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THE RIGHT TO SELF-DETERMINATION OF INDIGENOUS PEOPLES AND THE PROPOSED NORDIC SÁMI CONVENTION: FROM HOPES RAISED TO HOPES DASHED?

Abstract: During the first two decades of the twenty-first century, the right to self-determination of peoples in international law spread its wings. This is particularly true in the context of indigenous peoples. While much has already been written about the right to self-determination in international law, most of the legal literature has not reflected on the right to self-determination in the context of the legal developments of a Nordic Sámi Convention. In 2005, a first text was drafted which ambitiously presented a progressive self-determination model for the Sámi in Norway, Sweden, and Finland. However, in 2017 a new draft was proposed which reflected a different model. This article discusses how the right to self-determination of the Sámi operates under these two drafts. By comparing the self-determination models under the 2005 Draft and the 2017 Draft, it will become clear that much of the former has been streamlined under the latter, up to the point that the self-determination model under this new draft has been downgraded. At the same time, it becomes evident that the self-determination model under the 2005 Draft has serious value. Therefore, this article argues that the text of the 2005 Draft could still be used as a template for legal scholars and legal practitioners. Moreover, it could serve as a benchmark to inform and guide future policies and laws of any state that has an indigenous people residing in its territory.

Keywords: self-determination, autonomous governance, participatory engagement, indigenous peoples, Nordic Sámi Convention

1. Introduction

As noted by one commentator, the notion of self-determination 'has long been one of which poets have sung and for which patriots have been ready to lay down their lives'.[1] Historically, the ideas underlying the American and the French Revolution formed the roots of self-determination, yet it was only until the early twentieth century that self-determination was brought to the attention of the international community.[2] Particularly, Vladimir Lenin and Woodrow Wilson contributed significantly to the development of the concept. Whereas Lenin's understanding of the self-determination of peoples included a right to secession, Wilson's conception focused on a continuing democratic relationship between the government and the people.[3] In those days, these approaches towards self-determination were only political principles.[4] This changed after the Second World War when self-determination began to be interpreted as the right for colonial peoples to establish their own independent states.[5] Since then, the right to self-determination has crystallized mainly into two dimensions in positive international law. On the one hand, a people can exercise the right to self-determination by constituting a new governing institutional order in the form of an independent state. This is known as external self-determination.[6] On the other hand, a people can exercise this right continuously within a state, referred to as internal self-determination.[7]

1 Humphrey, "Political and Related Rights", 193.

2 Brilmayer, "Secession and Self-Determination: A Territorial Interpretation", 177, 179-180; Brilmayer also refers to Ronen who links the American and French Revolution to the notion of self-determination; Ronen, *The Quest for Self-Determination*; See also Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 11-13; Raič, *Statehood and The Law of Self-Determination*, 172-175; Van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?*, 14-15.

3 Brilmayer, Secession and Self-Determination: A Territorial Interpretation, 180-181; Anaya, "A Contemporary Definition of the International Norm of Self-Determination", 134-135; See generally also Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 14-23; Raič, *Statehood and The Law of Self-Determination*, 177-188.

4 *Åland Islands Case* (1920) League of Nations Official Journal 3 [5].

5 Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective", 315.

6 Van den Driest, *Remedial Secession: A Right to External Self-Determination as a Remedy to Serious Injustices?*, 84-94; Shikova, *Self-Determination and Secession: In Between the Law, Theory, and Practice*, 53-72.

7 See generally Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective".

The right to self-determination of peoples is now well established in international law, and over the last two decades its internal dimension has gained prominence, particularly in the context of indigenous peoples. One of the most noteworthy developments in this regard is the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[8] Although the UNDRIP itself is not legally binding, it is still considered to be one of the most important international legal instruments on indigenous rights. Key provisions of the Declaration elaborate on already existing legal standards under positive international law.[9] Examples are the right to self-determination, cultural rights, and land rights.[10] In this respect, the UNDRIP serves as a soft law instrument that facilitates the understanding and application of the fundamental human rights of indigenous peoples within both customary international law and treaty law.[11]

The contemporary international legal framework on the rights of indigenous peoples does not only concern the UNDRIP. Another key legal international instrument is Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organisation (ILO Convention 169).[12] A detailed discussion of ILO Convention 169 in this article would not be proper place[13] but it is important to note is that it

8 UNGA Res 61/295 (13 September 2007) UN Doc A/61/295 (UNDRIP).

9 As noted by Anaya, these provisions neither have sui generis status nor introduce new rights in international law; UNHRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, S. James Anaya (11 August 2008) UN Doc A/HRC/9/9, para 40; This is also known as the 'no new rights' narrative. For a critical commentary on this, see specifically Esterling, "Looking Forward Looking Back: Customary International Law, Human Rights and Indigenous Peoples", 299-303.

10 Iorns Magallanes illustrates that 'even though it cannot be maintained that the UNDRIP as a whole can be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law'. Some examples she points to are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies; Iorns Magallanes, "ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples", 43 .

11 Allen, "The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project", 231.

12 Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169).

13 The 2020 special issue on 'ILO Convention 169: Critical Perspectives' of the International Journal of Human Rights is recommended to be consulted for this. For an introduction of the special issue, see Gilbert and Larsen, "Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future" 83.

concerns a multilateral treaty protecting indigenous peoples and their traditional way of life. The treaty has had a significant role on the development and shaping of the contemporary international legal framework that protects indigenous peoples.[14] Moreover, its normative status is strong due to being a treaty. The major issue, however, is that only a limited number of states have expressed their consent to be bound by ILO Convention 169.[15] Therefore, the Convention fails to have universal application in the international community where states remain the primary actors. Another issue is practical: for those states that have expressed their consent to be bound by ILO Convention 169, proper capacity building and financial resources are necessary to realise the protection of indigenous peoples in the long run.[16] The right to the self-determination of indigenous peoples has also not been completely fleshed out in ILO Convention 169. According to one commentator, 'the ILO declared itself incompetent at recognising the right to self-determination, which it felt should be left to a UN body with requisite authority'.[17] The UNDRIP, however, has integrated the right to self-determination in a clear manner, taking this as a point of departure in one of its first provisions, and subsequently further builds on the relevant legal aspects of ILO Convention 169. A good example is how the UNDRIP presents the right to self-determination as its anchor and further crystallises participatory engagement of indigenous peoples as a key element of this right in decision-making processes that significantly affect them.[18]

The rise of the right to self-determination of indigenous peoples in contemporary international law should not be underestimated but it did not occur within the context of UNDRIP only. Prior to its adoption in 2007, significant legal developments regarding the right to self-determination of indigenous peoples took place in the Nordic region, particularly involving

14 This is particularly true when it comes to the crystallisation of participatory rights of indigenous peoples, which have significantly developed in the inter-American human rights system. See also Cuneo, "ILO Convention 169 in the Inter-American Human Rights System: Consultation and Consent", 257.

15 For the current status of ratifications of ILO Convention 169, see 'UNTC, Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries' <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280oc0136&clang=_en> accessed 16 January 2025.

16 Gilbert has also shown this by taking the ratification process of ILO Convention 169 by the Central African Republic as an example; Gilbert, "The ILO Convention 169 and the Central African Republic: From Catalyst to Benchmark", 221.

