

Round-table event to celebrate the 15th anniversary of the FCNM

25 November 2013, Agora G03

The Framework Convention and challenges to minority protection today

Panel 3: Complementary reflections on selected issues of current relevance:

Current challenges and protection of Indigenous Peoples' rights under the FCNM

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Statement

Thank you, Ms Chairwoman. It is a pleasure and a privilege for me to participate in this round-table event. Thanks once again to the Secretariat for the invitation and for kindly managing all the logistics.

Distinguished colleagues, minorities' and States' representatives, Ambassadors, Ladies and Gentlemen:

The aims of this brief statement are twofold, as follows. First, to draw attention to the significance and the potential implications of the rush to natural resources and the effects of climate change for indigenous peoples in both the Russian Federation and the Nordic countries, especially in Norway. Second, to explore whether and how indigenous peoples may benefit from the protection provided by the Framework Convention for the Protection of National Minorities when facing these issues.

However, before addressing these issues, I would like to stress the relevance of the right to self-identification according to art.3 for those indigenous peoples that may benefit from the Framework Convention. These are the Sami people in Northern Europe, and, in the Russian Federation, (at least) the 46 indigenous peoples officially recognized as “indigenous small-numbered peoples of the North, Siberia and the Far East”.¹

¹ In the Decree No.536-r issued in 2006 the government of the Russian Federation recognized 40 peoples as ‘Indigenous Small Peoples of the North, Siberia and the Far East’. The acts No.255 (2000) “On the common list of

The self-identification's dimension is particularly relevant for indigenous peoples, since many of them expressively refuse to be called "minorities".² Furthermore, as widely known, the term "minority" is often perceived as pejorative and reductive.³ Therefore, this statement explores the potentialities of the protection offered by the Framework Convention for indigenous peoples in facing the rush to natural resources and climate change without any intention to impose such view or interpretation, but rather with the aim to suggest an additional instrument to all the parties involved.

Ladies and Gentlemen, as widely known, the exploitation of natural resources is increasing in many countries. For instance, Russia is one of the biggest oil and gas producers in the world,⁴ and it is planning to increase its production capacities by 2015 through the construction of more oil and gas pipelines.⁵ Norway is the world's third largest producer of crude oil and natural gas

numerically small Indigenous Peoples of Russia" amended by Act No.1145 (2011) states that in total 46 numerically small IPs are living in the Russian Federation. Four specific conditions have to be met by the peoples in order to obtain such a status. Firstly, the amount of members shall not exceed 50,000. Secondly, they have to maintain a traditional way of life. Thirdly, they have to live in areas that have traditionally been inhabited by their ancestors. Finally, they have to identify themselves as a distinct ethnic community (Law No.82-FS 'On Guarantees of the Rights of Numerically-small Indigenous Peoples of the Russian Federation' of 1999, art.1, para.1). In particular, the numerical limit is rather unique worldwide, and creates asymmetrical legislative protection among groups that share similar challenges and characteristics but eventually are not recognized as IPs. This is exactly what happened with the following groups: the *Altai Kezhi*, the *Nogay*, the *Komi-Izhemtsy* or *Izvatas* whose number is over 50,000. Although these groups are not directly addressed in this statement, the general considerations contained in the article may also be applicable to them. On this, see also Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on the Russian Federation, 13 September 2002, ACFC/INF/OP/I(2003)005, para.53; and Anaya James, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples. Addendum: Situation of IPs in the Russian Federation", Fifteenth Session of the Human Rights Committee, 23 June 2010, UN Doc. A/HRC/15/37/Add.5., available at: http://unsr.jamesanaya.org/docs/countries/2010_report_russia_en.pdf, 5, paras.7-8.

² A notorious case involves the Sami people. As you know, in the first monitoring cycle of Norway, the Sámediggi (the Sami Parliament) declared that "it does not consider the Framework Convention to be applicable to the Sami people", and continued to do so in the following monitoring cycles. Advisory Committee of the Framework Convention for the Protection of National Minorities, First State Report by Norway, 2 March 2001, ACFC/SR(2001)001, 4.

