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La autoidentificación individual y colectiva como indígena en el Ártico europeo: perspectivas legales internacionales

Individual and Collective Self-Identification as Indigenous in the European Arctic: International Legal Perspectives

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INDIVIDUAL AND COLLECTIVE SELF-IDENTIFICATION AS INDIGENOUS IN THE EUROPEAN ARCTIC: INTERNATIONAL LEGAL PERSPECTIVES*

LA AUTOIDENTIFICACIÓN INDIVIDUAL Y COLECTIVA COMO INDÍGENA EN EL ÁRTICO EUROPEO: PERSPECTIVAS LEGALES INTERNACIONALES

AUTOIDENTIFICAÇÃO INDIVIDUAL E COLETIVA COMO INDÍGENA NO ÁRTICO EUROPEU: PERSPECTIVAS LEGAIS INTERNACIONAIS

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ABSTRACT

Who is indigenous is a question which is often difficult to answer from the perspective of non-indigenous law. Lovelace v. Canada is one of the key cases of indigenous rights law. It forms an important precedent but it does not establish an unlimited subjective right to be indigenous within the framework of the ICCPR. The decision in Lovelace v. Canada cannot be construed as requiring states which are parties to the ICCPR to allow anybody to claim indigenous identity without the consent of the indigenous people in question. ILO 169 strengthens the position of indigenous peoples in this regard. Self-identification has multiple dimensions: collective self-identification as indigenous, individual self-identification as indigenous, and collective identification of the self through the identification of an individual as indigenous. Only indigenous peoples can decide who is a member. This decision is a sovereign right of the collective.

** Artículo de reflexión que se enmarca en el análisis del derecho comparado internacional dentro del ejercicio profesional del autor como profesor universitario.*

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indigenous, human rights, sovereignty, ICCPR, ILO 169.

RESUMEN

Quién es indígena es una cuestión que a menudo es difícil de contestar desde la perspectiva del derecho no indígena. Lovelace vs. Canadá es uno de los casos claves de derechos indígenas. Es un precedente importante, pero no establece un derecho subjetivo ilimitado de ser indígena en el marco del PIDCP. La decisión de Lovelace v. Canadá no puede interpretarse como un precedente para que los Estados partes del Pacto puedan permitir que alguien reclame la identidad indígena, sin el consentimiento del pueblo indígena en cuestión. El Convenio 169 de la OIT refuerza la posición de los pueblos indígenas en este sentido. La autoidentificación tiene múltiples dimensiones: la colectiva, la individual y la colectiva del yo a través de la identificación de un individuo como indígena. Sólo los pueblos indígenas pueden decidir quién es uno de sus miembros. Esta decisión es un derecho soberano del colectivo.

PALABRAS CLAVE

Indigenas, derechos humanos, soberanía, OIT 169.

RESUMO

Quem é indígena? É uma questão que muitas vezes é difícil de responder do ponto de vista da lei não indígena. Lovelace v. Canadá é um dos principais casos de direitos indígenas. É um precedente importante, mas não estabelece um direito subjetivo ilimitado para ser indígena dentro da estrutura do Pacto Internacional dos Direitos Civis e Políticos – PIDCP. A decisão de Lovelace v. Canadá não pode ser interpretada como um precedente para que os Estados partes do Pacto permitam que alguém reivindique a identidade indígena, sem o consentimento dos povos indígenas em questão. A Convenção nº169 da Organização Internacional do Trabalho (OIT), reforça a posição dos povos indígenas a esse respeito. O direito à autoidentificação tem múltiplas dimensões: o coletivo, o individual e o coletivo do eu, através da identificação de um indivíduo como indígena. Somente os povos indígenas podem decidir quem é um de seus membros. Esta decisão é um direito soberano do coletivo.

PALAVRAS-CHAVE

Indígenas, direitos humanos, soberania, PIDCP, ILO 169.

1 THE CASE OF *LOVELACE V. CANADA*

1.1 Background

In Finland, the question who is indigenous has been the center for heated controversies for several years. The indigenous Sámi people, who live in Norway, Sweden, Finland and Russia, have suffered discrimination by the dominant sectors of society for centuries. While Norway has ratified ILO Convention No. 169[1] (ILO 169), none of the three other states which govern Sápmi, the homeland of the Sámi people, have done so. In Finland, the discussion as to whether ILO 169 should be ratified, has been going on since the 1990s. One of the controversies in this context is the question who is actually indigenous. ILO 169 applies to indigenous and tribal peoples, which are defined using objective and subjective criteria: "A specific indigenous or tribal group or people meets the requirements of Article 1.1 [ILO 169], and recognizes and accepts a person as belonging to their group or people."[2] On the subjective level, an indigenous "person identifies himself or herself as belonging to this group or people; or the group considers itself to be indigenous or tribal under the Convention."[3] Although the image of the reindeer herding Sámi dominates the outside view of the Sámi, most Sámi engage in modern livelihoods[4] and other traditional forms of income, such as fishing,[5] continue to play important cultural

1. C-169, Indigenous and Tribal Peoples Convention, 1989 (ILO 169), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314>.

2. International Labour Organization, ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169) - A Manual, 2nd ed., International Labour Office, Geneva (2003), p. 8.

3. Ibid.

4. See also Timo Koivurova / Vladimir Masloboev / Kamrul Hossain / Vigdis Nygaard / Anna Petrétei / Svetlana Vinogradova, Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States, in: 6 Arctic Review on Law and Politics (2015), <https://arcticreview.no/index.php/arctic/article/view/76>.

