LEGAL QUESTIONS REGARDING MINERAL EXPLORATION AND EXPLOITATION IN INDIGENOUS AREAS

Susann Funderud Skogvang[1]

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INTRODUCTION

This article deals with some legal issues associated with natural resource extraction affecting indigenous peoples. My focus will not be on the possibilities or the positive effects of new industries when it comes to employment matters or economic development. There are plenty of people addressing those questions. I will focus on the potential legal conflicts arising from mining activities on indigenous territories.

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[1] Associate Professor, Faculty of law, University of Tromsø – The Arctic University of Norway. I would like to thank my colleagues Elise Karlsen, Mattias Åhrén and Kristina Labba for their helpful comments.

The title of this article is *Legal Questions Regarding Mineral Exploration and Exploitation in Indigenous Areas*, but it could have been named *Legal Questions Regarding Extractive Industries in Indigenous Areas*. Extractive industries include, in addition to mineral exploration and exploitation, oil and gas extraction. In this paper, I will mainly focus on extractive mineral industry—hence the title. The legal questions, however, are essentially the same with regard to oil and gas extraction when it comes to impact on indigenous peoples' rights. The international legal framework is, to a large extent, also the same. The article is therefore relevant also for legal discussions about oil and gas extraction on indigenous territories.

My contribution begins with a brief description of the current interest in the topic. In this part I will look into some trends and major challenges with mining activities in indigenous areas. The examples will mainly be from a Norwegian Sami perspective. The Sami people are indigenous peoples living in Norway, Sweden, Finland and Russia.[2] Traditional Sami livelihoods are reindeer-husbandry, fishing and hunting. There are 50-65000 Sami living in Norway.[3]

The second part of the article discusses the existing international legal framework and standards applicable to mineral extraction on indigenous peoples' lands.

The third and final part of the article draws attention to the present situation of the Sami people in Norway when it comes to mineral exploitation on Sami lands.

I. CURRENT INTEREST ON THE TOPIC

There are more than seven billion peoples in the world.[4] 370 million of them, spread across some 70 countries worldwide, are considered to be indigenous peoples.[5] Most indigenous peoples

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[2] For more information about the Sami people see *About Sami people*, GÁLDU: RESOURCE CENTRE FOR THE RIGHTS OF INDIGENOUS PEOPLE, http://www.galdu.org/web/index.php?sladja=25=eng (last visited Aug. 28, 2013).

[3] Nordisk samekonvensjon (Draft Nordic Sami Convention) 120 (2005).

[4] WORLDOMETERS, http://www.worldometers.info/world-population/.

[5] *Indigenous People, Indigenous Voices: Factsheet*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, http://www.un.org/esa/socdev/

live in rural and vulnerable areas such as the Arctic and the tundra, in deserts, in the high mountains or in the tropics.[6] Lands and natural resources are vital for their livelihood and culture, and social and spiritual well-being.[7] They are therefore, to a larger extent than urban people, dependent on rights to natural resources and the management of natural resources for their subsistence. Because of indigenous peoples' dependence on natural resources, the interest in preserving these resources in a long-term perspective is significant.

Several indigenous areas around the world host rich deposits of different types of valuable minerals.[8] This fact makes international commercial industries very eager to enter indigenous territories. Exploration and exploitation of minerals in such areas is fairly controversial, and has been vigorously debated for years.[9] The extractive industry and its negative impact on indigenous peoples is a historical, present, and continuing problem.[10] There are endless reports of ongoing human rights violations related to extractive industry activities in indigenous territories.[11] Pollution of drinking water, loss of grazing land, and forced relocation are examples of this.[12] At the 12th session of the U.N. Permanent Forum on Indigenous Issues held in New York in May 2013, different conflicts with extractive industries in indigenous areas were addressed from all

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unpfii/documents/5session_factsheet1.pdf (last visited Aug. 28, 2013).

[6] DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 545 (2011).

[7] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 141 (2004).

[8] Asbjørn Eide: *Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources*, *in* THE YEARBOOK OF POLAR LAW 2009 246 (2009). *See also* PITFALLS AND PIPELINES. INDIGENOUS PEOPLES AND EXTRACTIVE INDUSTRIES 4-5 (Whitmore, Andy ed., 2012).

[9] Reports of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Extractive industries operating within or near indigenous territories, (2011) A/HRC/18/36 [hereinafter Extractive Industries and Indigenous Territories] and Extractive industries and indigenous peoples, (2013) A/HRC/24/41 with further references. [hereinafter Extractive Industries and Indigenous Peoples].

[10] *See* PITFALLS AND PIPELINES, *supra* note 8, at xiii.

[11] *Id*. at xxi.

