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## **THE RIGHT TO LAND UNDER THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

The Danish Institute for Human Rights welcomes the call for submissions communicated by email of 23 October 2019 by the Office of the United Nations High Commissioner for Human Rights (OHCHR) concerning the study on the right to land under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) being carried out by the Expert Mechanism on the Rights of Indigenous Peoples.

This submission consists of two sections. The first section gives information regarding the application of the UNDRIP in Greenland. The second section gives information on the Institute's work in relation to indigenous peoples in other parts of the world.

### **1. GREENLAND**

#### **1.1 INTRODUCTION**

The Danish Institute for Human Rights is the national human rights institution of Denmark and Greenland.

By request of the Greenlandic parliament, Inatsisartut, and government, Naalakkersuisut, the Institute shall evaluate, promote and monitor the implementation of human rights in Greenland, including giving advice to public authorities on new legislation and by request.

In cooperation with the Human Rights Council of Greenland, the Institute monitors the situation in Greenland and drafts parallel reporting to international bodies and compiles status reports on various human rights topics.<sup>1</sup>

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<sup>1</sup> Status reports are available in Danish and Greenlandic on e.g. the website of the Danish Institute for Human Rights,

## 1.2 THE UNDRIP IN GREENLAND

Despite that the UNDRIP is not legally binding, the Institute is of the impression that Danish authorities as well as the Greenland Self-Government authorities (the parliament, Inatsisartut, and government, Naalakkersuisut) accepts the UNDRIP as a relevant and guiding commitment in ensuring indigenous peoples' rights.

In its June 2018 mid-term report under the UN Universal Periodic Review of Denmark and Greenland, the Danish government, having coordinated the report with Greenland, expressed the following as a reply to a recommendation on "Promote and protect the rights of indigenous peoples, peasants and other rural workers":

"Denmark is party to the ILO convention 169 concerning Indigenous and Tribal Peoples in Independent Countries and supports the implementation of the UNDRIP of 2007. On 21 June 2009, the Act on Greenland Self-Government came into force replacing the former Greenland Home Rule Act of 29 November 1978. A principal objective of introducing self-government has been to facilitate the transfer of additional authority and thus responsibility to Greenlandic authorities. In the preamble to the Self-Government Act, it is recognised that the people of Greenland is a people pursuant to international law with the right to self-determination, and the act affirms that the Greenland Self-Government authorities exercise legislative and executive power in the fields of responsibility taken over."<sup>2</sup>

In the national submission under the UN Universal Periodic Review, 2011 (first cycle), Naalakkersuisut expressed strong support to the UNDRIP. Naalakkersuisut "strives to implement important provisions of the UNDRIP in its day to day work, although the government is categorized as a public rather than an indigenous government."<sup>3</sup>

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<https://menneskeret.dk/vores-arbejde/groenland/satus-paa-menneskerettigheder-groenland>.

<sup>2</sup> Universal Periodic Review of the United Nations Human Rights Council, Denmark's 2nd Mid-term Report, June 2018, page 20, accessible here:

[https://lib.ohchr.org/HRBodies/UPR/Documents/Session24/DK/Denmark\\_Mid-TermReport2018.pdf](https://lib.ohchr.org/HRBodies/UPR/Documents/Session24/DK/Denmark_Mid-TermReport2018.pdf)

<sup>3</sup> Denmark's National report under the UPR first cycle, 2011, Contribution by the Greenland Self-Government, page 17, par. 109, accessible here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/107/60/PDF/G1110760.pdf?OpenElement>

### **1.3 RECOGNITION OF A RIGHT TO LAND/ESTABLISHMENT OF PROCESSES TO ADJUDICATE LAND RIGHTS/INVOLVEMENT OF INDIGENOUS PEOPLES (ARTICLES 25, 26, 27, 30, 32 OF THE UNDRIP)**

#### **1.3.1 Ownership to land (articles 25-27 of the UNDRIP)**

By tradition, ownership to the territory of Greenland is shared and no physical person or legal entity can obtain property rights to land in Greenland.

