



**Tanja Joona**

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# Indigenous Peoples' Rights in the Arctic with Comparative Approach

WINTER SCHOOL

Part II



LAPIN YLIOPISTO  
UNIVERSITY OF LAPLAND  
Pohjoisen puolesta – maailmaa varten



Erasmus+



# What is the ILO?

- International Labour Organisation 1919
- Specialized agency of the United Nations system which aims to improve living and working conditions for working people all over the world
- It adopts Conventions or treaties, and assists governments and others in putting these into practice



# Tripartite

**1. Employers**

**2. Governments**

**3. Workers**

**The ILO is built on dialogue and cooperation among these three partners, with each representative taking decisions independently**

# Access to the ILO

► Indigenous and Tribal Peoples as such do not have a formal position within the ILO tripartite system. However, they can participate in ILO meetings and other activities in the following manner:

1. As representatives of **governments, or of workers' and employers' organizations**
2. As representatives of a non-governmental organisation on the **ILO Special List of Non-Governmental International Organizations**

Indigenous and tribal peoples can also send information **directly** to the ILO. This can be done in the following way:

1. Through any workers' or employers' organization – including those made up of indigenous and tribal peoples
2. They can send information themselves

# The ILO and Indigenous and Tribal Peoples

## **1957**

ILO Indigenous and Tribal Populations Convention (No. 107) adopted,  
27 ratifications, 19 still in force

## **1989**

ILO Indigenous and Tribal Peoples Convention (No. 169) adopted,  
23 ratifications





- In 1989, the International Labour Organisation (ILO) adopted the Indigenous and Tribal Peoples Convention (ILO Convention **No. 169**). Since then, the Convention has been ratified by 23 countries.
- In these countries, the ILO supervisory bodies have monitored and guided the implementation process through regular examination of reports and provision of comments to the concerned governments.

**Number**

<b>Country</b>	<b>Date</b>	<b>Status</b>	<b>Note</b>
<b>Argentina</b>	03 Jul 2000	In Force	
<b>Bolivia, Plurinational State of</b>	11 Dec 1991	In Force	
<b>Brazil</b>	25 Jul 2002	In Force	
<b>Central African Republic</b>	30 Aug 2010	In Force	
<b>Chile</b>	15 Sep 2008	In Force	
<b>Colombia</b>	07 Aug 1991	In Force	
<b>Costa Rica</b>	02 Apr 1993	In Force	
<b>Denmark</b>	22 Feb 1996	In Force	
<b>Dominica</b>	25 Jun 2002	In Force	
<b>Ecuador</b>	15 May 1998	In Force	
<b>Fiji</b>	03 Mar 1998	In Force	
<b>Guatemala</b>	05 Jun 1996	In Force	
<b>Honduras</b>	28 Mar 1995	In Force	
<b>Luxembourg</b>	05 Jun 2018	Not in force	The Convention will enter into force for Luxembourg on 05 Jun 2019.
<b>Mexico</b>	05 Sep 1990	In Force	
<b>Nepal</b>	14 Sep 2007	In Force	
<b>Netherlands</b>	02 Feb 1998	In Force	
<b>Nicaragua</b>	25 Aug 2010	In Force	
<b>Norway</b>	19 Jun 1990	In Force	
<b>Paraguay</b>	10 Aug 1993	In Force	
<b>Peru</b>	02 Feb 1994	In Force	
<b>Spain</b>	15 Feb 2007	In Force	
<b>Venezuela, Bolivarian Republic of</b>	22 May 2002	In Force	

In this context, workers' organizations have also assisted indigenous and tribal peoples' organizations to bring **specific issues to the attention** of the ILO supervisory bodies.

Moreover, the Convention has inspired governments and indigenous peoples far beyond the ratifying countries, in their work to promote and protect indigenous peoples' rights.

→ Finland



# UNDRIP

- In 2007, the United Nations General Assembly adopted the **UN Declaration on the Rights of Indigenous Peoples (A/RES/61/295)**. The adoption was the culmination of years of discussions and negotiations between governments and indigenous peoples and is a landmark achievement, which provides the international community with a common framework for the realization of indigenous peoples' rights.



## United Nations Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on Thursday, 13 September 2007, by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). [Click here to view the voting record.](#)

Nine years have passed since the UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly. Since then, the four countries voting against have reversed their position and now support the Declaration. Today the Declaration is the most comprehensive international instrument on the rights of indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and well-being of the indigenous peoples of the world and it elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples.