17 Joona, *ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach*, 76.

18 For participatory engagement as an essential element of the right to self-determination of indigenous peoples, see also Section II of this article.

the Sámi, the indigenous people of *Sápmi* – an area that encompasses the northern parts of Norway, Sweden, Finland, and Russia.[19] The Sámi have inhabited this region for centuries, predating the establishment of modern states in *Sápmi*. As a people, they have thrived on a traditional lifestyle centered around hunting, fishing, and gathering. Central to this lifestyle is reindeer herding, which has necessitated a nomadic existence, moving reindeer herds across *Sápmi* between seasons.[20] However, due to historical assimilation policies, the Sámi have faced considerable marginalisation, which has led them to strive for their right to self-determination.[21]

A landmark moment in Sámi self-determination was the call for a Nordic Sámi Convention, which already emerged in the 1980s when the Sámi Council formally proposed the idea to conclude a Nordic Sámi Convention.[22] While one major critique is that Russia has not been included, making negotiations challenging as Russia prefers to regulate the rights of its indigenous peoples independently,[23] the pursuit of a Nordic Sámi Convention remains significant. After all, it aspires to pave the way for a 'joint Nordic Sámi nation', providing a foundational basis for potentially including the Sámi in Russia in the future.[24] Essential to this process is the right to self-determination, which underpins the idea of a Nordic Sámi Convention. A first draft of the Nordic Sámi Convention was submitted in 2005 by an Expert Committee, and the discussions culminated in a new draft proposed in 2017.[25]

While the legal developments surrounding the Nordic Sámi Convention are noteworthy, scholarly discussion on this subject concerning the self-determination rights of indigenous peoples in international law has been

19 Bankes and Koivurova, "Introduction" 1.

20 Åhrén, "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law: The Saami People's Perspective", 1; UNHRC, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, on the situation of the Sami people in the Sápmi region of Norway, Sweden and Finland (6 June 2011) UN Doc A/HRC/18/35/Add.2, para 5.

21 Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 181.

22 Koivurova, "The Draft for a Nordic Saami Convention", 280; Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples", 12; Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 182.

23 Koivurova, "Can Saami Transnational Indigenous Peoples Exercise Their Self-Determination in a World of Sovereign States?", 120.

24 Koivurova, "The Draft for a Nordic Saami Convention", 114.

25 Heinämäki and Cambou, "New Proposal for the Nordic Sámi Convention: An Appraisal of the Sámi People's Right to Self-Determination", 3; Niemivuo and Viikari, "'Nordic Cooperation at a Crossroads", 126.

notably sparse. Although the 2005 Draft Nordic Sámi Convention garnered some attention and discussion,[26] examinations of the 2017 Draft remain limited within the broader discourse among international lawyers.[27] Against this backdrop, this article seeks to fill this gap by examining the right to self-determination of the Sámi as articulated in both the 2005 Draft and the 2017 Draft.[28] Furthermore, this article aims to demonstrate that the developments of a Nordic Sámi Convention are crucial in trying to understand how the right to self-determination of indigenous peoples could be fleshed out in the twenty-first century.[29]

To this end, the article employs a comparative analysis, taking inspiration from the comparative law approach presented by Reitz.[30] Although the units of comparison that Reitz discusses mostly relate to national legal systems, comparative exercises remain essential to studying law in general. For instance, Glenn notes that '[c]omparative law is increasingly integrated into law itself, as a fundamental technique and means of support'.[31] In the context of contemporary international law, comparative analyses could remind the international lawyer of comparative international law, which concerns the exercise of 'identifying, analysing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law'.[32] The current article, however, does not

26 Koivurova, "The Draft for a Nordic Saami Convention"; Koivurova, "The Draft Nordic Saami Convention: Nations Working Together"; Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples"; Koivurova and Bankes (eds), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights*; Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination".

27 Vidmar, "Another One Bites the Dust? A Critical Appraisal of the New Draft of the Nordic Saami Convention from the Perspective of Indigenous Rights", 165; Heinämäki and Cambou, "New Proposal for the Nordic Sámi Convention: An Appraisal of the Sámi People's Right to Self-Determination"; Falch and Selle, "The Nordic Sámi Convention and Self-Determination in the Nordic Context", 85-86; Niemivuo and Viikari, "'Nordic Cooperation at a Crossroads", 126-129.

28 For the texts of the 2005 Draft Nordic Sámi Convention and 2017 Draft Nordic Sámi Convention, see 2005 Draft Nordic Sámi Convention (submitted 27 October 2005) <https://www.regjeringen.no/globalassets/upload/aid/temadokumenter/sami/sami_samekonv_engelsk.pdf> accessed 16 January 2025; 2017 Draft Nordic Sámi Convention (adopted 13 January 2017) <https://www.regjeringen.no/no/tema/urfolk-og-minoriteter/samepolitikk/nordisk-samisk-samarbeid/nordisk-samekonvensjon/id86937/> accessed 16 January 2025.

29 Koivurova has also shown that the 2005 Draft is 'crucial in trying to reveal the essence of what would otherwise be a mere pronouncement that indigenous peoples have a right to self-determination'; Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples", 4.

30 Reitz, "How to Do Comparative Law".

31 Glenn, "Aims of Comparative Law", 87.

32 Roberts and others, "Comparative International Law: Framing The Field", 469.

take a comparative international law approach, as the latter focuses largely on comparative exercises between national or regional actors regarding their methods of engaging with international law.[33] Instead, this article examines, by ways of comparison, two self-determination models in the drafting process of a treaty, namely the self-determination model under the 2005 Draft Nordic Sámi Convention and the self-determination model under the 2017 Draft Nordic Sámi Convention. Here, the units of comparison (the self-determination models under the 2005 Draft and the 2017 Draft) are two products of a drafting process concerning an international legal instrument that has not been ratified until this day.

The structure of the article is as follows. First, the article will provide a general discussion on the right to self-determination of indigenous peoples in contemporary international law. After this, it will compare the self-determination models proposed under the 2005 Draft and the 2017 Draft. Section III will compare the general aspects of the right to self-determination under the 2005 Draft and 2017 Draft. Subsequently, Section IV will compare the right to self-determination in the context of natural resources and land rights under the 2005 Draft and 2017 Draft. Next, Section V will compare the right to self-determination under the 2005 Draft and 2017 Draft in a transboundary context. Finally, the article will present some reflections.

2. Self-Determination of Indigenous Peoples in International Law

Whereas the idea of self-determination was traditionally deployed in the context of statehood, the indigenous rights movement has highlighted that the core of self-determination is not about the attributes of statehood.[34] Instead, emphasis is put on self-determination as a human right, which is about a people being able to control their destiny and to have an institutional government devised accordingly within a state. The underlying idea of the right to self-determination of indigenous peoples, therefore, does not

33 Roberts and others, "Comparative International Law: Framing The Field", 469; For numerous contributions in the field of comparative international law, see also Roberts and others, *Comparative International Law*.

34 For most indigenous peoples, their viability significantly depends on the existing state and, with that in mind, they do not wish to secede. Borrowing the words of Anaya, '[o]nly in limited circumstances would secession be a cure better than the disease, and even then it would most likely be only a partial step toward the full realisation of self-determination values'; Anaya, "A Contemporary Definition of the International Norm of Self-Determination", 163; See also Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era", 185.

mean the creation of new states *per se*.[35] It concerns the nuanced creation of institutional procedures and processes which make it possible for an indigenous people to maintain and control their destinies. As such, the rationale of the right to self-determination of indigenous peoples is to protect, preserve, strengthen and further develop their collective identity.[36] In essence, self-determination is about the relation between the state and an indigenous community,[37] and in that regard it is 'a tool to reshape a new relationship between states and indigenous peoples in a spirit of partnership and mutual respect'.[38] This requires the ongoing guarantee of effective avenues of political participation in the governing institutional order so that the collective identity and situations of an indigenous people can be taken into account.[39] The right to self-determination of indigenous peoples does not simply concern an end result. Instead, it needs to be understood in terms of process and legitimacy.