[12] *Id*.

over the world.[13] The U.N. Special Rapporteur on the Rights of Indigenous Peoples has just published on a new report on this topic.[14] In the U.S., Native Americans are struggling against mining companies from the Navajo Nation in the south,[15] to Inuit people in Alaska in the North.[16]

The traditional Sami areas in Norway have been subjects of a large number of conflicts between mineral activities and traditional Sami livelihood. Just to mention a few, in 1993-1994 the international mining companies Rio Tinto Zink Corporation PLC, Ashton Mining Ltd., Monopos Ltd., and Mamikaivos OY got permission to exploit minerals in reindeer-herding areas in Finnmark, the northernmost county of Norway[17] The affected Sami communities were not consulted or even heard.[18] Today, in particular two controversial ongoing mining projects on Norwegian Sami territories are the roots of heated debates: the Repparfjord/Ulveryggen-project by Nussir ASA[19] and the Biedjovaggi-project by Arctic Gold AB.[20] None of these projects

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[13] Econ. & Soc. Council, Permanent Forum on Indigenous Issues, Report on the Twelfth Session (20-31 May 2013), U.N. Doc. E/3013/43 (2013).

[14] *See* Extractive Industries and Indigenous Peoples, *supra* note 9.

[15] *See generally* Claudia Rowe, *Coal Mining on Navajo Nation in Arizona Takes Heavy Toll*, HUFF. POST: GREEN, (June 6, 2013), http://www.huffingtonpost.com/2013/06/06/coal-mining-navajo-nation_n_3397118.html.

[16] *See generally Mines in Alaska*, NORTHERN ALASKA ENVIRONMENTAL CENTER, http://northern.org/programs/clean-water-mines/hardrock-mines-in-interior-and-arctic-alaska (last visited Aug. 25, 2013). *See also* Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: The situation of indigenous peoples in the United States of America (2012), A/HRC/21/47/Add 1. [hereinafter U.S. Indigenous Peoples Report].

[17] *See generally Naturgrunnlaget for samisk kultur*, NORGES OFFENTLIGE UTREDNINGER 1997:4, (January 1997) 132-137, *avaliable at* http://www.regjeringen.no/Rpub/NOU/19971997/004/PDFA/NOU199719970004000DDDPDFA.pdf (stating that Sami peoples are to actively participate in the management of natural resources).

[18] *Id*.

[19] For more information about their ongoing projects see NUSSIR ASA, www.nussir.no (last visited Aug. 25, 2013).

[20] For more information about their ongoing projects see ARTIC GOLD, www.arcticgold.se (last visited Aug. 25, 2013).

are compatible with reindeer husbandry,[21] and in addition, Nussir ASA plans to use traditional coastal Sami fishing grounds as waste disposal in the Repparfjord/Ulveryggen-project.[22]

One distinct trend is that traditional indigenous industries and livelihood seems to have a weaker standing compared to other industries, modern or traditional: In Norway traditional Sami fishing lose against modern mineral activities and planned waste disposals in the sea in coastal Sami fishing areas.[23] Traditional reindeer herding loses in competitions with extractive industries on grazing land.[24] Commercial industries are considered far more profitable.[25] This threatens the continuance of traditional livelihood, as they compete on the same areas.

Another trend is that there is a rush in extractive industries, both mineral activities and oil and gas extraction.[26] This is because of a growing global demand for minerals, oil and gas. This also applies for Norway, where there is, at the same time, a property rights situation in Sami areas that is unclear, as I will discuss further in section 4.3. The government promotes extractive industry on the one hand, and hesitates in the process

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[21] *See generally* Tone Holmquist, *Ja til reindrift – nei til gruver (Reindeerherding Yes!, mines No!)*, http://kommunal-rapport.no/author/tone-holmquist (last visited Sept. 27, 2013).

[22] *See generally* NUSSIR ASA, *supra* note 19; Directorate for Environment, *Miljøforhold ved Nussir-saken tilstrekkelig utredet for behandling etter plan- og bygningsloven*, (Sept. 26, 2013) http:// miljodirektoratet.no/no/Nyheter/Nyheter/2013/September-2013/Miljoforhold-ved-Nussir-saken-tilstrekkelig-utredet-for-behandling-etter-plan--og-bygningsloven/.

[23] *Id.*

[24] NORUT Rapport 2011:2, http://www.norut.no/Norut-Alta-Alta/Publikasjoner/Rapporter/Foreslaatt-utbygging-av-Nussir-gruver-i-reinbeitedistrikt-22-Fiettar-konsekvenser-for-reindriften-i-22-Fiettar-og-20-Fala.

[25] *See* Letter of 21 May 2012 from Ministry of Trade and industry to the Ministry of Environment (ref. 13/227-9).

[26] Asbjørn Eide, *Indigenous Self-Government in the Arctic, and their Right to Land and Natural Resources*, *in* THE YEARBOOK OF POLAR LAW 2009 246, 247 (2009).

of identifying Sami rights on the other.[27] The Norwegian minister of Trade and Industry, Trond Giske has expressed that:

"I would advise municipalities to put forward the best possible conditions for mineral extraction. We have a world that is growing and there are many that should be brought out of poverty, and we must participate in the wonderful project and deliver the commodities to it."[28]

Regarding indigenous peoples rights he has stated that "there are various specific problems in northern Norway. Indigenous peoples' rights must be addressed and managed. We have to work on it."[29]

He expresses the Norwegian governmental attitude towards Sami rights: These matters are just obstacles to be eliminated. These are neither, as I read Giske, legal rights that Norway has to recognize, nor rights that the Sami themselves decide how to manage. This will be addressed in greater detail in Section 4.