Whereas the territory thus as such belongs to the state (the Kingdom of Denmark), the competence to decide over the use of the territory resides with the Greenland Self-Government authorities, Inatsisartut and Naalakkersuisut.

The Self-Government authorities thus grants usufruct of areas of the land to persons and entities, who can erect buildings on the areas allocated to them. The buildings can be mortgaged and may also with the permission of the Self-Government authorities be assigned to other persons together with the right of use to the land they are built on.

This tradition on the right to land was described in Denmark's interpretative declaration<sup>4</sup> on ratification of the ILO Convention 169 on indigenous and tribal peoples. The declaration was found by an ILO Committee to have no binding legal force, whereas the tradition as such, however, was found in accordance with the Convention.<sup>5</sup>

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<sup>4</sup> Government decree 97 of 9 October 1997 on ILO convention 169 on indigenous and tribal peoples (bekendtgørelse nr. 97 af 9. oktober 1997 af ILO-konvention nr. 169 af 28. juni 1989 vedrørende oprindelige folk og stammefolk i selvstændige stater), available in Danish at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=85894>.

<sup>5</sup> Report of the Committee set up to examine the representation alleging non-observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the National Confederation of Trade Unions of Greenland (Sulinermik Inuussutissarsiuqartut Kattuffiat-SIK) (SIK), 2001, par. 25 and 37, available at [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012\\_COMPLAINT\\_PROCEDURE\\_ID,P50012\\_LANG\\_CODE:2507219,en](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50012:0::NO::P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507219,en).

### **1.3.2 Determining the use of the land etc., including exploitation of natural resources (article 32 of the UNDRIP)**

The Greenland self-rule has been mentioned by the UN Special Rapporteur on the rights of indigenous peoples as an example illustrating how self-rule has furthered cooperation and dialogue between the indigenous people and the State:

“The present model of self-rule, which was adopted by the Danish Parliament and 75 per cent of the population of Greenland in a referendum, is a result of a process initiated in the 1970s by Greenlanders towards increasing self-governance. While Home Rule was achieved in 1979 with the establishment of a local parliament and a public government with authority in most political, social and economic matters internal to Greenland, the desire for further control of subsurface resources and the quest to be recognized as a people according to international law led to new negotiations between Greenland and Denmark and, finally, to the establishment of the present self-rule model. The process is regarded as unique, as it was initiated by Greenlanders themselves and negotiated peacefully with the Government of Denmark” (2018)<sup>6</sup>

At present, the Greenland Self-Government authorities has taken legislative and executive responsibility a range of areas, among others, taxes; expropriation; education; social security; health; the labour market; the regulation of hunting; fishing; electricity, water and heating supplies; natural resources.<sup>7</sup>

Fields of responsibility remaining under Danish authorities, but which Greenland can decide to take over include, among others, justice and criminal law; family law; aliens law; sea environment; border control. In these areas, legislative and executive powers are with the Danish parliament and government respectively.

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<sup>6</sup> UN General Assembly, Rights of indigenous peoples – Note by the Secretary-General, 17 July 2018, page 20, par. 80, A/73/176, available here: <https://undocs.org/A/73/176>

<sup>7</sup> The Prime Minister’s Office “Overview of matters that are taken over by Greenland Home Rule (I and II), respectively Government of Greenland (III)” (*Oversigt over sagsområder, der er overtaget af Grønlands hjemmestyre (I og II) henholdsvis Grønlands Selvstyre (III)*) available at:

[http://stm.dk/multimedia/Oversigt\\_sagsomr\\_der\\_241111.pdf](http://stm.dk/multimedia/Oversigt_sagsomr_der_241111.pdf)

A few but central areas shall remain with the Danish authorities, e.g. foreign relations and defence.

An example on the consequences of decisions by authorities on the use of land is the de facto closure of settlements Illorsuit and Nuugaatsiaq. In the summer 2017 a landslide caused a tsunami to hit Illorsuit og Nuugaatsiaq, killing four people. Due to continued risk of further landslides, Naalakkersuisut and the Municipality of Qaasuitsup advised against anyone again taking residence in the two areas thereby effectively closing the settlements. The decision was taken on the basis of an assessment by the Greenland Emergency Management Commission, which is established by Greenlandic law (Inatsisartut) and comprises both self-government, municipal authorities and Danish authorities.