5. See e.g. Siri Ulfsdatter Søreng, Fishing Rights Discourses in

and (at least locally) economic roles. The Sámi, who, despite being separated by borders and speaking everal different languages (some of which are on the brink of extinction, with some Sámi languages already having become extict after the use of the language was outlawed or at least frowned upon for centuries) are one people. Despite the fact that language is not a unifying factor in defining Sáminess, the definition of who is Sámi is centered around the question of language. One reason for this is that in contemporary Sápmi, the definition of who is Sámi is no longer left to the Sámi people. Rather, this fundamental right to define who is indigenous is claimed by the states. In the case of Finland, the definition of who is Sámi has been made in the Act on the Sámi Parliament. In Norway, Sweden and Finland, the nation states have created elected bodies which are meant to represent the indigenous Sámi who live in the respective countries. Although these bodies are referred to as "parliaments", they do not have law-making but only consultative functions (the Sámi parliament in Sweden is actually an agency of the Swedish government). The question who is allowed to vote in elections for the composition of these national Sámi parliaments is answered by the nation state. The decision is made by a five member committee of the Finnish Sámi Parliament. In the last twenty or so years, with the ratification of ILO 169 on the horizon, there has been renewed interest in indigenous identity and today there are a number of persons who claim to be Sámi but are not recognized as Sámi by the Sámi Parliament since they had lost the connection to the indigenous culture and in particular the language too long ago. While it is impossible to assess such claims as in the context of this research, it has to be noted that two perspectives collide with each other: if the loss of culture happened too long ago in order to qualify for Sámi status under Finnish law, the reason for that is found in the oppression by the settler society under which the Sámi, not unlike many other indigenous peoples around the world, have suffered for centuries. In contrast to reindeer herding and fishing Sámi, many of those who claim such a status refer to themselves as 'Forest Sámi'. On the other hand there appears to be a concern among those who are currently recognized as Sámi under Finnish law that the inclusion of persons with less longstanding links to Sámi culture might weaken Sámi culture and identity overall. One factor which might contribute to the latter point of view is the fact that the self-declared 'Forest Sámi' refer to the persons who are Sámi within the meaning of Finnish law as 'language Sámi', which might be understood by some as an indicator for a distinct unwillingness to define themselves as Sámi through the use of Sámi languages and an emphasis on aspects of Sámi culture other than language. In 2015, the Supreme Administrative Court of Finland overruled decisions by the Sámi Parliament and accepted the claims by almost 100 applicants and enrolled them in the list of voters for the Finnish Sámi Parliament.[6] For legal purposes, there is no category of 'non-status' indigenous persons in Finnish law. However, there are already persons who are widely accepted as Sámi without being included in the electoral roll for the Finnish Sámi parliament: Sámi children. In order to vote, you have to be 18 years or older. Yet there are indigenous children who meet all material criteria to be considered indigenous but have not yet reached the age necessary to be allowed to vote. But group acceptance can very well be different from the acceptance as a person who is eligible to vote for the Sami Parliament. In fact, there has to be a difference because the right to vote in the election for the Sami Parliament in Finland is restricted to Sami age 18 or older who are citizens of Finland. This does not mean that children under the age of 18 or persons who do not hold Finnish citizenship could never be Sami - such a result would be absurd. (The same problem will occur elsewhere in the case of individual states trying to regulate transnational indigenous peoples or sections thereof.) This not only highlights the need for the proposed Nordic Sami Convention and for cooperation with the Russian Federation in this regard, but it also shows that the question who is Sami cannot be answered by the Finnish, Swedish, Norwegian or Russian state but only by the same. As a consequence, the Act on the Sami Parliament only regulates who has the right to vote in the elections to the Sami Parliament or to stand for election, it does not regulate who is Sami. This allows for a distinction between being indigenous and being allowed to vote in the elections to the Sami Parliament. This is the same under customary international law and under ILO 169. Equating the right to vote in the election to any national Sami Parliament would be to deny that the Sami people is one people. The transnational nature of the Sami people has been imposed on them from the outside. Different definitions as to

Norway: Indigenous Versus Non-indigenous Voices, <http://www.marecentre.nl/mast/documents/Mast2008_Vol6_2_Sorreng.pdf>.

6. Yle, Nearly 100 new people accepted as Sámi persons against will of Sámi Parliament, 30 September 2015, <http://yle.fi/uutiset/osasto/sapmi/nearly_100_new_people_accepted_as_sami_persons_against_will_of_sami_parliament/8343268>.

who is permitted to participate in the election to the different national Sami Parliaments (which only exist in Norway, Sweden and Finland but not in Russia) cannot have binding effect for the Sami people when it comes to defining who is Sami. The right to define its membership is one of the core aspects of the right of every people to self-determination. No single state can define who is Sami. The states may decide who can participate in elections to the respective Sami Parliaments, but they cannot decide who is Sami. This right, like membership in any other people, rest with the people. Denying the Sami the right to define for themselves who is Sami would be a violation of their right to self-determination. The absence of traditional institutions, which has been caused by the dominant societies over the course of several centuries, cannot be used by states as an argument against the self-determination of this indigenous people.

Also, it is seen as problematic that the decision as to who is Sámi is made by only a handful of persons, but that is less of a problem as one might think at first sight — as long as there is access to effective court procedures during which these decisions can be scrutinize, like in the case of administrative decisions. And this is essentially what the decision by the Sámi Parliament is: an administrative decision concerning the rights of individuals, with the power to decide being transferred from the state to a non-state institution, the Sámi Parliament, which also has other functions in administrative processes, for example under the Mining Act.[7] What is important in this context is that the Sámi Parliament does not make its own laws but has executive roles, i.e., to execute Finnish law when defining who is Sámi and to participate in the administrative process in other contexts. In doing so, it might not always have the interests of the people whom it represents in mind. That the interests of the Sami parliaments do not have to overlap with the interests of the indigenous communities becomes even more evident if, keeping in mind the peculiar role of the Swedish Sami parliament, one looks at the function of states in international law: "States are the principal actors on the international scene. They are legal entities, aggregates of human beings dominated by an apparatus that wields authority over them. Their general goals are quite distinct from the goals of each individual or group."[8] In the case of the Sámi people, this is not only true with regard to the state but also with regard to the Sámi Parliaments. While it can be argued that indigenous institutions have to be acceptable to the indigenous people in question,[9] the participation of a significant part of the Sámi people in the elections to the Sámi parliament is at least an indicator for the legitimacy of the Sámi Parliament. However, what is at stake here are of course the rights of the very persons who are not (yet) allowed to vote in elections to the Sámi Parliament. Since the entry in the electoral role is the only kind of legal status of Sáminess under Finnish law and because this can only be obtained throug the Sámi Parliament, the same cannot necessarily be said for applicants for enrollment in the electoral roll (although it can be suspected because there are only very few practical and legal benefits associated with being Sámi in Finland, if any, especially the right to herd reindeer is not exclusive to the Sámi people, unlike in Norway and Sweden).

