Universitat Autònoma de Barcelona
Facultat de Dret

Assessing the impacts of Mining Exploration in European Indigenous Land and the pressing need for further legal enactment

Silagissiartuaarusaarnialerunarpoq (1) for Guohtun (2)

(1) - Greenlandic word that means; "The weather will slowly and gradually become good again"

(2) - In Northern Sámi; a word that describes the ideal conditions for reindeer to find lichen to graze under a covering of snow

Together; "THE WEATHER WILL SLOWLY AND GRADUALLY BECOME GOOD AGAIN -FOR- THE REINDEER TO FIND LICHEN TO GRAZE UNDER A COVERING OF SNOW"

Adrià Medina i Altarriba

Treball de Final de Grau

Grau en Dret (2021-2022)

Tutor: Joan Manel Abril i Campoy

Idioma: Anglès

14 de Juny 2022

How I respect

the old Sami life

That was true love of nature

where nothing was wasted

where humans were part of nature

(...)

See the smart ones of the present

pollute the world and poison

eat it barren

gnaw its bones

(...)

I hide in the depths, in the hiding places of the tundras

to watch silently

how

my

land

is

destroyed.

Valkeapää (Sápmi poet)**,** exctracts from '*Trekways of the Wind'*

ABSTRACT

To make the 'green transition' proposed by the United Nations and the European Union in the 2030 horizon possible could come with a great price if the issue of mining exploration in european Indigenous Lands presented in this dissertation is not properly and legally addressed during the current decade. The global surge in demand for rare earth minerals and other elements key to green energy and transport as well as cutting edge high-tech poses a threat to the rights and livelihoods of the Indigenous Peoples of Europe in the Arctic where these materials are found in great proportion. This dissertation, with the help of key practical cases in Sápmi and Greenland, distinguishes and identifies mining exploration and its impacts both material and non-material in Indigenous Land as well as the domestic, European and international legal framework and response in which mining exploration is (or should be) subsumed. Special emphasis is put on exploring the necessity of a clear and active legal regulation addressing such impacts. A jurisprudential comparison is made between the ECHR and the IACHR exploring the right to *communal indigenous property*. The key aspects that a proposed hypothetical future contractual framework should include are highlighted. Relevant conclusions are drawn.

A fi de que la 'transició verda' que les Nacions Unides i la Unió Europea s'han proposat de cara a l'horitzó 2030 sigui possible, es podria arribar a pagar un preu molt gran si la qüestió de la fase d'exploració minera en terres indígenes europees que es presentarà en aquest TFG no s'adreça de forma singular i legalment durant la dècada present. L'increment de la demanda global per 'minerals rars' i d'altres elements clau que alimenten les fonts d'energia i transport verdes així com de noves tecnologies suposa una amenaça als drets i les vides dels Pobles Indígenes Europeus de l'Àrtic on dits materials es troben en grans proporcions. Aquest TFG amb l'ajuda de casos pràctics clau a Lapònia i Groenlàndia diferencia i identifica la fase d'exploració minera i els impactes que genera, bé materials bé immaterials en terres indígenes així com el marc legal domèstic, internacional i europeu en el qual dita activitat se subsumeix o hauria de subsumir-se. Es posa un èmfasi especial en explorar la necessitat d'una regulació clara i proactiva. Es realitza una comparació jurisprudencial entre la CEDH i la CIADH explorant el *dret a la propietat comuna indigena*. Finalment, es proposa i destaquen els aspectes clau que un hipotètic marc contractual hauria d'adreçar. S'extreuen conclusions rellevants.

LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CSR	Corporate Social Responsibility
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUCFR	European Union Charter on Fundamental Rights
EIA	Environmental Impact Assessment
FMA	Finish Mineral Act
FPIC	Right to Free Prior and Informed Consent
IACHR	Inter American Court of Human Rights
ILO	International Labour Organization
ILO C169	Indigenous and Tribal Peoples Convention no.169
IPs	Indigenous Peoples
INGO	International Non-Governmental Organization
MEPS	Members of the European Parliament
NMA	Norwegian Mineral Act
REE	Rare Earth Elements
SMA	Swedish Mineral Act
SDG	Sustainable Development Goals
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UN	United Nations
TEU	Treaty of the European Union

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1. GENERAL INTRODUCTION & AIM OF THE DISSERTATION

The aim of this dissertation is to dig deeper into the impacts and regulation of a sometimes-overlooked phase of the mining life cycle, that is, the exploration phase, which takes place and impacts the territory and singular context of European indigenous lands in the Arctic. All the while using the opportunity to highlight the importance of protecting indigenous people's rights through legal means that are effective, foresighted, and actively beheld by the EU-EEA-EFTA Member States concerned. Free Prior and Informed Consent embedded in the ILO C169 and UNDRIP is "the name of the game" as it allows IPs to actively participate in the decisions that can define a life-time, but there are many steps to climb, and limited willingness, so other ways for legal enactment should also be considered. Questions such as, but not limited to, will try to be answered:

a) To what extent are the mining exploration stage's impacts on Indigenous Land overall acknowledged and legally addressed in the European Arctic as compared to the mining exploitation stage?

b) Are the EU/EEA-EFTA Fennoscandinavian countries legally proactive enough in protecting its Indigenous people's rights in front of extractive industries activities during the exploration stage?

c) What is it that the ECHR seems to lack with respect to IPs protection in comparisson to the IACHR?

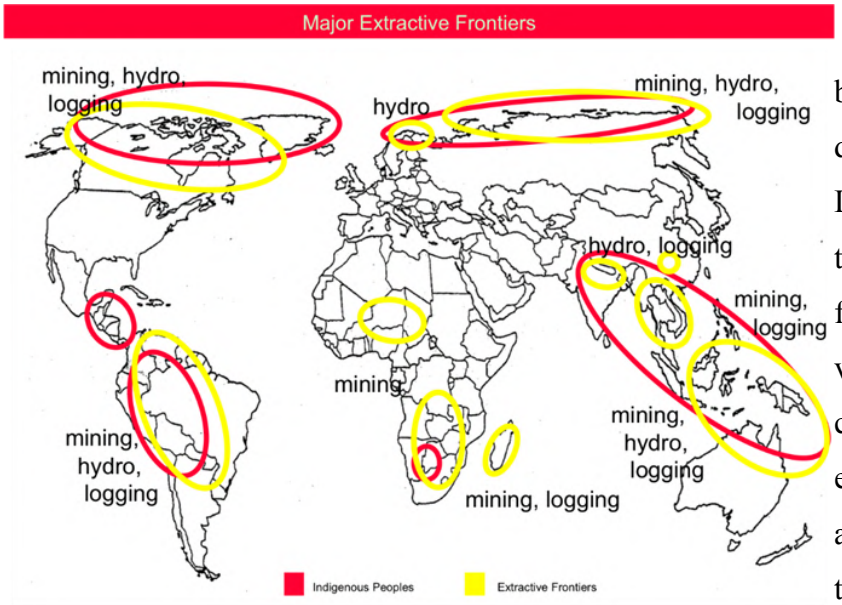
d) Is there a need for a standard contractual form for corporations to follow? If so, what key aspects should be taken into account?

As to why I personally find it to be so important to address this very specific issue of mining exploration in European Indigenous Land right now, the answer lies in the neo mineral rush that these precise lands are experiencing today. While in all probability not as efficient and faster as generally desired, the whole world, and mostly Europe, is starting to witness a massive shift to greener solutions for energy, transportation, and overall lifestyle. At least in the open sphere of politics and media, and especially since the release of the 17 Sustainable Development Goals (SDGs) within the 2030 UN Agenda for Sustainable Development (2016), the Paris Agreement (2016) and the European Green Deal (2019), Climate Change is no longer ignored and having become

one of the main worries of our society, (in 2021, 93% of Europeans believed is a serious problem) it is starting to be practically addressed. This has brought a massive inflow of public and private investment into cutting-edge green high technologies, which require the so-called 'rare earth elements' as well as 'strategic metals' to function.

Being an essential part of Semiconductors, HDDs, LCDs, and other components for, let us say, a Tesla electric vehicle to function properly, for now, these materials can only be extracted by mining. And it is in the Finno Scandinavian countries where most of the REE materials within Europe are present and can be mined, more specifically in the European Arctic; Greenland and Lapland, where the indigenous *Inuit* and *Sápmi* respectively live. Of particular importance for their REE potential are the Gardar Province of SW Greenland, the Svecofennian Belt and subsequent Mesoproterozoic rifts in Sweden, and the carbonatites of the Central Iapetus Magmatic Province.[1]

But not only REE are present in the traditional lands of the only indigenous peoples of Europe, also minerals like nickel, copper, vanadium and cobalt, all being highly demanded in the production of electric vehicle batteries can be found, and deposits of iron, gold, silver, platinum, copper, uranium, lead and zinc, as well as economically significant minerals including diamonds, have already been extracted from Sápmi and Greenland over the years and some are actively being extracted today[2].

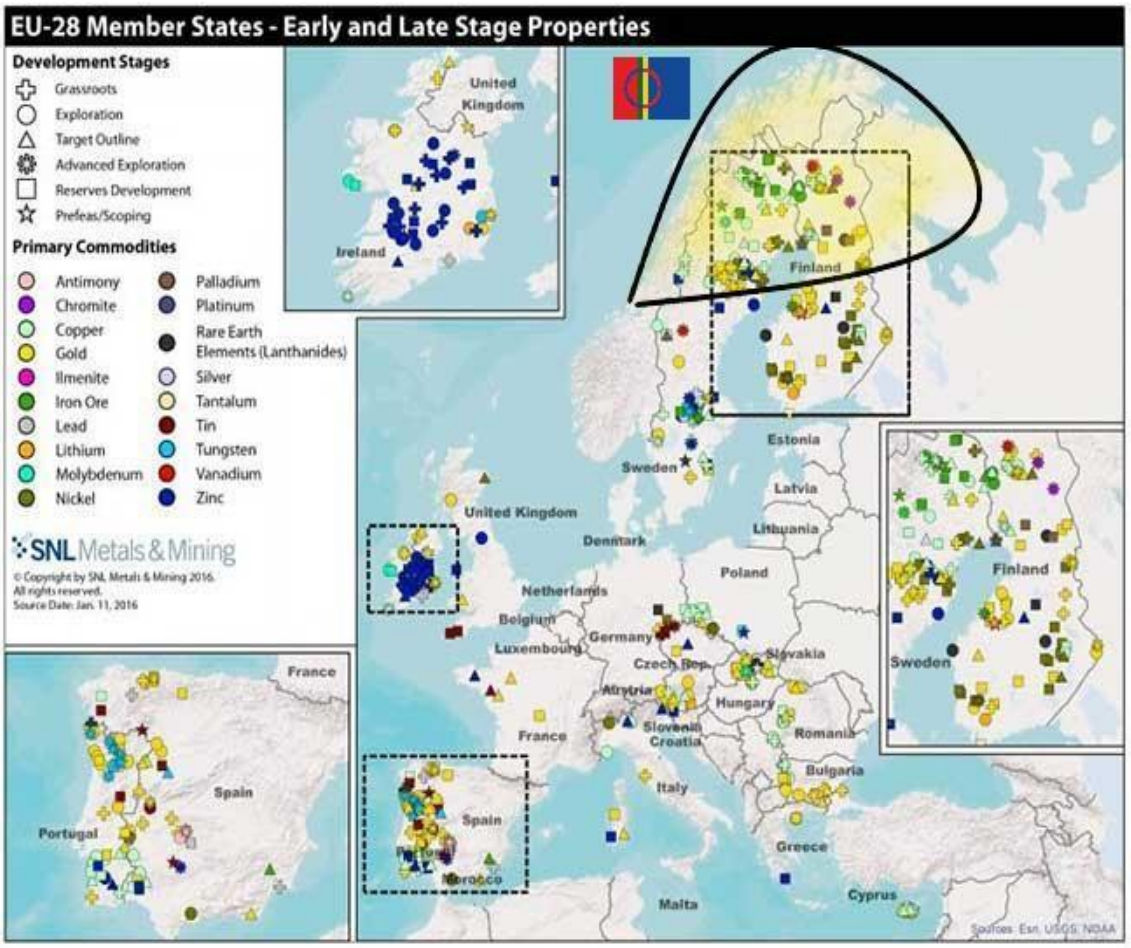


Produced by Russell Barsh in cooperation with First Peoples Worldwide

The coincidence between mineral deposits and Indigenous Land is not exclusive to the Arctic, as seen in the following map, which vividly shows the conjunction between extractive industries activity and IPs territory.

[1] Kathrin M. Goodenough, et altri, 'Europe's rare earth element resource potential: An overview of REE metallogenetic provinces and their geodynamic setting' (OGR, 72, 2016)
[2] Rasmus Kløcker Larsen, et altri, 'The impacts of mining on Sámi lands: A knowledge synthesis from three reindeer herding districts' (EIS, 9, 2022)

A similar map is provided here involving one of our regions of interest (Sápmi), exclusively focused on mining prospects and activity in comparison to land traditionally used for reindeer husbandry and inhabited by the Sámi in the EU;



Source: own edit, original map from *SNL Metals & Mining*

After the Arctic region is briefly situated, the European indigenous territories in the Arctic will be identified and the lifestyle, legal status, and historical perspective of its inhabitants will be properly introduced. These will include the Sámi peoples who populate most of the cultural region of Lappland or Sápmi, divided between the states of Finland, Norway, Sweden and Russia and the Greenlandic Inuit, who inhabit the autonomous self-governed island of Greenland, autonomous country that belongs to the Kingdom of Denmark.

The so-called small peoples of Russia will be briefly addressed but not case-studied as Sámi and Greenlanders over the dissertation. This first part will overall necessarily allocate the social context and territory that will be studied further below.

After that the process of mining exploration will be explained in contraposition to mining extraction, avoiding excessive technicalities, and focusing on the impacts both material and non-material on the territory and its inhabitants. This will allow for the identification of the negative externalities generated which will provide a cause to analyze the existing legal protection at the domestic and international level and seek for further enactment..

Naturally, the relevant international legal instruments, including UNDRIP, the ILO Convention 169 (and a necessary comparison between the two), the EU Charter of Fundamental Rights and the European Convention on Human Rights, and others will be analyzed in order to find those provisions relevant to the stage of mining exploration. In contrast to such imperative legal instruments, complementary or soft law may be added.

Next, a case-per-case thorough study of the domestic legislation with regard to mining exploration of the Fenno Scandinavian countries that foster the European IPs will be analyzed and at least one relevant practical case, with the most contemporary relevance, will be examined as well for each country (Finland, Sweden, Norway, Denmark-Greenland). This will be extremely useful to draw certain conclusions and differentiate the respective systems. .

The second-to-last chapter will draw a jurisprudence pattern study, focusing on the ECHR, and a comparison on the matter of the right to private property with the IACHR will be made, especially highlighting the InterAmerican legal approach to *common indigenous property.*

Finally, the reader may find a proposed hypothetical general contractual framework containing certain key elements that it should cover in order to be effective on a case-per-case application, exploring, among others, such concepts as; *culpa in contrahendo*, contractual relativity, free mutual assent, FPIC, role of state, *in dubio pro indigenous,* information transparency, response to abandonment, reversal of the burden of proof of impact, mitigation of externalities, engagement incentives, transparency, and reassurance.

2. METHODOLOGY

Fortunately, and through the Erasmus program within my International Relations degree, I have had the opportunity to spend an academic year in Iceland studying and working.. I have enrolled in UNAK and passed most of the courses available within the wondrous MA in Polar Law that the University offers as a *sui generis* complete academic dive into the legal issues concerning the Arctic and Antarctic regions, featuring renowned scholars that provide superb lectures, and a marked emphasis on Indigenous Rights and Resource Management in the region. This has allowed me to gain unique insight in the recurrent theme of this dissertation as well as exclusive access to sources, materials, and direct contact with experts which I believe can be reflected in the overall development of this dissertation.

As stated above, the exploration stage will be the focus of the paper, assessing the activities that can have an actual impact on Indigenous stakeholders Expectations and Environment and the legal framework in which it is (or should be) encompassed. Within a theoretical frame, what will be called 'Cognitive externalities' and 'Material externalities' focusing on the uncertainty that is generated, will be assessed, alongside the domestic and European legal response if any with the help of practical cases. As for Sápmi (land of the Sámi), the cases studied will focus on reindeer husbandry and encompass Akkermann-Enontekiö (Finland), the license-pending case of the iron-ore mine in the Gállok region (Sweden) and a foreshadowing of what could happen after the recent discovery in the month of January 2022 confirming big-value findings of cobalt and tellurium, metals important for batteries to electric vehicles in Bidjovagge (Norway). As per regard to Greenland, the focus will be on the Killavaat (Kringlerne) and Kuannersuit (Kvanefjeld) mining project in Greenland, studied in its early stages by professors Rachael Lorna Johnstone[3] and Anne Merrild Hansen, and the results depicted in various works.[4]

[3] Professor, University of Akureyri and University of Greenland

[4] Anne Marie Hansen & Rachael Lorna Johnstone 'In the Shadow of the Mountain: Assessing early impacts on community development from two mining prospects in South Greenland' (EIS, 480, 2019)

Anne Marie Hansen & Rachael Lorna Johnstone, 'Regulation of Extractive Industries Community Engagement in the Arctic' (Routledge, 2021)

The methodology used will be an interpretative one, following a qualitative method and the study of real cases to apply certain assumptions and extract relevant conclusions. As per the identification and analysis of the legal instruments that will be addressed, a stoplight methodology will be used in order to layer out its relevance both in terms of specific legal applicability and in terms of effectiveness in protecting Indigenous Rights in the context at hand, graphic layouts will be provided, as well as for the legal comparison of jurisprudence between the IACHR and the ECHR focusing on the deficiencies of the latter in terms of protecting private (common-indigenous) property rights. Extensive research of sources of quality will be exacted.

Indigenous Peoples tend not to make clear distinctions between their own and their families' futures and the future of the local community as a whole: the two are closely interlinked, this is why 'indigenous community' or 'Indigenous Peoples stakeholders' will be referred hereinafter as a unity, that includes while assessing the cases at hand, even though it can be understood that indigenous people like any other people may have specific differences of opinion or action with regards to a mining project. 'IPs stakeholders' must be understood as those locals to which the mining project affects directly, by reason of its location being in their native land or immediate surroundings or immediately affecting their rights (ex. reindeer husbandry). I would like to make clear that the term 'stakeholder' in this sense does not refer to the fact that these communities may have some sort of financial ties to the project as in owning stocks of the company or companies involved but rather their intrinsic connection (legally recognized or otherwise) to the land that makes them such.

