami as a precondition for membership. Whether, and to what extent, special economic rights are granted by Sweden and Finland to the Saami people remains the exclusive decision of those countries.

The EU Charter of Fundamental Rights, which was adopted at the Summit of Nice in 2000, does not specifically address the concerns of indigenous peoples.²² Instead, the Charter limits itself to reaffirming the general principle of non-discrimination²³ and to explicitly recognizing the cultural, religious and linguistic diversity of the Union.²⁴ Although the representatives of the Saami people had urged the members of the European Convention to include a special provision in the text on the framework and structure of the European Union on the right of the Saami people as an indigenous people to maintain and develop their own society, language and culture, no such guarantee appears in the final version of the treaty. The treaty does not go beyond a reaffirmation of the Union's commitment to the respect for the "traditional" human rights, "including the rights of persons belonging to minorities."²⁵

20. Accession Treaty of Sweden and Finland with the European Union, Protocol No. 3, Aug. 29, 1994, 1994 O.J. (C 241) 352.

21. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3.

22. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1. The Charter still lacks legally binding force. Its status remains unclear after the Constitutional Treaty for the European Union, which would have given it binding effect in the Union, was rejected by France and the Netherlands and will not enter into force in its original version.

23. *Id.* art. 21.

24. *Id.* art. 22.

25. Treaty Establishing a Constitution for Europe, art. I-2, Dec. 16, 2004, 2004 O.J. (C 310) 1.

III. Limited Relevance of Existing Regional Instruments with Regard to the Protection of Indigenous Rights

A. European Convention on Human Rights

The first instrument to which one would turn for the protection of indigenous rights is the European Convention on Human Rights,²⁶ which today is not only the most important regional human rights convention but also the most important example for an effective fundamental rights protection at the supranational level. However, the European Convention was conceived in the immediate post-war period, at a time when the protection of minority and group rights was not on the international human rights agenda and was even viewed by many as an insurmountable obstacle to any successful attempt of establishing an effective international human rights monitoring regime. It is, therefore, not surprising that the European Convention reflects the highly individualistic approach to fundamental rights protection of the "classic" liberal tradition: the rights granted by the Convention are those of the individual, and not those of any particular group to which the individual belongs.

An indirect reference to group affiliations is found in Article 14, which prohibits discrimination of individuals in the exercise of their Convention rights on grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."²⁷ This provision indirectly protects the individual's freedom to associate with religious, national or social groups; an individual's membership in these groups may not be used as a justification to deny his or her Convention rights. But this protection is purely "negative;" it protects the individual against state interference in the individual's Convention rights which are based on the individual's membership status in a group. By no means does it protect the existence or the rights of the group itself.

Although the Convention has been amended by a series of protocols which have extended the number and scope of the substantive rights protected by the Convention, this has not involved any change in its basic approach to fundamental rights protection which remains focused on the individual and

26. Convention for the Protection of Human Rights & Fundamental Freedoms [European Convention on Human Rights] as Amended by Protocol No. 11, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221.

27. *Id.* art. 14.

has little, if any, regard for the rights of the group. Some individual rights may still be used to defend certain indigenous practices or institutions, like the freedom of religion,²⁸ the freedom of assembly,²⁹ or even the right to property.³⁰ However, so far, the Convention's impact on the protection of indigenous peoples' rights has been very limited, more limited than that of Article 27 of the UN Covenant on Civil and Political Rights,³¹ which has been used, at least in some cases, by domestic courts in order to protect Saami economic and cultural rights.³² There is, as yet, no ruling by the European Court of Human Rights on the scope of the Convention rights with regard to indigenous peoples.³³

28. *Id.* art. 9.

29. *Id.* art. 11.

30. See Protocol to the Convention for the Protection of Human Rights & Fundamental Freedoms, Mar. 20, 1953, art. 1, 213 U.N.T.S. 262.

31. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 27, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

32. See Supreme Court of Finland, No. 117 (June 22, 1995) and Supreme Admin. Ct. of Finland, Nos. 692, 693 (Mar. 31, 1999), *cited in* S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 209-10 n.60 (2d ed. 2004).