To whom can such perspective be owned? Should a contemporary name be desired in the field of indigenous rights in international law, then it would be S. James Anaya, former UN Special Rapporteur on the Rights of Indigenous Peoples, who spoke of a *constitutive* aspect and an *ongoing* aspect of self-determination in 1993.[40] These dual aspects remarkably resemble how norms of international law can be qualified: generally, there are those norms of an organisational character and those of a societal (or perhaps

35 As noted by Foster, the right to self-determination as exercised by indigenous peoples is different than that of colonial people. Self-determination of indigenous peoples simply fits within a model that is different to self-determination in the context of decolonisation; Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples", 155; See also Van Genugten and Perez-Bustillo, "The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions".

36 Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era", 196.

37 Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples Claims in International and Comparative Law", 223; Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples"; For a meaning of a 'relational approach', see also McHugh, "Aboriginal Identity and Relations in North America and Australasia".

38 Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 188.

39 This creates a bottom-up approach that includes the choices of the community and continuous negotiations between indigenous peoples and governments; See for this also Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples", 148, 150-156; Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era", 193.

40 Anaya, "A Contemporary Definition of the International Norm of Self-Determination".

more accurately, a relational) character in international law.[41] It is certainly not surprising that a similar arrangement can be presented when examining the right to self-determination of indigenous peoples in contemporary international law: 'on the one hand, autonomous governance and, on the other hand, participatory engagement'.[42]

Autonomous governance may be considered as the constitutive aspect of self-determination of indigenous peoples in a state. The most relevant international legal instruments express this by ways of the legal entitlement of a people to 'freely determine their political status'.[43] The UNDRIP is even more concrete by expressing that indigenous peoples have 'the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions' when exercising their right to self-determination.[44] But why is this a constitutive aspect of self-determination then? There are good reasons to perceive autonomous governance as such. One is that it may be employed as an instrument to enable an indigenous people, who often form a minority in a state, its free will on matters that significantly affect them within the constitutional order of that state. Autonomy has its advantages in terms of 'identity, establishing a formal place for groups in the public world, giving further opportunity for them to reinforce the values of the group and to interact with other parts of society as a group'.[45] In the end, a representative government needs to govern without distinction, and autonomy can ensure an equal playing field between an indigenous people forming a minority and the non-indigenous majority in a state.[46] On top of that, autonomy is often used as an alternative

41 In 1898, such qualification of norms to examine the scope and content of international law was already employed. See in particular Van Vollenhoven, *Scope and Content of International Law (1898)*, 17-26.

42 Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era", 193.

43 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art. 1; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art. 1.

44 UNDRIP, art. 4.

45 Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples", 153.

46 Wright, "Minority Groups, Autonomy and Self-Determination", 618; See also Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples", 152.

to secession which can threaten the territorial integrity of the state and lead to unstable situations.[47]

The other aspect of self-determination of indigenous peoples concerns participatory engagement. This may be perceived as the ongoing aspect of self-determination, which is facilitated by its constitutive aspect. By ways of an autonomous representative body of an indigenous people within the constitutional order of a state, participation in decision and/or law-making that affect this indigenous people can be realised. Illustrative in this regard are the Sámi parliaments in Norway, Sweden, and Finland.[48] In the words of the major international legal instruments, a people is then able to 'freely pursue their economic, social and cultural development'.[49] Such understanding of self-determination highlights its procedural character.[50] For example, Anaya emphasises the ongoing character as a central aspect of the substance of self-determination. As soon as a governing institutional order is established, this order needs to be one in which a people can freely express its will continuously.[51] Jan Klabbers also refers to this as the right to be heard and to be taken seriously.[52] In this way, the right to self-determination implies a minimal standard of participation by indigenous peoples in the governing institutional order, yet a serious question remains: what would be the scope of participation then? For this, it is useful to refer to the 'contextual participation approach' proposed by Claire Charters.[53]

47 Weller, "Settling Self-Determination Conflicts: An Introduction", xiii.

48 For an analysis of the mandates and powers of the Sámi parliaments in Norway, Sweden and Finland, see Mörkenstam, Josefsen and Nilsson, *The Nordic Sámediggis and the Limits of Indigenous Self-Determination*.

49 ICCPR art. 1; ICESCR art. 1.

50 Klabbers, "The Right to Be Taken Seriously: Self-Determination in International Law"; It should be noted however that some argue that the nature of the right to self-determination is not only limited to a 'procedural process" but, also a "substantive mechanism' to ensure that an indigenous people can have influence over the material outcome of decision-making processes. See for instance UNHRC, Final report of the study on indigenous peoples and the right to participate in decision-making (17 August 2011) UN Doc A/HRC/18/42, 22, 26, 28; Åhrén, *Indigenous Peoples' Status in the International Legal System*, 135.

51 Anaya, A Contemporary Definition of the International Norm of Self-Determination", 157.

52 See generally Klabbers, "The Right to Be Taken Seriously: Self-Determination in International Law".

53 See generally Charters, "A Self-Determination Approach to Justifying Indigenous Peoples"; Note that Charters applies this approach to the international level. However, it could also be applied to a domestic one. Cambou also refers to this approach as a 'sliding scale model of self-determination'; Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 191.

According to Charters, the degree of participation is determined with the help of a normative spectrum ranging from full participation to no participation at all. The more impact a law- or decision-making process has on an indigenous people, the stronger the claim would be for an indigenous people to participate in the process. The underlying idea here is that a process and its results will be more legitimate if it affects an indigenous people.[54] For instance, if a license would permit multinational corporations to start projects on indigenous lands but does not respect indigenous practices and the traditional governance structures of the community, it would not be difficult to conclude that the latter's viability will be at stake. A high degree of participation by an indigenous people in the licencing process would then legitimise the decision-making process and its results if the indigenous community would be, let us say, forcefully evicted from their ancestral lands. In such cases, international law actually requires state authorities to obtain their consent, which has to be free, prior and informed.[55] Such obligation of the state concerns one of result: consent must be obtained freely, priorly and in an informed manner, and if this is not done, the state would violate its international obligation to do so. However, if the decision would have little to no impact on the indigenous people, the latter would have a weak claim to participate – and consultation as a means to obtain the consent of an indigenous people in the decision-making process would be sufficient. This could be best regarded then as a best effort obligation to obtain the consent, or an obligation of conduct. In such a case, the obligation does not require the state to obtain the consent of an indigenous people, but instead the state should have showed its best efforts to do so by means of consulting the community.[56]

All in all, what matters is the impact that a decision or a law has on an indigenous people, meaning that it does not matter whether the decision or law affects the entire population indiscriminately. The impact that it

54 Tennant, "Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993", 49.

55 UNDRIP art. 10; ILO Convention No. 169 art. 16.

56 Further research on the links between due diligence and self-determination has already been proposed elsewhere; See Malaihollo, "Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights", 151; Brus, Merkouris and de Hoogh, "The Normative Status of Climate Change Obligations under International Law: "Yesterday's Good Enough Has Become Today's Unacceptable", 21.

has on an indigenous people is what matters and viewing the right to self-determination of indigenous peoples as a matter of contextual participation, in the end, is flexible and functional since it takes into consideration political realities. At the same time, it is able to balance this with the free and genuine will of an indigenous people.