3. EUROPEAN INDIGENOUS PEOPLES (ARE) IN THE ARCTIC

THE ARCTIC

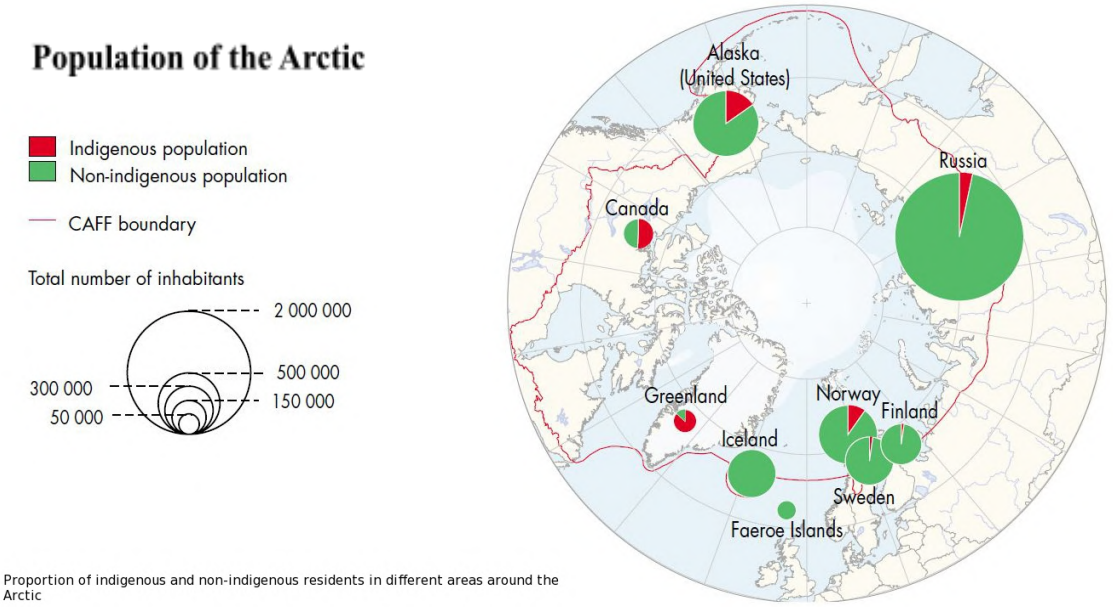
The Arctic, also referred to as the 'High North' due to its geographical location, is experiencing the effects of climate change more harshly and more rapidly than most other regions. Given the continuation of ice melting in the High North and the opening of the Arctic maritime routes for navigation for several months a year; Lloyd's estimated that by the end of this year 2022, around 100 billion dollars will be invested in the region. Occurring in a culture of economic growth, these changes in climate are perceived as natural opportunities for financial profit, a 'driving force' that can trample Arctic Indigenous Peoples lives. Extractive industries, such as mineral, oil and gas extraction, have proven especially problematic and continue to disproportionately impact indigenous peoples.[5] Indeed, the history of the relation between indigenous peoples and industrial corporations is one fraught with conflict and often characterized by exploitation and violations of fundamental freedoms and human rights suffered by indigenous communities, including rights to land, territories and resources.[6]

I concur with prof. Aileen A. Espiritu in that while the Circumpolar North cannot be

[5] UN Permanent Body on Indigenous Issues, Fact Sheet, Indigenous Peoples And Industrial Corporations, available online at <https://www.un.org/esa/socdev/unpfii/documents/PFII8_FS3.pdf>

[6] Ibid

defined as industrialized in a strict sense, it has experienced major natural-resource development to advance industrialization at the core and accumulation of capital by governments and industrialists (which have been majoritarily foreign). Economic growth and development cannot be separated nowadays from the process of globalization and the Arctic is internationally regarded as a geographical region, which has now become part and parcel of the globalized world in all its dimensions: ecological, economic, geo-political, and cultural, contributing itself to further globalization.[7] Metaphorically, the Arctic Indigenous Peoples have been awarded a double-edge sword. That is to say, the development has been accompanied by infrastructure build-up, synergies, wealth creation and 'purpose', but it has also dragged with it cultural shock, societal unrest, environmental catastrophes and, as per the purpose of my argument below; a perilous sense of 'uncertainty'. The Nordic Countries (including the sovereign states of Denmark, Finland, Iceland, Norway and Sweden; the autonomous territories of the Faroe Islands and Greenland; the archipelago of Svalbard and the autonomous region of Åland) are the only European representation in the Arctic. All of the Nordic Countries above, excluding Iceland, foster the only Indigenous Peoples of Europe as identified by standards of international law, these countries are known as the Fennoscandinavian States, and to these, though not thoroughly studied throughout the present dissertation, one must add The Russian Federation.



Proportion of indigenous and non-indigenous residents in different areas around the Arctic

[7] Mathias Finger, Lassi Heininen, Valery Konyshev & Alexander Sergunin, The Global Arctic Handbook (Springer 2021), p.1-2

The concept of 'indigenous peoples' in the current European debate, as stated *ut supra,* is mainly restricted to native populations living in the far north of the old continent and includes mainly two main baskets. These are the Sámi peoples, who inhabit the tail ends of Norway, Sweden, Finland and Russia, and the Greenlandic Inuit, living in Greenland. Last but not least, and as a third basket, there are many indigenous groups native to the Russian North and Siberia that are part of the 'Common List of Indigenous Small Peoples of Russia 2000'.

THE SÁMI PEOPLES

Baer Lars Andersen refers to himself and the rest of the Sámi community as the '*People from the northernmost part of Europe*'[8]. This vast region is known as 'Sápmi' and it extends from Norway to Russian Siberia, alongside Sweden and the Lapland region of Finland. Although the total number of Sámi in the four states amounts to only approx. 70,000 pax, curiously enough the Sámi can be considered as the oldest ethnic group to inhabit the Fenno Scandinavian states.

The Sámi have been dedicated for ages to their traditional way of life, most known is their practice of reindeer herding, which as self-explanatory as it is, consists of reindeer being herded by people in a limited area. Currently, reindeer are the only semi-domesticated animal which naturally belongs to the North.[9] It does, however, mean just way more than barely a way of subsistence for the IPs of the North, who have an intrinsic and historical connection with these practices with holistic symbolism.

Though most Sámi support themselves through fishing, hunting, and livestock farming, nowadays, a large number of them live outside the traditional Sápmi areas, and work in tourism, industry, service sector, and the public sector.

The colonization of Sápmi and the exploitation of the minerals in their land began in the Middle Ages and kept growing during the XIII and XIV centuries. Because several states claimed sovereignty over the area, the Sámi had to pay tribute to several Crowns.

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[8] Lars Anders Baer, 'The Saami of Scandinavia and Russia: Great strides towards self-determination since World War II' Cultural Survival (March 1994) <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/saami-scandinavia-and-russia-great-strides-towards-self> accessed 25 February 2022

[9] International Center for Reindeer Husbandry, 'What is reindeer husbandry' (Arctic Portal) available online at <https://reindeerherding.org/what-is-reindeer-husbandry>

Furthermore, christianization was brought to Sápmi as means to gain psychological and political control. Posteriorly, from 1751 to 1826, the nations that made their claims on the Sápmi, divided it among themselves.[10]

The last half of the XIX century and the first half of the XX century, has been considered the darkest age for the Sámi. When the Industrial Revolution began, the interest in extracting raw materials increased and so did the pressure on the Land and their inhabitants. New racial theories gained popularity among Europeans during this timeline. After craneal measurement and eugenics started to become popular among european anthropologists by the late 1800s, and after the foundation of the German Society for Racial Hygiene in 1905, the *"Svenska sällskapet för rashygien"* was founded in 1909 which would later be awarded with a government funded and run institute, the infamous Swedish State Institute for Racial Biology in 1922, built and opened in Uppsala. In the movie 'Same Blod'[11], based mostly in the Swedish Lapland of the 30s, a quite shocking scene portrays how the studies were conducted on Sámi children in boarding schools, measuring their physical traits and photographing them naked in front of each other.

This renewed economic interest of Sweden (which by then was in a union with Norway) in Sámi land made Sámi ownership of land and waters an obstacle to exploiting its natural minerals resources: iron ore, timber, etc. Thus, in 1886, Sweden's first Reindeer Grazing Act reduced Saami land ownership to a sort of usufructuary right to grazing and hunting grounds and fishing waters. The act marked the beginning of Swedish supremacy and control over Sápmi, depriving them of decision-making.

The year 1948 was a turning point, as the United Nations Declaration of Human Rights was adopted[12]. The UN declaration made it easier for the Sámi to organize and associate, and in 1950 the National Union of Swedish People's was founded.

The Sámi political goals in the 1990s were to obtain the right to self-determination and the rights of common ownership of the land. UNDRIP and the ILO Convention no.169

[10] David Nikel, 'The Sami People', Life in Norway (12 October 2018) <https://www.lifeinnorway.net/sami-people/> accessed 24 February 2022

[11] Amanda Kernell. (Director). (2016). Same Blood [Film]. Sveriges Television, Nordisk Film

[12] UNDHR available online at <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

which will be thoroughly discussed *ut infra,* are the relevant modern international legal instruments with which Sámi can work with to push their respective States and legislation to protect and preserve their rights.

On a political and legal level there are some differences among the Sámi communities in different Arctic states. *Ut infra* these legal differences at the domestic level will be thoroughly analyzed as per regards to resource extraction, and specifically, mining exploration.

Prof. Hugh Beach, states that the way the individual identifies as Sápmi has dramatically changed over the past years.[13] I believe, from an outsider perspective and without enough experimental basis, based on mouth-to-ear stories and experiences from Sámi individuals that I met during the Arctic Circle Conference of 2021 in Reykjavik, that the other way around is on the contrary, that is to say; the way the individual identifies a Sámi has not dramatically changed over the past years. Even after decades, the inner animosity remains the same. Morgan's "screen of racial contempt" is still present and probably will be forever. Even and especially in one of the most progressive countries of the world, such as Sweden.

Beach in fact, asserts that problems of discrimination, neglegt of legal rights, and pressures for assimilation still exist for many Sámi.

In Fennoscandinavia today, governmental policies are leading to a dangerous situation in which cultural elements such as language and art are greatly supported but the cultural elements that involve utilization of natural resources, mostly herding, are neglected. Seems more like an attempt of policy to artificially preserve a "*Sámitümelei*"[14] to serve the tourist market. And while it appears that the State is strongly supporting the Sámi, it is mostly with regard to those elements that do not interfere with non-Sámi interests.

THE SMALL PEOPLES OF RUSSIA

Russia has ratified the UN's International Covenant on Civil and Political Rights, like the Fennoscandinavian States and is bound also by Art. 27, which reads;

[13] Hugh Beach, Polar Peoples: Self-determination and Development (Minority Rights Group ed., 1994)

[14] Term cradled from 'Deutschtümelei', does not exist, serves to prove a point.

"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 practise their own religion, or to use their own language."

The covenant is part of national Russian law.[15] ILO Convention No 169, however, has not been ratified by Russia. Russia has a provision in its own Constitution that provides protection for indigenous peoples, which states:

"The Russian Federation guarantees the rights of small indigenous peoples in accordance with the generally accepted principles and standards of international law and international treaties endorsed by the Russian Federation."

However, indigenous people from Russia feel excluded from their traditional land use, where there are economic interests of companies and government.[16] Moreover, the Saami language and culture are under pressure, and a very small number of indigenous people actually have the opportunity to reach the Russian authorities.[17] Nevertheless, there are some Indigenous organizations in Russia such as Guoladaga Sámi Searvi (Kola Saami Association), and Murmanskka guovllu Sámesearvi (Saami Association of Murmansk). Moreover, the Russian Sámi can also participate through RAIPON (Russian Association of Indigenous People of the North), and strengthen their influence by participating in different international forums, such as the Arctic Circle, though due to the current war in Ukraine, all activities have been halted.

THE GREENLANDIC INUIT

Greenland, known as *Kalaallit Nunnat* (by the people living in this country), has a very interesting and unique political status, as it has been a self-governing state within the Kingdom of Denmark since 1979. Self-rule is exercised through a Parliament (Inatsisartut) and Government (Naalakkersuisut) that enacts legislation in specific fields, including mining, and has the economic responsibility for solving these tasks. To this effect, Greenlanders enjoy recognition of Land Rights/Title, including land

[15] Øyvind Ravna & Zoia Vylka, ' The People of the Tundra' (Rangifer, 22, 2002), p.154

[16] IWGIA Annual Report 2002 (2003) available online at <https://www.iwgia.org/en/resources/publications/305-books/4313-iwgia-annual-report-2002.html>

[17] Eva Josefsen, The Saami and the national parliaments: Channels for Political influence (IPU & UNDP 2010)

subsurface and Self-Government Rights. Such independence and sovereignty are provided by the Act no.473 on Greenland Self-Government (2009) which even allows, through a referendum, to grant the independence of Greenland from the Kingdom of Denmark.[18]

Native Greenlanders, also known as Greenlandic Inuit, represent 88% of the Greenlandic population. This community is far from ethnographically unified, as per the case of the Sámi, there exist some differences in language, culture, etc. between different communities and regions. Therefore, one finds mainly three groups: the Kalaallit of West Greenland, who speak Kalaallisut, the Tunumiit of Tunu (in East Greenland), who speak Tunumiit oraasiat and the Inughuit of the North. Nevertheless, the official language spoken by the majority of Greenlanders is Kalaallisut, and the second language is Danish. The Greenlandic community also has strong links with the Inuit of Western Canada, Alaska and Russia.

Greenland has a rather short history of being continuously inhabited as compared to continental Europe, with different settlers coming in at different times, as it has not only been inhabited by Inuit. For instance, its first inhabitants came around 2500 BC, however, they died out, and after them many other groups arrived from North America. However, their settlements didn't succeed either. Even Icelanders attempted to inhabit Greenland at the beginning of the X century, by the likes of Erik the Red and his sons and daughter, among them the famous Leif Eriksson. Hence, it was not until the XV century when the first Inuit arrived to Greenland and succeeded in inhabiting it and leaving descendants, which have survived and thrived until today.[19]

Greenlanders, similarly to the Sámi, maintain their traditional ways of living, which consist of subsistence gathering, hunting and fishing, however, they combine these today with conventional economic activities, such as commercial fisheries, tourism and cautiously developing resource extraction industries. Because of its importance both economically but also culturally, marine hunting is carefully regulated, with each

[18] See Chapter 8 S.21 Act no.473 on Greenland Self-Government (2009), consolidated version translated to English available at; <https://www.files.ethz.ch/isn/125366/3708_Greenland_Independence.pdf>

[19] IWGIA, 'The Indigenous World 2021: Kalaallit Nunaat (Greenland)' IWGIA (Greenland, 18 March 2021) <https://www.iwgia.org/en/greenland/4227-iw-2021-kalaallit-nunaat-greenland.html> accessed 12 March 2022

administrative area having a certain quota with regard to hunting of whales, seals and some fish stocks.

Around 50% of the national budget is financed by Denmark through an annual block grant.[20] This is, in principle, a major reason for Greenlanders not to rush towards independence from the Kingdom. Nevertheless, Ms. Naaja Nathanielsen, Minister for Mineral Resources, talked quite straightforward about '*Nation-building towards independence'*[21] during her speech on behalf of the Prime Minister of Greenland (Múte Bourup Egede) in the Arctic Circle Conference in Reykjavik, 2021. a P.M. who has previously declared that; *"Every morning I wake up with the mindset to make sure that also this day will bring Greenland closer to independence"*[22]

H.E. Naaja Nathanielsen, Greenland's Minister for Mineral Resources speech in the Arctic Circle Conference Opening session made it very clear that the New Government's strategy will be based on a "zero-tolerance" policy on fossils and radioactive minerals, introducing a Uranium and Thorium Ban, to ensure that everything to do with extracting radioactive ores, feasibility studies included, is prohibited. It will also revise the Mineral Resources Act of 2010 and pass further new legislation to consolidate its non-Approval policy on new Oil and Gas exploration permits[23] even if these could be technically possible and economically viable.

Within its new EU White Paper on Arctic Policy[24] (public copies made available in the Arctic Circle Conference in Reykjavik 2021), it is emphasized that the EU is seeking to deepen and broaden its partnership with Greenland, establishing a European Commission Office in Greenlandic territory, most probably in Nuuk.

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[20] Ibid

[21] Arctic Circle Conference, 14.10.2021, Plenary Room, Harpa, Reykjavik, OPENING SESSION, V. SPEECH: THE NEW GOVERNMENT OF GREENLAND

[22] Martin Breum, 'After Trump tried to buy Greenland, US gives island $12M for economic development' (Arctic Today, 9 April 2021) <https://www.arctictoday.com/greenlands-new-leadership-will-be-challenged-by-a-push-for-faster-independence/> accessed Dec 2021

[23] H.E. Naaja Nathanielsen 'Opening Session, V. Speech: The New Government of Greenland' 14.10.2021, Arctic Circle Conference, Plenary Room, Harpa, Reykjavik

[24] European Commission, JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS.A stronger EU engagement for a peaceful, sustainable and prosperous Arctic, Brussels, 13.10.2021

4. MINING EXPLORATION AND IMPACTS ON EUROPEAN IPS

MINING EXPLORATION. A DEFINITION

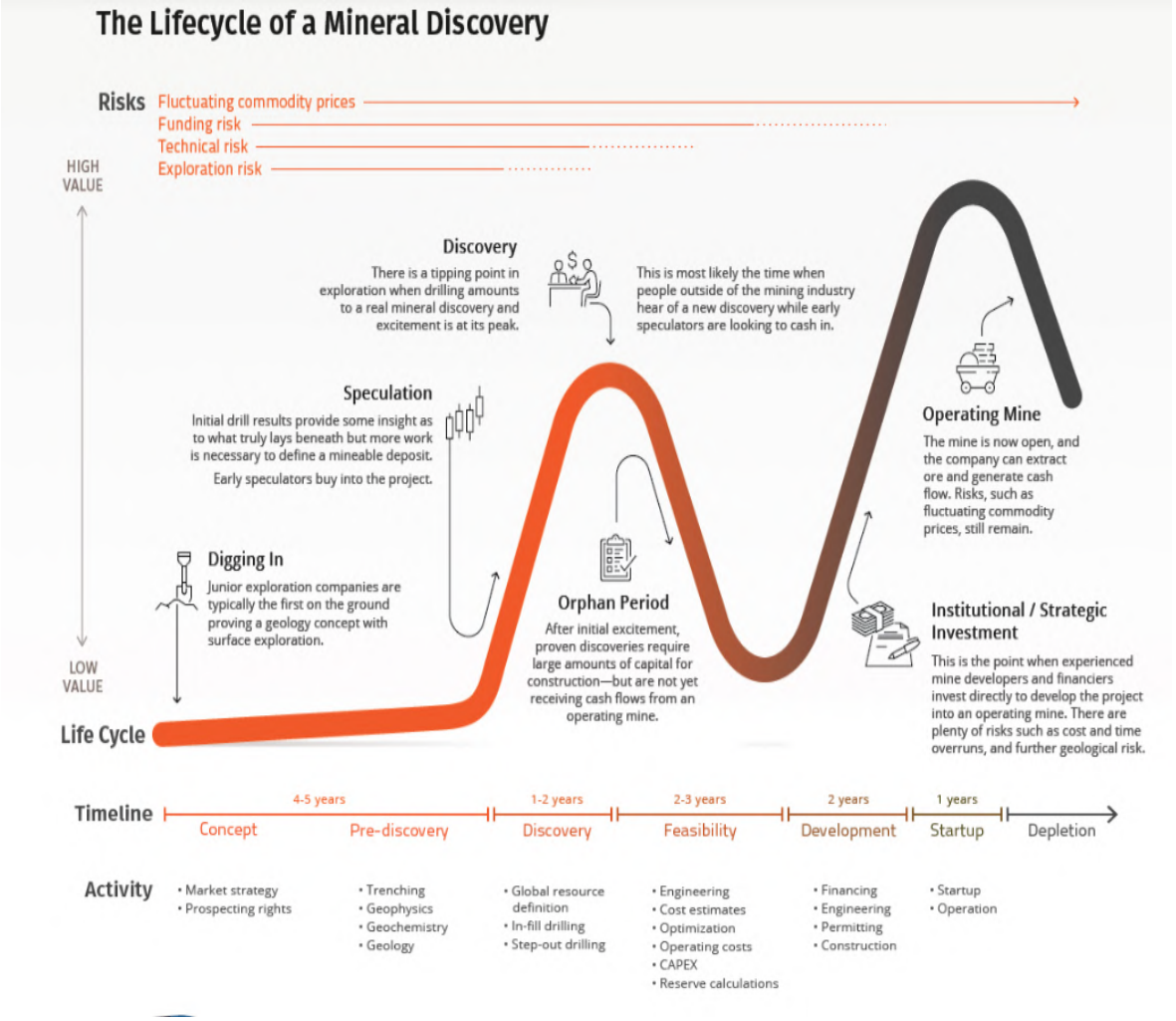
Even though it may appear as quite self-explanatory, mining exploration has more to it than what first comes into mind. A useful approach to properly legally defining mining exploration is by differentiating it from mining extraction. To extract minerals from beneath the surface of the earth one must first find them, and these rare or common minerals are not precisely at plain eyesight.

As defined by the The MIN-GUIDE Policy Guide Guidance for EU and MS mineral policy and legislation, **exploration** is the first step in the mining value chain which includes all processes related to finding ores (commercially viable concentrations of minerals) for the purpose of extraction at a later stage, while **extraction** involves the development, the opening up of an ore deposit for production. The key is to comprehend what it means by 'all processes related to finding (commercially viable) ores' and the impacts associated with these, which, all in all, drag a series of externalities, both material and cognitive to a certain land and population respectively.

For a company to start prospecting, it must first obtain an exploration permit from the competent domestic authority. The permit holder has the right to conduct exploration activities (from temporary constructions to feasibility studies through drilling) on the permit holder's own land and/or that owned by a third party.