33. So far, only two cases seem to have come either before the Commission (before 1998) or the Court. In *Könkämä v. Sweden*, App. No. 27033/95 (Eur. Comm'n H.R. 1996), the applicant villages claimed that the challenged Swedish legislation, which had declared traditional Saami hunting grounds to be accessible and open for all Swedish citizens, infringed the exclusive hunting and fishing rights which the Saami had exercised in the areas concerned on the basis of immemorial custom and, thus, violated the right to peaceful enjoyment of their possession protected by Article 1 of Protocol No. 1 to the European Convention on Human Rights. The Commission accepted that fishing and hunting, together with reindeer husbandry, were essential elements of traditional Saami culture and, thus, could be considered as possessions within the meaning of Article 1 of Protocol 1. However, the Commission declared the case to be inadmissible for failure of the applicants to pursue their claims through the ordinary Swedish courts (rather than through the Swedish Supreme Administrative Court to which the Saami villages had submitted a complaint which had been dismissed on technical grounds). The case of *Muonio Saami Village v. Sweden*, App. No. 28222/95 (Eur. Ct. H.R. Feb. 15, 2000) concerned a claim by the applicant village that permits for reindeer herding had been granted by the competent government agencies in disregard of the village's rights in respect of reindeer herding and that these rights had not been properly determined by the domestic courts, in violation of Article 6 of the Convention. The Court decided to strike the case out of the list after a friendly settlement had been reached by the parties under which the Swedish Government agreed to pay, *ex gratia*, the sum of SEK 65,000 to Muonio Saami Village for the alleged violation of its rights in respect of reindeer herding.

B. Framework Convention for the Protection of National Minorities

Although Europe has a long history in the protection of minority rights, it was not until 1995 that a Framework Convention for the Protection of National Minorities was adopted by the Council of Europe and opened for signature by member States.³⁴ After the Treaty of Westphalia it became common to include provisions regarding treatment of religious minorities in any major peace treaty. In the seventeenth and eighteenth centuries it was usual for a new sovereign taking over a territory to pledge to respect the existing rights in matters of religion hitherto enjoyed by the population in the newly acquired territories.³⁵ From the nineteenth century onward, the focus of international minority protection switched from religious to ethnic and national minorities. International efforts to guarantee minority rights culminated in the peace treaties that settled the First World War.³⁶ The new states created in Central and Eastern Europe, or states that had their boundaries redrawn following the war, signed agreements or made unilateral pledges concerning the treatment of national and religious minorities living within their respective territories. The implementation of those treaty provisions was subject to international monitoring and enforcement mechanisms established within the League of Nations. However, since the victorious allied powers did not accept any binding commitments for the protection of minorities within their own societies, the credibility of the minority protection system set up in Versailles suffered from its asymmetrical character right from the start. States with large national or ethnic minorities living within their boundaries soon began to view obligations resulting from the minority treaties as a threat to their own domestic stability. The breakdown of the system in the years preceding the Second World War greatly contributed to the dominant view of the post-war years that the establishment of an international system for minority protection, backed by corresponding monitoring and enforcement mechanisms, constituted a dangerous and intolerable infringement of national sovereignty.³⁷

To a considerable extent, this view still influences the Framework Convention for the Protection of National Minorities of the Council of

34. Council of Europe, Framework Convention for the Protection of National Minorities, Feb. 1, 1995, 34 I.L.M. 351 (1995) [hereinafter Framework Convention].