³ Especially in terms of rights' recognition both at national and international level. This has been recognized also by the Advisory Committee. Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on the Russian Federation, *op. cit.*, para.26.

⁴ The country is carrying out 20% of the overall gas production and 12% of the overall oil production. It disposes of one-quarter (25.2%) of the (so far) discovered gas reserves, 6.5% of oil reserves and the second largest coal deposit in the world (19%). Auswärtiges Amt, "Russische Föderation Wirtschaft", 2012, available at: http://www.auswaertigesamt.de/sid_B40F8123E22148D094A371B4F839A55C/DE/Aussenpolitik/Laender/Laenderinfos/RussischeFoederation/Wirtschaft_node.html [last accessed 12 December 2012].

⁵ Heinrich, "Russlands Erdöl- und Erdgasexportrouten Die russische Erdöl- und Erdgaswirtschaft- Aktuelle Entwicklungen im Überblick", *Forschungsstelle Osteuropa Bremen, Arbeitspapiere und Materialien* 113, April 2011, 22.

since 2004, and, according to official projections, the oil and gas production should remain stable until 2020.⁶

Many oil and gas explorations are planned onto indigenous territories.⁷ As also underlined by the Advisory Committee, the competing economic interests on oil, gas and other industrial exploitation generally prevail on indigenous peoples' claims over land.⁸ The impossibility to carry out traditional activities affects indigenous peoples' means of livelihood as well their culture. This indirect interference in their life style is comparable to a violation of the right to private life, family life or the home as according to art.8 of the European Convention on Human Rights,⁹ as well as the protection provided for in other conventions and declarations, such as the 1989 International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, and the 2007 UN Declaration on the Rights of Indigenous Peoples.

Gas and oil exploitation often cause irreparable damage to the surrounding flora and fauna. For instance, in Russia, oil spills and waste disposals in the watercourses or lakes inevitably cause water pollution and harm and kill fishes; and the Tundra tends to absorb oil and other substances' leakages. Furthermore, the construction of oil pipelines often intersect reindeer pastures and interrupt their migratory patterns affecting the subsistence activities of reindeers herding and grazing run by indigenous communities. Finally, coal and gold mining activities have reverse

⁶ State of the Environment Norway/Norwegian Environment Agency, "Norway", at <http://www.environment.no/Topmenu/About-SOE-Norway> [last accessed 14 November 2013]. In particular, the production of gas and natural gas liquids almost doubled in last twenty years. State of the Environment Norway/Norwegian Environment Agency, "Oil and gas activities", at <http://www.environment.no/Topics/Marine-areas/Oil-and-gas-activities> [last accessed 14 November 2013].

⁷ In Russia, the indigenous peoples traditionally inhabit large and remote areas from the Kola Peninsula in the west to the Bering Strait in the east. These areas are immensely rich in natural resources, including oil, gas and minerals. IWGIA, "The Indigenous World 2013", Copenhagen, IWGIA, 2013, 30. More specifically, according to a recent study of EURAC, oil extractions are taking place in the following Russian federal subjects: Murmansk Oblast, Nenets Autonomous Okrug, Yamalo-Nenets Autonomous Okrug, Sakha Republic, Chukotka Autonomous Okrug; in Kamchatka Krai; while gas and oil extractions are taking place in: Khanty-Mansi Autonomous Okrug, Yamalo-Nenets Autonomous Okrug; and a planned gas pipeline is to be built in the Altai Republic. Anna Koch and Alexandra Tomaselli, "Implementation of Indigenous Rights in Russia: Shortcomings and Recent Developments", unpublished yet, submitted for publication to peer-reviewed journals. This is a legal research complemented by qualitative interviews to well-known experts in the field. See also Anaya James, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples. Addendum: Situation of IPs in the Russian Federation", *op. cit.*, 13, para.47.

⁸ Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on the Russian Federation, *op. cit.*, para.49.