A third trend is the diffuse situation when it comes to responsibility for respecting indigenous peoples' rights. One problem, if we can call it that, is that states are seldom involved in extractive industries.[30] International companies do such work. One can thus talk about a three party-relationship with regard to extraction of natural resources: Indigenous peoples, states, and extractive industry-companies. States are obliged to "respect, protect and fulfill" indigenous peoples' rights.[31] International

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[27] *See* Kjell Are Guttorm, *Finnmarkskommisjonen mister støtte*, NRK, (Feb. 6, 2013, 9:33 AM), http://www.nrk.no/kanal/nrk_sapmi/1.11057889.

[28] *Skattekammeret i nord*, NRK, (Apr. 9, 2012, 1:31 PM), http://m.nrk.no/artikkel.jsp?art_id=1.8309965.

[29] *Stortinget, Møte fredag den* 22. oktober 2010 kl. 10, Sak nr. 4 [13:10:26], STORTINGET, (Oct. 22, 2010), http://www.stortinget.no/nn/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2010-2011/101022/4/#a2.

[30] This is unless the state has organized state owned companies, like what Norway and Sweden have done with Statoil and LKAB. *See* PITFALLS AND PIPELINES, *supra* note 8.

[31] UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS PROTECT, RESPECT, AND REMEDY FRAMEWORK, at 3, U.N. Doc. HR/PUB/11/04 (2011), *available at* http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. [hereinafter UN Guiding Principles on Business and Human Rights].

companies have no such obligations, despite general public sentiment that the private sector too should contribute to respect, protect, and fulfill human rights, including rights of indigenous peoples.[32] States are obliged to make sure that companies act in accordance with the current legislation. It follows from U.N. Guiding Principles that: "State's protective role entails ensuring a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by business activities."[33] However, in practice one can see that you end up with no one who is fully responsible for indigenous matters, as the state parties trust in corporate responsibility.[34]

For these reasons the topicality of legal research on this field is unquestionable. It is my hope that this article will contribute to further legal discussions on this subject.

II. INTERNATIONAL LEGAL FRAMEWORK AND STANDARDS

A. Generally

Several aspects of mineral exploration and exploitation can be problematic in relation to indigenous peoples' rights to land and natural resources. International law provides indigenous peoples extensive substantial and procedural rights in this matter, especially through the development of improved human rights standards that have changed with time, place and economic assumptions. Developments have moved towards acknowledging more rights as part of human rights. The contemporary international legal system has its formal origins in the U.N. Universal Declaration of Human Rights of 10 December 1948.[35] The notion of human rights as such is of course much older. The

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[32] *See id* at 1-2.

[33] *Id* at 2. *See also* Forum on Bus. & Human Rights, Statement by Professor James Anaya Special Rapporter on the Rights of Indigenous Peoples (Dec. 5, 2012) (by James Anaya) *available at* http://unsr.jamesanaya.org/statements/forum-on-business-and-human-rights-2012-statement-by-professor-james-anaya.

[34] *Id*.

[35] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

provisions of the U.N. Universal Declaration have subsequently been followed up in a number of U.N. human rights conventions,[36] and the vast majority of the human rights enshrined in the provisions of the Declaration are currently codified in legally binding convention provisions.[37] Trindade states that UDHR have "inspired, and paved the way for, the adoption of more than seventy human rights treaties."[38]

I will in the following discuss the most important rules expressed in international law applicable on mining activities in indigenous territories.

B. Applicable Substantial Rights

1. Superior Principles

The most important substantial indigenous peoples' rights for the purpose of resource extraction are the right to property, the right to culture, and the right to self-determination. Indigenous people shall enjoy these rights without any form of discrimination.[39] This means that the overall principle of international law, principle of freedom from discrimination, applies to all these three important substantial rights. The right to non-discrimination is first and foremost enshrined in the U.N. Convention on the Elimination of Racial Discrimination,[40] which in its entirety is devoted to this right, but it also features in essentially all other human rights instruments.[41] Further, the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 2 states:

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[36] Antônia Augusto Conçado Trindade, Universal Declaration of Human rights available at http://untreaty.un.org/cod/avl/ha/udhr/udhr.html.

[37] *Id.*

[38] *Id.*

[39] UDHR, *supra* note 35, art. 2.

[40] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

[41] *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signing* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 4, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221, 225-26 (entered into force Sept. 3, 1953) [hereinafter ECHR].