**United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295)**

[English](#) | [Español](#) | [Français](#) | [Dzongkha](#) | [中文](#) (PDF version)



The UN Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007



- Following the adoption of the UN Declaration, there is now a **general consensus** that there must be a focus on implementation of indigenous peoples' rights at the country-level to ensure that international instruments bring the necessary changes for the millions of indigenous peoples around the world, who are still living in marginalized and disadvantaged situations.



- although these instruments were negotiated at different time periods by different bodies and therefore diverge in some respects.
- However, **the implementation process** of the two instruments is largely the same, and experiences generated so far in the context of Convention No. 169 can thus to a certain degree serve to inspire the further efforts to implement the Declaration.

# Structure of ILO Convention No. 169

- I. General Policy (Articles 1 to 12)
- II. Substantive Issues
  - 1. Land (13-19)
  - 2. Recruitment and Conditions (20)
  - 3. Vocational Training, Handicrafts and Rural Industries (21-23)
  - 4. Social Security and Health (24-25)
  - 5. Education and Means of Communication (26-31)
  - 6. Contacts and Co-operation across Borders (32)
- III. Administration (33)
- IV. Procedural Provisions (34-44)

# Coverage of ILO Convention No. 169

► Indigenous and tribal peoples constitute at least 5,000 distinct peoples with a population of more than **370 million, living in 70 different countries**. This diversity cannot easily be captured in a universal definition, and there is an emerging consensus that a formal definition of the term “indigenous peoples” is neither necessary nor desirable. Similarly, there is no international agreement on the definition of the term “minorities” or the term “peoples”.

Coverage – The ILO takes a practical approach. The Conv. 169 does not define who are indigenous and tribal peoples. It only describes the peoples it aims to protect (Article 1):

- **Elements of tribal peoples include:**

- traditional life styles
- culture and way of life different from the other segments of the national population
- own social organization and traditional customs and laws

- **Elements of indigenous peoples include:**

- traditional life styles
- culture and way of life different from the other of the national population
- own social organization and political institutions
- living in historical continuity in a certain area, or before others "invaded" or came to the area

- Self-identification (1.2)
- Self-determination (1.3)
- Self-management (Preamble)
- Government responsibility (2.1)
- Consultation ( 6.1) Consultation is a fundamental principle of the Convention.
- Participation (7.1) Participation is another fundamental principle of the Convention
- Customs and traditions (2.2)



► **Customary law, penal systems and access to justice.**

This section explains the right to retain customs and customary law, including penal systems, as long as these are not in conflict with international human rights, as well as the need to improve indigenous and tribal peoples' access to justice.

→ **Land and territories (distinguishes IP from minorities)**

This section explains the crucial concepts of indigenous and tribal peoples' lands and territories and the related rights, including to ownership and possession.

## ► **Natural resources.**

This section explains indigenous and tribal peoples general right to the natural resources in their territories as well as the rights to consultation, participation and benefit-sharing in cases where the State retains the rights over mineral resources.

**Development**

**Education**

**Health and Social Security**

**Contacts and cooperation across borders**

## e) Ratification (37-38)

- ▶ Ratification is a sovereign and voluntary act of a state
- ▶ Beginning of a process of dialogue and cooperation between the government and the ILO
- ▶ ILO Conventions cannot be ratified with reservations
- ▶ Before ratification: dialogue among the partners
- ▶ Situation of indigenous and tribal peoples varies in different countries → a uniform approach cannot be applied ( 34)

# Process of ratification

**1. GOVERNMENT**

**2. ILO**

**3. FORMAL REGISTRATION**

**4. COMES INTO FORCE: 1 YEAR LATER**

**5. OBLIGATIONS:**

- 1st report due 1 year after coming into force
  - 2nd report due 2 years later
- periodic reports every 5 years (or more often if necessary)

## f) Supervision

- ▶ Once a Convention has been ratified, governments are required to send **regular reports** to the ILO on how it is being implemented in their country
- ▶ These reports should include information on the situation in the relevant area, both in law and actual practice
- ▶ → reports are reviewed by the **Committee of Experts on the Application of Conventions and Recommendations** (20 members)
- ▶ → Committee makes its comments in two ways:
  - \* **Observations**
  - \* **Direct Requests**

Conference Committee

- When ratifying an ILO Convention, countries commit themselves to make its **provisions part of their national law**. To ensure that this is done properly and also has an impact on a practical level, countries **have to report** back to the ILO on measures taken and on any problems encountered. This has to be done at intervals of **one to five years**, depending on which Convention is concerned.