Most inhabitants of the app. 40 families from the evacuated areas have been relocated to Uummannaq, where the Self-Government in July 2019 finished establishing permanent homes as compensation for their loss of not being able to return to live in the settlements.<sup>8</sup>

### **1.3.3 Military activities (article 30 of the UNDRIP)**

As Denmark is responsible for the defence of the Kingdom of Denmark, Denmark's Joint Arctic Command is upholding and protecting the sovereignty of Denmark/Greenland but also performs fishing vessels inspection, search and rescue, maritime pollution prevention, hydrographic surveys etc. in Greenland.<sup>9</sup>

The U.S.A. has a military base, Thule Air Base, in the North of Greenland. Earlier US military activities in different areas of Greenland have resulted in left oil and diesel barrels, nuclear waste and other types of hazardous waste which have polluted the surroundings.

An agreement of cleaning up after the activities was agreed upon by Denmark and Greenland in 2018, in which Denmark claimed responsibility and allocated 180 million DKK (app. 24 million EUR) for the removal and clean-up.

The UN Special Rapporteur on hazardous substances and wastes visited Denmark and Greenland in 2017. The rapporteur, in his final report

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<sup>8</sup> Greenlandic newspaper 'Sermitsiaq', online edition, 19 July 2019, available in Danish at: <https://sermitsiaq.ag/node/214991>

<sup>9</sup> Joint Arctic Command's website: <https://www2.forsvaret.dk/eng/Organisation/ArcticCommand/Pages/ArcticCommand.aspx>

from the visit in 2018, commended the agreement on the clean-up but recommended full transparency from Danish authorities in the process. The rapporteur also recommended that Denmark must identify and remove all military waste left in Greenland that is unwanted by the people of Greenland.<sup>10</sup>

The Danish Institute for Human Rights agrees that Denmark must continue to take responsibility for cleaning up military waste left in Greenland in close cooperation with the Self-Government in order to respect the principle of UNDRIP's article 30.

#### **1.4 EFFECTIVE MECHANISMS/PROGRAMMES/REMEDIES (ARTICLES 8, 10, 28, 29, 32 OF THE UNDRIP)**

In November 2016, the Human Rights Council of Greenland and the Danish Institute for Human Rights published a status report on the human rights situation in Greenland, which included a chapter on natural resources.<sup>11</sup>

In the report, we focused on how the local population can be involved in the preparation phase of mining projects and in decisions on tourist concessions of land and fishing sites and whether there is sufficient means of redress/access to remedy for the local population in these respects. Concerning local involvement, we recommended, among other items, that Naalakkersuisut ensure that the local population is involved in the decision-making processes concerning tourist concessions of land and fishing sites, most notably by making it a condition for the concession that the local population has been consulted beforehand.

We also recommended that Naalakkersuisut, together with the Danish government, consider letting the "Aarhus convention" – the UN Convention on Access to Information, Public Participation in Decision-

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<sup>10</sup> UN General Assembly, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on his mission to Denmark and Greenland, 14 November 2018 (A/HRC/39/48/Add.2), item 84.

<sup>11</sup> Menneskerettigheder i Grønland – Status 2016, November 2016, available in Danish and Greenlandic here: <https://menneskeret.dk/udgivelser/menneskerettigheder-groenland-status-2016> with a summary in English here: [https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/status/2015-16/groenland/gr\\_status\\_summary\\_a5.pdf](https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/udgivelser/status/2015-16/groenland/gr_status_summary_a5.pdf).

making and Access to Justice in Environmental Matters, enter into force in Greenland (by repealing a territorial reservation to Denmark's previous ratification).

Concerning means of redress, we recommended that Naalakkersuisut ensures an access to an efficient remedy through an administrative complaints mechanism for all local residents especially affected by concessions for purposes of tourism. We also recommended that Naalakkersuisut, together with the Danish government, consider letting the Danish act on The Mediation and Complaints-Handling Institution for Responsible Business Conduct enter into force in Greenland. The act regulates the affairs of the Danish contact point under OECD's responsible business conduct guidelines for multinational enterprises.