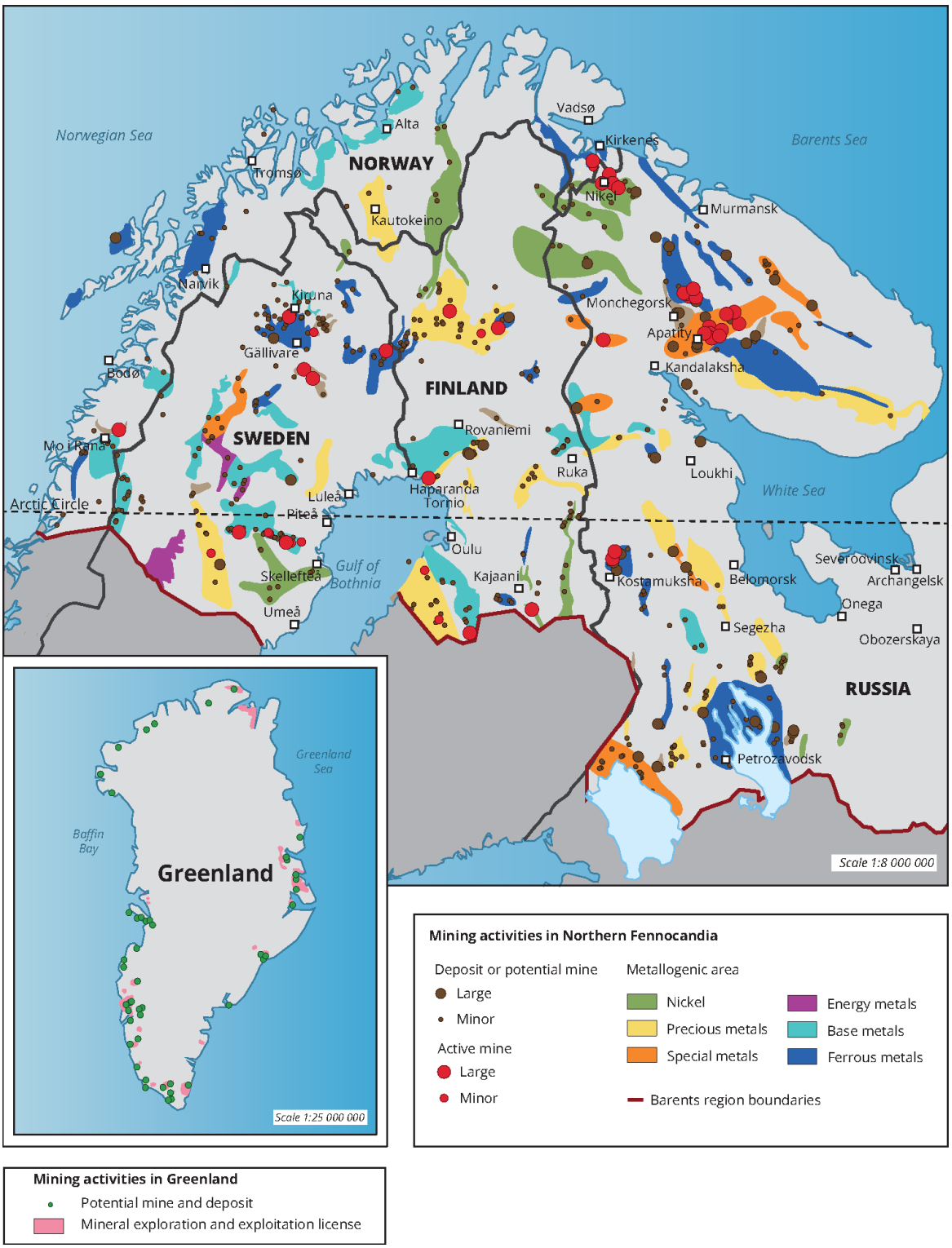
As it will be discussed *ut infra*, this exploration permit, goes through a due process of law which varies according to diverse domestic legislations throughout Fenno Scandinavia but commonly, it is not given with the free prior and informed consent of the indigenous stakeholders.

As seen in the Montage below by *The Visual Capitalist*, the lifecycle of a mining project is quite tortuous and must face ups and downs that can make a stage impassable therefore putting the whole project to sleep or to an end, and a mining corporation alongside its shareholders may witness the capital invested until then put at risk or completely vanish, while leaving behind a trail of erosion of the land and impacts on the communities which sometimes can take years to recover.



Usually, there can be hundreds of exploration companies while only a tiny percentage move from the exploration stage to become producing mines, or to even start building any permanent infrastructure. This stage can last for years, dragging and influencing local decisions about individual and community development. The exploration stage is not only crucial to be assessed legally for its potential impacts but for its importance *per se* as a stage of the 'mining life cycle', to have a voice, a binding one, at this stage for the IPs stakeholders and/or community is of vital importance, as it is the only moment in which consent can 'really' be given.

The following is a map of mining prospects and activities in Greenland and Fennoscandinavia provided by the European Environment Agency of the EU.



While material externalities of mining are, just as those of the fuel industries, quite visible, and have been thoroughly accounted by academia, there is in my opinion, a lack of thorough research on the psychological and cognitive externalities of the early stages of mineral development which carries not only the visible extraction phase, but exploration as well, which can last for years. The work of Prof. Rachael Lorna Johnstone is shining a light on such issues.

IDENTIFYING NEGATIVE EXTERNALITIES OF MINING EXPLORATION

COGNITIVE EXTERNALITIES

Even the tiniest leak of information will travel around an indigenous community faster than anywhere else since close family ties and strong social networks tend to be more prominent in such communities and localities, especially in the modern era, through social media. This can put immediate pressure on the Indigenous stakeholders and affect right away their decision-making, say, that of an Inuit fisherman or a Sámi reindeer herder.

Mainly, two conflicting general actors will try to seize the narrative, leaving the Sámi or Greenlanders behind with incomprehensive or biased flows of information. Though they sometimes appear as a multitude of actors, the two general 'kidnapper actors' can be embodied in the Mining Corporation as the 'pusher' and the Environmentalist INGO as the 'againster'. The kidnap of the narrative creates a dichotomy 'for-against', that can trap the community and lead to severe social tension. This 'all or nothing' dichotomy I believe to only serve the interests of the corporation representing the 'all' and the INGOs representing the 'nothing'. A kidnap of the narrative that turning dialogue into 'overly optimistic – overly pessimistic' dichotomy, takes out 'realistic' and/or indigenous stakeholders' interests off the picture, creates societal distress, upsets the unity of the community, and impedes, all in all, meaningful engagement with the mining project.[25]

Unfortunately, according to general thinking if a company is exploring an area, it already means that there will be a mine in that location, which as explained *ut supra*

[25] Similar views expressed by Finnsih and Swedish Sámi interviewed by Timo Koivurova et altri in 'Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States (ARLP, 2015)' agreed that the media influences mining related thinking in a negative way.

this is proven not to be the case since only a small part of exploration activities eventuate in exploitation and an even smaller part of those result in an actual mine.

This can put immediate pressure on the Indigenous stakeholders, worries and excitement alike will start to flourish. I believe there are two pre-notice of the project variables that particularly affect indigenous stakeholders and influence their response and action in a very early stage. These are;

The Prospect variable

Business prospects tend to be scarce in most indigenous communities. In Sápmi though it may vary in numbers from the different Fennoscandinavian States and in Russia, the economy is mainly based on such traditional activities as reindeer husbandry, fishing and hunting, duodji (Sami handicrafts) and cultural industries alongside new and emerging opportunities rooted in Sami tradition in such areas as food production and processing, tourism and a range of other rural industries.[26]

Likewise in Greenland, where the economy relies heavily on export of fisheries (a market quite fragile to international price fluctuations) and the Danish annual block grant in subsidies.[27] For the last two decades focus has been directed to the tourism industry, trying to keep at balance the traditional life and the environment, which are co-dependent. More than 200 years of collection and study of minerals in Greenland have led to the discovery of gold, rubies, diamonds, coppers, olivine, marble and oil, and no less than aprox. 75 new minerals, plus there is a possibility of exploiting the reserves of diamonds, platinum, and oil and gas reserves.[28] The questions are how, why and by who. In 2014, a handful of promising mining prospects were prepared, and set to open during the next five years.[29] Recently, rising prices and market liberalization have made investment in the prospecting for and the production of minerals much more interesting in Sápmi. This is particularly visible on the Fennoscandian Shield, which is recognised as having a mineral potential of global importance. Just within the traditional

[26] OECD, "Sami economy, livelihoods and well-being" in Linking the Indigenous Sami People with Regional Development in Sweden, (OECD Rural Policy Reviews 2019)

[27] Naalakkersuisut, 'Economy and Industry of Greenland' (Naalakkersuisut, 2014) <https://naalakkersuisut.gl/en/About-government-of-greenland/About-Greenland/Economy-and-Industry-in-Greenland> accessed 15 Feb 2022

[28] Ibid

[29] Ibid

Sápmi area, there are up to 50 functioning mines in the region and within a few years there could be as many as 84.[30] This has submerged both areas current society affairs and political discourse in a deep debate over mining. Having become the breeding ground for high expectations over job or supply-chain opportunities, doubts and fears over the reliability of the ventures' clean-up plans, and overall environmental and 'cultural shock' concerns.

The Psychological variable

One must keep in mind that all around the world, indigenous communities are considered at higher risk of psychiatric disorder.[31]

What is more; cultural discontinuity and oppression have been linked to high rates of depression, alcoholism, suicide, and violence in many communities, with the most dramatic impact being on youth.[32] Indigenous mental health deterioration has also been linked to political foot-dragging on Indigenous rights, land, and resources.[33] The suicide rate in Greenland is six times higher than in Denmark and is especially pervasive in the Inuit community.[34] While gathering data for all Sámi in this matter proves difficult, in Sweden, a 2013 study found young Sámi were more likely to contemplate suicide than other young Swedes.[35]

This 'tormented legacy' serves to reflect on the fact that there is a great psychological impact to an indigenous stakeholder when a project arises, the threat that imposes on the

[30] Johanna Roto, Mining in Sápmi – Active Metal Ore Mines and Projects. [Map] Nordregio (2015) <https://nordregio.org/maps/mining-in-sapmi-active-metal-ore-mines-and-projects/>

[31] UN Department of Economic and Social Affairs, 'Indigenous Peoples Health' (United Nations, 2018) <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health.html> accessed 15 Feb 2022
Steve Kisely et altri, Peter Kovacs, 'The prevalence of depression and anxiety disorders in indigenous people of the Americas: A systematic review and meta-analysis' (NIH 84, 2017)

[32] Institute of Community and Family Psychiatry Sir Mortimer B. Davis — Jewish General Hospital & Division of Social & Transcultural Psychiatry, Mental Health of Indigenous Peoples (Report No. 10, 2001), p.5

[33] Ibid, p.123

[34] World Directory of Minorities and Indigenous Peoples 'Inuit (Greenlanders) Profile' (Minority Rights Group International, 2015) <https://minorityrights.org/minorities/inuit-greenlanders/> accessed 08 May 2022

[35] Umberto Bacchi, 'Scandinavia's Sami struggle with suicide, worsened by climate change' Thomson Reuters (April 7,2017)
<https://www.reuters.com/article/us-arctic-climatechange-sami-idUSKBN17930S> accessed 09 May 2022

traditional way of life is a factor that ought to be considered, as well as the cultural shock the foreign contingents imply. Though it must be said that Greenlanders and Sámi in general are more immune to the latter than other indigenous communities. The main difference between Sámi and Greenland in my opinion in this regard is that while the first complies with the three underlying characteristics of economic development in the North borrowed from R.M. Bone, by A.A.Espiritu[36], that is; *a dependency on primary and tertiary activities, small secondary and quarterly economic development and decisions about social/economic affairs made from outside the region*, the latter does not apply to Greenland where self-government from Copenhagen has been key in a socially inclusive and environmentally aware governmental policy trend regarding mining.[37] Even so, the psychosis of uncertainty is an impact that is very hard to measure and quite omitted in policy-making, yet can have devastating consequences nonetheless.

Uncertainty

Uncertainty regarding the mining projects makes indigenous stakeholders prospect assessment halt, paralyze. They are waiting before making decisions about how to invest for their own futures, making plans but holding back on action owing to uncertainty.[38] Uncertainty is based both on lack of information about the projects and their impacts and on lack of a clear and reliable time-line for institutional decision-making regarding extractive projects.[39]

This will be very present in the domestic cases that will be analyzed in the following Chapters. In the case of Greenland, Profs. Johnstone and Hansen came across a good example in one of their interviews to a local stakeholder in Narsaq, the town beside the controversial *Kuanneeuit* mining project, who he himself was planning to "*expand a small tourism business but did not want to do so until a decision was made regarding the mine as he feared the mine would decimate the tourism industry*." This is perhaps the greatest, simplest example of how relevant the cognitive impact of the exploration stage is experienced in reality and the socio-economic consequences it might have if not

[36] Module developed by Aileen A. Espiritu, Assistant Professor, History Programme, The University of Northern British Columbia.

[37] See Chapter 3, p.19

[38] Anne Merrild Hansen & Rachel Lorna Johnstone, 'In the Shadow of the Mountain: Assessing early impacts on community development from two mining prospects in South Greenland' (EIS 480, 2019)

[39] Ibid

assessed properly. Another case that will be analyzed below, regarding the Sámi in Sweden, is that of the Gállok region. In 2006, Beowulf Mining Plc. (UK) and their Swedish affiliate, Jokkmokk Iron Mines AB, were given permission by the Swedish government to explore possibilities for mining in Gállok; in the province of Lapland. This year 2022 has been decisive as per the Government permitting the development of the mine, against UN Special Rapporteur's advice. One must understand these example's importance in the sense of the massive impact that, say, 16 years of uncertainty in the case of Gállok, or almost 10 years in Narsaq, have had, how it had given way to conflict and a state of affairs that turned sour and lingered on altering the lives and well-being of these communities.

MATERIAL EXTERNALITIES

Having analyzed the impact of the psychological pressure, sense of uncertainty and state of paralysis that the concept of opening a mine and the exploration stage can cause in an indigenous community, one must turn to the material impact on the land itself that just the same exploration phase, once it starts can have, and why indigenous stakeholders ought to be included in the crucial decision that can change so much in the frame of so little and why an extra-step of protection is needed in order to duly assess the negative externalities that will materialize.

The first and most crucial step of the mining process both for the corporation and the indigenous stakeholders is the earliest of early stages, that is, even before exploration can begin, the corporation needs permission.

Once granted permission for 'prospecting rights' in the form of a permit as explained *ut supra*, companies (note the plurality) will place all kind of foreign personnel and machinery to the ground to start surveying, a process that can last for decades[40]. Through either ground or airborne methods, geophysical companies undertake magnetic, radiometric and electromagnetic surveys to detect a response which may indicate potential deposits of mineral resources.

To map the area deemed minable, geophysical, geographical, and geochemical surveys will be conducted. Airborne surveying will include aeromagnetic, radiometric and

[40] Nicholas Lepan, 'Visualizing the Life Cycle of a Mineral Discovery' The Visual Capitalist (Victoria, BC, 12 September 2019) <https://www.visualcapitalist.com/visualizing-the-life-cycle-of-a-mineral-discovery/> accessed 12 Jan 2022

digital elevation models (DEM). Ground surveying tends to be far more intrusive than anything else. Sampling can vary from minor to major impact while exploration also involves drilling to probe the contents of known ore deposits and potential sites.[41] Trenching can also be conducted, a method which involves digging narrow trenches in the ground. Finally, gravity surveys can also be conducted from the ground as well as from the air.

Needless to say, these activities, way before any 'promised' positive externalities are at sight, will profoundly affect the environment in which they are conducted, varying upon the specificities of the case, from noise pollution to biodegradation and land degradation by the immense trenching holes left behind.

Small to large infrastructure projects can negatively impact access to grazing land and the reindeer's main food – ground and tree lichen. For example, there has been a significant decline (71%) in the area of lichen-abundant forests over the past 60 years in Sweden.[42] Around 2.500 reindeer died in traffic collisions in 2017 in the four northernmost countries.[43] According to Minna Näkkäläjärvi, Swedish Sámi reindeer herder and activist; "*It's not possible for reindeer husbandry and mining to co-exist in the same area."*[44]

A good comparative example of this is the similar, quite drastic situation that has been happening in Northern Canada, where, according to a 2018 report, the 70% decline of Caribou over the last decade can be attributed to key areas of the summer and fall range having been taken up for mining exploration in the last two decades; a disturbance that has led to the loss and degradation of key habitat for caribou, thereby exacerbating the decline of the herd.[45] Note that it has been mining exploration and not mining extraction that has caused said decline.

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[41] K2Fly 'The 5 Stages of the Mining Life Cycle' (Decipher, 2019) <https://www.decipher.com.au/blog/mining-resources/the-5-stages-of-the-mining-life-cycle> accessed 11 Jan 2022

[42] Sandström et al., 2016

[43] OECD, 2019

[44] Thomas Nilsen, 'Miners hunting for metals to battery cars threaten Sámi reindeer herders' homeland' The Barents Observer (Kirkenes, February 09, 2022) <https://thebarentsobserver.com/en/node/7082> accessed 10 Dec 2021

[45] Brenda L. Parlee, John Sandlos & David C. Natcher, 'Undermining subsistence: Barren-ground caribou in a "tragedy of open access"' (SA 403, 2018)

Following these examples, a mining project can have drastic consequences for Indigenous stakeholders' way of life even before it has crystallized in an actual functioning mine. This serves to reinforce the idea that there is quite a massive loophole in Indigenous legal protection in front of mining industries in the early stage of a mining project.

5. INTERNATIONAL LEGAL FRAMEWORKS

ILO CONVENTION NO.169 ON INDIGENOUS AND TRIBAL PEOPLES

The International Labour Organization was established in 1919 under the Treaty of Versailles, as it has always been at core value of the only tripartite (nowadays) UN Agency, that bringing together Governments, Employers and Workers, to set labour standards, can pave the way for peace and understanding among and within States. Indigenous Peoples found an international forum in the ILO which allowed them to push for the codification of **ILO Indigenous and Tribal Populations Convention no.107** (1959)[46] which was a pioneering document in that it was the first international instrument to specifically address the human rights of Indigenous peoples. As a renewed and stronger continuance, came **ILO Indigenous and Tribal Peoples Convention no.169** (1989)[47], which has been ratified and therefore legally binding by only two states in the European Arctic: the Kingdom of Norway and the Kingdom of Denmark.

Art. 6(1) of the ILO Convention no.149 reflects the general requirement to consult with indigenous peoples as a general obligation under the Convention, whenever legislative or administrative measures affect them directly, the need to consult under certain circumstances is particularly emphasized, including prior to exploration or exploitation of mineral and sub-surface resources in its Article 15(2). The Convention defines the legal category of "Indigenous Peoples"and the subsequent rights that it entails; the right to be consulted through Free Prior and Informed Consent in state policy that may interfere with their livelihood (6.(1)); the right to decide their own development priorities (Art. 7); the right to access education and be educated in native knowledge (Arts. 26-31); the right to natural resources, participation in management decisions, and right to share benefits (art. 15); the right to participate in their own institutions as well as in the governmental non-indigenous ones (Art. 6); "due regard" for customs and customary law (Art. 8); and right to maintain their autonomous "criminal law" (respectfully with Human Rights law) (Art. 9).

[46] ILO C107 consolidated version available at;
<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107>

[47] ILO C169 consolidated version available at;
<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document>

Regarding specifically mining activities and the exploration phase, we must look into the articles that stipulate the rights upon the use of land and natural resources. These are of primordial importance and "shall be specially safeguarded" (Art. 15). For example, as a general norm, indigenous people have the right "to participate in the use, management and conservation of natural resources" (Art. 15). However, there are surely some exceptions to this norm, such as in cases where the State keeps hold of the ownership over some kind of natural resource. In such a context, the Convention creates a series of safeguards in order to ensure that indigenous communities are consulted and, what is more, that they participate in the benefits or are compensated for any damage occurred. As stated above and following these safeguards, the provisions on natural resources (Article 15) should be applied conjointly with the general provisions on consultation and participation (Arts. 6 and 7). In addition, the Convention emphasizes on the necessity to ascertain whether and to what extent indigenous peoples' interests will be damaged, before any exploration and exploitation of natural resources takes place on their lands (which can be practically achieved through an Impact Assessment involving all parties concerned; IP, State and Corp.).

Article 7(3) explicitly states that 'impact studies' should be carried out in cooperation with indigenous communities to analyze the social, spiritual, cultural and environmental impact planned activities could or would have, and that the results of these analyses shall be taken into account as fundamental criteria for the implementation of the activities.