- The conclusions of the CEACR's examination of States' reports come in two forms:
- **Observations**, which are the CEACR's public comments on the application of ILO Conventions; and
- **Direct requests**. These are sent directly to the government in question, and generally ask for more information on specific subjects.
- There are also special procedures to deal with more serious situations and alleged violations of ILO Conventions. The most commonly used form of complaint in the ILO system is called a **Representation**. A Representation, alleging a Government's failure to observe certain provisions of ratified ILO Conventions, can be submitted to the ILO by a workers' or employers' organization.

# How to participate in the supervision

- Indigenous peoples can ensure that their concerns are taken into account in the regular supervision of ILO Conventions by the CEACR in several ways:
- **By sending verifiable information directly to the ILO on, for example, the text of a new policy, law, or court decision.**
- **By making alliances with trade unions, and through them, raising issues of concern.**
- **By asking for technical cooperation from the ILO, through which governments and indigenous peoples can get assistance in the implementation of ratified Conventions.**
- **By drawing the attention of the ILO to relevant official information from other UN supervisory bodies, fora or agencies.**



- ILOLEX ([www.ilo.org/ilolex](http://www.ilo.org/ilolex)), ILO's trilingual database, provides information about ratification of ILO Conventions and Recommendations, comments of the CEACR, Representations, Complaints, interpretations of ILO Conventions, and the like. In ILOLEX, you can search for information about a specific Convention and/or about a particular country.

# g) Interpretation

- ▶ **Article 34**

- ▶ "as appropriate"

- ▶ "as necessary"

- ▶ "wherever practical"

- ▶ "to the extent possible"

- ▶ limiting and making vague

- ▶ **Art. 13-19**

- ▶ → criticized and rejected by various indigenous peoples

- ↳ denied the right to self-determination

- ↳ indigenous customs and institutions can be too easily overridden

- ↳ land right articles only recognise rights over land that IP currently use and occupy; they don't recognise any rights over land that they used to occupy

- It might not be the best, it is better than anything else available

# The 1969 Vienna Convention

- The Vienna Convention on the Law of Treaties (VCLT) is a **treaty concerning the international law on treaties between states**. It was adopted on 23 May 1969<sup>[3]</sup> and opened for signature on 23 May 1969. The Convention entered into force on 27 January 1980. The VCLT has been ratified by 116 states as of January 2018. Some countries that have not ratified the Convention, such as the United States, recognize parts of it as a restatement of customary law and binding upon them as such.
- General rule of treaty interpretation
- Articles 31-33

# Other International instruments

1. **International Covenant on Civil and Political Rights**, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.
2. **International Covenant on Economic, Social and Cultural Rights**, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976
3. Council of Europe, **Framework Convention for the Protection of National Minorities**
4. **ILO convention 107** Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Note: entered into force June 2 1959. This Convention was revised in 1989 by Convention No. 169
5. **ILO convention 169:**  
Convention concerning Indigenous and Tribal Peoples in Independent Countries, (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991.
6. **American Declaration on the Rights of Indigenous Peoples** (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session) OEA/Ser/L/V/II.95 Doc.6 (1997).

## h) The concept of Land Articles (13-19)

- ▶ Many indigenous and tribal peoples have a special relationship to the land. It is where they live, and have lived for generations
- ▶ In many cases, their traditional knowledge and oral histories are connected to the land, which may be sacred, or have a spiritual meaning
- ▶ The concept of land usually embraces the whole territory they use, including forests, rivers, mountains and sea, the surface as well as the sub-surface
- ▶ Article 13.1

- ▶ The Convention recognizes **both individual and collective aspects of the concept of land**. The concept of land encompasses the land which a community or people uses and cares for as a whole. It also includes land which is used and possessed individually, e.g. for a home or dwelling
- ▶ Land can also **be shared among different communities or even different peoples**. This means that a community or peoples live in a certain area and also has access to, or is allowed to use another. This is especially the case with grazing lands, hunting and fishing and gathering areas and forests
- ▶ Article 13.2

# Land Rights

- ▶ The Convention clearly states that indigenous and tribal peoples have rights to the land they traditionally occupy
- ▶ What are "lands which they traditionally occupy"?
- ▶ Article 14.1
- ▶ Australia
- ▶ Identification of the lands, Article 14.2
- ▶ Land claims, Article 14.3

- Article 14

- 1. The rights of **ownership and possession** of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.
- 2. Governments shall take steps **as necessary to identify** the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
- 3. Adequate procedures shall be established **within the national legal** system to **resolve land claims** by the peoples concerned.