Having outlined the right to self-determination of indigenous peoples in international law, the remainder of this article will compare the self-determination models under the 2005 Draft Nordic Sámi Convention and the 2017 Draft Nordic Sámi Convention. Notably, the 2005 Draft stands out not merely as a framework convention but as an international legal instrument that delineates specific rights and obligations for the Sámi people, effectively addressing their legal challenges rather than providing only ambiguous guidelines.[57] This deliberate concretisation of legal norms is particularly evident in the self-determination model of the 2005 Draft, which enhances the rights of indigenous peoples, aligning closely with principles later articulated in the UNDRIP. Remarkably, the 2005 Draft predated the adoption of the UNDRIP and showcased a keen awareness of emerging international legal standards, warranting commendation for its forward-thinking approach. However, the subsequent 2017 Draft fell short of these early aspirations, offering little more than a reiteration of existing international law concerning self-determination. When examining the 2005 Draft in comparison to the 2017 Draft, distinct disparities emerge, particularly regarding: (1) the general aspects of the right to self-determination; (2) the right to self-determination in the context of land rights and natural resources; and (3) the right to self-determination in a transnational context. The following Sections will discuss these aspects. Each Section will first discuss the matter under the 2005 Draft, followed by comparing it with the 2017 Draft.

3. General Aspects of Self-Determination

For an analysis of the general aspects of the right to self-determination of an indigenous people under the 2005 Draft, the point of departure would be Article 3.

57 Koivurova, "The Draft for a Nordic Saami Convention", 107-108.

> *Article 3 Draft Nordic Sámi Convention (2005)*
> As a people, the Sámi has the right of self-determination in accordance with the rules and provisions of international law and of this Convention. In so far as it follows from these rules and provisions, the Sámi people has the right to determine its own economic, social and cultural development and to dispose, to their own benefit, over its own natural resources.

This formulation of the right to self-determination very much reflects its expression in Article 1 of the International Covenant on Civil and Political Rights (ICCPR), Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 3 of the UNDRIP.[58] However, most noticeable is that Article 3 of the 2005 Draft Nordic Sámi Convention refers to 'the right to self-determination in accordance with the rules and provisions of international law', while at the same time it needs to be understood in accordance with the rules and provisions 'of this Convention'. Therefore, the 2005 Draft Sámi Convention seems to add something extra to the contemporary understanding of the right to self-determination of indigenous peoples in international law. This becomes clear when taking a closer look at some other provisions of the Convention, especially those of Chapter II of the 2005 Draft Nordic Sámi Convention.[59]

Chapter II of the 2005 Draft Convention covers political representation and decision-making institutions, which is central to the right to self-determination of indigenous peoples.[60] As for the Sámi, this is primarily exercised by the Sámi parliaments in the Nordic context.[61] Relevant provisions under the 2005 Draft Nordic Sámi Convention are Articles 14-22, which give further meaning to the right to self-determination in this sense. Article 14 emphasises the constitutive aspect of self-determination by giving

58 For differences and commonalities of processes regarding the Human Rights Committee, the UNDRIP and the 2005 Draft Nordic Sámi Convention, see generally Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples".

59 Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 191.

60 Heinämäki, "The Nordic Saami Convention: The Right of a People to Control Issues of Importance to Them", 134-135; See generally also Foster, "Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples".

61 Noteworthy is that the Draft Convention does not limit the Sámi parliaments' representation to solely domestic matters. Article 19 of the Draft Nordic Sámi Convention expands the Sámi parliament's representation also to intergovernmental matters; 2005 Draft Nordic Sámi Convention art. 19; See also, Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 193.

further meaning to the realisation of the freely expressed will of the Sámi via a model of self-governance.[62] Important to note in this regard, the model is well balanced and legitimate, since the elections are prescribed by law, but at the same time 'prepared through negotiations with the Sámi parliaments'.[63]

Subsequently, the right to self-determination is given further meaning under Article 15 of the 2005 Draft Convention, stating that the Sámi parliaments have an independent authority on all matters for which they are responsible under national or international law.[64] That is to say, they can make independent decisions on particular matters. However, one may duly wonder what these independent decisions entail. What is its scope precisely? Articles 16-18 elaborate on the scope of these independent decisions by making vital references to the earlier mentioned contextual participation approach towards self-determination: the more impactful a matter is on the Sámi, the higher the level of participation is required.[65]

Article 16 of the Draft Nordic Sámi Convention is a good example. This provision concerns a vital manifestation of ongoing Sámi self-determination, since it requires that negotiations take place with the Sámi parliaments on matters that are of major importance to the Sámi. In particular, Article 16 states that negotiations need to take place 'sufficiently early' with the Sámi parliaments on matters that are of major importance to the Sámi.[66] This sets the basis for the ongoing aspect of self-determination: a minimum form of participatory engagement. But there is more. The degree of participatory engagement increases when the Nordic states adopt or permit measures that significantly affects 'the basic conditions for Sámi culture, Sámi livelihoods

62 2005 Draft Nordic Sámi Convention art. 14; See also Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 191; Important to note is that the Sami parliaments are not the only representative bodies through which self-determination can be manifested. Cambou accurately points out that other Sami associations can function as legitimate representatives of the Sámi people. Examples are the Samebyar, siidas, the reindeer herder communities and the village assemblies of the Skolt Sami; 2005 Draft Nordic Sámi Convention art. 21.

63 2005 Draft Nordic Sámi Convention art. 14.

64 2005 Draft Nordic Sámi Convention, art. 15.

65 Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 191; For the "contextual participation approach", see also Section II of this article.

66 Here, "sufficiently early" refers to early stage negotiations that make it possible for the Sámi people to have meaningful influence over decisions that truly impact them; 2005 Draft Nordic Sámi Convention art. 16; See also Heinämäki, "The Nordic Saami Convention: The Right of a People to Control Issues of Importance to Them", 137.

or society'. If that is the case, the state authorities have an obligation of result in that for such measure the consent by the Sámi parliament in question needs to be obtained.[67] It is important to note here that this does not imply an absolute veto for the Sámi parliaments.[68] Since the measure needs to 'significantly' harm the basic conditions for Sámi culture, Sámi livelihoods or society, the threshold for state authorities to obtain the consent of the Sámi parliament in question is fairly high. There needs to be 'significant' harm. Good examples are: (1) the relocation of an indigenous people from their ancestral lands and (2) the storage or disposal of hazardous materials in the lands or territories of an indigenous people.[69]

At this point, one may wonder: can these general aspects of the right to self-determination be traced in the 2017 Draft Nordic Sámi Convention as well? Article 4 of the 2017 Draft presents the way in which Sámi self-determination is presented.

> *Article 4 Draft Nordic Sámi Convention (2017)*
> The Sámi people has the right to self-determination. Based on that right they may freely determine their political status and their economic, social and cultural development.
> Self-determination is exercised through self-government in internal affairs and through consultation with regard to issues which may be of particular importance to the Sámi.[70]

There is not so much new to say about the first paragraph of Article 4. It is in line with the wording of Articles 1 of the ICCPR and ICESCR, Article 3 of the UNDRIP, and similar to Article 3 of the 2005 Draft Nordic Sámi Convention by expressing the core of the content of self-determination: the free will of the Sámi. The second paragraph of Article 4 subsequently presents the constitutive aspect of the right to internal self-determination by highlighting that Sámi self-determination is exercised through

67 2005 Draft Nordic Sámi Convention art. 16.

68 According to Cambou, this implies that the Sámi parliaments have a limited power to veto decisions that would significantly harm the Sámi people; Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 193; See also UNDRIP art. 19.