That the discussion in Finland centers on this definition created by the Finnish state rather than the sovereign right of the Sámi people as part of their right to self-determination to make this decision shows that the loss of indigenous sovereignty due to centuries of oppression is nearly complete. The Sámi people have only a very limited and indirect role in determining who is Sámi. In many parts of the world, in particular in Latin America, the idea that somebody might want to be identified and accepted by others as indigenous would be surprising at best, not least due to the continued discrimination suffered by indigenous peoples. This discrimination also exists to a not insignificant degree against the Sámi in Finland. The problem discussed here is an example for the continued dominance of the majority society over an indigenous people even in one of the most developed countries on Earth, and one which is proud of its human rights record on the international level.

The Sámi should decide for themselves who is Sámi. In the words of Professor Hurst Hannum, one of the world's leading experts on self-determination, "[i]ndigenous groups emphasize their right to define themselves, both in terms of individual self-identification and with respect to the community's right to define its members."[10]

7. Mining Act [Finland], <http://www.finlex.fi/en/laki/kaannokset/2011/en20110621.pdf>.

8. Antonio Cassese, International Law, 1st ed., Oxford University Press, Oxford (2001), p. 3.

9. James Webber, The Public-Law Dimension of Indigenous Property Rights, in: Nigel Bankes / Timo Koivurova (eds.), The Proposed Nordic Saami Convention - National and International Dimensions of Indigenous Property Rights, 1st ed., Hart Publishing, Oxford / Portland (2013), pp. 79-102, at p. 91.

10. Hurst Hannum, Autonomoy, Sovereignty, and Self-Determination; The Accommodation of Conflicting Rights, Revised

At times, these two approaches collide with each other. Self-identification as a

> ""subjective" criterion has been widely accepted, although it is not clear whether it would be sufficient if other "objective" criteria (e.g., ancestry) were not also present. It is also uncertain whether an ethnically indigenous individual would lose whatever legal rights and obligations accrue to an "indigenous" person, if, for example, he or she were expelled from the indigenous community or chose to become fully assimilated into the dominant society."[11]

While assimilation into the dominant society[12] has practically become normal in many countries which are home to indigenous peoples, there are also attempts by outsiders to join indigenous communities:

> "In the United States, for example, a non-Indian adopted into an indigenous group cannot participate in federal programs designed for indigenous groups, in Malaysia, adoption and membership in an indigenous community do create indigenous status."[13]

Self-identification as indigenous has at least two dimensions: self-identification of the group as an indigenous people and self-identification of an individual as an indigenous person. While the former is widely accepted, the latter still provides a lot of challenges as the rights and interests of individuals collide with the rights and interests of groups. Normally human rights apply in the relationship between the state or other forms of public authority on one hand and individuals or groups on the other hand. The individual or group has rights against the public authority or state. This is what can be described as the standard model of human rights. In some cases, human rights are also relevant in a horizontal relationship between actors which are formally on the same legal level, e.g. two parties to a contract. In particular when there is not really a level playing field but rather a degree of dependency, e.g. in the relationship between employer and employee or landlord and tenant, human rights have third party effect and the state has to protect the individual through domestic law. Today self-identification is commonly understood as an individual decision, a way in which the individual shapes his or her identity. Borders which were long seen as impenetrable are becoming more permeable, e.g. religion, gender or culture. When it comes to ethnicity, this border is still more solid, as cases like that of Rachel Dolezal have shown. In particular in Latin America, where large parts of the population have some indigenous family background, discrimination based on ethnic categories is still rampant. Individual self-identification as indigenous can lead to such situations if the individual self-identification as indigenous is not supported or even opposed by the indigenous group in question. Indigenous groups have a legally protected interest in defining membership criteria and states accordingly can be required by indigenous rights norms, such as Article 27 of the International Covenant on Civil and Political Rights[14] (ICCPR) to respect the decisions of indigenous communities to define who is a member. It is incompatible with the right of indigenous peoples to self-determination if the state defines who is an indigenous individual. At the same time are indigenous communities require to adhere to human rights standards themselves and the state is obliged to enforce human rights of individuals against indigenous communities if necessary. This confluence of rights and obligations of individuals, indigenous communities and public authorities,[15] is illustrated in one of the landmark cases of international[16] indigenous rights law.

Edition, University of Pennsylvania Press, Philadelphia (1990), p. 88.

11. Hurst Hannum, Autonomoy, Sovereignty, and Self-Determination; The Accommodation of Conflicting Rights, Revised Edition, University of Pennsylvania Press, Philadelphia (1990), p. 88, footnote omitted.

12. On the legal consequences see Rebecca Tsosie, Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples Fit Within Civil Society?, in: 5 University of Pennsylvania Journal of Constitutional Law (2003), pp. 357-404.

13. Hurst Hannum, Autonomoy, Sovereignty, and Self-Determination; The Accommodation of Conflicting Rights, Revised Edition, University of Pennsylvania Press, Philadelphia (1990), p. 88, there fn. 319, emphasis in the original.

14. International Covenant for Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 171.

15. See also in more detail Kirsty Gover, Indigenous Membership and Human Rights: When Self-Identification Meets Self-Constitution, in: Damien Short / Corinne Lennox (eds.), Handbook of Indigenous Peoples' Rights, 1st ed., Routledge, London / New York (2016), pp. 35 - 48, also available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262558> [all links are last visited 28 May 2016]; Austin Badger, Austin, Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples, in: 26 American University International Law Review (2011), pp. 485-514; Siobhán Mullally, Gender Equality and Group Rights: Negotiating Just Multicultural Arrangements, in: Koen De Feyter / George Pavlakos (eds.), The Tension Between Group Rights and Human Rights: A Multidisciplinary Approach, 1st ed., Hart Publishing, Oxford / Portland (2008), pp. 107-130, p. 122; K. Henrard, The Interrelationship between Individual Human Rights, Minority Rights and the Right to Self-Determination and Its Importance for the Adequate Protection of Linguistic Minorities, in: 1 Global Review of Etnhopolitics (2001), pp. 53 et seq.