# Natural resources, Art. 15

- Indigenous and tribal peoples have rights to the natural resources of their territories, including the following:
  - The right to participate in the use, management, protection and conservation of these resources;
  - the **right to be consulted** before natural resources on their lands are explored or exploited;
  - the right to studies on the effects of such exploration and exploitation;
  - the right to benefit in the profits made from any exploitation and use of natural resources; and
  - the right to be compensated by the government for any damages caused by such activities.

# Displacement, Art. 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their **free and informed consent**. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.
3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

# The Committee of Experts:

In the case of Norway:

” The Committee of Experts does not consider that the Convention requires title to be recognized **in all cases** in which indigenous and tribal peoples have rights to lands traditionally occupied by them, **although** the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention”



Norway: Protected  
right to use lands

Sweden: Strongly  
protected right to  
use lands

Finland: Strongly  
protected right to  
use lands



## **ILO 169 in Norway**

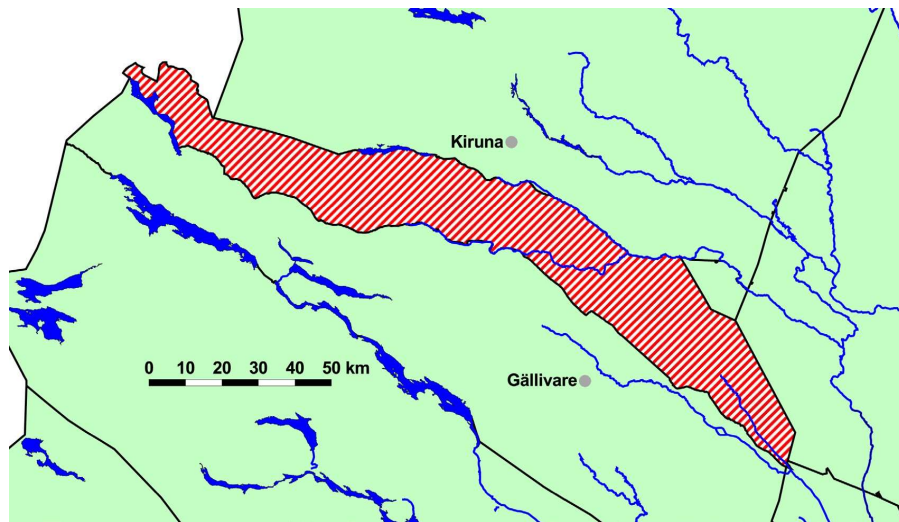
The Finnmark Act (Finnmarksloven) of 2005 transferred about 46,000 km<sup>2</sup> in Finnmark County in Northern Norway, which equates to around 95 % of the country's total area, to the residents of Finnmark County.

FeFo (Finnmarkkuopmodat) is managed by a Board of Directors comprising six members. Three of these directors are appointed by the Sami Parliament of Norway and three by the Finnmark County Council. FeFo owns and administrates the land and natural resources in 96 % of the area of Finnmark County.

The property of the Finnmark Estate (Finnmarkseiendommen) is operated, managed and developed by FeFo in collaboration with others.



# Girjas case in Sweden



In 2009 the **Girjas Sámi Village** and Swedish Sámi National Union (SSR) went to court against the Swedish State to try

who has the right to manage small-game hunting and fishing on the reindeer pastures of Girjas Sámi Village in the mountains.

This case has gone through the two lower courts, and today the case started in the Swedish supreme court. The case will be handled over 6 weeks, is of principal importance, and has attracted high attention both among Sámi peoples and mainstream society.

→ Taxed Mountain case 1982 (Skattefjällmålet)



## Sweden and ILO 169

According to rapporteur Sven Heurgren in his Committee report in 1999 he stated that:

“it is the obligation of the State to clarify the right holders of ILO 169. According to him, the definition of a Sámi in the Swedish Act on Sámi Parliament already contains many of the elements also expressed in Article 1 of the Convention No. 169.

However, he continues:

“even if the Sámi definition is close to the definition in the Convention, *it is not decisive* that these are the persons who should be considered to be the *rights holders of the Convention* in Sweden.”