⁹ This has been recognized in the case *G. and E. v. Norway*, European Commission of Human Rights, Application No.9278/81 and 9415/81, 3 October 1983.

effects over the living conditions of indigenous peoples as well, since many companies improperly treat the mines' waste and leave open-air dumps close to indigenous settlements.¹⁰

In Norway, a new arctic oil terminal,¹¹ and a 280-kilometre pipeline is planned to be built in the next years to transport the oil from the twin Skrugard and Havis oilfields located in the Barents Sea to the region of Finnmark.¹² As well known, in 2005 the Norwegian parliament adopted the “Finnmark Act”.¹³ The (Norwegian) Sami parliament shall appoint half of the board members of the Finnmark Estate, and provide guidelines and considerations on changes to be made in the use of uncultivated areas.¹⁴ However, neither the marine and offshore resources nor fishing rights were included in the Act.¹⁵ Therefore, the construction of such oil pipelines falls outside the administration of the Finnmark Estate even if it may heavily affect such territory.

As to Sweden, the expansion of mining activities particularly in and around the town of Kiruna as well as the urbanization plans of this city are prevailing over lands' claims of reindeers' herders.¹⁶ In Finland, Sami indigenous land rights are yet to be completely safeguarded against extensive logging activities.¹⁷

Turning to climate change adverse effects, I would like to stress that the United Nations Human Rights Council (HRC) in its Resolution on “Human Rights and Climate Change” in 2009 affirmed that “[...] climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right

¹⁰ Anna Koch and Alexandra Tomaselli, *op. cit.*

¹¹ Thomas Nilsen, “New Arctic oil terminal in Finnmark”, *The Barents Observer*, 3 September 2012, at <http://barentsobserver.com/en/energy/new-arctic-oil-terminal-finnmark-03-09> [last accessed 14 November 2013].

¹² Trude Pettersen, “First oil to Finnmark”, *The Barents Observer*, 12 February 2013, at <http://barentsobserver.com/en/energy/2013/02/first-oil-finnmark-12-02> [last accessed 14 November 2013].

¹³ This act established the “Finnmark Estate” (*Finnmarkseiendommen*) partially complying with the land rights' provisions contained in the ILO Convention No.169 (Art. 14). This is an autonomous organization in charge of administering the land, the water and the other natural resources of Finnmark—46,000.00 km² (i.e., approx. the size of Denmark) traditionally inhabited by the Sámi in Norway—officially “securing Sámi culture, reindeer husbandry, rough pasturing, economic activity and community life”. Resource Centre for the Rights of Indigenous Peoples, “The Finnmark Act and the Finnmark Estate”, at http://www.galdu.org/govat/doc/eng_finnmark_act.pdf [last accessed 14 November 2013]; Johan Mikkel Sara, “Indigenous Governance of Self-Determination: The Saami Model and the Saami Parliament in Norway”, paper presented in the Symposium on “The Right to Self-Determination in International Law”, organized by Unrepresented Nations and Peoples Organization (UNPO), Khmers Kampuchea-Krom Federation (KKF), Hawai'i Institute for Human Rights (HIHR), 29 September-1 October 2006, The Hague, Netherlands, at <http://www.unpo.org/downloads/JohanMikkelSara.pdf> [last accessed 14 November 2013], 2-3.

¹⁴ Johan Mikkel Sara, *op.cit.*, 3.

¹⁵ Resource Centre for the Rights of Indigenous Peoples, “The Finnmark Act and the Finnmark Estate”, *op.cit.*

¹⁶ Advisory Committee of the Framework Convention for the Protection of National Minorities, Third Opinion on Sweden, 16 November 2012, ACFC/OP/III(2012)004, para.57.