35. Thornberry, *supra* note 1; KRASNER, *supra* note 1, at 77-84.

36. See Thornberry, *supra* note 1, at 38-52.

37. INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 30-31 (1955).

Europe. Although Article 1 of the Convention stresses that the protection of national minorities falls within the scope of international cooperation and, thus, is not part of the reserved domain of States,³⁸ the Convention leaves the member States a wide margin of discretion in implementing their (limited) obligations. To begin with, the Framework Convention contains no definition of the notion "national minority."³⁹ It is up to the States themselves to decide which of the groups living on their territory they are prepared to recognize as "national minorities," subject to the general principle that the distinctions made should not be arbitrary or irrational.⁴⁰ While, in general, indigenous peoples have been recognized as "national minorities" for the purposes of the Framework Convention by the relevant States (for example, Sweden, Norway, Finland, and Russia),⁴¹ Denmark has persistently argued that the Inuit in Greenland constitute the majority population of that territory, enjoying considerable powers of self-government under existing home rule arrangements, and can, therefore, not be considered as a minority under international law in general and the Framework Convention in particular.⁴²

The Framework Convention protects a number of rights of persons belonging to national minorities, namely the right of equality before the law;⁴³

38. Framework Convention, *supra* note 34, art. 1.

39. Hans-Joachim Heintze, *Article 1, in RIGHTS OF MINORITIES IN EUROPE*, *supra* note 7, at 77, 82.

40. Hans-Joachim Heintze, *Article 3, in RIGHTS OF MINORITIES IN EUROPE*, *supra* note 7, at 107, 111-12.

41. The Saami people are considered national minorities in Sweden. Declaration of Sweden Contained in the Instrument of Ratification Deposited on 9 February 2000, available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=8&DF=08/02/05&CL=ENG&VL=1> (scroll down to "Sweden"). The pertinent observations of Finland, Norway and the Russian Federation on existing minorities, within the meaning of Article 3 of the Convention, can be found in their first state reports: Council of Europe, *Report Submitted by Finland*, ACFC/SR(1999)003 (Feb. 16, 1999); Council of Europe, *Report Submitted by Norway*, ACFC/SR(2001)001 (Mar. 2, 2001); Council of Europe, *Report Submitted by the Russian Federation*, ACFC/SR(1999)015 (Mar. 8, 2000). The state reports can be accessed at Council of Europe, Human Rights, National Minorities, <http://www.coe.int/t/e/human%5Frights/minorities/> (follow "State Reports" hyperlink under "Framework Convention (Monitoring)" subhead; then follow "First Cycle" hyperlink) (last visited Feb. 7, 2007).

42. *See, e.g.*, Council of Europe, *Report Submitted by Denmark*, ACFC/SR(1999)009, at 12 (May 6, 1999), available at <http://www.coe.int/t/e/human%5Frights/minorities/> (follow "State Reports" hyperlink under "Framework Convention (Monitoring)" subhead; then follow "First Cycle" hyperlink) (stating that "the populations of these territories [Faroe Islands and Greenland] are not under international conventions defined as minorities of Denmark"). *But see* Alfredsson, *supra* note 11, at 531 (taking a critical view of this approach).

43. Framework Convention, *supra* note 34, art. 4.

the right to maintain and develop their culture;⁴⁴ the right to freely express themselves in their minority language;⁴⁵ the right to learn his or her minority language and — subject to certain conditions — to be taught in this language;⁴⁶ and the right to maintain cross-border contacts with people that share their ethnic, cultural or linguistic heritage.⁴⁷ On the other hand, social and economic rights, which are of particular importance for the maintenance of the traditional livelihoods of indigenous peoples, are barely mentioned in the Convention. Article 15 meekly speaks of the parties' obligation to "create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."⁴⁸

As the wording of the different provisions makes clear, the rights regulated by the Convention are those of the persons belonging to national minorities, not those of the minorities themselves. Although they may exercise their rights in community with others, the emphasis is clearly on the protection of individuals and not of groups as such. In other words, the Convention sticks to the concept, as well as to the language, of individual rights and does not address the issue of collective rights.⁴⁹ It is exactly the category of collective rights, however, which is of particular relevance to the needs and concerns of indigenous peoples. The disregard for the collective dimension of rights, together with the absence of any substantial reference to the rights to land and natural resources, greatly reduces the significance of the Convention for the protection of indigenous rights. The issue of self-determination, which is central to the struggle of indigenous peoples for the right to autonomously decide their path to development, is completely absent from the text of the Convention.

