

# CONVERSATION BETWEEN LEE SWEPSTON AND LARS NORBERG ON THE RIGHTS OF THE SAMI AS AN INDIGENOUS PEOPLE IN THEIR ANCESTRAL HOMELAND

---

KIRUNA IN AUGUST 2009

## PRESENTATION

**Mr. Lee Swepston** is a former Senior Adviser on Human Rights of the ILO in Geneva.

**Mr. Lars Norberg** is a former Ambassador and Permanent Representative to the International Organizations in Geneva.

**In connection with the opening of the Swedish Sami Parliament in Kiruna on August 25, 2009, Mr. Swepston and Mr. Norberg had an exchange of views on the rights of the Sami as an indigenous people in their ancestral homeland. As derives from this summary the conversation focused on the right to land and water, which is crucial for the survival of the Sami culture.**

### Lee:

In your view, does Sweden live up to its principles on human rights with respect to minorities and indigenous people in particular?

### Lars:

There have been improvements over recent decades in many respects. Minorities, immigrants, refugees and other vulnerable groups are fairly well protected by our legislation. But of course among individuals there exist xenophobia and racism and people who act accordingly. So there may be a discrepancy between the official attitude towards those groups and the way they are treated by some in society.

When it comes to indigenous people things get much more complicated. To start with, the Sami are, together with Roma, Jews, Meänkieli-people and Finns, recognized as national minorities and are entitled to rights as such. In addition, under international law the Sami are recognized as an indigenous population and they are in that capacity entitled to the special rights laid down in the UN Declaration on indigenous people and other relevant international instruments, such as the ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169). Together these make up the established international law, together with more general international human rights instruments. As to your question if Sweden lives up to established principles regarding the Sami as indigenous people I cannot answer yes.

**Lee:**

So you do not think that Sweden lives up to its principles as concerns the Sami?

**Lars:**

Well, rather no than yes.

**Lee:**

We have looked at the international law – and this is law that Sweden supports in international meetings even if it has not yet been incorporated in national law – but how does Swedish performance compare?

**Lars:**

Let me focus on the right to land and water since that is the very foundation for the existence of the traditional Sami culture, as it is with other indigenous peoples around the world. Without access to the customary right to grazing land for the reindeer the Sami society will vanish.

Over the last 200 years the Nordic states, in particular Sweden and Norway, have carried through a gigantic land grab.

In Norway in the 19<sup>th</sup> century the state authorities simply declared that the Finnmark - where Sami were in majority – was empty (!) territory and thus belonged to the Norwegian state.

In Sweden the confiscation of the Sami homeland, occurred in a slow and treacherous way. Although Lapland was officially declared the exclusive homeland of the Sami, in the 19<sup>th</sup> century the Government allowed and even encouraged colonization. From the beginning of the 20<sup>th</sup> century the State promoted large scale exploitation of forests, minerals and rivers in Sami territory, effectively displacing the Sami without any right to claim dispossession.

**Lee:**

Yes, that reflected the 19<sup>th</sup> century prevailing view in the dominant European states. Values are different now, and Norway in particular has ratified Convention No. 169 and regulated land use in an important part of Finnmark in a way that corresponds to C169. So can we assume that the democratic Nordic governments now fully respect and apply their own laws and their international commitments as regards indigenous peoples?

**Lars:**

What Norway does to implement ILO169 in Finnmark is certainly impressive and I would wish that it would inspire the Swedish Government to ratify C169 and to implement it. It is also true that the Sami' situation in both countries has improved in many respects since the 1950s. However, when it comes to the Sami' inherent right to land and water the attitude of the Swedish authorities has not changed.

**Lee:**

Can you give some examples?

**Lars:**

Yes, I certainly can. One dark chapter in Sweden's and Norway's Sami politics is their handling of the issue of transborder reindeer herding. In the border treaty concluded in 1751 (the "Lapp Codicil") the Sami were guaranteed their inherent right for all time to traditional reindeer grazing on both sides of the border irrespective of citizenship. This is of particular importance to the Swedish Sami since 1/3 of their summer grazing is traditionally on the Norwegian side. But since the early 19<sup>th</sup> century the two governments have bit by bit hollowed out these rights and reduced the Swedish Sami's grazing land on the other side of the border so that now there remains only a fraction of what it should be. And no compensation was ever granted.