UNDRIP DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a rather recent non-legally binding declaration which was adopted by the United Nations in 2007, and had the objective to promote "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world". UNDRIP[48] safeguards collective rights that are not considered in other traditional human rights charters, which tend to emphasize individual rights more. Again, UN Declarations are generally not legally binding; however, they represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles, some of these principles can actually be either a formalization of

[48] UNDRIP consolidated version available at;
<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>

international binding norms or become such overtime. UNDRIP is recent and cannot fall into this category, nevertheless its importance is paramount when read together with ILO C169, as it will be explained *ut infra*. one would expect that FPIC contained in UNDRIP will at some point become such an international norm overtime, as it is becoming a regional norm in InterAmerica through the IACHR jurisprudence as it will also be analyzed *ut infra*.

The most important articles that one must extract from UNDRIP, with regards to their practical weight during the mining exploration are the ones related to FPIC, self-government (as FPIC cannot be fully understood without at least some sort of political and organizational autonomy), therefore; Arts. 3, 4 and 19. Articles accompanied by the right to self-determination, which is also strongly related to FPIC and self-government. Art.13 UNDRIP is of the most relevance, as it states; *Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return*.

This is very significant, not only and for obvious reasons during the exploitation phase, but, especially in the exploration phase, as the prospector or permit holder should take into account the effects that prospecting work can generate on the traditional use of the land, say, the effects of certain impactful prospecting techniques upon reindeer grazing and herding.

For FPIC to fulfill its *ratio essendi,* it should be present in all stages of the extractive industries, in the exploration phase, the implementation phase, exploitation phase (+benefit-sharing), and closure. However, in practice, this right is hardly met, and even in cases where consultations take place, coercion and manipulation can also be exercised upon indigenous stakeholders.

THE UNDRIP - ILO C169 TANDEM

It is important to take a comparative approach with these two key international legal instruments and discern their legal nature in the realm of PIL. Now for the interest of Indigenous stakeholders during the exploration phase of mining activities, the fundamental aspect that entitles said stakeholders with the capacities (including veto, but not always) that FPIC provides, is the legal definition and boundaries of the

connection with the land. This is, understandably, the most contentious issue for all parties involved and were usually the articles for which drafting and negotiations lingered on in the case of both international instruments. For ILO C169, these are Arts.13-19 which -jointly read- recognize the cultural and spiritual importance of indigenous land -'covering the total environment of the areas which the peoples concerned occupy or otherwise use'-, as well as ownership and possession of traditionally occupied lands and protection where lands have been used but not occupied, that is, **a collective right to property** which includes; the right to natural resources (found in that land), the right to participate in management of decisions and right to share benefits, the right to transmission of land rights through traditional processes, penalties for those who infringe indigenous land rights, and liberties to improve access to land if necessary.

As per UNDRIP on the other hand, from Arts.25-30 one can extract a legal basis for the same **right to collective property** from the spiritual relation with traditionally owned, occupied, used lands/territories/waters/coastal seas and other resources, which in that case can include; the right to the above stated lands and resources (own, use, develop, control) which should be legally recognised and protected by States, recognition of IPs legal traditions and land tenure systems, the right to compensation if these territories are taken from them without free, prior and informed consent, right to environmental protection and conservation and no military activities on indigenous lands unless justified or agreed upon with the peoples living there.

As seen *ut supra,* both instruments cover the same key areas. And in fact, both put forward the legal build-up for Collective Indigenous Rights, with a special emphasis on natural resources as per the subject of this dissertation.

A fair argument can be made that they need each other. UNDRIP sets the principles of States, ILO C169 creates a framework in which to work practically. The first is a statement of intent or 'standard of achievement', while the latter is legally-binding. It is true that still too few States have ratified ILO C169, but in the case of the Arctic, Norway and Greenland (Denmark) encompass more than 60% of the IPs of Europe. And many in-ground projects like the Inter-Agency Support Group on Indigenous Affairs have been born within its legal ecosystem. As Prof. Lee Swepston puts it, a Convention must incorporate more compromises of principle than would a Declaration, which is amply demonstrated by comparing the ILO and UN instruments.

A Convention necessarily includes 'minimum' standards – that is, a floor below which ratifying countries may not descend – while a Declaration expresses what 'ought' to be the policies. This is, indeed, why it is essential to have two instruments, one binding and one aspirational.

FPIC, A LEGAL DEFINITION

The application of FPIC as a right pivots on indigeneity.[49] The principle of indigenous people's rights to free, prior and informed consent is based on that indigenous people have the right to say yes or no to operations that have an impact on their traditional land areas, before the operations start.

Specifically, FPIC means[50];

Free:

- The stakeholders shall have been informed of their right to say yes or no
- The indigenous people shall have accepted the decision-making process and work process that will be used in every operation
- The information initiative responsibility lies with the company, the information shall be transparent and objective
- The process shall be free from bribery or coercion
- Meetings and decisions shall take place at locations and times and in the languages and formats determined by the IPs
- Mediation shall be implemented if an agreement cannot be met
- The company undertakes to not continue the process without the consent of the indigenous people

Prior:

- The information shall be provided as early as possible
- Sufficient time must be provided to understand and analyze all relevant information and the consequences thereof

[49] Rachel Lorna Jhonstone, "What is Required for Free, Prior and Informed Consent and Where Does It Apply?" in Regulation of Extractive Industries: Community Engagement in the Arctic, Rachael Lorna Johnstone and Anne Merrild Hansen, eds. (Routledge 2020)

[50] Strategy on Minerals and Mining in Sápmi by the Sami Parliament adopted by the Plenary Assembly in Åre, Sweden on 20 May 2014

- The decision-making process required in order to be able to submit their consent must be respected despite delay.

Informed:

- Be objective, covering both the positive and negative consequences
- Be complete, covering the spectrum of potential social, financial, cultural and environmental impacts as well as the impacts for the rights of the indigenous people
- Be accessible, transparent, clear and in the language designated by the indigenous people
- The indigenous people shall have the opportunity to be accompanied by advisors
- The information shall be made available to all groups within the indigenous people.

Consent:

- A freely given decision that may be a "Yes or a "No" to the proposed measure
- The right to change one's mind if new information comes to light
- Shall be provided in the manner and through the decision-making process decided by the indigenous people
- Not the same as consultations
- Not indefinitely valid

THE EU CHARTER OF FUNDAMENTAL RIGHTS

The EU Charter of Fundamental Rights, which was adopted at the Summit of Nice in 2000, does not specifically address the concerns of indigenous peoples. The treaty does not go beyond a reaffirmation of the Union's commitment to the respect of "persons belonging to minorities'.

As per mild interest of IPs, the EUCFR protects private property (Art.17) in an individualistic sense, affirms equality before the law of all people (Article 20), prohibits discrimination on any ground (Article 21), and requests the Union to protect cultural, religious and linguistic diversity.

The Copenhagen criteria, designed in 1993 for countries wishing to join the EU, specifically highlights the protection of minorities. It is stated that *"membership*

requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities"

Furthermore, Art.2 TEU states that the "*Union is founded on the value of respect for human dignity (...) equality (...) and respect for human rights, including the rights of persons belonging to minorities"* while the bodies and institutions of the EU are bound by these provisions, they cannot undertake measures that would exceed their competence, and in these areas it is up to the Member States to ensure the protection of fundamental rights through the application of their own legislation and international obligations. Nonetheless the TEU and EUCFR do give powers to the Union to enact legislation and instruments to contribute to the protection of the rights of the EU's own IPs. That can be done through programs, financing and policy.[51]

Finally, Protocol No.3 to the Accession Treaty of Sweden and Finland with the European Union explicitly mentions Sámi rights linked to their traditional means of livelihood, most notably their right to reindeer husbandry. Though this is regarded as a legal basis for future modifications of the Community Treaties, and not a certain minimum standard of treatment as a precondition for membership. Whether and to what extent the special economic rights are granted by Sweden and Finland to the Sámi remains an exclusive decision of those countries.[52]

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights is an international treaty that entered into force in 1953, it sets out fundamental rights for the benefit of persons within the European region. Persons claiming to be the victim of a violation of these rights by a State Party to the treaty may apply to the European Court of Human Rights, in Strasbourg, for redress.[53] The ECHR however does not include specific provisions on

[51] European Commission's submission at the United Nations Permanent Forum on Indigenous Issues (UNPFII), available at; <https://www.un.org/esa/socdev/unpfii/documents/UNPFII%20European%20Commission%20submission.pdf>

[52] University of Oklahoma College of Law, 'Symposium: Lands, Liberties, and Legacies: Indigenous Peoples and International' (AILR 31, 2007)

[53] Pamphlet no.7 on Guidelines regarding minority rights by the European Convention on Human Rights, available at <https://www.ohchr.org/sites/default/files/Documents/Publications/GuideMinorities7en.pdf>

minorities or indigenous peoples as such, but it does include rights to equal treatment and non-discrimination which may reflect some minority concerns.

The only specific reference to IPs, understood as minorities one finds in Art. 14 ECHR: "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"

The protection of property through Art.1.1 (Protocol Paris, 20.III.1952) ECHR is of an individualistic nature and it is rather leaning towards the potesty of the State, but we can find, marked in bold letters, an interesting reference to the general principles of international law, which with time and further ratification of ILO C149 and acceptance of UNDRIP principles, most prominently FPIC, could become as such;

"*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and* ***subject to the conditions provided for*** *by law and* ***by the general principles of international law.*** *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"*

Applications for redress under the Convention are heard by the European Court of Human Rights (ECtHR), which derives as a byproduct of the Convention, to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols" (art.19 ECHR) which may result in a legally binding judgements. According to the Court; "a minority group is in principle entitled to claim the right to respect for the particular life-style it may lead as being 'private life', 'family life' or 'home'" under Article 8 of the Convention. Several cases involving the IPs of northern Europe have sought to raise such a claim, although no such application has yet succeeded. *Ut infra,* in Chapter a jurisprudential comparison of approach by the European Court of Human Rights and the Interamerican Court of Human Rights with respect to FPIC, as per the right of property and right to respect for private and family life will be made.

ART.27 OF THE UN INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The UN's International Covenant on Civil and Political Rights, ratified by all Fennoscandinavian States, in its art.27, reads;

"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 practise their own religion, or to use their own language."

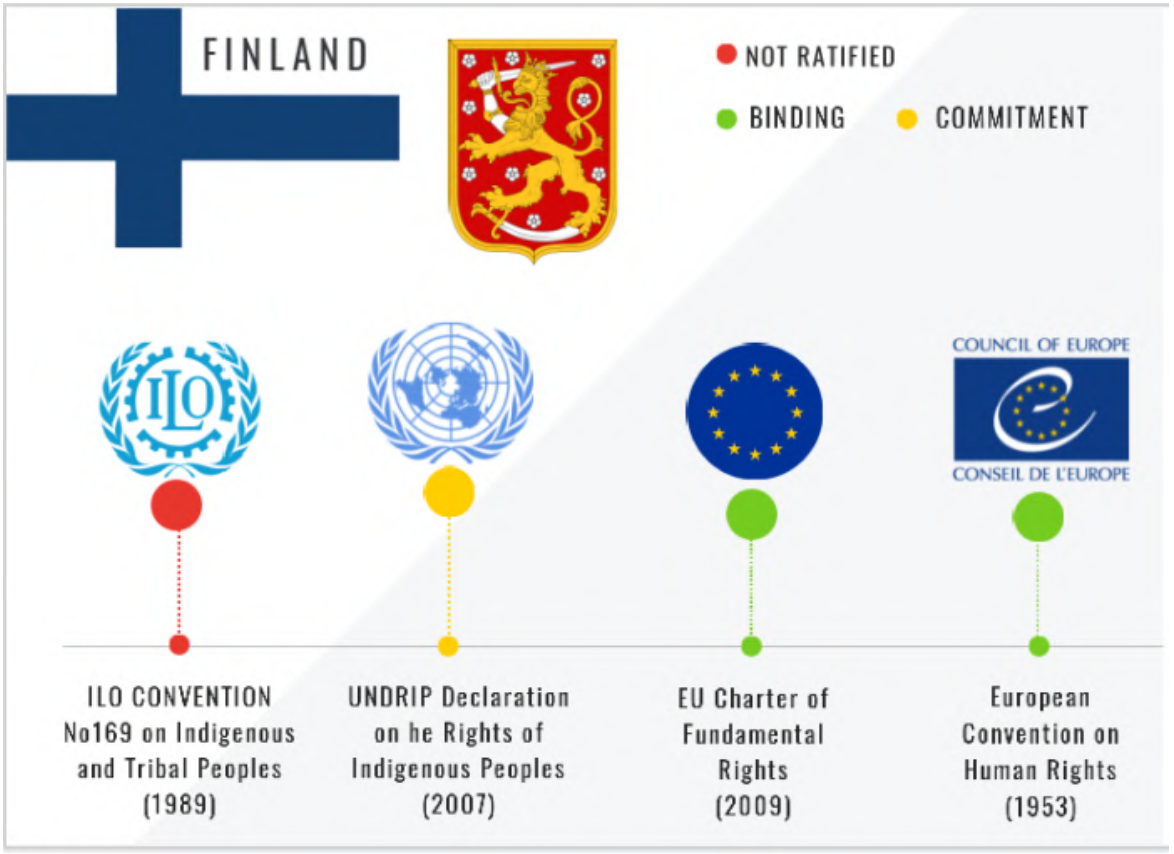
SOFT LAW INSTRUMENTS

Other kinds of protection that existing international legal instruments offer during the exploration stage are found in instruments considered as soft law (non-binding).

For example, the Circumpolar Information Guide on Mining for Indigenous Peoples and Northern Communities Prepared for The Sustainable Development Working Group (SDWG) of the Arctic Council, encourages; "*prospectors and exploration companies to consult with community leaders and to work with them to communicate with the local population early in the planning stages of the project and before going onto land. Depending on the size and location of the exploration project, a community may be consulted by government bodies looking for input before issuing permits for companies*." The Arctic Council's Arctic Monitoring and Assessment Programme (AMAP) also recommends that Indigenous communities be consulted prior to opening new geographical areas for oil and gas exploration and development, which could apply to mining as well. The Guiding Principles for Durable Extractive Contracts by the OECD recommends this as well. And the Handbook for ILO Tripartite Constituents states that; "*Indigenous Peoples must be informed, consulted and participate from the very outset of a planned intervention, including before concessions or licenses are granted to operators*."

6. DOMESTIC LEGAL FRAMEWORKS AND CASE STUDIES

I. FINLAND



Source: own elaboration

In Finland, if a project is to be conducted in Sápmi territory, their consent can be required, although during the exploration stage their opinions are not legally binding.[54]

An exploration permit remains valid for a maximum of four years and it may be extended for a maximum of three years at a time. In total, the permit may remain valid for a maximum of 15 years. The average legal timeframe for exploration permit handling is 120 days in forested areas and one year in Natura 2000 areas[55] (if no appeals

[54] Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (European Commission) & MinPol, 'Final Report on Legal framework for mineral extraction and permitting procedures for exploration and exploitation in the EU (MINLEX)' (MinPol, 2017) p.65

[55] Natura 2000 area (nature conservation units based on an EU nature directive; European Commission, 2021).

take place). In Sámi Homeland areas, it may be one year for gold panning and may extend to two years for other types of exploration.[56]

The relevant domestic legal instruments at play during the phase of mining exploration within the Finish Sápmi Homeland are; The Mining Act 621/2011 or *Kaivoslaki*, The Sápmi Parliament Act 974/1995 or *Saamelaiskäräjälaki*, and the Reindeer Husbandry Act 848/1990, or *Poronhoitolaki*.

The Finnish Constitution grants cultural rights to the Sápmi, including language and cultural autonomy in their Homeland, which in practice, covers the municipalities of Enontekiö, Inari and Utsjoki and the area of the Lapland reindeer herding cooperative located in the municipality of Sodankylä. This cultural autonomy is exercised in the form of the Sápmi Parliament which co-manages the threshold of Sámi livelihood; hunting, fishing and most of all, reindeer herding. Having said that, Section 17 par.3 of the Constitution is rather spare, as it follows;

"Section 17 - Right to one's language and culture; (...)

The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act[57]*."*

There are quite a few elements of the wording of the above article that leave much to be desired. For once, the article is not addressing the Sámi specifically but alongside the Roma people and broadly "other groups", second, it seems to put the emphasis on the language rather than the culture, which by all means, includes the prior as such. Finally, this sense of generality when quoting culture excludes the practicality of inner cultural activities, most notably; reindeer herding.

The Sápmi Parliament Act (*Saamelaiskäräjälaki* 974/1995) in its Section IX, establishes the obligation for the authorities to negotiate in good faith with the Parliament before adopting any measure or decision that may concern the Sápmi Region.

SPA Section IX (1)(3) of the Act establishes:

"Obligation to negotiate (...)

[56] As per Tukes disposals

[57] That is: The Sápmi Parliament Act 974/1995 or *Saamelaiskäräjälaki.*

—

3) applications for licenses to stake mineral mine claims or file mining patents"

The obligation has applied to the Ministry of Trade and Industry or any of its subsidiaries, but it **does not imply veto power**, as Section IX (2) follows;

(2) In order to fulfil its obligation to negotiate, the relevant authority shall provide the Sápmi Parliament with the opportunity to be heard and discuss matters. Failure to use this opportunity ***in no way prevents*** *the authority from proceeding in the matter.*

Reindeer Husbandry Act*, (Poronhoitolaki, 848/1990), Chapter 8, Section 53:*

When planning measures concerning State land that will have a substantial effect on the practice of reindeer herding, the State authorities ***must consult*** *the representatives of the reindeer herding co-operative in question.* – A consultation, that, again, does not imply any veto powers or binding force.

Chapter 1 (S. I) of the Mining Act (Kaivoslaki, 621/2011), states that mining activities that take place within the Sápmi territories shall be adapted, to secure the rights of the Sámi as an indigenous people. A Sámi rights impact assessment is required for permits concerning extraction activities in the Sápmi homeland (Chapter 5, S. 38 MA, 621/2011). Nonetheless, actual mining preceding exploratory activities can be carried out based on notification only, and require a permit in case the owner of the land does not consent (Chapter 2, S. 9 MA, 621/2011).). Such a permit will be issued by the Finish Safety and Chemicals Agency or *Tukes.* According to the said Agency, exploration ought to be based on prospecting work, the landowner's consent, an exploration permit or a mining permit. An operator doing exploration therefore, needs only an exploration permit from *Tukes* (which will automatically grant priority for a mining permit) if

- exploration cannot be carried out as prospecting work;
- the property owner has not given consent to exploration;
- the operator wants to ensure a priority for exploiting the deposit;
- exploration could cause any harm to people's health or general safety, damage to other industrial and commercial activity, or any deterioration in value related to the landscape or nature protection values;

- the exploration is targeted at locating and exploring a deposit containing uranium or thorium.

A direct mention to the Sámi livelihood reality should be included in these guidelines, yet it is clearly missing.

FMA Section XXXVIII (1) states;

"In the Sámi Homeland, the permit authority shall – in co-operation with the Sámi Parliament, the local reindeer owners' associations, the authority or institution responsible for management of the area, and the applicant – establish the impacts caused by activity in accordance with the exploration permit, mining permit, or gold panning permit on the rights of the Sámi as an indigenous people to maintain and develop their own language and culture and ***shall consider measures*** *required* ***for decreasing and preventing damage****… "*

FMA Section XXXVIII (4);

"In a special reindeer herding area, the permit authority shall, in co-operation with the local reindeer owners' associations, assess the damage caused to reindeer herding through activity under the permit."