16. On the case law in Canada see Jaime Battiste, Defining Aboriginal Identity: What the Courts Have Stated (2014), http://mikmaqrights.com/wp-content/uploads/2014/01/Defining-

In the case of Sandra Lovelace v. Canada,[17] the Human Rights Committee (HRC) had to deal with competing claims regarding indigenous identity. The applicant was born a Maliseet Indian and had lived in the territory of her native people in Canada. In 1970 she had married a non-indigenous man. In accordance with Canadian law[18] she accordingly lost her status as an Indian woman due to this marriage to a non-indigenous man.[19] She was therefore no longer permitted to live in the indigenous reservation. After her divorce, she wanted to move back to her parental home in the reservation but was denied the right to do so. The Canadian legislation which was used to deny Ms Lovelace's claim at the time in question only applied to indigenous women, not to indigenous men.[20]

The HRC is particularly well-suited to deal with this kind of problem: "The fact that under the OP the HRC receives communications from individuals, rather than groups, has not been without controversy. It is advantageous, however, from the current perspective because it allows individuals to advance both the claim, based on inter-communal conflict, that their cultural community has not been treated fairly by the state, and the claim, based on intra-communal conflict, that the accommodation instituted by the state for their community fails to treat them fairly as individuals."[21]

1.2 Relevance of the Case in the Context of the Sámi People

In Lovelace v. Canada the HRC had to deal with the recognition of indigenousness of an individual by the state as it was Canadian law which regulated Ms Lovelace's membership in her native tribe and which caused the loss of that status when she married a non-indigenous man. The Lovelace precedent therefore is relevant with regard to cases in which the state imposes membership criteria, as is also the case in the Nordic countries with regard to the question who is Sámi. Therefore it appears necessary to analyze this, easily misunderstood,[22] case with regard to the question of indigenous identity and the recognition of indigenous identity by the authorities.

Aboriginal-Identity-Final-draft-for-MMN.pdf.

17. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. 24/1977, U.N. Doc. CCPR/C/OP/2 at 224 (1990), reprinted in 1 Canadian Human Rights Yearbook (1983) 305-314, see also W. Pentney, Lovelace v. Canada: A Case Comment, 5 Canadian Legal Aid Bulletin (1982) 259; Anne F. Bayefsky, The Human Rights Committee and the Case of Sandra Lovelace, in: 20 Canadian Yearbook of International Law (1982), pp. 244 et seq.; Mary Ellen Turpel, Indigenous People's Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition, in: 20 Cornell International Law Journal (1992), pp. 579 - 602, at p. 583; Hurst Hannum, Autonomoy, Sovereignty, and Self-Determination; The Accommodation of Conflicting Rights, Revised Edition, University of Pennsylvania Press, Philadelphia (1990), p. 88, there fn. 319; Andrew M. Robinson, Would International Adjudication Enhance Contextual Theories of Justice? Reflections on the UN Human Rights Committee, Lovelace, Ballantyne and Waldman, in: 39 (2) Canadian Journal of Political Science / Revue canadienne de science politique (2006), pp. 271–291, pp. 281 et seq.; Kristian Myntti, The Beneficiaries of Autonomy Arrangements - With Special Reference to Indigenous Peoples in General and the Sami in Finland in Particular, in: Markku Suksi (ed.), Autonomy: Applications and Implications, 1st ed., Kluwer Law International, The Hague / London / Boston (1998), pp. 277-294, at p. 285; Camilla Ida Ravnbøl, The Human Rights of Minority Women: Romani Women's Rights from a Perspective on International Human Rights Law and Politics, in: 17 International Journal on Minority and Group Rights(2010), pp. 1-45, at pp. 15 et seq.; William W. Black, Canada's Human Rights System and the International Covenants, in: 6 National Taiwan University Law Review (2011), pp. 209-230, at p. 217; Tanja Joona, The Definition of a Sami Person in Finland and its Application, in: Christina Allard / Susann Funderud Skogvang (eds.), Indigenous Rights in Scandinavia: Autonomous Sami Law, 1st ed., Ashgate, Farnham / Burlington (2015), pp. 155-172, at p. 164.

18. For the current version of Canada's Indian Act (R.S.C., 1985, c. I-5, available online at <https://www.escr-net.org/sites/default/files/Indian_Act_0.pdf>) see <http://laws-lois.justice.gc.ca/eng/acts/i-5/>. On later developments see Sébastien Grammond, Discrimination in the Rules of Indian Status and the McIvor, in: 35 Queens Law Journal (2009), pp. 421-432, for a broader view and context see Sébastien Grammond, Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities, 1st ed., McGill-Queen's University Press, Montreal / Kingston / London / Ithaca (2009), pp. 71 et seq.; K. J. Verwaayen, Losing Ground/Standing Ground as We Speak - Land, Nation, and Indigenous Women's Testimony in Canada's Acts of Abocide, <http://www.kanada-studien.org/wp-content/uploads/2014/02/04_Verwaayen_2-oe.pdf>; Jean Leclair, Federal Constitutionalism and Aboriginal Difference, in: 31 Queen's Law Journal (2006), pp. 521-535.

19. On the rights of women in the context of Canada's Indian Act see in more detail Katrina Harry, The Indian Act & Aboriginal Women's Empowerment: What Front Line Workers Need to Know (2009), <http://www.bwss.org/wp-content/uploads/2010/06/theindianactaboriginalwomensempowerment.pdf>. For a broader perspective see Stacy L. Leeds, Resistance, Resilience, and Reconciliation: Reflections on Native American Women and the Law, in: 34 Thomas Jefferson Law Review (2012), pp. 303-324; Jennifer Koshan, The Nordic Saami Convention and the Rights of Saami Women: Lessons from Canada, in: Nigel Bankes / Timo Koivurova (eds.), The Proposed Nordic Saami Convention - National and International Dimensions of Indigenous Property Rights, 1st ed., Hart Publishing, Oxford / Portland (2013), pp. 379-398.

20. No author named, Use of International Law by Indigenous People in Canada, <http://teachinternationallaw.ca/guide/indigenous/in-canada>.

21. Andrew M. Robinson, Would International Adjudication Enhance Contextual Theories of Justice? Reflections on the UN Human Rights Committee, Lovelace, Ballantyne, and Waldman, in: 39 Canadian Journal of Political Science / Revue canadienne de science politique(2006), pp. 271–291, at p. 280, footnote omitted.