The biggest blow occurred in 1972. In that year Sweden and Norway decided in one stroke to deprive the Swedish Sami of another 70% of the grazing land that they possessed on the Norwegian side of the border. Since the Sami right to that land is a private property right, this was a stark violation of national and international law. For instance protocol 1 of the European Convention on Human Rights states that "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law." This land grab was imposed in spite of the unanimous protest of all Swedish Sami concerned. And to make the whole thing assume the character of pure confiscation the governments of Sweden and Norway flatly rejected the Sami's claim for adequate compensation. In the Swedish parliament a few members voiced concern about the legality of a decision depriving the Sami of the basis for their existence without due compensation, but in the end there was no opposition and the parliament went along and supported this injustice.

**Lee:**

It sounds strange that in our time such a thing could happen in a society otherwise governed by the rule of law. This does not match Sweden's international reputation.

**Lars:**

Yes, it certainly is strange. It's like when President Nixon had to admit that he was breaking the law and said "when the President does it it's legal"

And add to this that in the same treaty, in violation of Article 6.1 of the European Convention, the parliament in certain matters deprived the Sami of the fundamental right to a fair and public hearing "by an independent and impartial tribunal established by law."

**Lee:**

In the 1970s Sweden had ratified the European Convention. Can you explain how in spite of this such a decision could be taken?

**Lars:**

No, I honestly cannot understand how the authorities of my country with its well-established and stable legal system could commit such an injustice against a small and vulnerable indigenous population like the Sami. It does not make sense.

**Lee:**

Try to guess anyway!

**Lars:**

OK, but this is only speculation. First I feel that in the state apparatus there is an ingrained attitude dating way back in history that the Sami are under the guardianship of the authorities and that these are free to handle Sami issues as they please. Secondly I think that within the political establishment there is an informal network representing economically strong groups that have an interest in exploitation of Samiland.

**Lee:**

I take it this is not formal guardianship as in Brazil, for instance, but rather an attitude?

**Lars:**

Correct, it's no longer a formal guardianship, rather a relic from the past.

This attitude is illustrated by the Government's handling of the inherent right of Sami to hunt and fish. In the 1990s the Government simply proclaimed that these rights even belong to the State and thereby deprived the Sami of the control of hunting and fishing in Sami territory.

Another example is the Sami Foundation whose objective is supposed to be to protect and promote Sami interests. But the Government acts as the owner of the Foundation and uses its funds for its own purposes. Last year, for instance, the Government made a decision to transfer funds to a county administration for a certain purpose contrary to Sami interests expressed by the Sami.

**Lee:**

Yes, this has been the pattern of taking indigenous land and resource rights around the world for more than 500 years now, but most people assume these times are long past in democratic European states. As regards the Sami's rights to land and water, how would you characterize the situation now in the 21<sup>st</sup> century?

**Lars:**

In Sweden there has not been any real improvement to speak of. The authorities pursue the same policy as in the past, which is characterized by a reluctance to restore land rights already taken from the Sami, both in Sweden and the vast grazing land in Norway that was lost in 1972, and cooperating with Norway to allow Sami lands to be taken without compensation. In Parliament, regardless who controls the majority, there is a small but important opposition against ratifying ILO Convention No. 169 on indigenous peoples and as it now stands I don't see any prospect for a Swedish adherence to that convention.

**Lee:**

That has been the consistent message the ILO has received from Sweden as well, even though Norway was the first to ratify the Convention and generally considers that it has been helpful in resolving outstanding issues. Denmark has also ratified it, and made it a cornerstone of internal indigenous policy. Do I understand correctly that the main

opposition comes from politicians representing small land-owners who do not wish to acknowledge that the Sami have any land rights?

**Lars:**

That's right.

**Lee:**

But Sweden voted for the UN Declaration on indigenous peoples – isn't that a step forward? Does it indicate a change in attitude?

**Lars:**

Yes, it should - but as of now it is unclear what significance it will have.

**Lee:**

Why?

**Lars:**

The Declaration is not a legally binding document. The Government can support it without making any real commitment. If the Government really intends to recognize the Sami rights as indigenous people internally, in the way it has recognized these rights for indigenous peoples in other countries, it should ratify ILO C169 which would oblige the Government to rectify past injustices.

**Lee:**

The effect the Convention would have on past injustices is rather complex, though it could play a role. I won't try to develop this idea here, but the Convention would definitely put a brake on the further involuntary loss of land rights, such as we are now seeing. And the Convention – along with the UN Declaration – makes it clear that it should be very difficult to take indigenous land in the public interest, and that in any case there should always be compensation.

Many of the things you told me occurred decades ago. Hasn't the attitude of the authorities changed since then?