69 UNDRIP articles 10, 29(2); ILO Convention No. 169 art. 16; See also Barelli, "Free, Prior and Informed Consent in the UNDRIP: Articles 10, 19, 29(2) and 32(2)", 254-256, 264-265.

70 Translation by Mattias Åhrén, see also Åhrén, "Legal Analysis of the 10 January 2017 Draft Proposal for a Nordic Sami Convention", 3, 5-6.

'self-government in internal affairs'. Nonetheless, it should be noted that the scope of Sámi self-determination under the 2017 Draft Convention is not absolutely limited to the right to internal self-determination only. In Article 19, obligations of the Nordic states in the context of the Sámi Parliament's right to independent representation in international organisations and meetings dealing with issues of particular importance to the Sámi can be found.[71] In this way, Article 19 expresses a legal entitlement of the Sámi parliaments that may well be seen as the constitutive aspect of the right to self-determination of the Sámi, which is exercised, not internally within the constitutional framework of the state but, towards the rest of the international community. It is certainly not surprising that these concern traces of a right to external self-determination, which does not take the form of unilateral or remedial secession, but forms the foundation for an indigenous people to participate on the international level.[72]

So far, it would be fair to say that the constitutive aspect of self-determination as expressed in Article 4 of the 2017 Draft Nordic Sámi Convention reflects contemporary positive international law on self-determination of indigenous peoples. It is another story when we examine the ongoing aspect of the right to self-determination, namely participatory engagement. Article 4(2) of the 2017 Draft addresses this aspect. Those who are well-versed in the right to self-determination of indigenous peoples in international law will come face to face with a notable difficulty here. Article 4(2) states that Sámi self-determination is exercised 'through consultation with regard to issues which may be of particular importance to the Sámi'. Under the 2017 Draft, these words seriously limit the aspect of participatory engagement under the right to self-determination to only a right to consultation. However, such legal entitlement is not the same as the right to self-determination.[73] As showcased earlier in this article, the right to self-determination of indigenous peoples includes a wide spectrum of participatory aspects ranging from consultations to obtaining the consent of an indigenous people in a free, prior

71 A similar provision can be found in the 2005 Draft; See 2005 Draft Nordic Sámi Convention art. 19; Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)Gain Their Right to Self-Determination", 15-16.

72 Koivurova, "The Draft Nordic Saami Convention: Nations Working Together", 285-286; For general contributions on participation of indigenous peoples on the international level, see also Charters, A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy; Jones, *Self-Determination as Voice: The Participation of Indigenous Peoples in International Governance*.

73 Åhrén, *Indigenous Peoples' Status in the International Legal System*, 135-138.

and informed sense.[74] Consultations only form a minimum basis of the aspect of participatory engagement under the right to self-determination, but the scope of the latter also extends to free, prior and informed consent as a concrete articulation of an indigenous people's free will to determine their future if their special relationship with the ancestral lands, environment and the natural world is significantly harmed. In such situation, their right to self-determination creates the possibility for them to meaningfully influence the decision-making process and its outcome.[75] While international law extends the scope of the right to self-determination of indigenous peoples beyond mere consultations, the 2017 Draft does the opposite: it limits the right to self-determination to a right of consultation and 'locks the Sámi in a position where they will always have to rely upon the good will of the state in decision-making processes, without no real power of their own'.[76]

The ripple effects of this limitation throughout the other parts of the 2017 Draft Nordic Sámi Convention cannot be overestimated. This is particularly the case for Chapter II of the 2017 Draft. This Chapter aims to concretise the constitutive aspect of the right to self-determination of the Sámi and does this by addressing, what the 2005 Draft previously qualified as, Sámi governance. While some provisions of Chapter II are helpful in concretising the content and scope of Sámi self-determination, some concretise the serious limitation addressed earlier in Article 4(2).[77]

Take for instance Articles 17 and 18 of the 2017 Draft. These provisions explicitly address consultations as a means of participatory engagement and confirm that it is sufficient that the state authorities consult the Sámi parliament or other Sámi representatives, such as Sámi villages, *siidas*, reindeer herders or other Sámi organisations. However, the question remains whether the Sámi would sufficiently be heard and taken seriously in situations where their special relationship with the environment and natural

74 See Section II of this article.

75 Åhrén, *Indigenous Peoples' Status in the International Legal System*, 135.

76 Åhrén, "Legal Analysis of the 10 January 2017 Draft Proposal for a Nordic Sami Convention", 7; By limiting the right to self-determination to a right to consultation, there is heightened risk of consent being manufactured. 'Decision makers and the wider public may interpret agreements as expressions of freely obtained consent, although the Indigenous groups may have felt forced to the negotiation table'; Larsen and others, 'Negotiated Agreements and Sámi Reindeer Herding in Sweden: Evaluating Outcomes", 983.

77 Helpful provisions are Articles 15 (on Sámi parliament cooperation with other indigenous peoples and national, regional and local entities), 16 (on state promotion of cooperation of Sámi parliaments and the forming of joint organisation) and 19 (on state obligations to promote Sámi representation on the international level).

world is seriously at stake. According to Articles 17 and 18 of the 2017 Draft, the state authorities would only be obliged to seek the consent of the Sámi parliament of other Sámi institution, but not necessarily obtain it. What if a Sámi community would be forcefully evicted from their ancestral lands? Chapter II of the 2017 Draft Convention does not provide an obligation for the state authorities to obtain the consent for the Sámi community then, but only a duty to consult as a means to seek that consent. Meanwhile, international law – as this article pointed out to earlier – is clear: consent must be obtained.[78] As Chapter II of the 2017 Draft only expresses an obligation for the state authorities to seek the consent of the Sámi by ways of consultations, it does not contain any reference points for a contextual participation approach or sliding scale where this best efforts obligation transforms into an obligation of result to obtain the consent of the Sámi parliament or other institutions. Therefore, the whole spectrum of the ongoing aspect of the right to self-determination of indigenous peoples is not integrated completely into the 2017 Draft.

Another problematic issue in Chapter II of the 2017 Draft is that of Article 14. This provision is about the mandate of the Sámi parliaments.

> *Article 14 Draft Nordic Sámi Convention (2017)*
> The Sami parliaments make independent decisions in such matters for which they are responsible under national law and in other matters they engage in.[79]

The concern here is that the mandate of the Sámi parliaments for making independent decisions is determined by the national law of the Nordic states, and not international law. Compared to the 2005 Draft, which refers to the Sámi parliaments making 'independent decisions on all matters where they have the mandate to do so under national or international law', this is a major drawback.[80] As the 2017 Draft expresses that the mandate of the Sámi Parliament to make independent decisions is determined by national law only, the Sámi Parliaments' legal entitlement to make independent decisions is conditioned to the requirement that it conforms with national law

78 For Norway, this becomes arguably even more problematic as it is a state party to ILO Convention 169, which concretely expresses this obligation in Article 16. See ILO Convention No. 169 art. 16.

79 Translation by Mattias Åhrén, see Åhrén, "Legal Analysis of the 10 January 2017 Draft Proposal for a Nordic Sami Convention", 8.