22. Cf. Andrew M. Robinson, Boomerang or backfire? Have we been telling the wrong story about Lovelace V. Canada and the effectiveness of the ICCPR?, in: 14 (1) Canadian Foreign Policy (2007), pp. 31-49.

1.3 Key issues

Often the first issue which comes to mind in the context of indigenous identity and rights is the issue of land rights. Enjoyment of indigenous land rights requires membership in the indigenous community in question. In some cases, it might be controversial within an indigenous community who exactly is a member, a question which is not irrelevant given the limitations on resources and continued poverty experienced by many indigenous communities.

Essentially, the question that needs to be asked is if the Lovelace precedent provides for is a right to membership in an indigenous community against the wishes of that community.

1.3.1 Discrimination

Ms Lovelace claimed a violation of her rights under the ICCPR. The HRC looked in particular at Articles 12 (1), 17, 23 (1), 24 and 27 ICCPR.[23] In Communication R. 6/24 of 30 July 1981, the HRC found that Canada had violated Ms Lovelace's rights under Article 27 ICCPR. But the HRC also clarifies that the decision was not based solely on Article 27 ICCPR. As a member of the Committee, Nejib Bouziri, stated in his individual opinion appended to this decision:

> "In the Lovelace case, not only article 27 but also articles 2 (para. 1), 3, 23 (paras. 1 and 4) and 26 of the Covenant have been breached, for some of the provisions of the Indian Act are discriminatory, particularly as between men and women. The Act is still in force and, even though the Lovelace case arose before the date on which the Covenant became applicable in Canada, Mrs. Lovelace is still suffering from the adverse discriminatory effects of the Act in matters other than that covered by article 27."[24]

The HRC interpreted Article 27 ICCPR in light of other norms of the Covenant, in particular in the context of gender-based discrimination. It was

> "of the view that statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be. It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case."[25]

The decision by the HRC cannot be construed as requiring states which, like Finland, are parties to the International Covenant on Civil and Political Rights (ICCPR) to allow anybody to claim indigenous identity without the consent of the indigenous people or group in question. Indeed, the case is not only concerned with indigenous rights issues under Article 27 ICCPR but deals with discrimination based on gender.

1.3.2 The right to enjoy one's culture

Whether somebody has the domestic legal status of an indigenous person is not as relevant under Article 27 ICCPR as one might think at first sight because the personal scope of Article 27 ICCPR can go beyond the definition of who is an indigenous person under domestic law. Merely denying a person the legal status of an indigenous person under domestic law does not necessarily trigger a violation of Article 27 ICCPR. The HRC clarified that

> "not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12 (1) of the Covenant set out in article 12 (3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people."[26]

23. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 7.3

24. Individual opinion submitted by a member of the Human Rights Committee under rule 94 (3) of the Committee's provisional rules of procedure Communication No. R. 6/24; see also Allen McChesney, Aboriginal Communities, Aboriginal Rights and the Human Rights System in Canada, in: Abdullahi Ahmed An-Na'im (ed.), Human Rights in Cross-Cultural Perspective: A Quest for Consensus, 1st ed., University of Pennsylvania Press, Philadelphia (1992), pp. 221-252, at p. 250, there fn. 54.

25. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 16.

26. Human Rights Committee, Sandra Lovelace v. Canada,

A violation of Article 27 ICCPR requires that the person in question is unable to enjoy the indigenous culture. This right has a strong community element. Merely enjoying aspects of the culture by oneself but being excluded from other aspects by the community can amount to a violation of Article 27 ICCPR if this exclusion is forced on the individual by the state. Being prevented from engaging in a cultural activity of one's own culture can amount to a violation of Article 27 ICCPR.

One example could be reindeer herding in Norway or Sweden, where only indigenous persons have the right to herd reindeer. Being denied the status of an indigenous person under domestic law there has the consequence that a person is not permitted to herd reindeer. In Finland, the person in question has other legal ways to become engaged in reindeer herding as this traditional cultural activity of the Sami people has been opened up by the state to non-indigenous persons as well.

As less exclusive rights are attached to the label 'indigenous person' by domestic law, it becomes less likely that an individual person who considers him- or herself indigenous but who does not fulfill the criteria of domestic law can successfully claim a violation of Article 27 ICCPR. Less exclusive rights for indigenous peoples also means less exclusion of non-indigenous persons. The price for this inclusion is then paid by the indigenous culture which is more and more weakened and which will eventually be at risk since the label 'indigenous' will at some point no longer provide adequate protection of the culture against appropriation by outsiders. In so far strengthening the rights of persons who consider themselves to be indigenous but who do not have the status of an indigenous person under domestic law can actually lead to less protection of the indigenous culture because everybody else - regardless of any attachment to the indigenous culture or even complete disregard for it - would also have to have the same rights in order to avoid discrimination. The difference is, of course, that complete outsiders will not be able to rely on Article 27 ICCPR.

2. Who is indigenous?

This raises the question if there is some kind of standard under Article 27 ICCPR as to who actually is an - individual - indigenous person. The HRC did not presume to create such a standard. The individual personal scope of Article 27 ICCPR is therefore still somewhat unclear. In the case of Ms Lovelace, her birth and upbringing in an indigenous community and her obvious roots in the indigenous community qualified her without further question. While there had been some cases from Sápmi before the HRC some decades ago,[27] there are hardly any new cases. At the time of writing I am not aware of any international cases concerning claims to indigenousness if the claim is denied by the indigenous community in question.

The riots in the state of Haryana in India in early 2016 concerning the legal status of the Jat caste did not concern individual membership in an indigenous group but the legal status of an entire ethnic group within Indian law. In many parts of Latin America, the continued discrimination against indigenous individuals, also by the Mestizo communities, exercises a significant level of pressure on indigenous persons to assimilate. In many rural areas the economic situation of indigenous persons, local peasant families and communities of African descent are similarly bad and benefits given by governments to indigenous groups can lead to resentments but the discrimination associated with status of being indigenous is often so significant that indigenousness is hardly ever a status which is actively sought by persons who would not be considered to be indigenous by the local community. While such cases may exist, the problems will usually be on the local level in circumstances not that dissimilar from the situation Ms Lovelace had found herself in, the solution, though, will often not be in legal action. Litigation will often not be an approach which will be feasible for the persons such affected, primarily for financial reasons. The usual

Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 15.