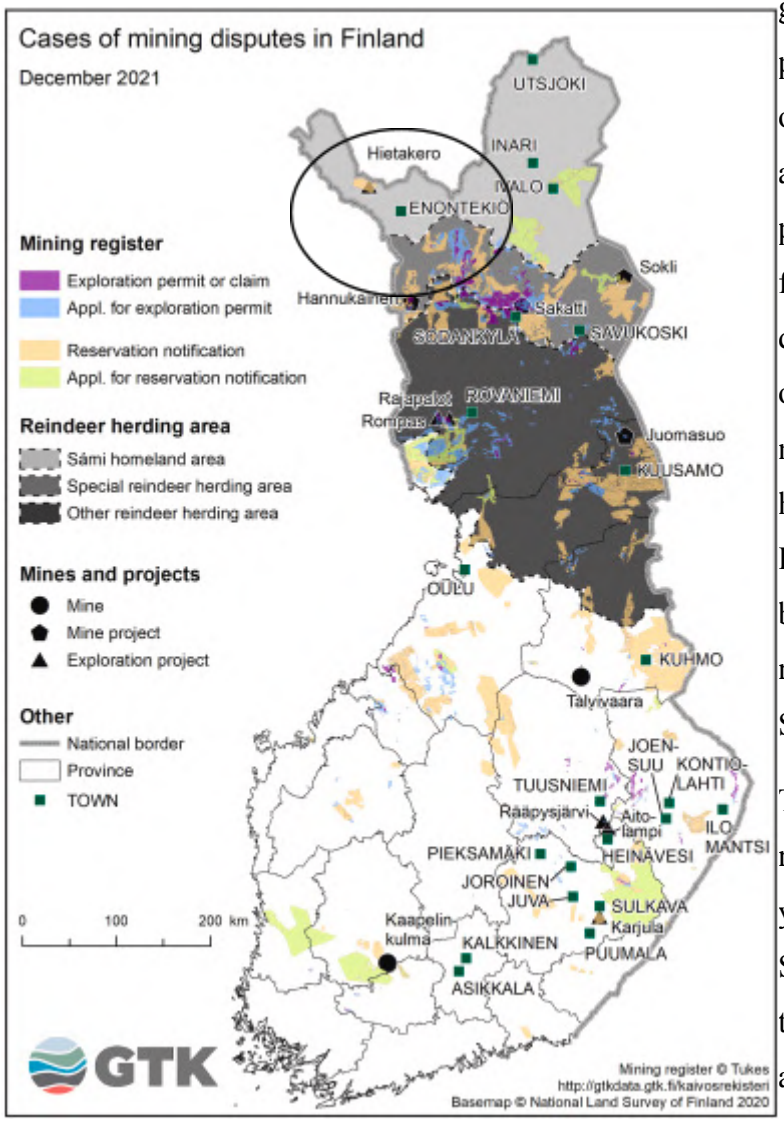
While the Mining Act clearly recognises the possible damages caused to the Sámi, gives only to Tukes the decision capacity, incapacitating the consent of the Sápmi Parliament and community who can only state their assessments of the damage. What is more, the Sápmi (in the institutional form of the Parliament, Local Reindeer Owners association or even local government authority) are put in the same "cooperative" level with the Applicant in the assessment of the damage, which is ultimately the decider.

The above legal configuration demonstrates a legal tendency to disregard or underestimate the actual negative impacts that the exploration stage has on indigenous communities. In fact, out of the 20 ongoing disputes related to mining in Finland identified by prof. Toni Eerola,[58]14 of them concerned mining exploration, while 4 concerned mine development and only 2 to mines or mine exploitation as such.

Out of the ongoing disputes identified by prof. Eerola, one must highlight the case of the Dutch-owned mineral exploration company *Akkerman Finland Oy* in the North

[58] Toni Eerola, 'Corporate conduct, commodity and place: Ongoing mining and mineral exploration disputes in Finland and their implications for the social license to operate' (RP 76, 2022)

Western Enontekiö area, which is part of 1) Sápmi Homeland (in light grey) and 2)Reindeer herding area (in dark gray), said Dutch corp. applied and was granted their claim reservation in the Spring of 2020[59], (reservation notification permit code: VA2020:0007) and the Sámi reindeer herders whose pastures would be affected in practice, received this information only through a newspaper announcement.[60] This is a good example of how the process in the Mining Act of making a reservation for an area becomes in practice, therefore, a mere formality, and said Act does not, as seen *ut supra*, oblige *Tukes* to specifically notify the Sápmi rights holders or the Sápmi Parliament in Finland before granting such a reservation permit within Sápmi homeland.



This, together with court rulings during the recent years (such as SAC:2013:179), stating that Sámi rights holders and the Sámi Parliament are not entitled to file complaints on such decisions regarding the reservation of areas is becoming a worrying national derive according to the Sápmi Council and its president Christina Henriksen

[59] Eerola, p.7

[60] Piera Heaika Muotka, 'Finland violates the rights of the Sámi people by allowing mining companies in Sámi homeland' *Sámiraddi* (Kárášjohka, June 202, 2020) <https://www.saamicouncil.net/news-archive/finland-violates-the-rights-of-the-smi-people-by-allowing-mining-companies-in-smi-homeland> accessed 09 Mar 2022

who calls for the amendment of the Mining Act of Finland, to ensure that the rights of the Sámi people are protected in every stage of every process.[61]

That could be a reality if only Finland would domestically implement UNDRIP, voted for in 2007, which could be done as well, at least partially, by ratifying the ILO Convention no.169 and with it the principle of free, prior and informed consent to be applied in cases of mining exploration permits. Said implementation and ratification would make binding for the Finnish authorities the refrain from giving consent by Sámi actors that comes with FPIC. This move will undoubtedly continue to be a 'scary' pitfall for Finnish legislators and lobbyists, a very difficult one to surpass without substantial political and policy change.

An example of this is the very recent ongoing reform of the Mining Act, a draft government proposal on the reform having been sent out for comments in the beginning of March this year 2022.[62] While stricter conditions for exploration to be allowed in certain nature reserves and state lands have been agreed by the government parties as well as a higher degree of local engagement[63], the opportunity to introduce FPIC for mining exploration as a legal specificity tied to the rights of Finnish Sámi reindeer herders, has not been taken.

In fact, a recent ruling from the Supreme Administrative Court of Finland (KHO:2021:83) examined the administrative procedure relating to the awarding of an exploration permit within the Sámi homeland and the impact assessment on Sámi rights carried out by Tukes, concerning an exploration permit, with a total area of 390 hectares and an exploration plan consisting of an impressive 20-drill hole exploration program. The exploration permit decision was appealed against by the Sámi Parliament, the Finnish Association for Nature Conservation and the local reindeer herder's association, mainly based on arguments that exploration within the area had negative impacts on Sámi rights and the failure to appropriately assess the impacts of exploration on Sámi rights. Tukes was able to demonstrate at Court, that it had requested numerous statements from the Sámi Parliament and the local reindeer herder's association while

[61] Ibid

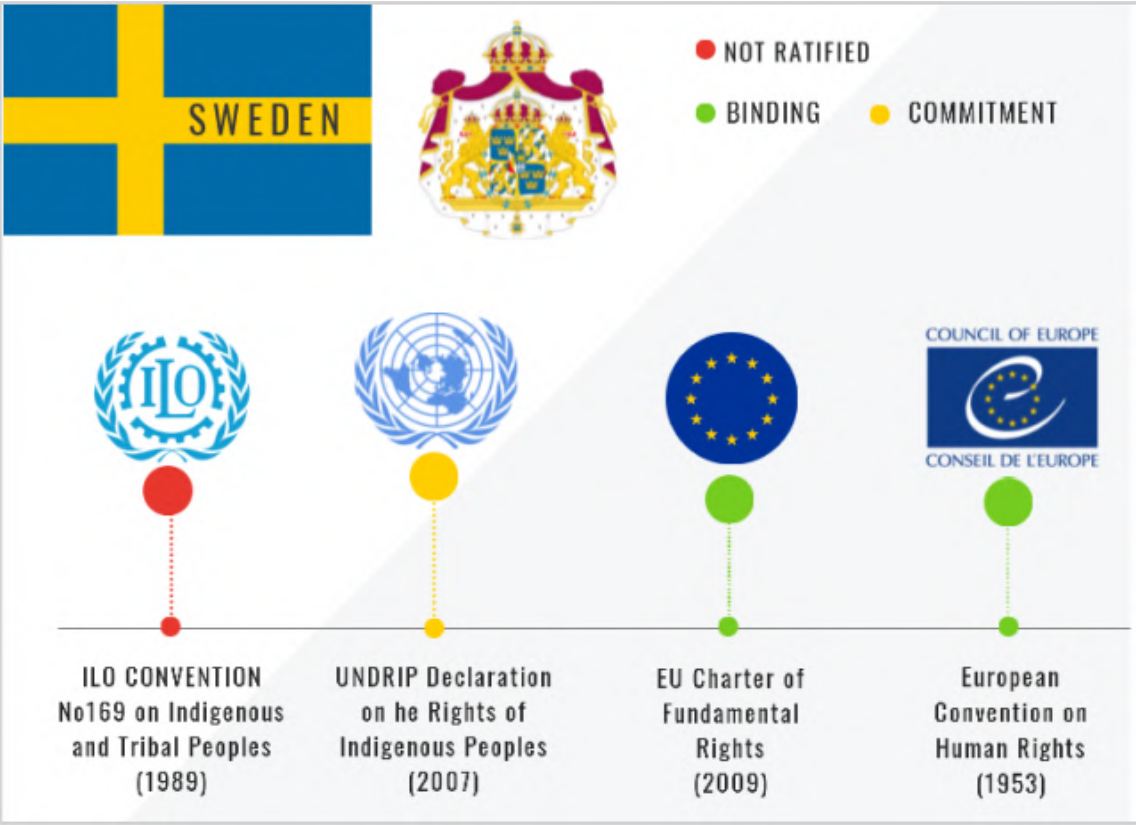
[62] Finnish Government, Statement of the Ministry of Economic Affairs and Employment, available at; <https://valtioneuvosto.fi/en/-/1410877/reform-of-the-mining-act-to-be-circulated-for-comments-minister-for-economic-affairs-lintila-stresses-the-necessary-conditions-for-sustainable-mining>

[63] Ibid

assessing the grounds of the permit application and arranged a consultation with the Sámi Parliament and the local reindeer herder's association as required by the Mining Act. Based on the statements received and the above-referred consultation, the exploration permit decision contained permit conditions that aimed to minimize possible negative impacts that the planned exploration program would have on reindeer herding. Taking into consideration the planned exploration activities that were considered as 'small-scale' by the Supreme Administrative Court, the judges thus considered that the IA had been carried out in an appropriate manner and the appeals were dismissed.[64] As stated *ut supra*, the fact that Tukes, as the granting authority is required to listen rather than to consult, to obtain statements, rather than consent is of course detrimental to Sámi stakeholders.

[64] KallioLaw, 'Recent developments in mining and environmental legislation' *Lexology* (Finland, September, 2021) <https://www.lexology.com/library/detail.aspx?g=e563552c-ee5f-44df-bd98-65afa4a9a5ea> accessed 23 May 2022

II. SWEDEN



Source: own elaboration

In Sweden, during the process for exploration permits, the County Administrative Board, the municipality and the Sápmi Parliament (the Parliament of the Sápmi indigenous peoples of Sweden) are involved and are entitled to comment on the application.[65] Sámi reindeer herders have the same status and rights as landowners in relation to mineral activities, but lack veto power, especially during the exploration stage.[66] Reindeer herding and mineral extraction are both regarded as national interests, however they typically compete in mine planning processes.[67]

In Sweden, mineral exploration and the extraction of "concession minerals" are governed by the Minerals Act (1991:45) which includes metallic ores, a wide range of industrial minerals, coal, oil, gaseous hydrocarbons and diamonds. Nonetheless, further domestic legislation is applicable in parallel to the Minerals Act, these are; the Planning

[65] MINLEX, p.95

[66] Timo Koivurova, et altri, 'Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States' (ARLP 76, 2015)

[67] Ibid

and Building Act (2010:900), Environmental Code (1998:808), Cultural Heritage Act (1988:950) and Off-Road Driving Act (1975:1313).

In 2011, the Constitution of Sweden explicitly recognized the Sámi as a people, as distinguished from a minority group.

The competent authority for mining exploration is the Mining Inspectorate, headed by the Chief Mining Inspector (a government appointee), who issues both permits for mineral exploration (exploration permits) and extraction (extraction or mining concessions) for mineral deposits associated with the Minerals Act. Regarding the extraction concession procedure, the County Administrative Board takes part in the evaluation of land use issues connected to the location of the extraction area applied for, but the same does not happen for mining exploration.

SMA Section V (c) reads;

"(...) If the exploration work is to be done within an area used for reindeer herding, a valid plan of operations shall also be sent to the Sami Parliament. Act (2014:782)"

SMA Section V (d) states;

"The plan of operations shall be ***confirmed by the Chief Mining Inspector*** *and shall become valid insofar as it fulfills the requirements on content in Section 5, the measures set out in it are necessary for appropriate exploration and do not cause the property owner or any other concerned party inconvenience of such magnitude as to* ***outweigh the permit holder's interest in being allowed to carry out the work,*** *and the* ***permit holder has complied with his obligations*** *according to Section 5 a, and Section 5 b"* - which refer to serve the operation plan to the owner of the land or special right holder (reindeer herder Sápmi), make available a translation of the plan of operation in Finnish, Meänkieli, and the Sami language, and receive objections to the contents of the plans from the mentioned parties, who only have three weeks to do so.

Section V (d) continues; "*(...) In a decision to confirm a plan of operations, the Chief Mining Inspector* ***shall set out the conditions*** *needed to protect public interests and private rights and* ***to prevent or limit inconvenience.*** *The Chief Mining Inspector may also decide that the plan of operations shall apply immediately."*

According to the Minerals Act, holders of special rights, including affected Sami villages, need to be involved during some stages of the grant process of exploration. But

just as it is the case for Finland, the entitlement for Sámi actors (Sápmi Parliament and Special Herding Rights Holders) to comment on the application lacks veto power. The final decision power lies solely on The Chief Mining Inspector.

The wording of these legal texts seems to undermine the impacts of mining exploration, as if notification only could serve as a guarantee. At the same time, mining exploration in Lapland is perceived as a direct threat to the Sápmi people and Reindeer herding to which they are both dependent culturally and on as a staple to subsistence. According to Minna Näkkäläjärvi, Swedish Sámi reindeer herder and activist; "*It's not possible for reindeer husbandry and mining to co-exist in the same area."*[68] Other areas of the Arctic are a clear and red siren that Swedish legislators and policy makers seem to be purposely ignoring. In Northern Canada, according to a 2018 report, a 70% decline of Caribou over the last decade can be attributed to key areas of the summer and fall range having been taken up for mining exploration in the last two decades; a disturbance that has led to the loss and degradation of key habitat for caribou, thereby exacerbating the decline of the herd.[69]

In 2006, Beowulf Mining Plc. (UK) and their Swedish affiliate, Jokkmokk Iron Mines AB, were given permission by the Swedish governmental agency Bergsstaten to explore possibilities for mining iron ore in Gállok (also known as Kallak); an area located 40 km northwest of Jokkmokk in the province of Lappland, Sweden.[70] This year 2022, UN Special Rapporteur on the rights of indigenous peoples José Francisco Cali Tzay (Guatemala) and Special Rapporteur on human rights and the environment David R. Boyd (Canada) urged Sweden not to issue a license for said iron-ore mine.[71]

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[68] Thomas Nilsen, 'Miners hunting for metals to battery cars threaten Sámi reindeer herders' homeland' *The Barents Observer* (Kirkenes, July 09, 2020) <https://thebarentsobserver.com/en/node/7082> accessed 11 Mar 2022

[69] Brenda L. Parlee, John Sandlos & David C. Natcher, 'Undermining subsistence: Barren-ground caribou in a "tragedy of open access"' (2018) SA 403 <https://www.science.org/doi/10.1126/sciadv.1701611> accessed 10 Mar 2022

[70] EJAtlas, 'Gállok/Kallak Iron Mine, Sweden' *Environmental Justice Atlas* (February 06, 2022) <https://ejatlas.org/conflict/gallok-kallak-iron-mine-sweden> accessed 19 Apr 2022

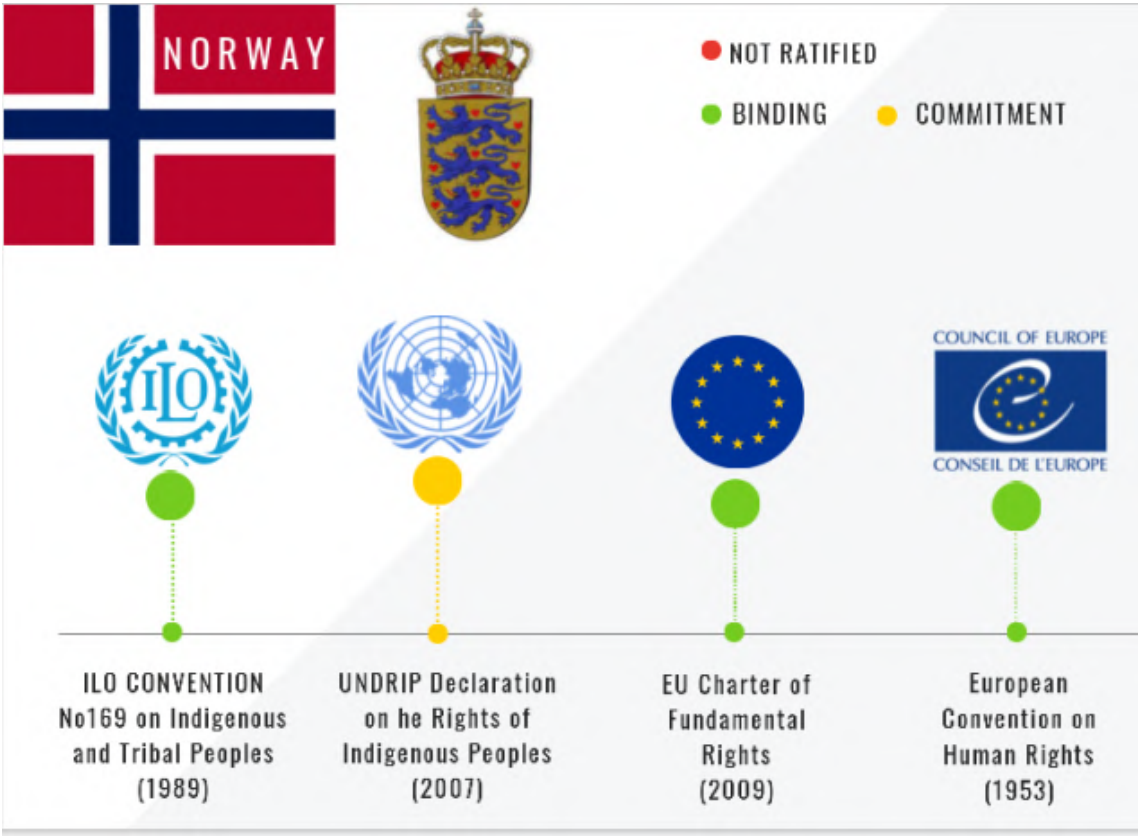
[71] UN-OHCHR, 'Sweden: Open pit mine will endanger indigenous lands and the environment – UN experts' *UN Media Center* (Geneva, February 10, 2022) <https://www.ohchr.org/en/press-releases/2022/02/sweden-open-pit-mine-will-endanger-indigenous-lands-and-environment-un> accessed 19 Apr 2022

While this year 2022 could be decisive as per the Government blocking or otherwise permitting the development of the mine, one must understand this example's importance in the sense of the massive impact that 16 years of uncertainty regarding the mine have had on the community. It is a good example to highlight how the lack of information transparency and excluding non-corporate local stakeholder involvement in the exploration phase gives way to conflict and a state of affairs that turns sour and lingers on for more than a decade, altering the lives and well-being of the community, and specially Reindeer habitat and normality and viability of herding. As of 22 of March 2022, amidst the development of this dissertation, the Swedish Government finally, and controversially, approved Beowulf Mining company's application for the mine in Gállok.[72] Can ILO No.169 ratification help solve the issues mentioned? This question will try to be answered below as we approach the domestic legal frameworks and case studies of Norway and Greenland (Denmark).

Source: Sáminuorra (*Polar Journal)*

[72] ES, 'WWF criticizes the government's approval of an iron mine in Gállok, Sweden' (25 March, 2022) <https://arcticwwf.org/newsroom/news/wwf-criticizes-the-governments-approval-of-an-iron-mine-in-gallok-sweden/> accessed 01 April 2022

III. NORWAY



Norway is not in the EU, but part of the EEA-EFTA, which makes certain EU Legislation binding, except for the Svalbard Archipelago which is excluded from the EEA agreement. It is the only country so far analyzed that has ratified the ILO 169 Convention, and also its main mining act (adopted 2009 replacing five other laws[73]) contains specific provisions for the Finnmark area (where most of the Norwegian Sámi live), thus the level of protection is quite potent, especially in Finnmark.