80 2005 Draft Nordic Sámi Convention art. 15.

of the Nordic states. The interests of the state, thus, remain at the centre. While no problems would arise if Sami self-determination was implemented through national law, the mandate needs to be determined by international law and not national law.[81]

Table 1. Comparison of the general aspects of self-determination under the 2005 Draft and 2017 Draft

	2005 Draft	2017 Draft
Human rights language	Yes	Yes
Autonomous governance	Yes	Yes
Mandate international law	Yes	No
Participatory engagement	Yes	Yes
Sliding scale approach	Yes	No

4. Self-Determination in The Context of Land and Resources

Under the 2005 Draft, Article 3 mentions that the right to self-determination of the Sámi also includes a right 'to dispose, to their own benefit, over its own natural resources'. This is what Dorothée Cambou also refers to as the resource dimension of the right to self-determination under the 2005 Draft Convention.[82] The rationale of this dimension can be found in the fact that the Sámi people are an indigenous people.[83] As their special relationship with the natural world, their environment and their ancestral lands takes a central place in their collective identity, and their viability as a people depends on this strong bond, their collective identity cannot be bargained away. Instead, it requires serious protection. Since the right to self-determination is a means to protect, preserve, strengthen and further develop this identity, it would be unreasonable to exclude natural resources from the scope of their freely expressed will. While Article 3 of the 2005 Draft provides such firm foundation, the equivalent under the 2017 Draft does

81 Åhrén, "Legal Analysis of the 10 January 2017 Draft Proposal for a Nordic Sami Convention", 8.
82 Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 194-197.
83 For a brief introduction on the Sámi as an indigenous people in Norway, Sweden and Finland, see also Heleniak and Napper, "The Role of Statistics in Relation to Arctic Indigenous Realities", 17-20; Importantly, this book chapter examines the way in which national statistical offices of multiple Arctic states categorise the peoples in the Arctic and how these classifications have been used.

not contain any reference to a context of natural resources. In this regard, the 2017 Draft lacks a strong foundation to sufficiently link the right to self-determination to rights related to land and resources like the 2005 Draft does. When it comes to the relevant Chapter on rights to land and resources under the 2005 Draft and 2017 Draft, this link is easy to find under the former, but hard to find under the latter.[84]

The 2005 Draft Convention innovatively gives further meaning to the right to self-determination in the context of natural resources by linking land rights to the right to self-determination in Articles 34-40. As regards the utilisation of resources, Article 36 of the 2005 Draft Convention particularly further concretises the right to self-determination of indigenous peoples in this context, which is innovative. Why is this the case? It is because positive international law remains somewhat hesitant in fine-tuning how and when an indigenous people is to be seriously heard in a decision-making process regarding land and natural resources. For instance, Article 32 of the UNDRIP declares that states need to engage in meaningful consultation and cooperation with the relevant representative body of an indigenous people so that their free, prior and informed consent may be obtained before approving any project that impacts their lands, territories, or resources. However, this is mostly about a best efforts obligation regarding consultations and not the whole sliding-scale of participatory engagement extending to an obligation of result to obtain an indigenous people's free, prior and informed consent. When does such best effort obligation transform into an obligation of result then?

In order to address this question, Article 36 of the 2005 Draft Convention is useful. This provision concretises the ongoing aspect of self-determination, i.e. participatory engagement, in the context of land and resources. The provision firstly presents a default setting, which comes down to a best efforts obligation of the Nordic states to negotiate with the affected Sámi. If the situation falls within the scope of Article 16 of the 2005 Draft Convention, negotiation with the relevant Sámi parliament is also required. This is striking because the form of participatory engagement primarily focuses on negotiations with those affected on the ground and not with Sámi representatives in a political

84 It should also be noted that serious drawbacks related to land rights may be found in Chapter IV of the 2017 Draft Nordic Sámi Convention. For example, the 2017 Draft assumes that Sámi territories can be legally expropriated, but the question remains whether international law allows this. Other problems relate to benefit sharing and restitution. See also Åhrén, "Legal Analysis of the 10 January 2017 Draft Proposal for a Nordic Sami Convention", 12-14.

body only. It follows that the minimum of the ongoing aspect of self-determination in the context of decisions affecting indigenous land and resources is set by such negotiations. Then, Article 36 presents us a way how the degree of participation can be heightened and when a state's best efforts obligation can change into an obligation or result, i.e. obtaining the consent of the Sámi. If the utilisation of the concerned area by the Sámi is essential to their culture and if it is impossible or substantially more difficult for the Sámi to continue utilising the area when the activity permitted by the Nordic state authorities takes place, the Nordic state authorities are required to obtain the consent by both the Sámi parliament and the affected Sámi. In this sense, Article 36 innovatively further crystallises the right to self-determination of an indigenous people in the context of land and resources, and provides the Sámi a possibility to say no to projects that seek access to their traditional territories in particular situations.

Consider, for instance, the situation of wind power development in an area that has traditionally been used by the Sámi for reindeer herding and the wind turbines make it substantively more difficult for the Sámi to undertake their traditional reindeer herding practice.[85] Usually projects like these require a license from a Nordic state before the project can commence. According to Article 36 of the 2005 Draft Convention, both the affected Sámi reindeer herders and the Sámi parliament would be required to be negotiated with before the license is granted. However, to prevent participatory engagement becoming merely an administrative exercise of 'ticking a box', Article 36 would require the state authorities to do more before making a decision on granting or rejecting the license in this given circumstance. In this case, Sámi reindeer herding, as a cultural practice, is conducted in the area concerned. As this is essential to Sámi culture, and the wind turbines would make it substantially more difficult for Sámi reindeer herders to utilise this area for this cultural practice, it follows

85 Of course, the *Fosen* case would come to mind in this regard. In this case, however, the Norwegian Supreme Court did not deeply engage with participatory engagement, but rather whether the cultural rights of the Sámi reindeer herders protected under Article 27 ICCPR were violated. It may be argued that there was no reason to interpret the duty to consult, as participatory engagement may be seen as a means to protect these cultural rights under Article 27. As the Supreme Court already established the violations of the cultural rights that were to be protected, the conclusions did not warrant further examinations on participatory engagement. For a recent analysis that examines the content of the *Fosen* case and its contribution to interpret Article 27 ICCPR, see also Cambou, "The Significance of the Fosen Decision for Protecting the Cultural Rights of the Sámi Indigenous People in the Green Transition".

that state authorities are required to obtain the consent by both these Sámi reindeer herders and the Sámi parliament concerned. Without this consent, the license shall simply not be granted. However, if the wind turbines would be constructed in a different area, which would not make it substantially more difficult for the Sámi to practice traditional reindeer herding, consent is not required, but negotiations with the affected Sámi and Sámi parliament would suffice.[86]

Under the 2005 Draft, there was Article 36, which obviously included clear reference points for a contextual participation approach in the context of natural resources. However, not much of this has survived under the 2017 Draft. The relevant provision under the 2017 Draft, which would be somewhat the equivalent of Article 36 of the 2005 Draft, emphasises that state authorities who have to decide on licences for infringements in Sámi land rights must particularly ensure that such infringements do not harm Sámi culture, language, and social life.[87] In deciding whether to permit such infringement, the state authorities are then required to consider the overall impact of multiple measures that could affect the Sami's cultural, linguistic, and social aspects.[88] Here, the language employed would remind the human rights lawyer to Article 27 of the ICCPR and the relevant practice of the Human Rights Committee concerning this treaty provision.[89] However, Article 30(1) of the 2017 Draft Nordic Sámi Convention does not further concretise participatory engagement of the Sámi parliaments and the affected Sámi in the decision-making procedure. With that in mind, the concretisation of the right to self-determination in the context of land and resources, as

86 A recent situation that would be relevant to refer to now is the Markbygden wind farm park in Northern Sweden. This wind farm park is currently being built and if it is completed it will be the largest onshore wind farm in Europe. This is important for a smooth energy transition but at the same time the wind farm park has the potential to severely impact the Sámi and their livelihood as it will limit the movements of reindeer herders and endanger the reindeers. For a legal analysis of the Markbygden wind farm, see also Szpak, "Relocation of Kiruna and Construction of the Markbygden Wind Farm and the Saami Rights"; For a legal analysis of wind farm projects and reindeer herders' rights in Northern Finland, see Nysten-Haarala, Joona and Hovila, "Wind Energy Projects and Reindeer Herders".