27. E.g. Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), 27 July 1988; Human Rights Committee, Sara et al. v. Finland, Communication No. 431/1990, U.N. Doc. CCPR/C/50/D/431/1990 (1994), 9 July 1991 and 23 March 1994; Human Rights Committee, Länsman et al. v. Finland, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994), 26 October 1994; Human Rights Committee, Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. Doc. CCPR/C/58/D/671/1995 (1996), 30 October 1996; Human Rights Committee, Communication No. 779 / 1997, Anni Äärelä and Jouni Näkkäläjärvi v. Finland, UN Doc. CCPR / C / 73 / D / 779 / 1997, 7 November 2001. See also K. Hossain, The Human Rights Committee on Traditional Cultural Rights: The Case of the Arctic Indigenous Peoples, in T. Veintie and P. K. Virtanen (eds.), Local and Global Encounters: Norms, Identities and Representations in Formation, 1st ed., Renvall Institute for Area and Cultural Studies, Helsinki (2009), pp. 34 et seq.

consequence would be to move from predominantly indigenous regions to more urban areas, thereby contribution to the assimilation and the watering down of indigenous culture.

What the HRC does require in the context of Article 27 ICCPR is that "statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole".[28] The decision has to be "reasonable, or necessary to preserve the identity of the tribe".[29] The same has to apply mutatis mutandis not only to residence rights but to membership in the indigenous community in general.

The use of the word "or"[30] in the last passage of the HRC's Communication quoted in the last paragraph leaves some room for unclarity. It does not immediately become clear whether a measure has to be both "reasonable" and "necessary to preserve the identity of the tribe" or whether a measure which is necessary in this context also has to be reasonable. As the word "or" follows a comma and given the context of the sentence in question, it appears likely that the HRC meant to express that such a decision has to be both "reasonable" and "necessary" for the preservation of the "identity of the tribe". The HRC left open what was meant with the latter term. As culture is not a static concept and because indigenous culture is not cast in amber to be preserved without changes but can develop as much as any other culture, indigenous identity is something different from indigenous culture. Indigenous identity does not cover every potential aspect of indigenous culture but goes to the hear of the question what defines an indigenous people, such as language, key forms of livelihood, forms of life such as nomadism etc. What constitutes the indigenous identity can only be defined by the indigenous community itself. This freedom must not be abused by indigenous decision makers when it comes to defining membership in an indigenous people, a duty which follows from the prohibition of the abuse of rights (abus de droit), which is a general principle of law[31] within the meaning of Article 38 (1) lit. c) of the Statute of the International Court of Justice,[32] which provides a summary of the sources of Public International Law. In so far, a balance exists between the right of indigenous peoples to protect the identity of their people and the human rights of individual persons who consider themselves to be indigenous. It is up to the state to safeguard this balance of rights which not only compete against each other but which find a common ground and a common legal origin in the rights protected by Article 27 ICCPR, which are both individual and collective in nature.

The obligation under Article 27 ICCPR is one of the state because it is the state which is a party to the Covenant. This does not mean, however, that indigenous decision makers would be free to ignore the Covenant when making decisions. This is not only a consequence of the erga omnes (i.e. binding everybody with regard to everybody else) nature of fundamental human rights but it also follows from the HRC's understanding of Article 27 ICCPR itself. Accordingly,"it d[id] not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe."[33]

In the case of Ms Lovelace, and also in the case of the Nordic states which currently govern Sápmi, the decision who is indigenous is one of domestic law. It is a decision made by the state. If this power is transferred from the state to the indigenous people in question, the state remains responsible under international human rights law for any decisions made by the indigenous people. Under international law it does not matter for the legal responsibility of the state which organizational sub-unit or authority has acted. The state is responsible for all actors which it has allowed to act. If indigenous peoples and authorities are given decision-making powers under domestic law, the state is responsible for human rights violations

28. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 16.

29. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 17.

30. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 17.

31. Cf. Michael Byers, Abuse of Rights: An Old Principle, A New Age, in: 47 McGill Law Journal /Revue de droit de McGill (2002), pp. 389-431.

32. Available online at <http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf>.

33. Human Rights Committee, Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981), para. 17.

committed in the exercise of such power. The originally sovereign[34] right of indigenous peoples to decide on who is a member of their group is thereby restricted, due to the loss of the original indigenous sovereignty.

3. Implications for the question if subjective elements are sufficient for membership in an indigenous group

Not only would the rights of indigenous peoples be violated if the state were to define membership in an indigenous group. It is only the indigenous people which, through its regular decision-making structures, can decide the conditions for membership. What the decision in Lovelace v. Canada shows is that indigenous authorities, however constituted, are not outside the realm of fundamental human rights norms. Human rights protect individuals and groups against the dominant parts of society. Therefore minimum human rights standards have to apply - not necessarily based on international treaties (to which non-state actors usually are not parties) or domestic law but on customary international law. There are certain fundamental rights which have to be respected at all times and by all actors which exercise power over others. In the case of Ms Lovelace, this meant that discrimination based on having been married to a non-indigenous person is not permissible because there is a rule of customary international human rights law to the effect that the right to marry is protected. Had the indigenous group been allowed to exclude Ms Lovelace, it would have amounted to a de facto limitation of the freedom of indigenous persons whom they marry. This would have been a violation of fundamental human rights.[35] Neither the Canadian state nor the indigenous group therefore was not permitted to impose such a restriction on Ms Lovelace, regardless of the domestic law applicable in Canada at the time.