The main legislative instruments regarding mining exploration in Norway therefore are the above mentioned Norwegian Mineral Act (2009) and the Finnmark Act (2005). The NMA contains several provisions on Sámi people, with special regard to the Finnmark area where Sámi interests are particularly taken into account. The administration and use of mineral resources pursuant to the Act ensures that the foundations of Sami culture, commercial activity and social life are safeguarded, and conditions for this same reason can be put forward alongside the permit to begin exploration within the Finnmark area. In fact, an exploration permit does not confer a right to undertake

[73] Petter Hojem, 'Mining in the Nordic Countries, a comparative review of legislation and taxation' (Nordic Council of Ministers, 2015)

exploration or pilot extraction until the Directorate of Mining has granted a special permit, which may be refused when granting the application would be contrary to Sámi interests.

NMA Section VI states;

"the Act shall be applied ***in accordance with the rules of international law relating to indigenous people and minorities****"* - that is, most prominently; ILO C169.

NMA Section XVII states;

"*in the case of a search in Finnmark, the searching party shall in addition give* ***written notice*** *to the Sameting* (the Sami Parliament)*, Finnmarkseiendommen* (the Finnmark Estate) *where it is landowner, and the relevant area board and district board for reindeer management. Whenever practically possible, the siidas* (reindeer pastoralistic districts) *(...)shall be given oral notice"*

"An exploring party shall take reasonable steps to obtain information about directly affected Sami interests in the area that is to be explored. ***A special permit may be refused if granting the application would be contrary to Sami interests.*** *In the assessment, special consideration shall be given to the interests of Sami culture, reindeer management, commercial activity, and social life. If the application is granted,* ***conditions may be imposed*** *to safeguard these interests. When processing the application, the Directorate of Mining shall give the landowner, the Sameting (the Sami Parliament), the municipality, and the relevant area board and district board for reindeer management an* ***opportunity to comment. If the Sameting or the landowner opposes the granting of an application, the Ministry shall decide the application****.* ***If the Ministry grants an application […], an appeal to the King by the Sameting or the landowner shall have a suspensive effect."***

Other legislation can be relevant regarding exploration planning. The Planning and Building Act of 2008 explicitly states that plans shall "*protect the natural basis Mining in the Nordic Countries for Sami culture, economic activity and social life*"

According to the Ministry of Trade and Industry guide to the Norwegian Minerals Act, the planning process including the EIA is generally more detailed and time-consuming than the operating license application.[74] An EIA that involves hearings within the right

[74] Hojem, p. 52

to comment that Sámi stakeholders possess, whether or not in the form of institutions (Reindeer Husbandry Associations, *Sameting* eg.).

As per the legislation analyzed *ut supra*, the level of protection during the exploration stage is very high in Norway. It is worth noting that the Norwegian Sami Parliament did not support the adoption of the new Minerals Act in 2009. Main arguments were that the increased landowner fee for operation in areas owned by the *Finnmarkseiendom* is not adequate to fulfill the ILO Convention 169 provisions on indigenous peoples' rights to benefits and compensations from natural resource exploitation, and that the current Act does not give Sami interests equal protection outside of Finnmark county.[75]

While the exact conditions of FPIC which certainly apply to exploitation are not specified as such in the wording of the NMA, the system of opposition and comment directly to the Ministry, as well as the direct appeal with suspensive effect allows for very satisfactory protection to reindeer herding and overall Sámi interests in Finnmark, weather or not it should be extended to other areas is a separate debate.

Pursuant, inter alia, to the Pollution Control Act, the Ministry of Climate and Environment has issued regulations that cover mining waste and thereby transpose the Mining Waste Directive (2006/21/EC).[76]

In the Kautokeino-Arctic Gold case in 2010, a Swedish mining company planned to reopen a gold mine in Biedjovaggi, an important reindeer territory. Kautokeino municipality has a 95% Sami population, so the company submitted the required EIA to the relevant planning authority, the Kautokeino Municipal Council. The Council completely dismissed the plan on the basis of ILO C169 and the new paragraph included in the Planning and Building Act that gave the municipality the authority to "protect the natural basis for Sami culture, economic activity and social life." A legal investigation that involved both the Norwegian Ministry of Environment and the Ministry of Justice concluded in favor of the municipality's decision. Today, year 2022, Kautokeino is facing, once again, the pressures of a Swedish mining company, this time "Arctic Minerals" after substantial resource estimates for copper, cobalt and tellurium were published after the drill cores taken over several years at the Bidjovagge Mine Project in Kautokeino.

[75] Hojem, p.50

[76] Ibid, p.55

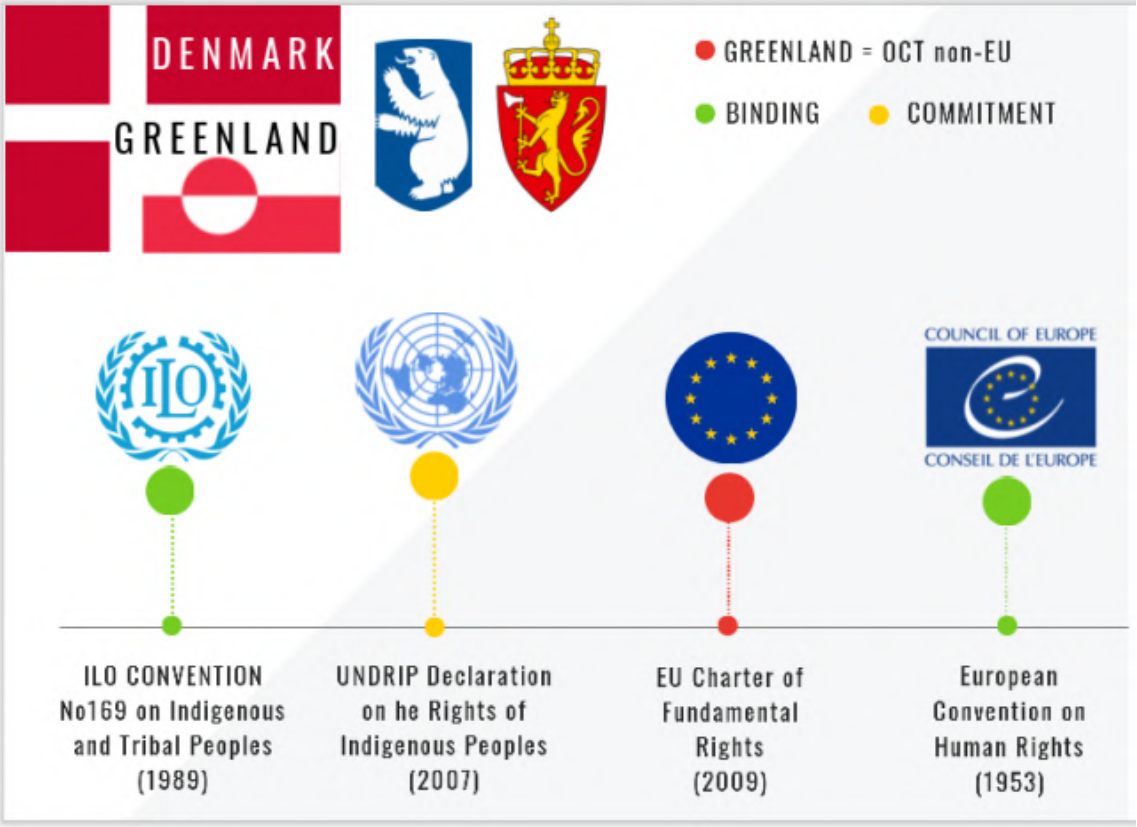
Both copper and cobalt are in growing demand worldwide as metals used in the sharply increasing production of batteries for electric vehicles. Tellurium, a by-product of copper smelting process, is used in solar panels and is also believed to be a promising component of next-generation batteries due to its ability to support high energy density.[77]

Norway has to uphold its international obligations towards the Sámi and continue its path to ensure FPIC in every step of the mining process, it cannot allow it to tramp over IPs rights in exchange for a faster transition towards renewables. Norway and the rest of Finnoscandinavian States must avoid committing to a 'Green Colonization' as defined by the Head of the Arctic and Environment Unit with the Saami Council, Ms. Gunn-Britt Retter [78] as the phenomenon of mining rush in Sápmi Land or rare-earth minerals and other minerals valuable to the tech required by renewable energies.

[77] Thomas Nielsen, 'Significant metals discovery in key reindeer herding land' *The Barents Observer* (Kirkenes, January 19, 2022) <https://thebarentsobserver.com/en/indigenous-peoples/2022/01/significant-battery-metals-discovery-key-reindeer-herding-land> accessed 23 May 2022

[78] Grunn Britt-Retter, 'Indigenous cultures must not be forced to bear the brunt of global climate adaptation' *The Arctic Today* (November 25, 2021) <https://www.arctictoday.com/indigenous-cultures-must-not-be-forced-to-bear-the-brunt-of-global-climate-adaptation/?fbclid=IwAR3bpPvAEl6fYdWedpTHhKeFETofYvDuSCZ0EGK_RRFIWDoYpbbO4BFncVo> accessed 17 April 2022

IV. DENMARK-GREENLAND



While the impacts and effects of mineral exploration that Greenlander Kalaallit have to face are quite similar to those of the Sámi in Fennoscandinavia, there is a key and major difference to take into account which is that, the Inuit in Greenland enjoy self-rule through a Parliament (Inatsisartut) and Government (Naalakkersuisut) that enacts legislation in specific fields, including mining, and have the economic responsibility for solving these tasks. To this effect, Greenlanders enjoy recognition of Land Rights/Tittle, including land subsurface and Self-Government Rights,

Such independence and sovereignty are provided by the Act no.473 on Greenland Self-Government (2009) which even allows, through a referendum, to grant the independence of Greenland from the Kingdom of Denmark.[79]

Chapter 9 S.23 (2) reads; *"Section 8 of the Greenland Home Rule Act shall remain in force until the mineral resource area is taken over by the Greenland Self-Government authorities."* Before the 2009 self-government legislation was implemented, Section 8.1

[79] See Chapter 8 S.21 Act no.473 on Greenland Self-Government (2009), consolidated version translated to English available at; <https://www.files.ethz.ch/isn/125366/3708_Greenland_Independence.pdf>

of the Greenland Home Rule Act (1978) read; *"The resident population of Greenland has fundamental rights to the natural resources of Greenland"*

Under the Act on Mineral Resources in Greenland, the exploitation of subsurface resources is administered jointly between Danish and Greenland authorities. The act **affords Greenland a veto on all matters relating to prospecting and exploitation of subsurface resources.** Since 1998, the administration of all mineral resource activities has been in the hands of Home Rule authorities.[80]

Section 1–2 of the Mineral Resources Act states that *"the Greenland Parliament Act aims to ensure that activities under the Act are securely performed as regards safety, health, the environment, resource exploitation and social sustainability as well as properly performed according to acknowledged best international practices under similar conditions"*.

The Mineral License and Safety Authority is overall the greenlandic administrative authority to grant mineral exploration permits, the Environmental Protection Agency for Mineral Resource Activities is responsible in the process as well. Appeals regarding decisions made by the two authorities can be submitted to the Greenlandic Government. Those entitled to appeal are parties to the case, those who have a major individual interest in the outcome of the case (indigenous stakeholders), as well as recreational and environmental associations. The Mineral Resources Act allows for the granting of a prospecting license, exploration license and exploitation license.[81]

The parliamentary election's debate in Greenland early last year 2021 was largely characterized by the controversial rare minerals and uranium mine project, 'Kvanefjeld' at the Kuannersuit mountain in Narsaq, South Greenland. In fact, the new Government presided by Mr Mute Bourup Egede took over in April after his left-wing party *Inuit Ataqatigiit* won on a platform for halting the mentioned mining project on environmental grounds, and it was quite a historical victory considering that Egede's party were newcomers. Disagreement over the project was the last straw that led to the collapse of the previous government earlier in the year. This is a crucial issue for

[80] Queen's University score table on multiculturalism policies for Indigenous Peoples by country (Denmark), available at;
<https://www.queensu.ca/mcp/indigenous-peoples/resultsbycountry-ip/denmark-ip>

[81] The Mineral Resources Act is the framework legislation for all activities related to mineral and hydrocarbon exploration and exploitation.

Greenland, that is determining the political agenda of this big-in size- small-in population- nation. The Kvanefjeld (or Kuannersuit) mineral deposit could contain the world's second-largest deposit of rare-earth oxides, and the sixth-largest deposit of uranium.[82]

Profs. Johnstone and Hansen[83] pointed out in their studies on the ground that the polarization they witnessed in Narsaq, the town beside the controversial *Kuanneeuit* mining project, was such a strong one, that according to their interactions on the ground, the community fell to division and a great deal of uncertainty[84]. According to their interactions on the ground, a consensus approach to mineral development appeared impossible. Opinions were entrenched as 'all or nothing' and it was extremely difficult for people to offer conditional support. The professor found that proximity to the project, especially long delayed projects, led to uncertainty which in turn led to paralysis, and they described this phenomenon as "*Narsaq on hold*". One citizen from East Greenland interviewed by the professors hypothesized that the uncertainty contributed to alcohol abuse because people did not feel like they had alternatives, at least in the short term, which links up with the established 'psychological variable' *ut supra.*

Similarly, the professors found that people in Narsaq, considered the mining project itself as the greatest risk to their community, during the initial phases of exploration in the area, and as time went by without a decision being made, some found that the uncertainty from the delays in reaching a decision was worse as everything was being on hold for so long that the community was starting to fall apart in various ways.

[82] Niels Henrik Hooge, 'Kujataa threatened by mining projects and uranium mining' (NMI 887, 2010)

[83] Johnstone and Hansen, 2020

[84] Ibid

7. ECHR DEFICIENCIES IN PROTECTING PRIVATE (COLLECTIVE-INDIGENOUS) PROPERTY. COMPARATIVE WITH THE IACHR.

The complaints of European indigenous peoples are frequently marginalized, and these communities have had limited success in obtaining in merito judgments when appearing before the organs of the European Convention of Human Rights (ECHR). Of the few cases addressed by the ECtHR and its predecessor, the European Commission of Human Rights, nearly every case was dismissed at the stage examining issues of admissibility without ever reaching the merits of the claims. The lack of *in merito* judgments is a stark contrast to the jurisprudence of the Inter-American Court of Human Rights (IACHR), where cases involving indigenous peoples are regularly addressed and resolved on their merits. The result is that the rights of Inter-American indigenous peoples are increasingly well established, while in Europe they remain in a state of limbo.[85] What is more enlightening, is that the IACHR Court adopted certain articles from UNDRIP and the ILO C169 as tools of interpretation for art.21 ACHR *in relatio* to 1.1 and 2 ACHR.

In the *Case of G. & E. v. Norway* the Sámi of Norway brought the first case by an indigenous European population before the European Commission on Human Rights (which received the complaints based on alleged violations of the ECHR acting as a 'filter' before the ECtHR, and existed until 1998 when the Court was made permanent). They alleged that the construction of the controversial Alta Hydroelectric Power Station, authorized by the Norwegian government, violated the property rights of the Sámi because it would result in the loss of traditional territories used for herding and fishing, activities claimed to be essential to their way of life. The European Commission on Human Rights *in abstracto* recognized the applicability of the right to protection of

[85] Peter Kovacs, 'Indigenous issues under the European Convention on Human Rights, reflected in an Inter-American Mirror' (GWILR 48, 2009)

property through ECHR Protocol 1, Article 1[86], yet it ultimately denied the complaint as lacking sufficient evidence.

In *Konk ¨ am¨ a and 38 Other Saami Villages v. Sweden* several Sami villages complained against the modification of the Swedish legal regime for hunting, fishing, and herding, which would require licenses when such activities occurred within state-owned territories. The Commission via Protocol 1, Art.1 The Commission recognized that *"the exclusive hunting and fishing rights claimed by the applicant Saami villages . . . can be regarded as possessions"* yet before getting to the merits of the case, the complaints were deemed inadmissible because the Sámi failed to exhaust local remedies. While European IPs are recognized with some legitimacy in their complaints, they are halted on procedural grounds for their case to be dismissed. In *Halvar From v. Sweden* though, curiously enough, when a non-Sámi swedish national sought protection conveying his own right to property based on Protocol 1, Art.1 of the Convention, asking for protection of his land from hunting by the Sámi, whose state-defined territorial boundaries overlapped with his own land, it was found that the hunting rights of the Sámi (equated to reindeer herding) in the area of northern Sweden were the property was located, were based on *"custom from time immemorial*" and therefore trumped the applicant's claims. The Commission further found it to be *"in the general interest that the special culture and way of life of the Sami be respected,*" and that *"reindeer herding and hunting are important parts of [Sami] culture and way of life".*

Finally, worth mentioning is the *Case of HINGITAG 53 v.Denmark*. The European Court of Human Rights heard the case, since the Commission ceased operation at this point. But yet again formalities trampled the way for a judgment on the merits. It all came down to a forced relocation of the Thule tribe of the Dundas peninsula in Greenland in order to build a US naval base. Danish compensation was slow and deemed insufficient by the Thule, even though the original inhabitants were given monetary and material damages, mostly in the form of a new settlement as well as immaterial damages being

[86] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, enacted Mar. 20, 1952, E.T.S. 5, 213 U.N.T.S. 222 [hereinafter European Human Rights Convention Protocol]. ("Protection of property: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.")

considered. But because the appropriation occurred before the entry into force of the ECHR commitment, the Court found its jurisdictional competence hampered *ratione temporis.* Thus, the Court declared the application inadmissible because *"the national authorities did strike a fair balance between the proprietary interests of the persons concerned and [the Court was] satisfied that the present case [did] not disclose any appearance of a violation of Article 1 of Protocol No. 1"*[87]

This "narrow interpretation of Protocol 1 undermines the cultural preservation of indigenous peoples" according to Giovanna Gismondi[88]; the Court's acceptance of the substitute homeland provided for the Inuits in HINGITAG 53 represents yet another case where "the European Court's analysis failed to consider the significance of lands for the physical and cultural integrity of indigenous peoples."

Now if one turns to the other side of the Atlantic, in the *Case of the Saramaka People v. Suriname* brought to the Inter-American Court of Human Rights, the Government of Suriname granted concessions to wood and gold mining corporations that consequently damaged the environment, polluting the Rio Suriname Superior and Saramacca River with mercury, not limited to the gold mining areas, because mercury was transported by water and wind to downstream and downwind areas[89]. These are the waters alongside which the *Saramaka* people have depended on for its subsistence for centuries. Yet the *Saramaka* are not in fact Indigenous, being descendants of the fugitive African slaves that were forcefully brought to the Americas in the XVII century[90]. And as stated *ut supra*; 'the application of FPIC as a *right* (or any safeguard on the matter) *pivots on indigeneity'*[91].

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[87] Kovacs, p.793

[88] Giovanna Gismondi, 'Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1' (YHRD, 18, 2016)

[89] Paul E. Ouboter, 'Review of Mercury Pollution in Suriname' (2015) 6, AJS <https://www.researchgate.net/publication/280050637_Review_of_mercury_pollution_in_Suriname> accessed 01 January 2022

[90] Gary Lee, 'African traditions thrive in Suriname' The Washington Post (Washington DC, 28 August 1995)<https://www.theguardian.com/sustainable-business/sustainability-dangerous-myth-over-consumption> 01 January 2022

[91] Rachael Lorna Johnstone, "What is Required for Free, Prior and Informed Consent and Where Does It Apply?" in *Regulation of Extractive Industries: Community Engagement in the Arctic,* Rachael Lorna Johnstone and Anne Merrild Hansen, eds. (Routledge 2020)

As pointed by the Court in the Case of the *Sawhoyamaxa Indigenous Community v. Paraguay* regarding the privatization of the Chaco Paraguayo and its subsequent multilateral damage on various degrees[92], leading to at least 18 child deaths attributed to the State of Paraguay; '*the concepts of property and possession in indigenous communities may have a collective significance, in the sense that its membership 'does not focus on an individual but on the group and its community'* (Par.126). In fact, most Indigenous rights can only be enjoyed in community and don't make sense on an individual basis.[93]

The Court considers that its jurisprudence on the right of property of IPs is also applicable to the *Saramaka* as a Tribal community, since their social, cultural, and economic characteristics are different from other sections of the nation, emphasizing '*the special relationship that exists between them and their ancestral territories'*, and because they are '*self-governed, at least partially, through their own norms, customs, and traditions.'* (Par.131)

This is of keen importance, because the Court doesn't let itself get lost in semantics, in that the scope of IPR can and must be extended to Tribal peoples when necessary. This brings up the question of the "positive" ambiguity that surrounds what constitutes "Indigenous" as in the sense that not having an exact constrained definition avoids limiting the scope of protection that may be granted. While in the Inter-American context it is taken as an opportunity to expand the scope of protection, in the European context the debate on who should be entitled to be 'specially protected' due to its indigeneity still impedes further development and for a single jurisprudential success in the ECtHR.