**Lars:**

No, on issues related to the rights to land and water, the attitude of authorities remains basically the same. As to the issue of transborder reindeer herding, a new treaty has been negotiated and it will soon be presented to the parliaments for adoption.

**Lee:**

What do you think about it? What does it provide?

**Lars:**

The negotiators have achieved what is possible within the very tight framework - or rather straitjacket – set by the two governments. For instance, they have not been allowed to deal with legal issues such as the scope of customary rights, compensation, etc. However, compared to the previous treaty the new one is in some respects an

improvement: the Sami are granted a level of self determination within the framework of the treaty and other provisions inconsistent with the European Convention have been removed. It is now up to the Sami themselves to take a position on the treaty.

**Lee:**

So do you think there are still some problems with the new proposed treaty? And if so, what are they?

**Lars:**

The very concept of government negotiations on Sami land rights is flawed. In two fundamental aspects this concept is incompatible with national and international law.

First, as I mentioned a moment ago the right to reindeer herding is recognized as a private property right. Under the constitutions of both Sweden and Norway the governments cannot - without the consent of the Sami - start negotiations and agree to dispossess them of their private property. But that is exactly what the governments have done. Circumventing due legal procedure the governments have in consecutive treaties agreed to deprive the Swedish Sami of most (more than 70 %) of their ancestral rights on the Norwegian side of the border.

Second, no compensation for losses was granted in the past, and it was not even considered.

**Lee:**

Are you saying that the new treaty confirms earlier taking without compensation?

**Lars:**

Well, to make myself understood I need to give you some background.

When the treaty of 1972 expired in May 2005 the "Lapp Codicil" from 1751 became the only legal instrument governing transborder reindeer herding. As mentioned a while ago, the Lapp Codicil guarantees the Sami grazing rights for all time irrespective of nationality, but it does not stake out the extent of those rights. That was however done in the treaty of 1919. In that document what was then recognized as the Customary rights of the Swedish Sami were mapped out in great detail.

In 2005, with all previous treaties erased, and with them all the encroachments imposed by the governments, the Swedish Sami argued that the negotiations on a new treaty should be pursued on the basis of a clean slate, and should determine the extent of the customary rights, both in terms of the area covered and the content of the rights.

For the Norwegians this would have been a setback because they maintained that all concessions Sweden had made in the past were still valid and therefore constituted the starting point for negotiations. To support that position Norway without prior notice transformed the expired 1972 Convention into national law on the Norwegian side of the border. This was a flagrant violation of international law since the Lapp Codicil is in force and Norway can not unilaterally suspend an existing bilateral treaty. The Swedish Government protested against this "breach of Norway's international obligations" but the protest was never followed up and the Swedish Government has not reacted when the (illegal) law has been used by Norwegian authorities to harass Swedish Sami

moving in to their traditional lands. For instance, fences and other material belonging to Saarivuoma Sami village were simply removed and confiscated and helicopters were used to drive reindeers away from their grazing areas.

During the ensuing negotiations the Norwegian side took it for granted that the Swedish concessions made in past treaties were not open to challenge. Contrary to that the Swedish Sami argued that since all previous treaties were erased they reclaimed all the grazing land they were deprived of under the 1972 treaty. In the end, however, the Swedish Government accepted the Norwegian position and in the new treaty only minor adjustments were made on the ground compared with the previous treaty.

**Lee:**

So the end result, is that the new treaty perpetuates the losses the Swedish Sami had suffered under previous treaties?

**Lars:**

Well, I guess that is the way the Norwegian side sees it. Assuming the new treaty will be adopted, the consecutive treaties since 1919 will cover a period of 120 years up to 2040. Norway seems to assume that the land loss the Swedish Sami suffered in 1919 will be perpetuated until 2040

But still it might be possible that in 2040, after 68 years, the land the Swedish Sami were deprived of in 1972 and perpetuated in a new treaty still can be recognized as their customary right. But it is uncertain. I personally have a feeling that by 2040 the Norwegians will argue that the rights the Swedish Sami have lost under the consecutive treaties are definitively extinct and that thereafter there is no further need for treaties. In other words, thereby this huge uncompensated land grab is completed.

It is appalling and contrary to international law that in 21<sup>st</sup> century democratic governments prevent indigenous people from using their land for many decades and then take that enforced absence as a basis to declare that the customary rights are extinct. It's wrong but unfortunately that is how Sweden and Norway act in these matters.