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.[42]

UNDRIP was adopted by the U.N. General Assembly on 13 September 2007.[43] Even though it is not formally legally binding, it is a prominent and guiding instrument: It is the first time a human rights forum in the United Nations system has developed standards specifically for indigenous peoples.[44] What is also special about UNDRIP is that it was negotiated jointly by states and indigenous peoples' representatives.[45] This provides UNDRIP with a contractual element that other U.N. declarations do not have. The U.N. Special Rapporteur on the Rights of Indigenous Peoples has in one of his reports stated that UNDRIP proclaims internationally accepted minimum standards for indigenous peoples' human rights.[46] These minimum rights have emerged e.g. through the practice of the Human Rights Committee,[47] the Committee on Elimination of all forms of Racial Discrimination[48] and the Committee on the Rights of the Child.[49] This means that the provisions mentioned in UNDRIP

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[42] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 2, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

[43] *Id.*

[44] MAKING THE DECLARATION WORK THE UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES 34 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

[45] *Id.*

[46] Report of the Special Rapporteur on Rights of Indigenous Peoples, James Anaya, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Human Rights Council, 6, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008).

[47] The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights Convention on the Elimination of All Forms of Racial Discrimination by its State parties, according to ICCPR part VI.

[48] The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties, according to CERD part II.

[49] The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors implementation of the Convention on the

will serve as a guiding interpretive tool for the application of international law in general.

In the following I will shortly introduce the legal framework regarding the right to property, the right to culture, and the right to self-determination.

2. *Right to Property*

The right to property has been affirmed as an International human right. This right is expressed in The Universal Declaration of Human Rights Article 17.[50] A general protection for property rights is also expressed in The European Convention on Human Rights (ECHR)[51] Article 1 of Protocol 1, and in The American Convention on Human Rights (ACHR)[52] Article 21. Property rights are considered to be a fundamental human right, also for indigenous peoples.[53] Indigenous peoples do enjoy protection for their property rights such as right to own and to use land, and the right to deny conflicting use of their lands.[54] According to the International Convention on the Elimination of All Forms of Racial Discrimination[55] (CERD) Article 5 (d)(v) State Parties undertake to prohibit "discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the right to own property alone as well as in association with others." According to the subsequent practice of the CERD Committee, and in particular

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Rights of the Child by its State parties, according to Convention on the Rights of the Child part II.

[50] UDHR, *supra* note 35.

[51] ECHR, *supra* note 41, protocol 1, art. 1.

[52] American Convention on Human Rights, art. 21, *opened for signature* Nov. 22, 1969, OEA/Ser.LV/11.50, doc. 6 (1980) (entered into force July 19, 1978).

[53] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 141 (2004).

[54] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, I.L.O. No. 169, 1650 U.N.T.S. 383, 386, 388-89 [hereinafter ILO 169] art. 14.

[55] CERD, *supra* note 40, 660 U.N.T.S. at 220.

CERD Committee General Recommendation No. 23,[56] states shall pay special attention to indigenous peoples property rights. The CERD Committee stated in the recommendation section 5:

> 5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."[57]

This means that indigenous property rights shall be acknowledged to the same extent as other citizens' property rights.

The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169)[58] also provides protection for indigenous peoples' property rights to lands.[59] The International Labour Organization is a labor organization affiliated with the U.N.-system[60]. The organization has, since the 1920s, been involved with the conditions for the indigenous peoples of the world.[61]

ILO 169 was adopted in 1989.[62] In this convention, the ILO member states recognize the "aspirations of these peoples to exercise control over their own institutions, ways of life and

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[56] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples,* U.N. Doc. CERD/C/51.Misc. 13/Rev.4 (Aug. 18, 1997).

[57] CERD Committee General Recommendation No. 23 section V.

[58] ILO 169 *supra* note 54.

[59] *Id*. arts.13 - 19.

[60] *See generally* INTERNATIONAL LABOUR ORGANIZATION, www.ilo.org.

[61] *See History of ILO's Work,* INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/indigenous/Aboutus/HistoryofILOswork/lang--en/index.htm.

[62] *See generally id.*

economic development and to maintain and develop their identities, languages and religions."[63] Governments are obliged to support this. ILO 169 covers a wide area of subjects, but the most important for indigenous peoples are the regulations in part II on land rights.[64] ILO 169 Article 14 provides strong protection for indigenous peoples' right to own and use land. One can say that the main objective of ILO169 is to provide indigenous peoples the right to preserve their identity as a people, and that they should have the right to maintain and develop their lifestyle and culture on their own terms, and that the authorities should have the duty to actively support this work. Property rights are a prerequisite for this. ILO 169 Article 14 states:

> 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. 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 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.[65]

This provision does not provide indigenous peoples with a certain right to subsurface resources, but provides protection for their right to own and use lands and natural resources, which they have traditionally used or had access to.[66] Mineral activities

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[63] ILO 169 *supra* note 54, at pmbl.
[64] *Id.* arts. 13-19.
[65] *Id.* art 14.
[66] *See* ANAYA, *supra* note 53, at 143.

in such areas can impede the exercise of their property rights. One must therefore see Article 14 in connection with Article 15 with regard to sub-surface resources. Article 15 (2) states that:

> [i]n cases in which the State retains ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.[67]

I will return to this in the discussion below regarding Applicable Procedural Rights.

