

# HUMAN RIGHTS ON ICE

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## 1. Introduction

Looking at human rights in the Arctic, one would expect that democratic and rich countries would be able to provide top-level performance when it comes to the realization of international human rights law and good governance guidelines. After all, these are minimum standards of human rights and governance that most of the Arctic States are eager to proclaim as their own and export to the rest of the world. In the following remarks, the focus will be on the rights of indigenous peoples.

Statistics and other evidence will show that indigenous communities in the Arctic are relatively poor in comparison with the rest of the populations of the States concerned. Income levels are low, unemployment levels are high, and education, social and health services and housing are more difficult to obtain and/or are of lower quality than further south. Many of the communities are under-represented or even un-represented in far-away capitals, and the delegation of autonomous power is uneven. Still their regions are rich in natural resources and they are geopolitically and strategically important. The opening of transportation routes and improved access to natural resources on land and at sea lends new emphasis to the importance of these homelands

An examination of the performance of the Arctic States in relation to the rights of indigenous peoples is less than encouraging. It really looks and feels like official human rights positions and attitudes in the Arctic are on ice. The steps taken in subscribing to international standards concerning the rights of indigenous peoples are inadequate and unfair, and there are significant shortcomings and inconsistencies in national implementation, even when the standards have been accepted.

This presentation is divided into five sections. Following the introduction, a survey of the Arctic States' acceptance and non-acceptance of international human rights instruments, that are most relevant to the rights of indigenous peoples and of the corresponding monitoring procedures reveals some significant gaps and restrictions (Alfredsson et al,

2011). Some of the contents of indigenous rights agreements are outlined and highlight the shortcomings of these agreements in the Arctic. Enhanced monitoring and the naming and shaming of the Governments concerned are seen as tools for improving the situation. And finally it suggests that the Arctic Council should place human rights in general and indigenous rights in particular on its agenda.

## **2. Acceptance of Instruments**

The Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169, adopted in 1989, in force from 1991) addresses the rights of indigenous peoples, notably the rights to land and natural resources and political and economic self-management. The express purpose of this human rights treaty (5th preambular paragraph) is to recognize “the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”. Of the Arctic States only Denmark and Norway have ratified this Convention, and it can be argued that Denmark ratified it for the wrong reasons (Alfredsson 2006).

The International Covenant on Civil and Political Rights (UN 1966, in force from 1976) has many relevant articles, in particular article 27, which the Human Rights Committee (of independent experts) has elevated to the provision most frequently employed in case law to the benefit of indigenous peoples, including cases from Canada, Finland and Sweden (Möller 2011, Möller and de Zayas 2009). All of the Arctic States have ratified the Covenant, and all of them except the United States of America have ratified its first Optional Protocol (UN 1966, in force from 1976) that allows the Human Rights Committee to receive and consider complaints from individuals (individuals can also speak on behalf of groups) against State Parties.

The USA has not ratified the International Covenant on Economic, Social and Cultural Rights (UN 1966, in force since 1976) which covers a series of relevant articles on issues like education, health, social security and housing. None of the Arctic States have ratified the Optional Protocol to this Covenant (UN 2008, not yet in force) that upon entry into force will allow complaints to the Committee on Economic, Social and Cultural Rights (of independent experts) regarding alleged violations of the Covenant’s substantive provisions.

The International Convention on the Elimination of All Forms of Racial Discrimination (UN 1966, in force since 1969) has strong language on the obligation of States to take special and concrete measures to combat racial discrimination. That wording covers minorities and indigenous peoples. While all the Arctic States have ratified the Convention, Canada and the USA have not made the declaration under article 14, paragraph 1; that recognizes the competence of the Committee on the Elimination of Racial Discrimination (CERD, independent experts) to receive and consider complaints from individuals and groups claiming to be victims of a violation by a State Party.

The USA has neither ratified the Convention on the Elimination of All Forms of Discrimination against Women (UN 1979, in force since 1981) nor the Optional Protocol to that Convention (UN 1999, in force from 2000). This protocol allows the Committee on the Elimination of Discrimination against Women (CEDAW, of independent experts) to receive communications from individuals or groups of individuals submitting claims of violations of rights protected under the Convention, and initiate inquiries into situations of grave or systematic violations of the human rights of women.

The USA has not ratified the Convention on the Rights of the Child (UN 1989, in force from 1990) which contains at least three articles on the rights of indigenous and minority children concerning identity and education. Canada, Iceland and the USA have not ratified the Convention against Discrimination in Education (UNESCO 1960, in force from 1962) that in article 5 has significant language about minority schools that is also applicable to indigenous schools.