87 2017 Draft Nordic Sámi Convention art. 30(1).

88 2017 Draft Nordic Sámi Convention art. 30(1).

89 As regards Article 27 ICCPR, the Human Rights Committee has famously determined that "substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community" amount to a violation of Article 27 ICCPR; *Ángela Poma Poma v Peru* (27 March 2009) UN Doc CCPR/C/95/D/1457/2006 [7.5].

articulated so innovatively in Article 36 of the 2005 Draft, may be summed up in a single word under the 2017 Draft: gone.

So much for participatory engagement in the context of rights to land and natural resources. The same can be said about the governance model for management of the environment, land, and resources. Under the 2005 Draft there were Articles 39 and 40.[90] These provisions provided a governance model for management related to the environment, land, and resources. Whereas the 2005 Draft Nordic Sámi Convention does not specify the operation of this model, the Sámi parliaments fulfil an influential role under this model.[91] To that end, the Sámi Parliaments have the right to co-determination in the public management of land and resources, but also the right to co-determination in the environmental management affecting these areas. The 2017 Draft, however, does not provide any reference points for this. The relevant provision under the 2017 Draft in this regard is Article 32 and, distressingly, this provision remains unclear as to provide genuine options for the Sámi to have a say on the matter and influence decisions that have an impact on their rights and livelihoods. The provision heavily highlights the role of state authorities and only refers to 'consult with' or 'actively involve' the Sámi. Simply put, it does not provide a foundation for a stronger voice of the Sámi in the management of natural resources. The latter rather remains in control of the Nordic states under the 2017 Draft.

Table 2. Comparison of self-determination in the context of land and resources under the 2005 Draft and 2017 Draft

	2005 Draft	2017 Draft
Resource dimension	Yes	No
Involvement Sámi parliament	Yes	No
Involvement affected Sámi	Yes	No
Sliding scale approach	Yes	No
Governance model management environment, land and resources	Co-determination	State-centric

90 2005 Draft Nordic Sámi Convention articles 39-40.

91 Articles 39 and 40, after all, entitle these bodies to co-decide on an equal footing with public authorities in managing issues related to traditional use of land and water, and natural and marine resources; See also Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 197.

5. Self-Determination in a Transnational Context

Perhaps the most remarkable aspect of the 2005 Draft Nordic Sámi Convention in which the right to self-determination of an indigenous people operates is the transnational context. Cambou also qualifies this as the transnational dimension of the right to self-determination under the 2005 Draft Nordic Sámi Convention.[92] The primary point of reference of this transnational aspect is 'to unite an indigenous people and find a common identity'.[93] This vital rationale is expressed in Article 2 of the 2005 Draft and emphasises the idea of one indigenous people residing in a territory which happens to be located within the boundaries of multiple Nordic states.[94] Against this backdrop, the right to self-determination of the Sámi cannot be exercised in only one Nordic state but needs to be primarily understood in a transnational manner which emphasises the common identity of the Sámi. At the end of the day, the rationale of the right to self-determination is to protect, preserve and further enhance the collective identity of the Sámi, who happen to live in multiple Nordic states. The 2017 Draft also expresses this rationale.[95]

However, how to exercise the right to Sámi self-determination as expressed in a transnational context? How can the Sámi as one indigenous people, and not merely multiple peoples forming minorities in numerous states, have a say on matters that significantly affect them in a transnational context? The 2005 Draft Convention provides arms and legs to the operation of Sámi self-determination by concretising the transitional context in which it operates in multiple provisions. First of all, Articles 10 and 11 form the basis. According to Article 10 of the Draft Convention, the Nordic states are obliged to show their best efforts in ensuring continued harmonisation of legislation

92 "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 197-199.

93 See in particular Koivurova, "Can Saami Transnational Indigenous Peoples Exercise Their Self-Determination in a World of Sovereign States?", 119; Compared to the UNDRIP, a different approach is followed under the Draft Nordic Sámi Convention. While Article 36 UNDRIP sets out the minimum requirements for states to take "effective measures" to ensure an indigenous people divided by state boundaries the right to develop contacts and relations across, the primary point of reference remains a state-centric one under the UNRIP; UNDRIP art. 36.the primary point of reference remains a state-centric one under the UNRIP; UNDRIP art 36.","plainCitation":"See in particular Koivurova, 'Can Saami Transnational Indigenous Peoples Exercise Their Self-Determination in a World of Sovereign States?' (n 23

94 2005 Draft Nordic Sámi Convention art. 2; See also Koivurova, "From High Hopes to Disillusionment: Indigenous Peoples", 12.

95 2017 Draft Nordic Sámi Convention preamble, art. 1.

and regulation that have a significant impact on Sámi activities across national borders.[96] Importantly, this creates a foundation for further Nordic cooperation as regards Sámi activities across the Nordic borders. Article 11, subsequently, puts forth obligations of the state to implement measures that make it easier for the Sámi to practice their culture and conduct commercial activities across the borders that separate the Sámi from each other.[97] In this way, the provision intends to ensure cooperation on cultural and commercial activities across these borders,[98] so that the Sámi can control their own future as a people.

Under the 2017 Draft, however, this has been weakened. Only a general provision on cooperation across borders can be found and no clear assignment is given to the Nordic states to cooperate with the Sámi parliaments so that legislation and other forms of regulation of significance for Sámi activities across borders is harmonised. Although Nordic cooperation across borders is further concretised in the context of language and culture in the 2017 Draft,[99] the 2017 Draft takes a very strong state-centric approach, and completely excludes the influence of the Sámi parliaments to harmonise relevant legislation of the Nordic states. Such harmonisation remains an essential process, which needs to include the voices of the Sámi, to not only legitimise that process but also its outcomes. All in all, the exclusion of a provision on harmonised legislation leads to the lack of a firm foundation for further Nordic cooperation and its absence may form an obstacle when it comes to taking into consideration the voice of the Sámi as regards the regulation of their rights transnationally. Consequently, the transitional context in which the right to self-determination operates under the 2017 Draft remains vague and is hardly concretised.

Another issue is the matter of joint organisation. Under the 2005 Draft, Article 20 provided a clear legal entitlement for the Sámi parliaments to form joint organisations. Related to this was an obligation for the Nordic states to strive for transferring public authority to such joint organisations as needed, so that Sámi parliaments could work together having a collective voice and to establish a governing institutional order that would represent

96 2005 Draft Nordic Sámi Convention art. 10.

97 2005 Draft Nordic Sámi Convention art. 11.

98 Cambou, "The 2005 Draft Nordic Sámi Convention and the Implementation of the Right of the Sámi People to Self-Determination", 197.