The recognition of the right to land and natural resources is, as I see it, the most fundamental element in a sustainable future for indigenous peoples. Protection for indigenous property rights to lands and natural resources is also expressed clearly in UNDRIP Article 26.[68] The principle of non-discrimination asserts that if domestic law acknowledges property rights to land in general, having resulted in privately held title to land for the non-indigenous population in non-indigenous areas, then the indigenous peoples' property rights on their traditional territories must be recognized too.[69]

3. *Right to Culture*

Indigenous peoples' right to the material basis for their culture has a solid legal status, which is expressed in several binding conventions, such as the U.N. Covenant on Civil and Political Rights (ICCPR)[70] Article 27. ICCPR Article 27 provides protection for indigenous peoples' exercise of their

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[67] ILO 169, *supra* note 54, art. 15.

[68] UNDRIP, *supra* note 42, art. 26.

[69] Mattias Åhrén, The Saami Traditional Dress & Beauty Pageants: Indigenous Peoples' Rights of Ownership and Self-determination over Their Cultures 122 (Tromsø 2010). Dissertation

[70] ICCPR, *supra* note 41, art. 27.

culture, including the material basis of culture, such as reindeer herding and fishing in saltwater areas. The article states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[71]

The provision sets up an absolute barrier for denying indigenous peoples and individuals the right to exercise their culture. The Human Rights Committee, which monitors the follow-up of ICCPR, has in its practice and in general comments interpreted the provision in a dynamic and expansive fashion.[72] The Human Rights Committee has interpreted the phrase 'culture' to include land rights, especially when it applies to indigenous peoples: In *Ominayak v. Canada* the Committee concluded that the exploitation of oil and gas on the territory of the indigenous Lubicon Lake Band amounted to a violation of ICCPR Article 27 because such activities destroyed traditional hunting and fishing grounds.[73] The Committee has also expressed that the Article obliges State parties to take positive measures to secure this right.[74] Although Article 27 is described in passive terms, the existence of a right is nevertheless ensured and requires that this should not be denied in practice. All ratifying states are therefore required to ensure that the existence of this right is protected. This expansive understanding of the protection of indigenous peoples' culture is also expressed in several articles of UNDRIP, such as Article 11, 25 and 31.

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[71] *Id.*

[72] *See* U.N. Human Rights Comm., General Comment No. 23: The Rights of Minorities, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994). *See also* ANTON & SHELTON, *supra* note 6, at 550.

[73] U.N. Human Rights Comm., Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (May 10, 1990).

[74] U.N. Human Rights Comm., General Comment No. 23: The Rights of Minorities, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 8, 1994).

Mineral activities in indigenous areas can deny indigenous peoples the right to exercise their culture. If the negative impact on indigenous cultures, even at a local level, is significant, there will be a violation of ICCPR Article 27.[75]

4. The Right to Self-Determination

Indigenous peoples have the right to self-determination. According to the common ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 1 "peoples" have the right to self-determination. The article states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[76]

Indigenous peoples' right of self-determination is also stated in the UN Declaration on the Rights of Indigenous Peoples, Article 3. This right includes the right to decide over the management of their natural resources. Legal doctrine has earlier

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[75] *See also* U.N. Human Rights Comm., Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994), section 9.4.

[76] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3 [hereinafter ICESCR].

debated whether this also applies for "indigenous peoples."[77] Today, the most prominent legal scholars on indigenous peoples' rights uphold for certain that indigenous peoples have the right to self-determination, under ICCPR/ICESCR Article 1. Professor S. James Anaya has expressed that:

> [S]elf-determination is identified as a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.[78]

ICCPR/ICESCR Article 1 (2) regarding peoples' right of self-determination would be relevant for indigenous peoples where mineral exploration occurs in indigenous areas. The clause will also serve as an interpretive argument in the application of ICCPR Article 27.

C. Applicable Procedural Rights

Indigenous peoples do also have certain procedural rights according to international law. These procedural rights are enshrined in the substantive rights, and are important to make substantive rights effective and applicable.

According to ILO 169 indigenous peoples have the right to participate in decision making processes. ILO 169 Articles 6 and 7 are very important elements of the convention, as the principle of consultation and participation constitutes the cornerstone of the convention.[79] Of more specific interest in mineral questions is ILO 169 Article 15. Article 15 prescribes a particular right to consult and participate in decision making in mineral matters. Consultations shall be made with a view to ascertaining whether and to what degree affected indigenous peoples' interests would

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[77] Åhrén, *supra* note 69, at 67; Láila Susanne Vars, The Sámi People's Right to Self-Determination 257 (2009). Dissertation

[78] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 98 (1996).

[79] ILO 169, *supra* note 54, arts. 6-7.

be prejudiced, before undertaking or permitting any program for the exploration or exploitation of mineral resources pertaining to their lands. The same article expresses that "[t]he peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."[80]

This means that indigenous peoples shall participate in deciding whether mineral activities can occur on their territories or not. They have a right to be consulted in good faith.