As to regional texts, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention, adopted in 1998 under the auspices of the UN Economic Commission for Europe, in force since 2001), as its name indicates, clearly introduces human rights and an open information approach to environmental affairs. It even has a complaints procedure. The Russian Federation has not ratified the Convention, and Denmark excluded Greenland and the Faroe Islands in her ratification instrument.

The European States in the Arctic, except for Iceland, have ratified the Framework Convention for the Protection of National Minorities of the Council of Europe, but some of

them have sought to place limitations on the number of groups that can be covered by the Advisory Committee (the monitoring treaty body under the Convention).

At the UN Human Rights Council in 2006, of the three Arctic States that were members of the Council at that time, Canada and the Russian Federation cast negative votes while Finland voted in favor of the draft Declaration on the Rights of Indigenous Peoples. After a delay and considerable watering down of the self-determination language, the UN General Assembly adopted the Declaration by resolution 61/295 on September 13<sup>th</sup>, 2007. The Nordic States voted for adoption, but Canada and the USA voted against, and the Russian Federation abstained. Subsequently, Canada and the USA have endorsed the Declaration (see news story on the website of the UN High Commissioner for Human Rights at "<http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx>", visited on 26 November 2011). These reactions to the new Declaration, as well as the explanations of votes by some of the Arctic States, like that of the Russian Federation and Sweden, are disappointing.

In 2007 when the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples, several States asked for the floor to explain their votes. Russia indicated that they "cannot agree with the document's provisions relating in particular to the rights of indigenous peoples to land and natural resources, and to the procedure for compensation and redress" (from UN document A/61/PV.107, p. 16). And Sweden stated: "The Sami and other indigenous peoples must have the right to influence the use of land and natural resources that are important for their survival" (from UN document A/61/PV.107, p. 24). These and other similar statements indicate the lack of political willingness and negative attitudes that are at the core of indigenous rights. Obviously both statements fall short of the language of the Declaration, let alone the ILO Convention No. 169. These same attitudes also help explain why the draft Nordic Sami Convention has not yet been adopted.

As to Charter-based or extra-conventional monitoring by UN human rights bodies, it is sad to note that the Russian Federation and the USA have not issued standing invitations for country visits to investigators and working groups that operate under the special procedures of the UN Human Rights Council. Among them are the Special Rapporteur on the situation of

human rights and fundamental freedoms of indigenous peoples and the Independent Expert on minority issues.

This survey of the acceptance or non-acceptance of relevant human rights texts and procedures by the Arctic States does not suggest that the ratification of treaties will receive sufficient votes for declarations, leaving international complaints and the signing up for monitoring access alone to deal with the fulfillment of human rights in general and indigenous rights in particular. It does suggest, however, that such action could signal political willingness and constitute a first step on the road to improvements in the human rights performance in the Arctic. The survey clearly indicates that too often too many of the Arctic States are lagging behind when it comes to taking formal steps to accept human rights text at home.

### **3. Highlights of Contents**

There are several human rights at issue that are brought up one after the other in the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. In article 6, it says, *inter alia*, that in applying the provisions of the Convention, Governments shall, in good faith and with the objective of achieving agreement or consent, consult indigenous peoples through their representative institutions whenever consideration is being given to legislative or administrative measures that may affect them directly; establish means by which the groups can freely participate in all relevant policy- and decision-making that concerns them; and establish means and resources for the full development of indigenous institutions and initiatives.

In article 7 of the ILO Convention it says that indigenous peoples shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development. Furthermore, Governments shall take measures in co-operation with these groups to protect and preserve the environment of the territories they inhabit.

These provisions on political participation are supplemented in the 2007 UN Declaration and in an OSCE instrument, that is the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life (adopted in 1999 in Lund, Sweden, under the auspices of the OSCE High Commissioner on National Minorities), with extensive and quite detailed language on the institutions and powers necessary for self-governance. Nevertheless, local practices in the Arctic not only vary widely both between and within the States concerned but also more often than not fall below the global and regional standards.

Land rights of indigenous peoples are considered necessary for the protection of culture. In article 14 of ILO Convention No. 169, it says that the rights of ownership and possession over the lands that indigenous peoples traditionally occupy shall be recognized. In addition, measures shall be taken to safeguard the indigenous right to use lands not exclusively occupied by them, but to which they have traditionally had access to for subsistence and traditional activities. Governments shall take steps to identify the lands that the peoples traditionally occupy, and establish adequate legal procedures to resolve land claims.

Indigenous land rights are also confirmed in case law of the Human Rights Committee under article 27 of the ICCPR.