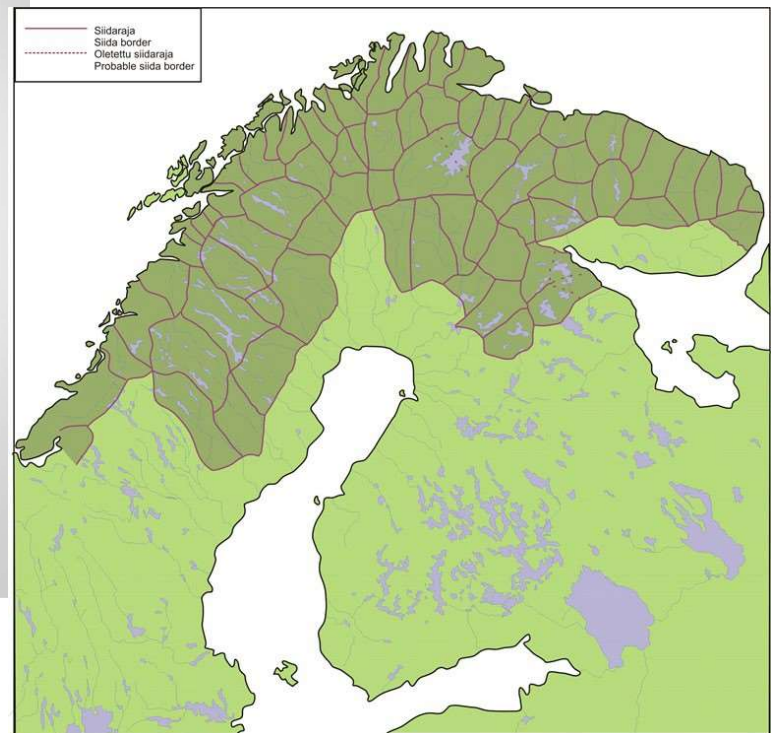
- **He continues, that the Sámi definition is made for the purposes of the legislation to define those persons who have the right to vote in the Sámi Parliaments elections.**
- Therefore, in the connection of the ILO 169 there might be a need to make a **separate criterion on who are to be regarded as the right holders of ILO 169, except the land rights.**
- The beneficiaries of the land right articles are defined in the Swedish reindeer herding legislation.
- And here comes the difference between Finland and Sweden, also in Norway. There you have two Sámi definitions, we have only one.

## To conclude...

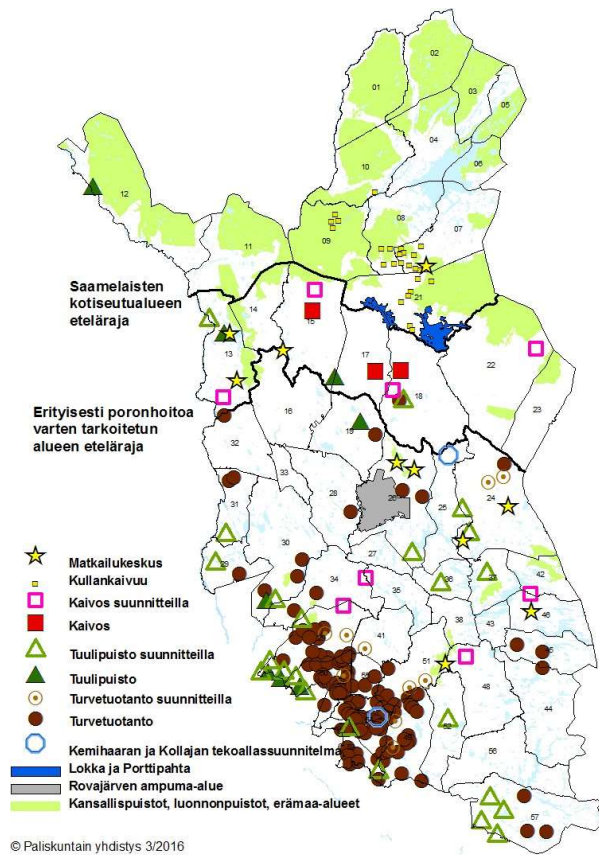
Although there do not necessarily have to be any linkages between the rights determined in the **national legislation and the rights in international law**, in this respect, the ILO Convention has a special status.

The Convention deals with rights of indigenous peoples and **usually a long historical dimension is related to those rights**. A concrete requirement to take into consideration in this historical dimension is already expressed in the first article of the Convention.