## **2. TOOLS AND TECHNICAL ADVICE RELATING TO INDIGENOUS PEOPLES**

The Danish Institute for Human Rights also works with the rights of indigenous peoples outside of Denmark and Greenland, most notably through the Institute's work on sustainable development and on business and human rights.

The Institute develops tools and provides technical advice where indigenous issues arise in the context of its work, as well as working on specific projects related to indigenous peoples.

The Institute would like to highlight the following topics which may be of interest to the OHCHR and the Expert Mechanism on the Rights of Indigenous Peoples:

### **2.1 UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS**

Aside from examining the right to land under UNDRIP, the Institute considers it of importance that the EMRIP also takes into consideration the questions related to the protection of the rights of indigenous peoples that are presented by additional frameworks to the UNDRIP. Indeed, the EMRIP may also wish to consider in its study areas where alignment of UNDRIP with additional instruments such as the UN Guiding Principles on Business and Human Rights (UNGPs) can add value for the protection of the land rights of indigenous peoples.

For example, according to the UNGPs, the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The

principles enshrined in the UNGPs can also serve to mitigate confusion surrounding which standards apply in which contexts as they provide that business enterprises should seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements.

Further, the UNGPs make explicit reference to additional standards that may need to be considered when business activity may have an impact on specific population groups including indigenous peoples:

“Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them.”<sup>12</sup> Given that business activity has a significant impact on the rights to lands and resources of indigenous peoples, we recommend that the study take into account the UNGPs when making recommendations concerning states’ responsibilities, and the responsibilities of business, in respect of the land rights of indigenous peoples.

In addition, the UN Guiding Principles reiterate the human right to access an effective remedy for those affected by business-related human rights abuses through state based judicial and non-judicial remedy mechanisms as well as through non-state-based grievance mechanisms. Although the UNGPs mention the need to consider additional barriers to access to remedy for certain groups including indigenous peoples, and the Accountability and Remedy Project of the OHCHR draw attention to access to remedy for groups at heightened risk of vulnerability or marginalization, the issue of access to remedy for indigenous peoples affected by business operations might deserve additional attention.

## **2.2 OTHER ACTIVITIES AND TOOLS**

Other activities and tools in the field of indigenous peoples’ rights include the Indigenous Navigator initiative, in which the Institute is one partner in a consortium including the International Labour Organization, the International Work Group for Indigenous Affairs, Forest Peoples Programme, the Asia Indigenous Peoples Pact, Tebtebba, and the Indigenous Peoples Major Group. The Navigator is a

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<sup>12</sup> OHCHR, UN Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy” Framework, 2011, commentary on Principle 12, page 14.



framework and set of tools for and by indigenous peoples to systematically monitor the level of recognition and implementation of their rights, including land rights.<sup>13</sup>

The Institute's work also includes general guidance for companies on due diligence in respect of engagements with indigenous peoples. Based on the UNDRIP and ILO Convention 169, the "Due Diligence Checklist for Companies" was published in 2019, which aligns the principles and rights in these two instruments with the human rights due diligence approach set out in the UNGPs.<sup>14</sup>

In the context of its work to promote national implementation of the UNGPs, and in particular the development of National Actions Plans on Business and Human Rights, the Institute encourages a human rights-based approach and has encouraged and facilitated consultations with indigenous peoples in several countries.<sup>15</sup>

I apologize for the very late response to your inquiry.

Yours sincerely,

Lise Garkier Hendriksen

CHIEF LEGAL ADVISER

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<sup>13</sup> The Indigenous Navigator is accessible here:

<https://nav.indigenousnavigator.com/index.php/en/>

<sup>14</sup> The Danish Institute for Human Rights, Respecting the rights of indigenous peoples: A due diligence checklist for companies, 2019, accessible here: <https://www.humanrights.dk/publications/respecting-rights-indigenous-peoples-due-diligence-checklist-companies>

<sup>15</sup> See more on the webpage on the Danish Institute for Human Rights webpage on national action plans on business and human rights, <https://globalnaps.org/>