The limited relevance of the Convention to the protection of indigenous rights in the cultural and linguistic field is further weakened by the way in which the treaty provisions are formulated. Often they do not impose precise and binding obligations on the State but rather set out some general principles or guidelines to be followed by States in the regulation of minority rights in the relevant area. For example, there is no unconditional right for persons belonging to a national minority to be taught in their native language. Rather,

44. *Id.* art. 5.

45. *Id.* art. 9.

46. *Id.* art. 14.

47. *Id.* art. 17.

48. *Id.* art. 15.

49. Heintze, *Article 1*, *supra* note 39, at 81, 85.

the States "shall endeavour to ensure, as far as possible and within the framework of their [existing] education systems that persons belonging to those minorities have adequate opportunities for being taught the minority language."⁵⁰

The same timid approach to minority protection underlies the monitoring system set up by the Convention. The main obligation of the State Parties is to periodically report to the Council of Europe "on the legislative and other measures taken to give effect to the principles set out in [the Framework] Convention."⁵¹ The reports shall be evaluated by an Advisory Committee, which shall consist of recognized experts in the field of minority protection.⁵² No provision is made for the representation of the relevant minorities on the Committee, or for the rights to address petitions or complaints to the Committee. According to the Convention text, the minorities themselves and their representatives have no formalized right of participation or "standing" in the procedure monitoring the implementation of the Convention. Nor is the application of the Convention subject to the jurisdiction of European Court of Human Rights,⁵³ although the Court has taken into consideration the standards defined in the Framework Convention for the treatment of minorities in cases which concern the application of certain Convention rights like Article 8 to members of such minorities.⁵⁴

IV. The Need for Separate Protection: The Nordic Saami Convention as a Possible Model

The preceding observations have shown that the concept of minority protection as it is currently understood and implemented within the Council of Europe does not sufficiently consider the special needs and concerns of indigenous peoples. Minority rights are predominantly conceived as a means of allowing individuals to retain their separate group identity while participating fully in the life of the larger society. Indigenous rights, on the other hand, are not primarily linked to the participation in the larger society

50. Framework Convention, *supra* note 34, art. 14(2).

51. *Id.* art. 25(1).

52. *Id.* art. 26(1).

53. This point is emphasized in Council of Europe, *Framework Convention for the Protection of National Minorities and Explanatory Report*, at 11, 15, Doc. No. H(1995)010 (1995).

54. See *Chapman v. United Kingdom*, App. No. 27238/95, ¶ 96 (Eur. Ct. H.R. Jan. 18, 2001), available at http://www.coe.int/t/dg3/romatravellers/jurisprudence/caselaw/CHAPMAN_en.asp (discussing Gypsies as a minority).

but should grant indigenous groups a substantial degree of autonomy in deciding their own way towards development, including the right to maintain a culture which is separate from the majority culture as well as from the cultures of other groups in society. At the universal level, this need for particular protection is reflected in ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples. At the European level, the draft of a Nordic Saami Convention, which is currently under consideration by the Swedish, Norwegian and Finnish governments, pursues a similar purpose.

A. Structure of the Draft Convention

The preamble of the Nordic Saami Convention recognizes the Saami people as *the* indigenous people of the three prospective member States of the Convention, of Finland, Norway and Sweden, and acknowledges the essential unity of the Saami as *one* people residing across national borders.⁵⁵ The three States reaffirm that they “have a national as well as international responsibility to provide adequate conditions for the development of Saami culture and society,” and explicitly recognize that “the Saami people has the right of self-determination.”⁵⁶ Moreover, “in determining the legal status of the Saami people, particular regard shall be paid to the fact that . . . the Saami have not been treated as a people of equal value, and have thus been subjected to injustice” in the past.⁵⁷ This clause may serve as a basis for certain types of affirmative action in favour of the Saami in the future.