Article 1 states that the Convention applies to indigenous peoples who are regarded as indigenous on account of their descent from the populations that inhabited the country at the time of the establishment of the present state boundaries. In the area of present-day Finland, this means the 17th and 18th centuries.

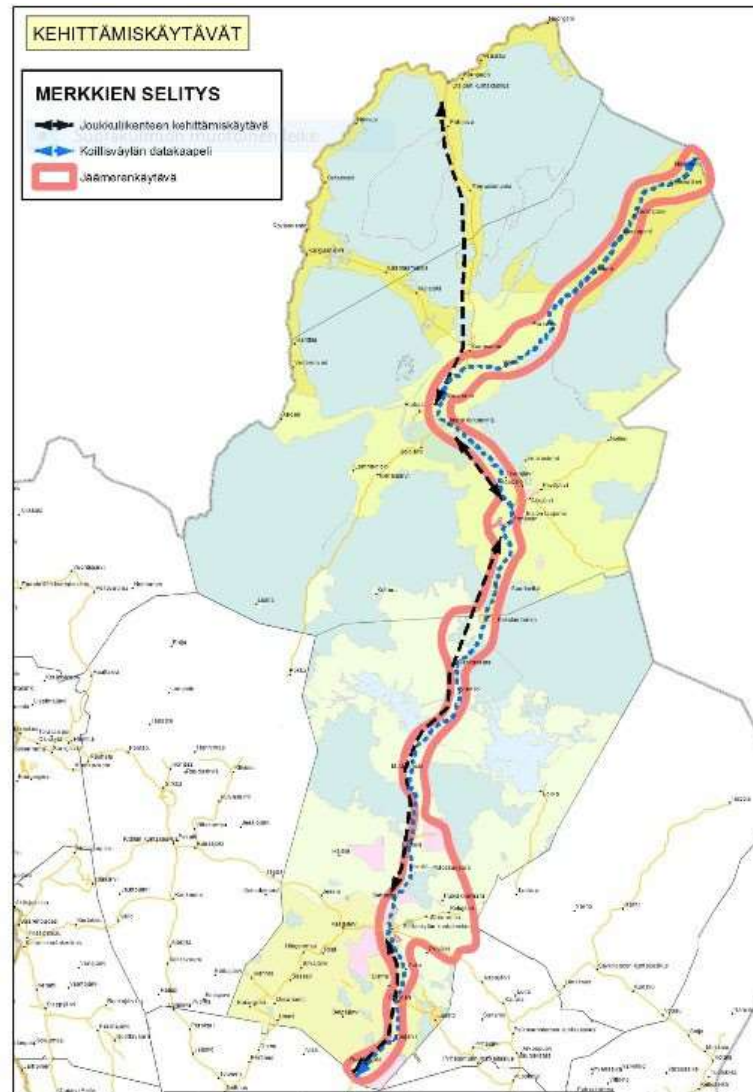


# Industrial land usage



- Reindeer herding is dependent on nature and it is based on using renewable natural resources in a sustainable way. Reindeer herding is affected by all land usage related to using natural resources in the reindeer husbandry area. The main influencers are forestry, mining industry, wind farms and hydropower production, peat production, travel industry and different kind of protected areas.

- County planning 2020 by  
Regional Council of Lapland
- Railroad to Arctic Ocean
  - Climate change







### Free, Prior and Informed Consent



## Free Prior and Informed Consent – An Indigenous Peoples’ right and a good practice for local communities – FAO

14 October 2016

This Free, Prior and Informed Consent (FPIC) Manual is designed as a tool for project practitioners (herein referred as project managers) for a broad range of projects and programmes (hereinafter to be referred to as projects) of any

development organization, by providing information about the right to FPIC and how it can be implemented in six steps.

FPIC is a principle protected by international human rights standards that state, ‘all peoples have the right to self-determination’ and – linked to the right to self-determination – ‘all peoples have the right to freely pursue their economic, social and cultural development’. Backing FPIC are the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Convention on Biological Diversity and the International Labour Organization Convention 169, which are the most powerful and comprehensive international instruments that recognize the plights of Indigenous Peoples and defend their rights.

[Click Here to See the Document](#)



### Free, Prior and Informed Consent



# The Right to be consulted...

9§ Act on Sámi Parliament

.... In Sámi Homeland area

2§ Act on Reindeer Husbandry

.... Have to be consulted, if *significant harm* is caused



# (Draft) Nordic Sámi Convention