99 For cooperation across borders in the context of language and culture, see 2017 Draft Nordic Sámi Convention art. 26.

the Sámi in the three Nordic states. This obligation to strive for transferring such public authority also included a component of consultation with the Sámi parliaments. The 2017 Draft has also weakened this. No more Article 20 of the 2005 Draft, but now Article 16 of the 2017 Draft. According to this provision, the Nordic states would be required to ensure that the Sámi parliaments can cooperate and form joint organisations. However, compared to the 2005 Draft, the reference to 'in consultation with the Sámi parliaments' is missing and, in that sense, the obligation to strive for a transfer of public authority to such joint organisations is not connected to a concrete form of participatory engagement of the Sámi parliaments anymore. Moreover, Article 16 of the 2017 Draft sets a condition to the transfer of public authority to joint organisations. According to Article 16 of the 2017 Draft, such transfer would only be possible if national legislation allows this. Here you have, then, the situation of the exercise of Sámi self-determination in a transnational context being limited by state interests. Joint organisations by the Sámi parliaments and transfer of public authority to joint organisations would be allowed, but only if it is not contrary to the interest of the state.

Finally, the transnational context in which Sámi self-determination operates becomes relevant in terms of Sámi reindeer herding. The 2005 Draft was elaborative as regards cross-border reindeer herding by the Sámi in the Nordic states, setting a strong foundation for a cooperative approach towards cross-border management of reindeer herding. Article 42 of the 2005 Draft established that reindeer husbandry concerns a traditional Sámi livelihood and a form of their culture, which is based on custom requiring special legal protection. With that in mind, the 2005 Draft expressed a duty for Norway and Sweden to maintain and develop reindeer husbandry as a sole right of the Sámi in the Sámi reindeer grazing areas.[100] In Finland, however, the situation is different as reindeer husbandry is not an exclusive right for the Sámi in the Sámi reindeer areas. To that end, Article 42 expressed that Finland would undertake to strengthen the position of Sámi reindeer husbandry.[101] Article 43, subsequently, emphasised the importance of a legal entitlement of reindeer grazing across national borders by the Sámi as a customary norm and that in the case of agreements between local Sámi communities concerning the right to reindeer grazing across borders, such agreements shall prevail.[102] Importantly, this sets the basis for a cooperative

100 2005 Draft Nordic Sámi Convention art. 42(2).
101 2005 Draft Nordic Sámi Convention art. 42(3).
102 2005 Draft Nordic Sámi Convention art. 43.

approach towards cross-border management of reindeer herding, making it possible for the Sámi people to take matters into their own hands when it comes to reindeer herding.[103]

The 2017 Draft, however, has weakened the way in which reindeer herding as a Sámi livelihood would be regulated too, mainly by streamlining the relevant provisions too much into a vague and unclear provision. The relevant provision under the 2017 Draft concerns Article 36, which expresses that reindeer herding is a Sámi livelihood and cultural form based on custom and must be protected by law. However, no right to reindeer grazing across borders by the Sámi is recognised by the 2017 Draft. Moreover, in the case of agreements made between local Sámi communities concerning cross-bordering reindeer grazing, the 2017 Draft does not emphasise that these agreements shall prevail – which is a significant difference from the 2005 Draft. The 2017 Draft Nordic Sámi Convention only conveys that the Nordic states need to promote the status and conditions of reindeer husbandry practiced by the Sámi and develop cross-border cooperation.[104] Such open-ended language remains vague.

Table 3. Comparison of self-determination in a transitional context under the 2005 Draft and 2017 Draft

	2005 Draft	2017 Draft
Transnational dimension	Yes	Yes
Harmonise legislation	Yes	No
Cooperation cross-border activities	Concrete	Vague
Joint organisation	Consult Sámi Parliaments	State-centric
Reindeer herding	Concrete	Vague

6. Conclusion

The 2005 Draft Nordic Sámi Convention whispered a profound promise for the advancement of the right to self-determination of an indigenous people living in the territory of multiple states by further concretising this

103 Broderstad, "Cross-Border Reindeer Husbandry: Between Ancient Usage Rights and State Sovereignty", 173-174.

104 2017 Draft Nordic Sámi Convention art. 36; See also Vidmar, "Another One Bites the Dust? A Critical Appraisal of the New Draft of the Nordic Saami Convention from the Perspective of Indigenous Rights" 177.

foundational norm. It accurately reflects a relational approach towards self-determination by emphasising a sliding-scale approach: the more a matter has significant impact on an indigenous people, the more self-governance and/or participation by the latter is required. The Sámi parliaments play a key role in this respect, while at the same time the importance of continuous negotiations and a full sliding scale of participatory engagement, ranging from consultations to free, prior and informed consent, can be found in the 2005 Draft.[105] In this respect, the 2005 Draft breaks through twentieth century state-centric approaches of international law and instead follows a more human-centric approach based on community values. It does so by revealing the 'sweet spot' between self-governance and participation. Its self-determination model, after all, does not solely provide stronger mandates for the Sámi parliaments representing the Sámi in the Nordic states. If only this was done, Sámi representatives would not only face difficulties challenging state authorities' decisions, but they might find themselves situated within it as well. The 2005 Draft counters this issue by emphasising the matter of participatory rights of local Sámi communities who are significantly affected by the actions or decisions of the Nordic states. Consequently, a web of continuous negotiations between local Sámi communities, Sámi representatives and relevant state actors is created, forming the fundament for an overall dialogue between these actors.

However, the 2017 Draft has significantly streamlined many aspects of the right to self-determination of the Sámi up to the point that it fails to give this foundational norm more arms and legs. The contrasts between the 2005 Draft and the 2017 Draft in this regard are stark. While the 2005 Draft embodied a transformative vision, empowering the Sámi and solidifying their right to self-determination in a forward-looking sense, the 2017 Draft tempered these aspirations by limiting the mandate and role of Sámi parliaments, and confusing the right to self-determination with a right to consultation. With that in mind, it makes sense that the aspiration of a Nordic Sámi Convention entering into force has entered a deadlock. For the 2017 Draft to be ratified by the Nordic states, the Sámi parliaments need to approve the text of the treaty.[106] However, would a Sámi parliament approve the text of the 2017 Draft if it diverges so much from the 2005 Draft? According to some, contemporary

105 See for instance 2005 Draft Nordic Sámi Convention articles 39-40.

106 Heinämäki and Cambou, "New Proposal for the Nordic Sámi Convention: An Appraisal of the Sámi People's Right to Self-Determination", 4; Niemivuo and Viikari, "'Nordic Cooperation at a Crossroads", 127.

international human rights law already has the potential to enhance Sámi rights in the Nordic states and, against that backdrop, concerns exist that the 2017 Draft could undermine this protection by international law.[107]

While one could conclude now that the hopes of a Nordic Sámi Convention have been dashed, there is still lingering optimism to be found if we acknowledge the following. An ideal legal framework regulating the right to self-determination of an indigenous people does not suddenly drop from the skies, but to speak of lasting self-determination, international law on the matter needs to be *organised*. The 2017 Draft may not provide such organisation, but it is the 2005 Draft that presents us with a vital foundation upon which to further build in international law. The text of this Draft, regardless of being adopted or having entered into force, could be used as a template by legal scholars and legal practitioners to refer to as an illustration of how the right to self-determination of an indigenous people operates and may be concretised. It could also serve as a crucial benchmark that can inform and guide future policies and laws of any state that has an indigenous people residing in its territory. Without such benchmarks, no further progress can be realised for meaningful manifestations of the right to self-determination which is essential to an indigenous people's viability and survival. In the end, the call for a Nordic Sámi Convention should not be viewed as a bureaucratic endeavour that has been dashed. Instead, by fostering dialogue grounded in the self-determination model as presented by the 2005 Draft, we may contribute to the further development of self-determination in international law with a vision for the future.

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107 Niemivuo and Viikari, "Nordic Cooperation at a Crossroads", 128.

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