Also UNDRIP addresses important procedural rights in several articles, for example Article, 5, 11, 18, 19, 20 and 32. According to these standards, combined with practice of various U.N. human rights bodies,[81] indigenous peoples might have a right to say 'no' to such activities on their land in accordance with the principle of free, prior and informed consent, or the right to receive redress and compensation.[82]

These procedural rights are of great importance. In The Human Rights Committee decision *Apirana Mahuika et al v. New Zealand* from 2000, the committee concluded that New Zealand did not violate ICCPR Article 27 since the vast majority of the Maori concerned had participated in consultations with the governments about the legislation on commercial fishing in New Zealand.[83] The Committee stated that when considering whether an action of the state is violating Article 27, one have to consider whether "the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures."[84]

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[80] ILO 169 *supra* note 54, art. 15.

[81] For instance CERD Committee General Recommendation No. XXIII on Indigenous Peoples (1997) and Committee on Economic, Social and Cultural Rights General Comment No. 21 on the right of everyone to take part in cultural life (art. 15, para. 1 (a), of the ICESCR) E/C.12/GC/21 (21 December 2009) (GE.09-46922) paras 36-37.

[82] UNDRIP supra note 42, arts. 19 and 32. *See* also Cathal Doyle & Jill Cariño, *Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector* (2013), *available at* http://www.piplinks.org/system/files/Consortium+FPIC+report+-+May+2103+-+web+version.pdf.

[83] *Apirana Mahuika et al v. New* Zealand, Human Rights Comm., Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (Nov. 15, 2000).

[84] *Id.* at 15.

D. UN Guiding Principles on Business and Human Rights

The United Nation Guiding Principles on Business and Human Rights, were unanimously adopted by the UN Human Rights Council in 2011.[85] The principles are among other factors grounded in states' existing obligations to respect, protect, and fulfill human rights and fundamental freedoms.[86] The aim of these principles is implementing the United Nations "Protect, Respect and Remedy Framework."[87] The publication consists of three parts. Part I deals with the state duty to protect human rights. Part II discusses the corporate responsibility to respect human rights. Part III contains access to remedies.[88]

As the title suggests, these standards are not legally binding, but rather voluntary upon corporations.[89] Nevertheless, it is increasingly held that the Guiding Principles reflects a global consensus with regard to corporate behavior, including when corporations engage in resource extraction in indigenous territories.[90] One can see a development among serious commercial actors, as they try to establish good practices, in accordance with international legal principles when they operate in indigenous territories.[91]

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[85] Guiding Principles on Business and Human Rights, *supra* note 31, at iv; *See also* THE U.N. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS. AN INTRODUCTION 2 (2013).

[86] Guiding Principles on Business and Human Rights, *supra* note 31 at 1.

[87] *Id*. at iv.

[88] *Id.* at iii.

[89] The Corporate Responsibility to Respect Human Rights. An Interpretive Guide, (OHCHR) U.N. 1 (2012).

[90] *Id* at 2.

[91] *Id*.

III. MINERAL ACTIVITIES IN TRADITIONAL SAMI AREAS - THE CURRENT SITUATION OF THE INDIGENOUS PEOPLES OF NORWAY

A. Present Situation

As mentioned in the introduction, mining activities in traditional Sami areas are well-known, and cause major concerns among Sami reindeer-herders and Sami fishermen.[92] In addition to the two major projects in Norwegian Sami areas mentioned at the outset, there are other mining projects in Norway, Finland, and Sweden that are equally contested.[93]

B. Implementation of International Law

As shown in section 3, international law provides a strong formal protection for indigenous peoples' rights, both with regard to substantive and procedural rights. Norway has ratified and at least formally, implemented amongst others, ICCPR[94], ICESCR[95], CERD[96] and ILO 169[97].[98] However, the factual implementation of international legal instruments is rather insufficient. The Norwegian governments have also expressed that Norwegian Sami policy is in accordance with UNDRIP.[99] This position is clearly not in conformity with reality.

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[92] See for example from Sweden John Ahni Schertow, *Swedish Government Gives Indigenous Peoples Land to Mining Company*, IC MAGAZINE (Aug. 23, 2013), http://intercontinentalcry.org/swedish-government-gives-indigenous-peoples-land-to-mining-company/.

[93] PITFALLS AND PIPELINES *supra* note 8, at 18.

[94] ICCPR, *supra* note 41.

[95] ICESCR supra note 76.

[96] CERD, *supra* note 40.

[97] ILO 169, *supra* note 54.

[98] Act of 21 May 1999 No. 30 cl. 2 (Human Rights Act) (Norw.) (relating to the strengthening of human rights statutes in Norwegian law); Act of 3 June No. 33 cl. 2 (Anti-Discrimination Act) (Norw.) (prohibiting discrimination based on ethnicity, religion, etc.); Act of 17 June 2005 No. 85 cl. 3 (Finnmark Act) (Norw.) (relating to legal relations and management of land and natural resources in the county of Finnmark).