According to the jurisprudence of the IACHR, based on art.1.1 American Convention on Human Rights (ACHR) the State must provide certain special measures to grant the full exercise of their rights, special regard must be given to property rights, as means to ensure IPs physical and cultural survival. The use and enjoyment of 'communal property' in accordance with art. 21 *in relatio* to 1.1 and 2 ACHR, and the subsequent use and enjoyment of the natural resources that lie within Indigenous Peoples

[92] That is; Extreme Poverty, No Medical Aid, Labour Exploitation, Prohibition to own Crops and Livestock, Impediment to Traditional Subsistence Practices among others.

[93] Johnstone, p.4

traditionally owned territory is the *minimum* required for survival. Again, these resources being, both in a material and spiritual sense, their *raison de vivre.* And the Court also states that subsoil natural resources must be included in their right to property, out-toping the extended notion, since the 18th century post-reformation western theories that the ownership of the land can only be justified if it is actually *being used.*

To surpass the ponderation between the State's right to grant concessions for the exploration and extraction of natural resources within Indigenous/Tribal territory versus the right to subsistence and survival of the Communities, the Court, noting the degree of impact of the extraction projects, establishes a series of safeguards to protect IPs against restriction or violation of their *communal* property. This must start with a *Prior Environmental and Social Impact Assessment* by a neutral third party, that will set the ground rules for *Effective Participation* and *Benefit Sharing*[94].

Following the degree of Impact, the Court, in *Saramaka,* establishes the following (which is paradigmatic, to say the least); '*(...) when it comes to plans of development to a large extent that tends to be a major impact within the territory of Saramaka, the State has the obligation not only to consultation (...), but also, must obtain the free, informed and prevailing consent, in accordance with its customs and traditions'* (Par.135) this certainly rings a bell, pointing out to FPIC.

Prima facie, the wording of Article 21 of the Inter-American Convention of Human Rights, addressing the right to property, is not much different from the ECHR's version but in fact, even though the Court throughout its argumentation fairly states that Suriname has not ratified the ILO 169 Convention, its art.15 alongside art.32 UNDRIP, serve as tools of interpretation of art.21 ACHR to '*communal' property* of IPs, through legal basis found in art.29.a) ACHR which refers to norms of interpretation. That is to say, that the IACHR takes art.32(2)UNDRIP and art.15(2)ILO C169 as means of interpretation for art.21 ACHR to property even acknowledging that a concerned State has not ratified either.

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[94] Daniel Felipe Dorado Torres, 'Saramaka y Sarayaku vs. Represa de la salvajina y Ley Forestal: ¿Diálogo jurisprudencial entorno al Derecho a la Consulta previa de los Pueblos Indígenas?' *Iusfilosofia Mundo Latino,* (no date)<http://iusfilosofiamundolatino.ua.es/download/Daniel%20Dorado.-%20Ponencia%20Consulta%20Previa.pdf> accessed 18 May 2022

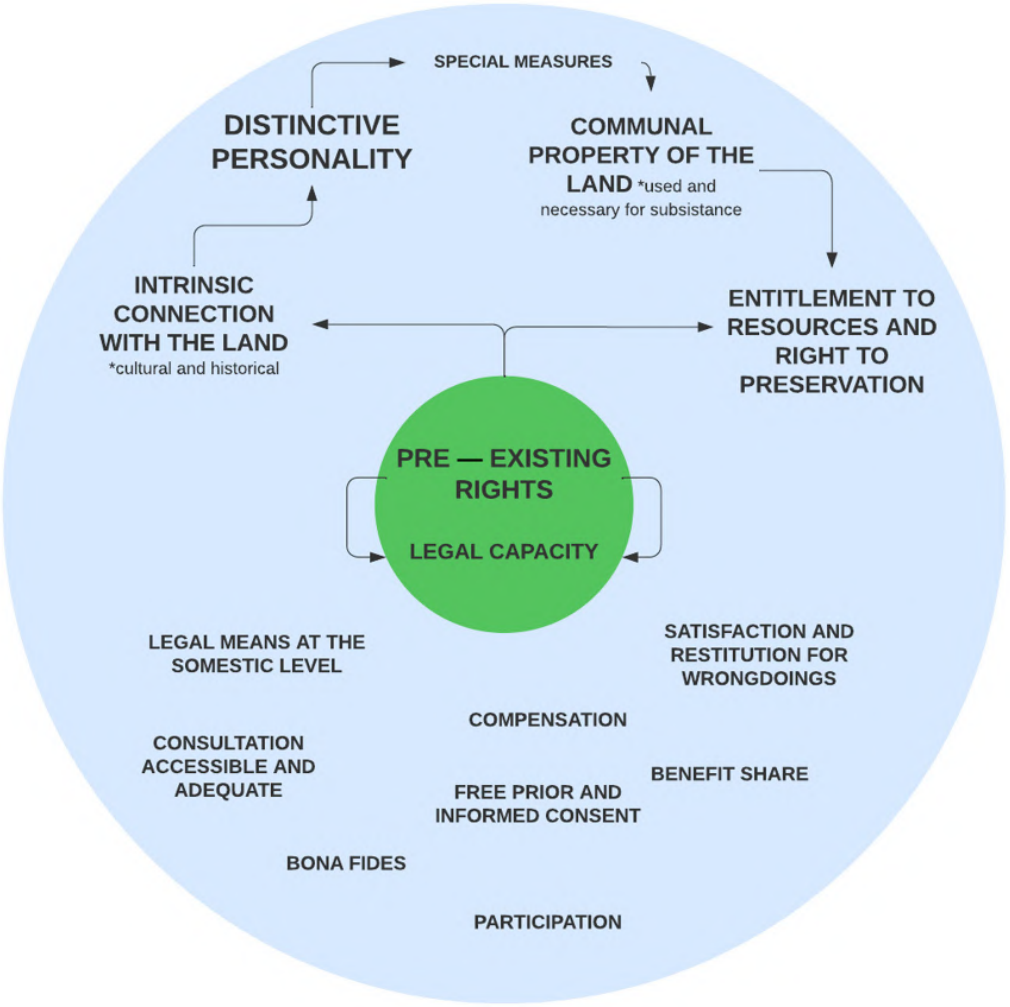
Why could not the ECtHR take this as precedent, say, for Finland or Sweden, and with more legal *raison* for both Denmark and Norway?

As per how this Consultation ought to take place we can find a more extended answer in the *Case of the Kishwa Indigenous Peoples of Sarayaku vs. Ecuador*. The Court sets the *Prior* nature of the consultation (Pars. 180 to 184), its *Informed* nature (Pars. 201 to 203), the *Bona Fides* principle and *Purpose* of reaching an agreement within the consultation (Pars. 185 to 200) as well as its *Adequacy* and *Accessibility* (Pars. 201 to 203). It is a State's duty to grant legal status to the Community at the domestic level, and engage in consultation, when the degree of impact is notable, as a safeguard opposable to 3d party interests (ex. Extractive Industries).

To date, the Inter-American jurisprudence on indigenous peoples has yet to be cited by the European Court of Human Rights in any case. As judge P. Kovas puts it; this begs the question of whether the ECtHR is ready to understand the merits of the indigenous peoples' claims, instead of rejecting them for failure to satisfy formal admissibility requirements.

A linear approach to the legal reasoning of the Court would start from the intrinsic connection (cultural and historical) with the land from which it derives a Distinctive Personality (that can be Indigenous and/or Tribal) that ought to be protected. It requires special measures by the State that must grant Legal Capacity to the Community and from there the Community must be able to uphold its *communal* Property of the land in accordance with art.21 ACHR, affecting the natural resources that have been traditionally used and that are necessary for the survival, development and continuity of their lifestyle and subsistence. Next arises its derivative right of preservation and the entitlement to the natural resources, including those found on the subsoil. And, as we have discussed *ut supra* it can only be the State through legal means within the domestic level that can safeguard these rights and adequately compensate for any violation.

Yet this linear approach, though not incorrect, perpetuates the paternalistic nature of the State, which is regarded as the granting power that *allows* indigenous rights to exist, moreover, that creates these rights. Rather, a more suitable approach is that of a sphere, where we can find Pre-Existing rights, in the center of it, and anything that orbits around it, whether *created* by the State at the domestic or at the international level must serve as a legal effective atmosphere of protection. Graphically put below, next page.

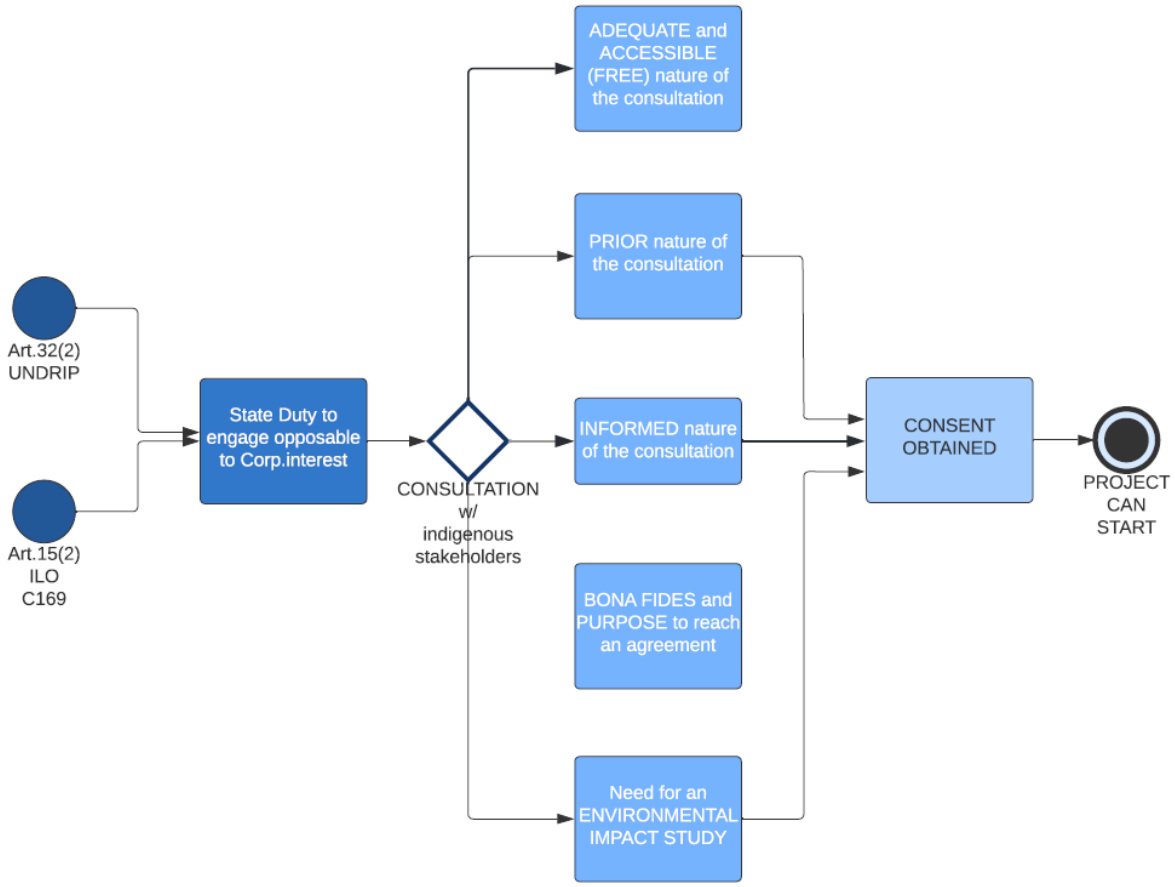


Source: own elaboration

In the three cases discussed, among others, the Court is pondering the right of the State to grant concessions to exploit its natural resources with the right to survival of the Tribal or Indigenous Community, FPIC is nothing less than a provision against *cultural* genocide[95], and *communal* (indigenous) property based on art.21 ACHR, alongside legal capacity as mean to uphold it, is nothing less than a provision against *physical* genocide in South America. These cases, happening in the tropical Amazon Jungles and vast Paraguayan Plains may seem apart from Arctic Indigenous Peoples struggles, yet save the extreme violence, they must be regarded, not only as a way of using FPIC as a binding tool of interpretation of the right to property in an indigenous context, but also as severe warning and as a constructionist approach.

[95] cf Johnstone, p.4

Europe should acknowledge this *pre-existing* condition of the right of indigenous peoples to communal property and legislate accordingly, as per a common legal basis from which to derive specific provisions regarding Benefit Sharing, Effective and Democratic Participation in policies regarding IP land affairs, and most importantly



Source: own elaboration

following the line of this dissertation; with regard to FPIC in every 'step of the way' when an impact on IP stakeholders is foreseeable.

Moreover, the Inter-American Court has further clarified that conflicting interests over the land must be analyzed on a case-by-case basis, which means that the right of indigenous peoples to collective lands. The Court has also stated that the protection under Article 21 reaches both "*communal property*" and *"private property of individuals.*" However, it has held that: "restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the

American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Art. 21(2) of the Convention[96]

8. PROPOSAL - A CONTRACTUAL FRAMEWORK

I believe that at this point it seems clear that further legal enactment in indigenous protection during the exploration stage of a mining project must be put in place. Attempting to cover it will prove difficult I am sure, and particularly difficult will be to surpass the issue of fully enacting FPIC, through ILO C169 (spec.art.15) and UNDRIP (spec.art.32) in domestic legislations throughout Fennoscandinavia, needless to say without massive legal commitment from countries that have not ratified the previous such as Finland and Sweden, and due to the non-binding nature of the latter. Enforcing the highest degree of FPIC at this early stage of the mining process could cover most if not all of the issues analyzed until now. While it seems to be out of reach in practical terms at least in the short term, seeing how even new reforms of Mineral Acts refuse to take this crucial step, a steady, relevant, and well-guided legal approach that ought to trigger a significant change of the mining business perception could be a way to mitigate the conflict. That is; the conflict between indigenous peoples and natural-resource development relating to power imbalances between two divergent international legal regimes — indigenous rights and international investment law[97].

In practice, the commonest complaint made by european indigenous peoples in the High North in relation to extractive industries is that consultation was inadequate, manipulative or did not take place at all[98]. Let us dig into this key notion of 'manipulation', that has very much to do with how this early stage of the project we are analyzing may be *contaminated*, unleashing a sort of *domino effect* that can signify a hidden violation of Indigenous rights as the project advances to further stages.

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[96] Gismondi, p.48

[97] Harvard Law Review ES, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) HLR 129 <https://harvardlawreview.org/2016/04/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/> accessed 02 Jan 2021

[98] Julian Burger, 'Indigenous Peoples, Extractive Industries and Human Rights' (European Union, 2014)

According to the UN Special Rapporteur, James Anaya[99]; apart from concerns over abusive use of force or direct reprisals, indigenous peoples should be free from pressure from State or company agents to compel them to accept extractive projects. Furthermore, States and companies should guard against acts of manipulation or intimidation of indigenous leaders by State or company agents. In other words, preventing commission and omission.

Now this distinction between manipulation and intimidation is quite interesting to the matter at hand. Refraining from the 'obvious violence' that intimidation implies, the act of manipulation entails dishonesty, and it is quite common in the private sector, often surfing a thin red line that separates legal and illegal practices mostly relating to the financial aspects of business (i.e. stock market manipulation and investment fraud). The point to be made is that if legal systems protect or at least intend to protect investors from being misled, why should they not protect indigenous stakeholders from the same thing?

The way information is released is a key factor to avoid manipulation and mitigate uncertainty, ensuring that indigenous stakeholders are able to make their decisions based on the least unbiased information possible.

A distinction between good and bad faith scenarios should be made here. Of course, most people will understand that a letter to the investors/shareholders by the mining corporation invested in the project during the exploration phase, as well as any public output or interaction out there released by the corporation will tend to radiate *overexcitement* and thus 'oversell' the viability and future plausible local benefits of the future mine, even before feasibility is conducted, but one must also come to the realization that this narrative is received differently by a foreign investor than a local Sámi or Greenlander. The need for a more transparent flow of information and comprehensive timeline arises.

The Corporations must be obliged by law to acknowledge that they are not only contracting the rights to explore and later exploit mineral resources from the State, but from the Indigenous Community as well, taking in the InterAmerican jurisprudential legal concept of *common indigenous property* and the Legal Capacity for IPs

[99] United Nations, General Assembly, Human Rights Council, Twenty fourth session, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, 1 July 2013, A/HRC/24/41

stakeholders that this entails. This new perception can in fact be solidified, through actual *contractual means*. What is meant by that is that Greenlandic and Fennoscandinavian (and other) lawmakers could take an inspiration from contractual private law, which they have already, by the principle of *mutual assent* as well as *due diligence* to a certain point, but more specifically they could rely on the principles of *relativity of contracts* and the *culpa in contrahendo.*

While the first states that a contract entered into in the name of another by one who has no authority or legal representation, or who has acted beyond his powers, shall be unenforceable, unless it is ratified, expressly or impliedly, by the person on whose behalf it has been executed, before it is revoked by the other contracting party, the latter refers to the obligation to compensate for pre-contractual damages which range in causes, for example; negotiating the contract without the intention to conclude it, purposely misleading the counterpart with false information, or by terminating contractual negotiations without just cause, and it implies a certain degree of bad faith. There are cases in which all or most of the investments that the wronged counterpart has been making up to the moment where the contract was supposed to be put into practice and it failed, are considered a detriment and therefore raises damage that creates an obligation to compensate. These of course are principles that should only serve as inspiration, but if one compares them with the matter at hand that has been analyzed until now, it seems crystal clear that these principles could well serve the interests of IPs stakeholders.

Mainly and within the limited approach this dissertation intends to have, the four main scopes of action of a hypothetical general contractual form intended to guide a case-by-case approach to legally safeguard indigenous stakeholders during the mining exploration stage would be;

- INFORMATION TRANSPARENCY

Corporations could be made to ‘recycle’ their monthly intern assessment documents about the mining project into transparent and understandable evaluations of the project and make them accessible to the community. An intermediary could be appointed. A certain higher degree of disclosure should be emphasized. It must be highlighted that the corporation has not already acquired the prospecting rights over the territory that it

is exploring, therefore, this clause would not be abusive to the corporation legal rights in a form of secret revelation or unfair competition by it being more transparent.

Furthermore, I believe that this monthly interaction, to which it could be studied the degree of State intervention, would certainly boost trust-building between the corporation and the indigenous community.

Finally, the Corporation could be held accountable for any release of information in *bad faith.* Penalties could apply if the information put *out there* by official corporation sources was intentionally misleading to the indigenous community.

- RESPONSE TO ABANDONMENT OF THE MINING PROJECT

The present fear of firm bankruptcy should be tackled, to which we could add the possibility of lack of capital flow or project abandonment for non-financial reasons overall. Alternatives and plan B-reassurance should be put in place by the State.

- REVERSAL OF THE BURDEN OF PROOF OF IMPACT

The burden to examine and prove the effects or negative impacts and externalities always falls on the IPs shoulders, a reasonable way to solve this impasse would be through positivizing the assumption that any mining exploration-related activity on the ground generates an impact and therefore a need to prove the impact shifts to the need to assess the degree of impact and act on it from the very first day in the planning stage, before 'boots are in the ground', that is to say before prospecting works start. This is a requirement that should be brought upon before the permit is granted and or included in the contractual framework. So the potential permit holder would now be required to assess first and prove the degree of impact of its planned activities on indigenous lands, and of course the only way could be through consultation with IPs stakeholders, even by the hand of 3d party intermediaries specialized in CSR or even governmental authorities if it was the case. That would engage IPs with the project in the very early stage while giving a sense of certainty by noting any plausible impact and meticulously assessing it.

- ENGAGEMENT INCENTIVES

The Government and/or third parties could issue insurance contracts with an attractive yield for those indigenous entrepreneurs that would invest in a project relying on the success of the mine. The Government should also hear out alternatives to development proposed by the community and contemplate funding such alternatives.