The Sami on their side totally reject the Norwegian argumentation to which the Swedish Government seems to acquiesce. Since at this moment all previous treaties are erased and till the time the new treaty is adopted, there is nothing legally preventing the Sami from recovering their land, which they to a limited extent are trying to do in spite of harassments from Norwegian authorities.

A moment ago you seemed surprised that things like that could happen in 1972 in societies otherwise governed by the rule of law. Even more strange and surprising is that the same thing is going to happen in the near future. The adoption of the new treaty amounts to a new or repeated land grab of the same magnitude as in 1972.

In my view all this demonstrates that Sweden and Norway have created a legal and political mess which they cannot justify but from which they do not seem to want to extract themselves. It should be noted that since 1995 the European Convention is integrated in the Swedish constitution. It seems unclear how the adoption of the new

Treaty on Transborder Reindeer Herding can be consistent with the current constitution.

**Lee:**

As you put it, the Sami position on this issue, seems convincing, but are politicians and the general public aware of past injustices and the Sami' claims to get their land rights back, or failing that at least compensation?

**Lars:**

Most Swedes are not and it does not fit their self image; other countries mistreat their indigenous peoples, but we don't. But the politicians who are responsible for this are certainly aware, because the Sami are constantly presenting their claims to government and parliament.

A prominent expert on Sami history, Lennart Lundmark, has described in great detail in his comprehensive book "Stolen Land" how the authorities have carried out this land grab over the last 200 years, systematically and often with treacherous methods. Unfortunately his book exists only in Swedish.

**Lee:**

Do you think that the new treaty will be adopted by the two parliaments?

**Lars:**

Yes I do.

**Lee:**

So, as you describe it, on the Norwegian side of the border more than 70 % of the ancestral grazing rights of the Swedish Sami have been lost, without compensation, and the two governments have refused to consider claims seriously. Even though there is a legal vacuum at the moment, the Swedish Sami are being prevented from reasserting their rights by grazing these lands. The strategy of the two governments is to continue these tactics until they can make a more credible claim that the rights are extinct. Both governments refuse to take any action to identify, to grant, or to restore and compensate the rights of the Swedish Sami in Norway in accordance with international law laid down in instruments such as ILO169 and the UN Declaration on Indigenous People. It will be very difficult to claim that the rights to land lost in 1919 are not already extinct after 90 years. If nothing changes, then the rights to the huge areas lost in 1972 and then perpetuated in a new treaty will be very difficult to maintain by the year 2040 when the new treaty expires.

**Lars:**

That's it. In my opinion it is revolting that the two governments with this policy of attrition are de facto confiscating the ancestral rights of the small and vulnerable indigenous population that is common to both of them.



I recall that in 2004 Sweden was criticized by the UN Committee on the Elimination of Racial Discrimination on precisely this set of facts. Sweden has not adjusted anything to respond to those comments.

Since the governments refuse to live up to their own principles on human rights and their commitments concerning indigenous peoples the Sami see no other possibility than to turn to the courts. But the problem here is that the costs of court proceedings are beyond the means of the small Sami communities.

**Lee:**

In the international arena the Nordic countries are in the forefront of promoting human rights, and protect minorities, the weak and the exploited; they condemn governments that drive indigenous peoples out of their traditional lands. How can your treatment of the Sami be consistent with this defence of rights in other countries?

**Lars:**

It is not.

**Lee:**

How can this be justified?

**Lars:**

As the Sami are very few the politicians dismiss them as unimportant, a minor issue. But they are wrong. The Sami constitute a common Nordic indigenous population and if we are not able to treat them in accordance with international standards then we should speak more softly when we lecture other countries on their treatment of their minorities. Our opinion will be less persuasive if it is known how our own indigenous people are being treated.

In fact the politicians are making a very big mistake of judgement. In the long run they can not turn a cold shoulder to the Sami claim to get their land rights back, or even simply to protect what they have now, and at the same time urge other states to do what they themselves are unwilling to do. Against that background the Sami issue is a major issue. And in this context Sweden's credibility in the international arena will be determined by the way it treats its Sami citizens.

I wonder if you with your experience have any advice to offer. Do you see any possibilities of getting a credible legal assessment as to whether the Nordic Governments have or have not acted in conformity with law?

**Lee:**

Yes, there are possibilities open. From my side, I can say that clearly the taking of lands from indigenous peoples, without their agreement and with no compensation, is not compatible with either Convention No. 169 or with the UN Declaration. I should explain that the ILO Convention in particular provides that the fact of occupation of lands in itself means that indigenous peoples have rights, though the kind and extent of those rights has to be determined at the national level. Therefore simply declaring that there is no legal title, or that the rights were extinguished by an unlawful confiscation, does not mean that under the Convention no rights exist.