[99] MINISTER OF LABOUR2007 [(Norw.). http://www.regjeringen.no/en/

The Sami enjoy protection for their universal human rights according to Norway's obligations. This is stated in a number of provisions, including ECHR Article 1, ICESCR Article 2 (2), ICCPR Article 2 (1). It also follows from ILO 169, Article 3, which states:

> 1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples.
>
> 2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.[100]

This principle is also stated in UNDRIP Article 1:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.[101]

This means that all general, fundamental human rights also apply to the Sami population in Norway. These rights must be interpreted taking into account the specific historical, cultural, social and economic circumstances of the Sami.[102] In addition, as an indigenous people, the Sami people are entitled to a separate set of rights, as discussed in part II.

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dep/ad/press-centre/press-releases/2007/United-Nations-adopts-Declaration-on-Rig.html?id=480895.

[100] ILO 169 *supra* note 54, art. 3.

[101] UNDRIP *supra* note 41, art. 1.

[102] Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rep. on the *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, at 9, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008).

C. Domestic Legal Framework

As mentioned introductorily, Sami rights to own and the right to use land and natural resources are not yet identified or fully recognized in Norway. The Government passed a new act in 2005, The Finnmark Act.[103] In order to establish the scope and content of the rights held by Sami and other people on the basis of prescription or immemorial usage or on some other basis, a commission is established to investigate rights to land and water in Finnmark.[104] Their work has just started up, as an ongoing, but very slow process to identify Sami rights to land in Finnmark. Still not one single area is finally cleared out.[105] The Finnmark Commission has submitted two reports for two smaller areas, but the parties can appeal and bring the decisions in the reports before the court system, according to the Finnmark Act clause 36 and 42.[106] I have in earlier work discussed if this slow process in itself is in conflict with the right to a fair trial within "reasonable time" according to fundamental human rights standards in ECHR article 6.[107] There is no longer any doubt that the process conflicts with the principle of a "fair trial within reasonable time."[108] Also other elements of this process could be contested legally, such as the assessment of evidence, the relation to international law, and the significance of Sami customary rights. Further extrapolation of these elements is beyond the scope of this article.[109]

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[103] Act of 17 June 2005 No. 85 (Finnmark Act) (Norw.) (relating to legal relations and management of land and natural resources in the county of Finnmark).

[104] The Finnmark Commission, cf. the Finnmark Act clause 29.

[105] *See* FINNMARKSKOMMISJONEN NORGES DOMSTOLER [FINNMARK COMMISSION: NORWEGIAN COURTS] (last visited Aug. 29, 2013, 9:28 PM) (Norw.), http://www.domstol.no/no/Enkelt-domstol/Finnmarkskommisjonen/.

[106] *Id*

[107] Susann Funderud Skogvang, *Samerett*, 244-45 [Norw.] 2009.

[108] Øyvind Ravna, *The Finmark Act 2005 Clarification Process and Trial Within a Reasonable Time*, 29 NORDIC J. HUM. RIGHTS 184 (2011).

[109] *See* Øyvind Ravna, *Er rettighetskartleggingen i Finnmark en hensiktsmessig ordning i nasjonal rett? – sett i lys av Finnmarkskommisjonens mandattolkning*, 612-31 [Norw.] Lov og rett 2012.

At the same time Norwegian governments are eager to speed up the tempo in the mapping and exploitation of mineral resources in the north of Norway, the traditional Sami area.[110] 100 million Norwegian kroner, (about 170,000 US dollars) has already been allocated to the mapping of minerals in Northern Norway from 2010-2014.[111] It is a great paradox that the government does not have the same haste to investigate Sami rights to land in the North: For the same period of time, The Finnmark Commission, who investigates Sami rights to own and use land, get approximately 40 million Norwegian kroner (about 65 000 UD dollars).[112] This amount covers salaries, rent and other operating expenses.[113] The Commission has several times asked for increased budgets, citing adequate economic resources for their work, but has not yet been heard.[114] One can ask whether the Norwegian government deliberately considers that as a clear land right situation is essential for the indigenous people's possibility to legally question mineral activities in indigenous areas. Legally acknowledged rights are difficult to ignore. Recognized property rights gives people a strong position in negotiations. Unclear or just potential rights give no position. It will therefore, without clear rights, be easier to do what the minister of trade and industries says: "To solve the Indigenous problem."[115]

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[110] *See* The Norwegian governmental strategy for mineral activities [Norw.] (2013) http://www.regjeringen.no/pages/38261985/mineralstategi_20130313.pdf, and Letter of 21 May 2012 from Ministry of Trade and Industry to the Ministry of Environment (ref. 13/227-9).

[111] Press Release, Nytt løft for mineralnæringen Statsbudsjettet 2013 [New Boost for Mineral Industry: State Budget 2013] (Aug. 10, 2012) (Norw.), http://www.regjeringen.no/nb/dep/nhd/pressesenter/pressemeldinger/2012/nytt-styrkeloft-for-mineralnaringen.html?id=703565.

[112] Kjell Are Guttorm, *Finnmarkskommisjonen Mister Støtte* [*Finnmark Commission Loses Support*], NRK SÁPMI (June 2, 2013) (Norw.), http://www.nrk.no/kanal/nrk_sapmi/1.11057889.