The text of the Convention itself is subdivided into seven chapters which deal with the general rights of the Saami people, Saami governance, Saami language and culture, Saami right to land and water, Saami livelihoods and the implementation and development of the Convention. The last chapter contains provisions on the entering into force of and the amendment of the Convention. The Convention is subject to ratification, which is only complete after the three Saami parliaments in Finland, Norway and Sweden

55. Nordic Saami Convention pmbl. (submitted Nov. 2005). An unofficial English translation of the Convention is available at [http://www.saamicouncil.net/includes/file_download.asp?deptid=2213&fileid=2097&file=Nordic%20Saami%20Convention%20\(Unofficial%20English%20Translation\).doc](http://www.saamicouncil.net/includes/file_download.asp?deptid=2213&fileid=2097&file=Nordic%20Saami%20Convention%20(Unofficial%20English%20Translation).doc) (last visited Feb. 7, 2007) [hereinafter Nordic Saami Convention].

56. *Id.*

57. *Id.*

have given their approval.⁵⁸ Amendments to the Convention must also be submitted to the Saami parliaments for approval.⁵⁹

The rights laid down by the Convention are minimum rights and do not prevent the member States from granting the Saami additional or extended rights or from taking more far-reaching measures for the protection of Saami culture and society.⁶⁰ In member States where more far-reaching rights exist already, the Convention may not be used as a legal justification for the limitation of those rights.⁶¹

The persons who are to benefit from the rights guaranteed by the Convention are defined in Article 4. The relevant criteria used to determine the association with the Saami people are language, means of livelihood, political status and descent.⁶² For the purposes of the Convention, persons who are to be considered as Saami are those who speak the Saami language as their domestic language,⁶³ who “have a right to pursue Saami reindeer husbandry in Norway or Sweden,”⁶⁴ who are “eligible to vote in elections to the Saami parliament” in their country of nationality⁶⁵ or who are the children of a person who fulfils one of these requirements.⁶⁶

B. Right of Self-Determination

The central right guaranteed to the Saami, in Chapter I of the Convention, is the right of self-determination. According to Article 3, however, this right is not only subject to the general rules and provisions of international law regarding self-determination, but also to the provisions of the Convention. Without giving a comprehensive definition of the right of self-determination, Article 3 lists the right of the Saami people “to determine [their] own economic, social and cultural development” and the right to dispose of their natural resources for their own benefit as the key features of the right to self-determination as recognized by the Convention.⁶⁷ Since the provision does not mention the right of the Saami to determine their *political* development, it is safe to assume that self-determination under the Convention does not

58. *Id.* art. 49.

59. *Id.* art. 51.

60. *Id.* art. 8.

61. *Id.*

62. *Id.* art. 4.

63. *Id.* art. 4(1).

64. *Id.* art. 4(2).

65. *Id.* art. 4(3).

66. *Id.* art. 4(4).

67. *Id.* art. 3.

give a right to secession. This interpretation is confirmed by Article 1, which states that “[t]he objective of this Convention is to affirm and strengthen such rights of the Saami people that are necessary to [its development], . . . with the smallest possible interference of national borders.”⁶⁸ Nor would such a restrictive interpretation be contrary to the prevailing concept of self-determination in current international law, which recognizes a right to secede as a necessary and lawful consequence of self-determination only in those cases in which the people concerned are denied any meaningful participation in the domestic political process.⁶⁹

The rights of self-government of the Saami people are regulated by Chapter II. As “the highest representative body of the Saami people”⁷⁰ in each of the participating countries, the Saami parliament is the main body competent to exercise those rights. The members of the Saami parliaments are elected in general elections.⁷¹ The draft Convention does not contain any specific provisions on the matters which shall be determined by the Saami parliaments and the powers they shall be given for this purpose. The precise definition of their tasks and powers is left to the member States. The Convention only establishes the general principle that Saami parliaments shall be given “such a mandate that enables them to contribute effectively to the realization of the Saami people’s right to self-determination” under international law and the Convention.⁷² Accordingly, they are granted the right to “make independent decisions on all matters where they have the mandate to do so under national or international law.”⁷³ The Convention thus stops short of recognizing the Saami parliaments as sovereign bodies.

The same ambiguity is evident in the provision on international representation. While the member “[S]tates shall promote Saami representation in international institutions and Saami participation in

68. *Id.* art. 1.

69. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 231 (5th ed. 2003) (noting that “[s]elf-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not as yet convincingly happened”). Specifically referring to self-determination in the context of indigenous peoples, James Anaya points out that “[s]ecession . . . may be an appropriate remedial option in limited contexts . . . where substantive self-determination for a particular group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned.” ANAYA, *supra* note 32, at 109.

70. Nordic Saami Convention, *supra* note 55, art. 14.

71. *Id.*

72. *Id.*

73. *Id.* art. 15.

international meetings,”⁷⁴ this by no means implies the recognition of their right to conduct their own international relations. In a similar vein, the international functions of the Saami parliament are limited to representing the Saami in “intergovernmental” matters.⁷⁵ The Convention thus avoids any hint at establishing an independent foreign relations power of the Saami. In keeping with this approach, the draft Convention does not envisage, contrary to suggestions made in the literature,⁷⁶ that the Saami become a party to it. The parties to the Convention will only be Finland, Norway and Sweden.

Article 6 confirms that the States are obliged under the Convention to take positive measures which effectively enable “the Saami people to secure and develop its language, its culture, its livelihoods and its society.”⁷⁷ Article 7, which deals with the protection of the Saami against discrimination, expressly mandates the adoption of “special positive measures”⁷⁸ for this purpose — measures which, in many legal systems, are known as “affirmative action” or “reverse discrimination.” This provision would seem to cover laws like the recent Norwegian statute which created special property rights for Saami in the northern province of Finmark that take precedence over conflicting property rights of persons of non-Saami origin. The law has been criticized as discriminatory. Article 7 of the Saami Convention could provide the required legal basis for such measures, especially since Article 46 requires member States to make the provisions of the Convention directly applicable as national law.

In elaborating the relevant legislation, member States shall show due respect for the Saami people’s traditional laws and customs and legal concepts.⁷⁹ Due consideration shall also be given to these concepts in the application of the law.⁸⁰ An important obligation, with regard to the significance of cross-border contacts and activities for the maintenance of a common Saami culture, is the duty of member States to strive for the “harmonization of legislation and other regulation” affecting those cross-border contacts.⁸¹

74. *Id.* art. 19.

75. *Id.*

76. ATLE GRAHL-MADSEN, *THE PEOPLE OF THE TWILIGHT ZONE* 73 (1988).

77. Nordic Saami Convention, *supra* note 55, art. 6.

78. *Id.* art. 7.

79. *Id.* art. 9.

80. *Id.*

81. *Id.* art. 10.

C. Economic and Cultural Rights of the Saami

With regard to land and water rights, the draft Convention grants the Saami the right to occupy and use the land or water areas which they have traditionally used “for reindeer husbandry, hunting, fishing or in other ways to the same extent as before,” regardless whether they are deemed to be the owners of the land or not.⁸² Permits for the prospection or the extraction of natural resources in land or water areas which are either owned or have traditionally been used by Saami for the above mentioned purposes shall not be granted by the competent state authorities without prior consultations with the affected Saami. If the prospection or extraction “would make it impossible or substantially more difficult for the Saami to continue to utilize” the land, the permit shall only be given with the consent of both the Saami parliament and the affected Saami.⁸³ In this case the “Saami shall have the right to compensation for all damage inflicted through [the prospection and extraction] activities.”⁸⁴ The same rules apply to all other forms of natural resource utilization affecting Saami land and water rights, including activities such as forest logging, construction of roads and recreational housing.⁸⁵

The Convention gives special consideration to reindeer husbandry as a central element of Saami livelihood and an important fundament of Saami culture. According to Article 42, reindeer husbandry shall enjoy special legal protection.⁸⁶ Taking into account the skeptical attitude displayed by Finland towards the recognition of special and exclusive Saami rights with regard to reindeer husbandry, this legal protection takes different forms in the individual member States. Norway and Sweden commit themselves under the Convention to “maintain and develop reindeer husbandry as the sole right of the Saami in the Saami reindeer grazing areas,”⁸⁷ as they have already done. Finland, on the other hand, which has observed no such exclusive rights, merely “undertakes to strengthen the position of Saami reindeer husbandry.”⁸⁸

The Convention also addresses the important cross-border aspects of reindeer husbandry.⁸⁹ Customary rights to reindeer grazing across national borders are recognized. However, if special agreements exist between Saami villages or

82. *Id.* art. 34.