¹⁷ Advisory Committee of the Framework Convention for the Protection of National Minorities, Third Opinion on Finland, 14 October 2010, ACFC/OP/III(2010)007, para.50.

to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation [...]”.¹⁸

Some of the adverse effects of climate change are visible in all these countries. For instance, in Norway, the mean temperature has generally been higher than normal in the recent years, particularly in the arctic areas where in 2009 the registered temperature was almost 3-Celsius degrees higher.¹⁹ According to official sources, “[t]he effects of climate change on Norway’s natural environment cannot be considered in isolation from other factors. Climate change comes in addition to the destruction of habitat, the spreading of alien species, pollution and overuse of natural resources”.²⁰ In particular, “oil and gas production has been the main cause of the increase in Norway’s carbon dioxide emissions since 1990”.²¹

In Sweden, the general warming is expected to be greater than the global average.²² In particular, the Swedish Commission on Climate and Vulnerability stated already in 2007 that “[t]he conditions for conducting reindeer herding in Sweden will be seriously affected by climate change”.²³

In the northern areas of the Russian Federation, effects of global warming such as permafrost degradation, increasing ambient air temperatures, precipitation, and frequency of extreme events, and an overall softening of the extreme climate, changed seasonal timings (phenology) may be observed.²⁴ The Russian northern areas are warming more than other parts of the world.²⁵ The Sakha area is particularly affected.²⁶ In this region, for instance, the relocation of

¹⁸ United Nations Human Rights Council (HRC), Tenth Session, “Human Rights and Climate Change”, Resolution No.10/4, 12 May 2009, UN Doc. A/HRC/10/L.11, Preamble para.7, at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf [last accessed 14 November 2013].

¹⁹ State of the Environment Norway/Norwegian Environment Agency, “Norway’s climate”, at <http://www.environment.no/Topics/Climate/Norways-climate> [last accessed 14 November 2013].

²⁰ State of the Environment Norway/Norwegian Environment Agency, “Norway’s climate”, *op.cit.*

²¹ State of the Environment Norway/Norwegian Environment Agency, “Norway’s climate”, *op.cit.*

²² Swedish Commission on Climate and Vulnerability, “Sweden facing climate change – threats and opportunities”, Final report, Stockholm 2007, at <http://www.government.se/content/1/c6/09/60/02/56302ee7.pdf>, 124.

²³ Swedish Commission on Climate and Vulnerability, “Sweden facing climate change – threats and opportunities”, *op.cit.*, 375.

²⁴ Susan A. Crate, “Climate Change and Human Mobility in Indigenous Communities of the Russian North”, Brookings Institution Report, 30 January 2013, at <http://www.brookings.edu/~media/Research/Files/Papers/2013/1/30%20arctic%20russia%20crate/30%20climate%20russia%20crate%20paper.pdf> [last accessed 14 November 2013], iii.

²⁵ Susan A. Crate, *op.cit.*, iv.

²⁶ In the last decade, scientific evidences show that permafrost degradation, the average annual precipitation rates, the air temperature, unprecedented increased. These effects are all attributed to climate change. Susan A. Crate, *op.cit.*, iv.

the indigenous community *Viliui Sakha*, although not imminent, may occur in the near future. In fact, their traditional practices of cow and horse breeding may soon become unfeasible due to the increasing precipitation, the overall climatic softening and the current permafrost degradation.²⁷

Thus, the land expropriations or evictions that may follow from the rush to natural resources and the relocations that may occur due to the adverse effects of climate change represent a concrete threat for indigenous peoples in these countries.

In this respect, the domestic legislation of such countries could be further complemented by the protection provided by Framework Convention. In fact, relevant instruments and legal protection provided by the Framework Convention when dealing with these issues may be found—at least—in articles 4.2, 5, and especially art. 15.

First, art.4 para.2 frames the obligation of all State Parties to adopt measures to guarantee full and effective equality of persons belonging to a “minority”. Indigenous peoples face wide-ranging problems in economic, social, political and cultural life,²⁸ and they do not yet stand on an equal footing with the majority. As stated by Judge Ziemele in her partly dissenting opinion in the case *Handölsdalen Sami Village and Others v. Sweden* before the European Court of Human Rights,²⁹ indigenous peoples—in this case, the Sami—are groups disadvantaged “by definition”.³⁰ Thus, before large-scale projects involving oil and gas exploitations or climate change effects indigenous peoples are even more vulnerable.