One of the best examples on how a state can manage membership in different indigenous peoples with different criteria is provided by the United States. There, membership in indigenous tribes is determined by the tribes.[36] "Tribal enrollment requirements preserve the unique character and traditions of each tribe. The tribes establish membership criteria based on shared customs, traditions, language and tribal blood."[37] All

34. On the legal status of indigenous peoples under current international law see Austen L. Parrish, Changing Territoriality, Fading Sovereignty, And The Development of Indigenous Rights (2007), <http://ssrn.com/abstract=969075>; Steven Wheatley, Conceptualizing the Authority of the Sovereign State over Indigenous Peoples, in: 27 Leiden Journal of International Law (2014), pp. 371-396; Gordon Christie, Indigeneity and Sovereignty in Canada's Far North: The Arctic and Inuit Sovereignty, in:110 The South Atlantic Quarterly (2011), pp. 329-346; Elena Cirkovic, The Myth of the Inkarri: Colonial Foundations in International Law and Indigenous Claims to Self-Determination, YCISS Working Paper, <http://ssrn.com/abstract=1431136>; Tonya Kowalski, The Forgotten Sovereigns, in: 36 Florida State University Law Review (2009), pp. 765-825; Cheryl L. Daytec, Fraternal Twins with Different Mothers: Explaining Differences between Self-Determination and Self-Government Using the Indian Tribal Sovereignty Model as Context, in: 22 Minnesota Journal of International Law (2013), pp. 25-71; Kalpana Murari, Indigenous Sovereignty: A Primer (2013), http://ssrn.com/abstract=2238109; Patrick Macklem, Distributing Sovereignty: Indian Nations and Equality of Peoples, in: 45 Stanford Law Review (1993), pp. 1311-1367; Jeremy Waldron, Supersession and Sovereignty, New York University School of Law, Public Law & Legal Theory Research Paper Series, Working Paper No. 13-33 (2013); Shin Imai, Indigenous Self-Determination and the State, Comparative Research in Law & Political Economy Research PAper 25/2008; ; Leena Heinämäki, Rethinking the Status of Indigenous Peoples in International Environmental Decision-Making: Pondering the Role of Arctic Indigenous Peoples and the Challenge of Climate Change', in T. Koivurova, E. Carina, H. Keskitalo and Nigel Bankes (eds.), Climate Governance, Environment and Policy, 1st ed., Springer, Heidelberg (2009), pp. 225 et seq.; Timo Koivurova, Sovereign States and Self-Determining Peoples: Carving Out a Place for Transnational Indigenous Peoples in a World of Sovereign States, in: 12 International Community Law Review (2010), pp. 202 et seq.; Timo Koivurova, Redefining Sovereignty and Self-Determination through a Declaration of Sovereignty: The Inuit Way of Defining the Parameters for Future Arctic Governance, in: Asbjørn Eide / Jakob Th. Müller / Ineta Ziemele (eds.), Making Peoples Heard - Essays on Human Rights in Honour of Gudmundur Alfredsson, 1st ed., Martinus Nijhoff Publishers, Leiden (2011), pp. 493-507; Kamrul Hossain, Status of Indigenous Peoples in International Law, in: 5 Miskolc Journal of International Law (2008) pp. 24 et seq.; S. James Anaya, International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State, in: 21 Arizona Journal of International and Comparative Law (2004), pp. 31 et seq.; Rüdiger Wolfrum, The Protection of Indigenous Peoples in International Law, in: 59 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law (1999), pp. 369-382. See also K. Henrard, Minority Protection Mechanisms as Means to Prevent and Settle Disputes Over Sovereignty, in: M. Jovanovic and K. Henrard (eds.), Sovereignty and Diversity, 1st ed., Eleven International Publishing, Utrecht (2008), pp. 123 et seq. For an Australian perspective on indigenous sovereignty see Irene Watson, Buried Alive, in: 13 Law and Critique (2002), pp. 253-269, at p. 255; for a view from Canada on the continuation of the colonial system see Brian Slattery, Aboriginal Sovereignty and Imperial Claims, in: 29 Osgoode Hall Law Journal (1991), pp. 681-703; Gordon Christie, A Colonial Reading of recent jurisprudence: Sparrow, Delgmuukw and Haida Nation, in: 23 Windsor Yearbook of Access to Justice (2005), pp. 17-53; for a Hopi view see Justin B. Richard, Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty, in: 36 Law & Social Inquiry (2011), pp. 201-234. On practical effects of the discussion of indigenous sovereignty see Kyle Powys White, Now This! Indigenous Sovereignty, Political Obliviousness and Governance Models for SRM Research, in: 15 Ethics, Policy, and Environment (2012), pp. 172-187; Jane Kloeckner, Hold On to Tribal Sovereignty: Establishing Tribal Pesticide Programs That Recognize Inherent Tribal Authority and Promote Federal-Tribal Partnerships, in: 42 Environmental Law Reporter (2012), pp. 10058-10077.

35. Cf. Article 16 (1) of the Universal Declaration of Human Rights, available online at <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf>.

36. U.S. Department of the Interior, Tribal Enrollment, <https://www.doi.gov/tribes/enrollment>.

37. U.S. Department of the Interior, Tribal Enrollment, <https://

of this happens within the overall framework of US law under the auspices of the U.S. Department of the Interior (DOI). Unlike interior ministries in many other countries, the U.S. DOI is not so much focused on domestic security but rather "protects and manages the Nation's natural resources and cultural heritage; provides scientific and other information about those resources; and honors its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities".[38]

Individuals can have a right to membership in an indigenous people while indigenous peoples have the (sovereign) right to decide who is a member. The latter decision has to respect the human rights of individual (potential) members while states must not violate the rights of indigenous peoples while trying to enforce the human rights of potential members.

Under customary international law, which is also reflected in Article 27 ICCPR, and the right of indigenous peoples to self-determination, indigenous peoples decide their membership. It can be permissible for indigenous peoples for set certain criteria for membership. These criteria must not be discriminatory and must not violate fundamental human rights which are part of customary international law:

> "while discrimination against non-descendants can be justified as a concomitant of tribalism, distinctions made between tribal descendants are suspect to the extent that they are based on immutable personal characteristics other than descent. Accordingly, in principle a descendant should not be treated less favourably than other descendants on the basis of their gender, or the gender of their indigenous ancestors, but distinctions made between descendants or on the basis of the number of their indigenous ancestors or "blood quantum" may be justified if they are otherwise "reasonable". In sum, these principles articulate the basis of a theory that accommodates certain tribal exclusions, by "ranking" types of discrimination by reference to the particular attributes of a settler society and the exigencies of tribal self-governance. International norms and associated jurisprudence have not ruled out the possibility that such principles may form part of a settler-state defense to individual human rights claims based on minority rights or non discrimination. To accept settler-state particularity in this way would entail the modification of the scope and quality of universalist ideology of international human rights. Whether the evolving body of settler-state human rights law on tribal membership, and the jurisprudence of international human rights bodies will diverge or converge on indigenous membership governance over time remains to be seen. It seems likely, however, that as tribal jurisdiction becomes more embedded in the constitutional frame of settler states, that efforts to reconcile tribalism and liberalism in settler state political theory will be furthered in the mainstream of human rights law, and not at its margins."[39]

Permissible, objective and reasonable, criteria can include especially the link to the indigenous culture, which receives special protection under Article 27 ICCPR, UNDRIP and customary international law. All of this also applies in countries which, like Finland, Russia or Sweden, have ratified the ICCPR but not ILO 169. It therefore is permissible for indigenous peoples under existing international law to impose minimum criteria for membership in order to protect indigenous culture, e.g. living the culture, speaking the language etc. — while respecting fundamental human rights. What the ICCPR requires is a test which allows for the protection of both[40] individual and collective rights.