83. *Id.* art. 36.

84. *Id.* art. 37.

85. *Id.* art. 36.

86. *Id.* art. 42.

87. *Id.*

88. *Id.*

89. *Id.* art. 43.

reindeer grazing communities concerning the right to reindeer grazing across borders, these agreements shall prevail.⁹⁰ The Convention also establishes arbitration committees as the mechanism for the enforcement of these agreements in case of dispute.⁹¹

The economic rights are complemented by language and cultural rights. In addition to the more "traditional" rights, like the right to use, develop and pass on the Saami language to future generations⁹² and the right of access to education in the Saami language within the Saami areas,⁹³ the relevant provisions of the draft Convention guarantee a number of innovative concepts. Two examples of such concepts are the creation of a distinct Saami media policy which "provide[s] the Saami population with rich and multi-faceted information"⁹⁴ and a right of control over activities by persons of non-Saami origin which use elements of the Saami culture for commercial purposes.⁹⁵ This right of control also includes the right to a reasonable share of the resulting revenues.⁹⁶

D. Monitoring Mechanism

The implementation of the Nordic Saami Convention shall be monitored by a Nordic Saami Convention Committee.⁹⁷ The Committee shall consist of six members, with the three member States and the three Saami parliaments choosing one member each.⁹⁸ The Committee shall be independent in its work. It should be noted that the Committee, apart from the usual functions of the submission of reports to the national governments and the elaboration of proposals for the strengthening of the Convention, shall also have the right to "deliver opinions in response to questions from individuals and groups."⁹⁹ This mechanism, if properly implemented, may well develop into a fully fledged individual petition procedure over time.

90. *Id.*

91. *Id.*

92. *Id.* art. 23.

93. *Id.* art. 26.

94. *Id.* art. 25.

95. *Id.* art. 31.

96. *Id.*

97. *Id.* art. 45.

98. *Id.*

99. *Id.*

V. Conclusion

In the past, the rights of indigenous peoples have received scant attention in European legal debate, which has focused instead on individual human rights and, after the end of communism, on the protection of national minorities. The definition of the status and the rights of indigenous peoples was almost entirely left either to global organizations, like the United Nations and the International Labor Organization, or to the national legal systems with sizeable indigenous populations. As a result, the relevant European legal instruments for the protection of individual and minority rights at the European level — the European Convention on Human Rights, the Framework Convention for the Protection of National Minorities, the EU Charter of Fundamental Rights — are silent on the issue and have achieved little, if any, relevance for the protection of indigenous rights in practice. Minority rights, however, cannot ensure an adequate level of protection for indigenous peoples. In particular, they provide an inadequate conceptual framework for the legitimate claims of these groups to a heightened degree of substantial and territorial autonomy for the preservation and protection of the particular ways in which they use their land, water and other natural resources, and which form the basis for the maintenance of their distinct culture. One therefore has to look to the relevant instruments at the global level, in particular to ILO Convention No. 169, in order to find the appropriate principles and standards in international law.

The Nordic Saami Convention, currently up for ratification in Norway, Sweden and Finland, may herald a change for the better. The Convention does not meet all the expectations which have been voiced in the past and presents some serious weaknesses: Russia will not become a party to the Convention, for instance, despite being host to a sizeable group of Saami; the concept of self-determination is defined only vaguely; and the concept of minimum standards leaves considerable discretion to the member States, especially in defining indigenous communities' political autonomy, self-governing powers and certain economic rights. Nevertheless, the Convention gives the Saami people a substantial say in the determination of its economic, social and cultural development and constitutes a significant step forward in the implementation of the rights granted by ILO Convention No. 169. It could even provide the successful blueprint for the establishment of the first international monitoring body specifically designed for the effective implementation of indigenous rights.