Whether a past taking is in violation of the national law is also something to be examined. Countries such as Australia, Canada, Colombia and New Zealand, among others, have decided – sometimes under the pressure of their courts, but with a strong dose of feeling that past injustices needed to be corrected as well – that claims of former unjust taking are open for discussion, correction and compensation. I trust that the Nordic Governments with their commitment to international law and human rights will find some just and constructive way to deal with this issue.

**Lars:**

I doubt they will. As to the Swedish Government I cannot share your optimism, in particular not as regards issues connected with the right to land and water. My impression is that both government and parliament are reluctant to initiate and participate in an open discussion on measures to restore and/or compensate loss of land as stipulated in C169 and the UN Declaration.

**Lee:**

Sweden might want to consider more carefully how it complies with international human rights treaties in general. The last time the UN Committee on Economic, Social and Cultural Rights examined a report from Sweden was in 2008, and it included the following paragraph in its conclusions:

*15. The Committee, while welcoming the initiative of a Nordic Sami Convention, reiterates its concern that the Sami land rights have not yet been resolved and that this fact negatively affects their right to maintain and develop their traditional culture and way of life, particularly reindeer herding. The Committee also reiterates its regret that the State party has not yet ratified ILO Convention No. 169 concerning Indigenous and Tribal People. (arts. 1, 2.2, and 15). The Committee urges the State party to ensure the adoption of the Nordic Sami Convention and consider ratifying ILO Convention No. 169. It also recommends the expeditious resolution of the Sami land and resource rights issues by introducing appropriate legislation, in cooperation with the Sami communities.*

Have other international options, such as the European Court, been examined?

**Lars:**

Yes, but the European Court would be a very cumbersome procedure for a considerable number of years at astronomical costs which are far beyond the means of the Sami communities.

Considering the attitude of the authorities I don't think it is politically possible to make any real progress on the national level. One possible avenue is therefore to establish an international panel of eminent legal experts composed of people like yourself, for instance with the task of determining the legality of the treaties. If they were to find that no injustice has been done, it's all history. If on the other hand – as I believe – the panel found that the treaties violate law, then I think that such a ruling could serve as the basis for a final settlement of the matter.

Unfortunately I fear that the Swedish Government would be opposed to such a panel. The problem here is therefore how to go about to give such a panel some kind of official status, maybe in the context of the UN or the Council of Europe.

**Lee:**

Well, it could also be done on an advisory basis – for instance a study commissioned by a ministry, a political party or a university. The question would then be not whether such a panel could be convened, but how to use its results.

I can suggest one other possibility: the Sami of Norway could ask the ILO to intervene under C169 to determine whether the Norwegian side of the action is compatible with the Convention, since Norway is bound by the Convention – and the Norwegian Sami Parliament has a right to intervene in the supervision of the Convention as they have already done in the Finnmark case. This would not be binding on Sweden directly, but it might help to clear up the conformity of this action with C169 in so far as Norway is concerned.

**Lars:**

A very interesting option provided one can find any Norwegian Sami willing to initiate a procedure in the interest of their Swedish kinsmen.

Incidentally I wonder whether Norway's obligations under C169 is limited to Sami with Norwegian citizenship or if they apply to all indigenous people that have customary rights in the country.

As mentioned the Lapp Codicil guarantees all Sami grazing rights on both sides of the border, irrespective of citizenship.

**Lee:**

Not an easy question, but I will say that the Convention contains no language limiting its application to indigenous peoples who are citizens of a ratifying country. And in fact the ILO Committee of Experts has already raised issues with some ratifying countries about how they treat indigenous peoples from other countries who are present in the ratifying country. So I have no definitive answer here, but the door is not shut.

**Lars:**

Since both governments in the context of transborder reindeer herding are reluctant to take any measures to identify and restore or compensate land as stipulated in ILO169 and the UN Declaration, the Sami have no other legal possibility than to resort to the courts. The problem is that the Sami communities don't have the means to finance court proceedings that would amount to several millions of SEK. As it is the governments who have messed things up should feel morally obliged to grant the Sami communities support to enable them to finance court proceedings in which they simply reclaim lost land rights. It would seem advisable to start with a few pilot cases. If the courts in such cases rule against the Sami further court proceedings might be without purpose. If on the other hand the courts decide to restore or compensate lost land such decisions could serve as guidance for negotiated settlements on the remaining cases.