[113] *Id.*

[114] *Id.*

[115] Stortinget - Møte fredag den 22. oktober 2010 kl. 10*:* Sak nr. 4 [13:10:26]*,* *STORTINGET,* (Oct. 22, 2010)*,* http://www.stortinget.no/nn/Saker-og-publikasjoner/Publikasjoner/Referater/Stortinget/2010-2011/101022/4/#a2.

Another unclear legal problem is that Norway passed a new Act on acquisition and exploitation of mineral resources in 2009—The Minerals Act.[116] The passage of this Act weakens the Sami's legal position in at least three ways.

First, the Norwegian government does not have an adequate focus on sustainable Sami communities. The aim of the new mineral act is to promote and ensure responsible management and use of mineral resources in accordance with the principle of sustainable development.[117] Sustainable development is defined as "development that meets present needs without compromising future generations' choices to meet their own needs."[118] The principle consists of three elements: sustainable ecological development, sustainable economic development and sustainable social/cultural development. It is therefore clear that indigenous cultural and social development is to be considered also in mineral cases according to the new Act. I am sorry to say that in Norway, the principle of sustainable development, does not fully apply for the Sami communities.

Secondly, the new act does not pay adequate attention to Sami rights; It does not address the Sami peoples' right to property, culture, or the right to self-determination.[119] The Sami people are not given the special right to consult in mineral matters, nor the right to benefit sharing.[120] Likewise, the important meaning of indigenous traditional knowledge is ignored. To fully enjoy one's culture, a person needs legal protection for one's rights, traditional knowledge, customs and practices. The Sami rights in mineral matters, is in this new act reduced to a right to be heard, not a duty for the state to take into

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[116] Act of 19 June 2009 No. 101 (the Minerals Act) (Norw.) (relating to the acquisition and extraction of mineral resources).

[117] *Id.* at clause 1.

[118] Ministry of Fisheries and Coastal Affairs: Havressurslovutvalgets, NOU 2005:10, LOV OM FORVALTNING AV VILTLEVENDE MARINE RESSURSER [LAW ON MANAGEMENT OF WILD LIVING MARINE RESOURCES], at 36 (June 9, 2005)(Norw.), *available at* http://www.regjeringen.no/Rpub/NOU/20052005/010/PDFS/NOU200520050010000DDDPDFS.pdf.

[119] Susann Funderud Skogvang, *Ny minerallov og samiske rettigheter*, 47 – 67 [Norw.] *Lov og Rett* 2010.

[120] *Id.*

account Sami rights when permission for mineral activity is considered.[121]

The third and perhaps most controversial aspect is that the three-party triangle has become a quadrangle in Norway. Since the Sami Parliament did not agree with the Norwegian authorities with respect to the content of the mineral Act, it has created its own mineral strategy.[122] The Sami Parliament has also entered into a couple of agreements with mineral companies.[123] This is a very dangerous strategy. Even though the agreements contain nothing but the obvious, the existence of the agreements are used for more than what they are worth by the mineral companies.[124]

CONCLUSION

The unclear legal situation described above puts the Sami people in a very difficult situation. The scope of their procedural and substantive rights remains unclear: the state's duty to consult with indigenous peoples in order to obtain their free, prior and informed consent is namely based on underlying substantial rights such as property rights, the right to a material basis for their culture and the right to be free from discrimination. These rights must be sorted out before any permission to explore or exploit mineral resources in Sami areas is given. Therefore it is of great importance not to rush into mineral exploitation in

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[121] *Id.*

[122] *Sametinget mineralveileder* [*Sami Parliament mineral supervisor*], SAMEDIGGI SAMETINGET (Jan. 17, 2012) (Norw.), http://www.sametinget.no/Miljoe-areal-og-kulturvern/Energi-og-mineraler/Sametinget-mineralveileder.

[123] *Viktig avtale mellom Sametinget, Sydvaranger Gruve AS og berørt reinbeitedistrikt* [*Important agreement between the Sami Parliament, Sydvaranger Mining AS and affected reindeer grazing*], SAMEDIGGI SAMETINGET (Norw.), http://www.sametinget.no/Miljoe-areal-og-kulturvern/Energi-og-mineraler/Viktig-avtale-mellom-Sametinget-Sydvaranger-Gruve-AS-og-beroert-reinbeitedistrikt (last visited Aug. 30, 2013); Bente Bjercke, *Setter spørsmålstegn ved Sametingets gruveintensjon* [*Question the Sami Parliament's Intention Mining*], NRK SÁPMI (June 6, 2013, 12:35 PM)(Norw.), http://www.nrk.no/kanal/nrk_sapmi/1.11071923.

[124] Liv Inger Somby, *Vurderer å bryte med Arctic Gold*

[*Considering Violate Artic Gold*], NRK SÁPMI (Feb. 13, 2013, 6:05 PM)(Norw.), http://www.nrk.no/kanal/nrk_sapmi/1.10911655.

traditional Sami areas without first clearly delineating Sami rights. The mineral resources will not go anywhere, but traditional Sami culture, such as reindeer husbandry, is at stake and cannot be resurrected once erased.