Second, as mentioned, extensive natural resources and land exploitations and climate change affect also indigenous peoples’ culture and, thus, their identity, religion, traditions and cultural heritage that should be promoted by State Parties according to art.5 of the Framework Convention.³¹ Furthermore, indigenous peoples’ culture and languages are susceptible to

²⁷ Susan A. Crate, *op.cit.*, v.

²⁸ Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on the Russian Federation, *op.cit.*, paras.41 and 131; Advisory Committee of the Framework Convention for the Protection of National Minorities, Second Opinion on the Russian Federation, 2 May 2007, ACFC/OP/II(2006)004, paras.64, 67 and 306; Advisory Committee of the Framework Convention for the Protection of National Minorities, Third Opinion on the Russian Federation, 25 July 2012, ACFC/OP/III(2011)010, paras.58 and 220.

²⁹ European Court of Human Rights, *Handölsdalen Sami Village and Others v. Sweden*, Application No.39013/04, 30 March 2010.

³⁰ Partly dissenting opinion of Judge Ziemele, as cited by Koivurova Timo, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospects and Prospects”, in *International Journal on Minority and Group Rights* 18(2011), 1-37, 20.

³¹ See also Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on Finland, 22 September 2000, ACFC/INF/OP/I(2001)002, para.22; Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on Norway, 12 September 2002, ACFC/INF/OP/I(2003)003, para.32; Advisory Committee of the Framework Convention for the Protection of

assimilation also due to the fact that many features of their traditional culture, such as fishing, hunting, reindeer herding, etc., are linked to the use of the land which is simultaneously subject to the above-mentioned competing economic interests.³² However, it should be also underlined that maintaining traditional activities does not necessarily mean that these are in contrast with technology advances, rather the contrary.³³

Last, but not least, the core disposition in the frame of today's presentation is art.15 on the effective participation of persons belonging to a "minority" in cultural, social and economic life and in public affairs, in particular those affecting them. Thus, indigenous peoples should participate and be taken into account not only in terms of benefit-sharing and compensations, but they should also be consulted and have a say in the implementation and the assessment of national and regional development plans and programs likely to affect them.³⁴ In particular, consultations should be conducted in good faith and result in a genuine dialogue.³⁵ In this regard, States' parties and the Advisory Committee may take inspiration from other instruments such as the above-mentioned 1989 International Labour Organization Convention (No. 169) and the UN Declaration on the Rights of Indigenous Peoples.

In conclusion, as seen, both the rush to natural resources and climate change are already affecting indigenous peoples in Northern Europe and the Russian Federation. Thus, *inter alia*, also the Framework Convention provides protection for these still very vulnerable and unheard peoples, especially in terms of guaranteeing their equality, the promotion and the expression of their culture and, in particular, their economic participation.

Thanks very much for your attention.

National Minorities, First Opinion on Sweden, 25 August 2002, ACFC/INF/OP/I(2003)006, paras.30-31; Advisory Committee of the Framework Convention for the Protection of National Minorities, Second Opinion on Sweden, 30 January 2008, ACFC/OP/II(2007)006, para.16.

³² See also Advisory Committee of the Framework Convention for the Protection of National Minorities, First Opinion on the Russian Federation, *op.cit.*, para.49.

³³ Advisory Committee of the Framework Convention for the Protection of National Minorities, Third Opinion on the Russian Federation, *op.cit.*, para.80.

³⁴ Council of Europe, Commentary on the Provisions of the Framework Convention, Article 15 (para.80). This is in line also with articles 6 and 7 of the International Labour Organization Convention No.169 "Convention concerning Indigenous and Tribal Peoples in Independent Countries" (ILO Convention NO.169) enacted in 1989.

³⁵ Thus, for instance, agreements of oil companies to adhere to corporate social responsibility standards are insufficient. Advisory Committee of the Framework Convention for the Protection of National Minorities, Third Opinion on the Russian Federation, *op.cit.*, paras.81, 231 and 268.