The Government could also ‘reward’ (prospecting, taxation incentives i.e.) the Corporation if it offers Traineeship programs and/or job vacancies to local indigenous stakeholders during the exploration stage, as well as any degree of meaningful engagement.

- MITIGATION OF NEGATIVE EXTERNALITIES

This is perhaps the most non-contractual out of the three since it refers to the damages that the exploration stage will cause materially. It would be difficult to tackle the cognitive ones, and rather, these, mostly related to the sense of uncertainty and paralysis could be tackled better by precisely a better transparent information flow, but what about the trenches, holes, noise pollution or overall degradation of the land during the exploration stage? Should not these be taken into consideration?

Down payments and collaterals normally serve as deterrents for any corporation to turn against one another in the long lasting process of contract negotiations, why could not these same instruments serve a similar purpose during the exploration stage as for indigenous stakeholders and their land?

Benefits and Opportunities (State)

- Better quantify and qualify the negative externalities during the exploration stage.
- Expectations Management.
- Stronger tackling of environmental degradation.
- Economy boosts and community development (e.g. Traineeship programs)

The State comes into the equation as an intermediary in the negotiations within the contractual framework, but it has to be more than a neutral actor. It shall apply a principle of *in dubio pro indigenous* at all times, reinforced by the idea that both the condition of IPs and of citizens of said State that the stakeholders enjoy should be a double guarantee of expected sovereign protection and safeguard by State authorities.

A defined contractual framework that focuses on carefully assessing the plausible impacts of mining exploration and prospecting techniques will help to better quantify and qualify said negative externalities, establishing a pattern useful for data gathering

and future planning that can serve at the same time to better and strongly tackle environmental degradation.

The Engagement Incentives to contrarrest uncertainty can foster economic development within the community as well as societal rest. Managing expectations and meaningfully engaging in the very early stage avoids confrontation and protests which are less likely to occur if a strong dialogue knot (or even better professional relationships) is wrapped around the three actors, State, Corp and IPs.

Benefits and Opportunities (Mining corporations)

- Building meaningful engagement with Indigenous Stakeholders fosters and enhances the corporation's soft power
- Foster alignment of expectations and convergence towards agreed objectives
- Build trust to strengthen mutual confidence and reduce risk for all parties
- Creation of jobs and of a production chain and synergies through the build-up of trust and entrepreneurship encouragement to the locals.

Obviously, companies aim at acting in full accordance to the rules in order to obtain permits, especially in sensitive mining-issues, and would rather not risk long and insecure procedures. National rules concerning mining activities would need to be well-clarified in order that companies would be less hesitant to plan their activities in IPs areas. Better defined criteria for appeal would also be essential for ensuring more security for companies.[100]

Again, the soft power of a corporation is crucial in cases of extractive industries. Having to cope with the social and mediatic stigma, the benefits mentioned above are a great opportunity for mining corporations to invest in their image and their corporate social responsibility. But not only that, in practical terms the risk for halts, protests, sabotages or other are practically erased when trust is built and relationships, say, trainships, employment, entrepreneurship fostering, etc and overall the project, whether it advances further or not, will enjoy a very healthy birth.

[100] Timo Koivurova, et altri, 2015

Benefits and Opportunities (IP stakeholders)

- Mitigate uncertainty by comprehensive transparent access to information
- Encourage insurance-backed entrepreneurship
- Meaningful engagement, a sense of belonging and recognition
- Avoidance of manipulation and ensure response in a predictable manner to potentially significant changes in circumstances

A contractual framework serves as a *legal equalizer* that gives the IPs stakeholders a sense of pertinence, belonging, recognition and decision power on their own matters. Building a contractual relationship is building trust in good faith and formality serves as the common glue that unites interests, either convergent or non concurrent to find a middle ground. Said formality and the binding nature implied in it serves not only the purpose of a meaningful engagement but ensures that manipulation is overall avoided and predictable responses are prepared for any sudden change in circumstances. Obviously, by contracting as equals, the access to information becomes direct and clean sourced, which does not necessarily rule out of the question an extra effort required by the Corporation to clarify and ensure comprehension by the IPs stakeholders through adequate access. It can also be a perfect moment to introduce Traditional Indigenous Knowledge to the equation which can serve the Corporation to better plan its action and to ensure greater success. Clarification overall is what

There is an ideal Sámi saying that goes; *'Mas amas diehtá maid oarri borrá'* which translates to '*How can a stranger know what a squirrel eats'*; i.e. how can we actually express ourselves about what others think or do if we don't know them. It is often used about Scandinavians who are always supposed to understand what is best for the Sámi.[101] This contractual capacity would allow the IPs stakeholders to clarify their position, to express themselves fully. And it would work both ways, say for the Corporation as well. Clarification, or rather clarity, which is achieved to contractual means can be a powerful antidote to uncertainty.

[101] Harald Gaski, 'Folk Wisdom and Orally Transmitted Knowledge – Everyday Poetry In Adages, Rhyme and Riddles' (Saami Culture, 2010)
<https://www.laits.utexas.edu/sami/diehtu/siida/language/folkevisdom.html> accessed 12 Jun 2022

9. CONCLUSIONS

Following the analysis *ut supra*, a mining project can have drastic consequences for IPs stakeholders' way of life even before it has crystallized in an actual functioning mine. For Sámi peoples the level of protection varies throughout Fennoscandinavia but seems clear that there is quite a massive loophole in Sámi special right holder's legal protection in front of negative externalities produced by mining industries in the early stage of a mining project, which can never be accountable for Benefit Sharing if no benefits at all are produced, that is, if it never becomes a fully operational mine.

The common incorrect legal assumption that mining exploration does not "gravely" endanger IPs life-style has been particularly evident in the cases relating to the Sámi peoples where one can easily identify the material externalities, as per the effects on reindeer herding facing the most prominent negative impacts. As per Greenlanders on the other hand, the cognitive externalities weigh more heavily on their side, if one takes into account their favorable situation in terms of legal protection through exercising effective self-rule in comparison.

It is usually easier to grant permits than to withdraw them. Some experts suggest that with the use of more effective technology it would be possible to predict the quality of the explored deposit without causing significant harm to the environment, that would help surpass material impacts as well as lower the degree of uncertainty.

European Arctic Indigenous Peoples have a stronger voice in comparison to other parts of the world and more impact in international forums mostly because they live in countries that respect human rights to a higher degree than others and these same countries are more fluent and have a bigger impact in international forums. Still, that does not mean that there is no room for improvement, on the contrary, this trend of rights development and legal empowering cannot fall to a still, or even less so worsen due to the 'green rush pressure' from rare-earth and renewable tech minerals. Rather, such a trend must continue forward and urgently address the issues that need to be legally addressed, such as mining exploration due to the simple fact that it is generating negative externalities very promptly.

International legal instruments that foster Indigenous Peoples rights, most remarkably UNDRIP and ILO C169 are quite clear on stressing the importance of consultation,

participation, and the principle of free, prior and informed consent as underlying rights that should be the framework for discussions on proposed activities by governments or companies on indigenous peoples' lands, consultation and consent being required at all phases of the project. Therefore further legal enactment should be on the horizon.

Ideally, and as stated before full implementation of FPIC at every stage, including prospection and exploration, would be desirable but, said further legal enactment can also come as a small step at a time, for a practical example, a direct mention to Sámi livelihood protection within the requirements to obtain an exploration permit say from *Tukes* in Finland or the Chief Mining Inspector in the case of Sweden would at least force corporate responsibility when conducting an EIA and -really- take into account IPs stakeholders interests.

The legal enactment that could signify a stirring change, mid to big step, in the mining exploration stage specifically would be an implementation of an obligated contractual framework between the Corporation and the IPs stakeholders, requiring consultation or rather, negotiation beyond an EIA, focusing on the *ut supra* stated proposals for a contractual framework based on the principles of *relativity of contracts* and *culpa in contrahendo* and the amenities such as; Information Transparency, Response to abandonment, Reversal of the Burden of Proof of Impact, Engagement Incentives and Mitigation of Externalities.

Finally, and nevertheless, nothing prevents the change in legislation to come as a huge step. While enacting an EU Mining Regulation that would include such obligations is not possible since it would signify a clear over-reach of competences, if one takes into account that only Norway, Denmark, the Netherlands and Spain have ratified ILO C169 so far in Europe, the idea of working on a new European Charter, similar to the Charter of Fundamental Rights of the European Union or the European Charter for Regional or Minority Languages, to contain specifically indigenous people's rights is within the realm of legal possibility. And it has been proposed already by the European Green MEPs, without much success, first in the EGP Resolution adopted at Utrecht Council, 20-22 May 2016[102]. This new Charter could reflect the essence of the ILO 169 and protect all indigenous people living in European countries but also affect European development aid and extractive companies. Another option would be to amend the EU

[102] See EGP Resolution adopted at Utrecht Council of May 2016, available at https://europeangreens.eu/fr/node/10201

Charter of Fundamental Rights to include a specific chapter on European indigenous rights. The same could be applied outside the EU, through a new Protocol amending the European Convention on Human Rights.

Indigenous Peoples have no other option but to REACT to damage, yet they should be given the option to ACT before damage is upon them, and this is why the mining exploration stage is crucial in my opinion, it is during this planning phase that legislation can proactively protect and prevent damage. Europe could take the example from Inter-America as well as set an example of its own, be it through a contractual framework, a new chapter or amendment to the EU Charter of Fundamental Rights . In dubio pro indigenous. There is no better moment during the Mining Lifecycle than the pre-permit concession during the Mining Exploration Stage to introduce a legal guarantee for European Indigenous Peoples rights, how much of the stairs the States or Supranational Institutions are disposed to walk up, how big of a step they want to take one cannot say, but upwards should be the only track to follow.

BIBLIOGRAPHY

Anaya, J., 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples' (HRC 21, 2013)

Arctic Circle Conference, 14.10.2021, Plenary Room, Harpa, Reykjavik, OPENING SESSION, V. SPEECH: THE NEW GOVERNMENT OF GREENLAND

Bacchi, U., 'Scandinavia's Sami struggle with suicide, worsened by climate change' Thomson Reuters (April 7, 2017) <https://www.reuters.com/article/us-arctic-climatechange-sami-idUSKBN17930S> accessed 09 May 2022

Baer, L.A., 'The Saami of Scandinavia and Russia: Great strides towards self-determination since World War II' Cultural Survival (March 1994) <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/saami-scandinavia-and-russia-great-strides-towards-self> accessed 25 February 2022

Beach, H., 'Polar Peoples: Self-determination and Development' (Minority Rights Group ed., 1994)

Burger J., 'Indigenous Peoples, Extractive Industries and Human Rights' (European Union, 2014)

Breum, M., 'After Trump tried to buy Greenland, US gives island $12M for economic development' (Arctic Today, 9 April 2021) <https://www.arctictoday.com/greenlands-new-leadership-will-be-challenged-by-a-push-for-faster-independence/> accessed 16 Dec 2021

Britt-Retter, G., 'Indigenous cultures must not be forced to bear the brunt of global climate adaptation' The Arctic Today (November 25, 2021) <https://www.arctictoday.com/indigenous-cultures-must-not-be-forced-to-bear-the-brunt-of-global-climate-adaptation/?fbclid=IwAR3bpPvAEl6fYdWedpTHhKeFETofYvDuSCZ0EGK_RRFIWDoYpbbO4BFncVo> accessed 17 April 2022

Dorado Torres, D.F., 'Saramaka y Sarayaku vs. Represa de la salvajina y Ley Forestal: ¿Diálogo jurisprudencial entorno al Derecho a la Consulta previa de los Pueblos Indígenas?' Iusfilosofia Mundo Latino, (no date) <http://iusfilosofiamundolatino.ua.es/download/Daniel%20Dorado.-%20Ponencia%20Consulta%20Previa.pdf> accessed 18 May 2022

Eerola, T., 'Corporate conduct, commodity and place: Ongoing mining and mineral exploration disputes in Finland and their implications for the social license to operate' (RP 76, 2022)

EJAtlas, 'Gállok/Kallak Iron Mine, Sweden' Environmental Justice Atlas (February 06, 2022) <https://ejatlas.org/conflict/gallok-kallak-iron-mine-sweden> accessed 19 Apr 2022

Gaski, H., 'Folk Wisdom and Orally Transmitted Knowledge – Everyday Poetry In Adages, Rhyme and Riddles' (Saami Culture, 2010) <https://www.laits.utexas.edu/sami/diehtu/siida/language/folkevisdom.html> accessed 12 Jun 2022

Gismondi G., 'Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1' (YHRD, 18, 2016)

Gronthold-pedersen J., 'Greenland prepares legislation to halt large rare-earth mine' *Reuters* (London, 17 September 2021)https://www.reuters.com/business/environment/greenland-prepares-legislation-halt-large-rare-earth-mine-2021-09-17> accessed 15 Dec 2021

Goodenough, K.M., et altri, 'Europe's rare earth element resource potential: An overview of REE metallogenetic provinces and their geodynamic setting' (OGR, 72, 2016) p.838-858

Hansen, A.M. & Johnstone, R.L. , 'In the Shadow of the Mountain: Assessing early impacts on community development from two mining prospects in South Greenland' (2019) EIS 480

Harvard Law Review ES, 'The Double Life of International Law: Indigenous Peoples and Extractive Industries' (2016) HLR 129 <https://harvardlawreview.org/2016/04/the-double-life-of-international-law-indigenous-peoples-and-extractive-industries/> accessed 02 Jan 2022

Heinämäki, L., "Legal Appraisal of Arctic Indigenous Peoples' Right to Free, Prior and Informed Consent," in Routledge Handbook of Indigenous Peoples in the Arctic Timo Koivurova, et al (eds) (Routledge, 2021)

Hooge, N.H, 'Kujataa threatened by mining projects and uranium mining' (NMI 887, 2010)

Hojem, P., 'Mining in the Nordic Countries, a comparative review of legislation and taxation' (Nordic Council of Ministers, 2015)

IWGIA, 'The Indigenous World 2021: Kalaallit Nunaat (Greenland)' IWGIA (Greenland, 18 March 2021) <https://www.iwgia.org/en/greenland/4227-iw-2021-kalaallit-nunaat-greenland.html> accessed 12 March 2022

IWGIA Annual Report 2002 (2003) available online at <https://www.iwgia.org/en/resources/publications/305-books/4313-iwgia-annual-report-2002.html>

Institute of Community and Family Psychiatry Sir Mortimer B. Davis — Jewish General Hospital & Division of Social & Transcultural Psychiatry, *Mental Health of Indigenous Peoples* (Report No. 10, 2001)

International Centre for Reindeer Husbandry, 'What is reindeer husbandry' (Arctic Portal) available online at <https://reindeerherding.org/what-is-reindeer-husbandry>

Johnstone, L.R., "What is Required for Free, Prior and Informed Consent and Where Does It Apply?" in Regulation of Extractive Industries: Community Engagement in the Arctic, Rachael Lorna Johnstone and Anne Merrild Hansen, eds. (Routledge 2020)

Johnstone, L.R., 'Listening to Arctic Voices in Extractive Industries' *The Polar Connection* (London, 14 February 2020) <https://polarconnection.org/arctic-voices-extractive-industries/> accessed 02 Feb 2022

Joona, T., "The Definition of a Sami Person in Finland and its Application, in Indigenous Rights in Scandinavia: Autonomous Sami Law, Christina Allard & Susann Funderud Skogvang (eds) (Routledge 2021).

Johansson P., 'Indigenous Self-Determination in the Nordic Countries: The Sami, and the Inuit of Greenland,' in Handbook of Indigenous Peoples' Rights, Corinne Lennox & Damien Short, eds. (Routledge 2016)

Josefsen, E., The Saami and the national parliaments: Channels for Political influence (IPU & UNDP 2010)

KallioLaw, 'Recent developments in mining and environmental legislation' Lexology (Finland, September, 2021) <https://www.lexology.com/library/detail.aspx?g=e563552c-ee5f-44df-bd98-65afa4a9a5ea> accessed 23 May 2022

Kernell, A. (Director). (2016). *Same Blood* [Film]. Sveriges Television, Nordisk Film

Koivurova, T., et altri, ‘Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States’ (ARLP 76, 2015)

Kovacs, P., ‘Indigenous issues under the European Convention on Human Rights, reflected in an Inter-American Mirror’ (GWILR 48, 2009)

Kløcker Larsen, R., et altri, ‘The impacts of mining on Sámi lands: A knowledge synthesis from three reindeer herding districts’ (EIS, 9, 2022)

Lee, G., ‘African traditions thrive in Suriname’ The Washington Post (Washington DC, 28 August 1995)<https://www.theguardian.com/sustainable-business/sustainability-dangerous-myth-over-consumption> accessed 01 Jan 2022

Lepan N., ‘Visualizing the Life Cycle of a Mineral Discovery’ *The Visual Capitalist* (Victoria, BC, 12 September 2019) <https://www.visualcapitalist.com/visualizing-the-life-cycle-of-a-mineral-discovery/> accessed 12 Feb 2022

Muotka, P.H., ‘Finland violates the rights of the Sámi people by allowing mining companies in Sámi homeland’ *Sámiraddi* (Kárášjohka, June 202, 2020) <https://www.saamicouncil.net/news-archive/finland-violates-the-rights-of-the-smi-people-by-allowing-mining-companies-in-smi-homeland> accessed 09 Mar 2022

Naalakkersuisut, ‘Economy and Industry of Greenland’ (Naalakkersuisut, 2014) <https://naalakkersuisut.gl/en/About-government-of-greenland/About-Greenland/Economy-and-Industry-in-Greenland> accessed 15 Jan 2022

Nathanielsen N. ‘Opening Session, V. Speech: The New Government of Greenland’ 14.10.2021, Arctic Circle Conference, Plenary Room, Harpa, Reykjavik

Nilsen T., ‘Miners hunting for metals to battery cars threaten Sámi reindeer herders' homeland’ *The Barents Observe*r (Kirkenes, July 09, 2020) <https://thebarentsobserver.com/en/node/7082> accessed 10 Jan 2022

Nilsen T., ‘Significant metals discovery in key reindeer herding land’ *The Barents Observer* (Kirkenes, January 19, 2022) <https://thebarentsobserver.com/en/indigenous-peoples/2022/01/significant-battery-metals-discovery-key-reindeer-herding-land> accessed 23 May 2022

Nikel, D., ‘The Sami People’, Life in Norway (12 October 2018) <https://www.lifeinnorway.net/sami-people/> accessed 24 February 2022

OECD Development Center, ‘Guiding Principles for Durable Extracting Contracts’ (OECD, 2019)

Ouboter, P.E., ‘Review of Mercury Pollution in Suriname’ (2015) 6, AJS <https://www.researchgate.net/publication/280050637_Review_of_mercury_pollution_in_Suriname> accessed 01 Jan 2022

Parlee B.L., Sandlos J. & Natcher D.C., ‘Undermining subsistence: Barren-ground caribou in a “tragedy of open access”’ (SA 403, 2018)

Ravna, Ø. & Vylka, Z., ‘ The People of the Tundra’ (Rangifer, 22, 2002)

Ravna, Ø., “Sámi Law and Rights in Norway – with a Focus on Recent Developments,” in Routledge Handbook of Indigenous Peoples in the Arctic , Timo Koivurova, et al (eds) (Routledge, 2021)

Strömgren, J., "The Swedish State's Legacy of Sami Rights Codified in 1886," in Indigenous Rights in Scandinavia: Autonomous Sami Law , Christina Allard & Susann Funderud Skogvang (eds) (Routledge 2021).

SDWG, 'Circumpolar Information Guide on Mining for Indigenous Peoples and Northern Communities' (Arctic Council, 2011)

United Nations, General Assembly, Human Rights Council, Twenty fourth session, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Extractive industries and indigenous peoples, 1 July 2013, A/HRC/24/41

UN Permanent Body on Indigenous Issues, Fact Sheet, Indigenous Peoples And Industrial Corporations, available online at <https://www.un.org/esa/socdev/unpfii/documents/PFII8_FS3.pdf>

UN Department of Economic and Social Affairs, 'Indigenous Peoples Health' (United Nations, 2018) <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health.html> accessed 15 Jan 2022

UNDRIP consolidated version available at;
<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>

Whitmore A. (ed.) et altri, 'Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries' (Tebtebba Foundation and IWGIA, 2012)

World Directory of Minorities and Indigenous Peoples 'Inuit (Greenlanders) Profile' (Minority Rights Group International, 2015) <https://minorityrights.org/minorities/inuit-greenlanders/> accessed 15 Jan 2022