In article 15 of the ILO Convention, it says that the rights of indigenous peoples to natural resources pertaining to their lands shall be safeguarded. These rights include the indigenous right to participate in the use, management and conservation of these resources. If States retain ownership, Governments shall establish or maintain consultation procedures with a view to ascertaining whether and to what degree indigenous interests' could be prejudiced by the exploration or exploitation. The groups should participate in the benefits of such activities and in addition receive fair compensation for any damages that they may sustain as a result of such activities. The UN Declaration from 2007 contains even stronger language on natural resources.

On all the issues raised above, national implementation in the Arctic region is characterized by significant shortcomings and inconsistencies. Whether it is land rights or autonomy, each country has widely varying schemes both when they are compared with each other and on occasion within the same country. Not only may these uneven performances fall behind the

applicable international standards, they may also generate resentments and even tensions between groups within the States concerned and across their borders.

#### **4. Suggested Responses**

As mentioned earlier, the inadequate human rights performance of the Arctic States at home is especially striking when compared with their foreign policies. Most of them like to export human rights to other countries and do not hesitate to criticize others for their lack of performance. There is reason to insist that justice begins at home, and there is every reason to name and shame countries if and when their performance is inadequate. Efforts should be made to maintain an international monitoring focus by intergovernmental and non-governmental organizations.

There are only occasional references to Arctic issues in State reports to the various human rights treaty bodies and to the Human Rights Council in relation to the Universal Periodic Review (UPR), and these monitoring instances are not in a position to focus on particular territories within States. As to special procedures, in recent years, UN Special Rapporteurs on indigenous rights have reported on their visits to indigenous communities in Canada (in UN document E/CN.4/2005/88/Add.3), the Russian Federation (in UN document A/HRC/15/37/Add.5) and the Nordic countries' Sami areas (in UN document A/HRC/15/37/Add.6). The Special Rapporteur on torture visited Greenland in 2008 (see UN document UN Doc. A/HRC/10/44/Add.2).

Cases relating to the Arctic that have been decided by complaints bodies, like the Human Rights Committee (Möller 2011) and the European Court of Human Rights, are few and far between. These and other similar treaty procedures, like the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women, should be tested more often. Petitions to the global and regional bodies require the exhaustion of national remedies.

For activating these monitoring instances, popular involvement is required. Self-help is crucial. Domestic performance must be tested in national courts and national human rights institutions; both individuals and groups should vigorously pursue appeals to international monitoring instances and scrutiny by non-governmental organizations if and when court

cases are lost at home. Much more needs to and can be done, and indigenous groups and NGOs have to lobby on multiple national, regional and global fronts. This is true for specialized indigenous organizations, like the Inuit Circumpolar Council and the Nordic Sami Council, but the effort should also extend to non-governmental organizations with general human rights mandates, like Amnesty International and Human Rights Watch.

In addition to the generation of domestic court cases, these outreach efforts should include shadow reports to the treaty bodies and the Universal Periodic Review (UPR) and regular submissions of materials to the various special procedures and not only to the ones dealing with indigenous rights but also those on education, housing and a number of other issues of importance to the peoples of the high north.

## **5. The Arctic Council and Human Rights**

In addition to other intergovernmental undertakings, one organization could and should do more to focus on human rights in the Arctic, and that is the Arctic Council. On its website and in its documents there are remarkably few direct references to human rights. Many of the issues under consideration by the Council have obvious human rights components, like climate change, sustainable development, traditional knowledge and indigenous cultures as well as indigenous participation, but it looks like human rights based approaches to these and other issues are largely being avoided. No significant working references to the ILO Convention No. 169 and the 2007 UN Declaration are on the Council's website.

When taking over the chairmanship of the Council for the period 2011-2013, Sweden stated that it would "lead the work on drafting guidelines for responsible entrepreneurship in the Arctic, which are based on existing internationally agreed guidelines on corporate social responsibility (CSR). Responsible entrepreneurship means that companies freely assume responsibility – beyond what is required by applicable legislation – on how their activities affect the environment, labour law conditions, human rights and the prevalence of corruption in their markets of operation. The aim is to create a platform for dialogue and cooperation on sustainable enterprise" (at "<http://www.arctic-council.org/index.php/en/about-us/chairmanship/185-swedish-chairmanship-of-the-arctic-council>", visited on 26 November 2011).



The introduction of CSR is a good initiative although it is formulated in a soft fashion. It sorely needs to be supplemented by clear commitments and undertakings by the Arctic Governments through the acceptance and implementation of the international instruments that are applicable to the rights of indigenous peoples. One move in the right direction would be ranking human rights and indigenous rights high on the Arctic Council's agenda.

## References

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