4. Potential Impact of ILO 169

With regard to Finland, this is already the international legal situation as it is today. Ratification of ILO 169 would contribute to strengthening the right of indigenous peoples to define criteria for membership:

According to Article 2 ILO 169,

> "1. Governments shall have the responsibility for developing, with the participation of the peoples

www.doi.gov/tribes/enrollment>.

38. U.S. Department of the Interior, Mission Statement, <https://www.doi.gov/whoweare/Mission-Statement>.

39. Kirsty Gover, Indigenous Membership and Human Rights: When Self-Identification Meets Self-Constitution, in: Damien Short / Corinne Lennox (eds.), Handbook of Indigenous Peoples' Rights, 1st ed., Routledge, London / New York (2016), pp. 35-48, also available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262558>, there pp 20 et seq., italics in the original.

40. There is no general rule which would prefer either individuals or collectives, as is highlighted by Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), 27 July 1988.

> concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity", which also "2. include[s] measures for: […] (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; […]."

Accordingly, ILO 169 protects the social identity of indigenous peoples and their institutions. Social identity includes defining the members of a society, institutions includes decision-making processes by indigenous institutions.

Also Article 5 ILO 169 highlights that this Convention cannot be used in order to weaken indigenous identity: "In applying the provisions of this Convention: (a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals; (b) the integrity of the values, practices and institutions of these peoples shall be respected; (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected."

Article 7 (1)1 ILO 169 protects the right of indigenous peoples "to exercise control, to the extent possible, over their own economic, social and cultural development". Social and cultural development also includes the decision about the question who is a member of the indigenous people and which link to indigenous culture is required in order to be a member. This norm also allows indigenous peoples to change their own definition of membership at a later stage, if they so desire.

The decision who is a member of an indigenous people is a remnant, and in many countries the last remnant, of the original sovereignty of indigenous peoples which they have lost in many ways in the last centuries. That indigenous peoples truly exercise a kind of sovereignty through their own (rather than state-imposed) institutions is reinforced by Article 8 (2) ILO 169. This norm also provides the general framework within which the state recognizes such sovereign decisions by indigenous peoples:

> "2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."

Article 8 (2) ILO 169 therefore also provides an answer as to the legal effects of Lovelace v. Canada: it is the indigenous peoples who make sovereign decisions e.g. over membership, but within the framework of existing international human rights law. That the decision of membership is included in Article 8 (2) ILO 169 follows indirectly from Article 9 ILO 169 which even allows indigenous people to exercise criminal jurisdiction through their traditional (and not necessarily democratic) institutions. It follows a fortiori that indigenous peoples must also have the power to make the far more fundamental decision regarding membership.

5. Consequences of *Kitok v. Sweden*

The Human Rights Committee already had to deal with a case concerning denial of indigenous status by an indigenous communtiy. In Kitok v. Sweden,[41] the applicant claimed a violation of his rights because he felt discriminated against as he considered himself Sámi but was not recognized as Sámi. In this case, the Human Rights Committee paid attention not so much to formal recognition but to the practical enjoyment of indigenous culture.

> "It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes Of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further

41. Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), 27 July 1988. On this case see e.g. Tanja Joona, The Definition of a Sami Person in Finland and its Application, in: Christina Allard / Susann Funderud Skogvang (eds.), Indigenous Rights in Scandinavia: Autonomous Sami Law, 1st ed., Ashgate, Farnham / Burlington (2015), pp. 155-172, at p. 164.

> noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.
>
> In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the ratio decidendi in the Lovelace case (No. 24/1977, Lovelace v. Canada), namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish."[42]

As a consequence, the HRC in Kitok sided with the community rather than the individual.[43] The approach taken by the HRC follows directly from the wording of Article 27 ICCPR. What is particularly noteworthy is that it is sufficient to have access to indigenous culture. Cultural rights can be understood as activity rights.[44] Article 27 ICCPR establishes a right to culture, not a right to be issued a declaration of indigenousness by the state.[45] It is not necessary to have a legally enforceable right to do so.[46] In Finland,[47] everybody can herd reindeer or apply for a fishing permit. Also other aspects of Sámi culture, such as wearing traditional clothing, speaking Sámi languages or yoiking, are not protected in a way which would make it impossible for outsiders to engage in such cultural practices. Combined with the finding of the Human Rights Committee in Kitok, this accessibility of Sámi culture for outsiders makes it very difficult to claim a right to legal recognition as Sámi against the will of the Sámi people. Such a right can only exist in the unlikely event that the indigenous community were to depart from the legal framework established in Lovelace, which would require a violation of fundamental human rights and targeted discrimination.

Conclusions

Individual self-identification as indigenous therefore cannot be the only criterion for membership in an indigenous people - just like acceptance by the totality of the people cannot be absolutely required in order to be indigenous. The decision who is a member of an indigenous people is to be made by the people as a community through its own decision-making structures.[48] This decision, which eventually is enforced by the state, has to respect fundamental human rights. Claims to legal recognition as indigenous, when made by persons of indigenous descent, can be rejected if doing so is necessary for the protection of the identity of the indigenous people and if the limitation is reasonable

42. Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), 27 July 1988, paras. 9.7 et seq.

43. See also Solomon A. Dersso, Taking Ethno-Cultural Diversity Seriously in Cultural Design: A Theory of Minority Rights for Addressing Africa's Multi-Ethnic Challenge, 1st ed., MArtinus Nijhoff Publishers, Leiden / Boston (2012), p. 150, there fn. 46.

44. Athanasios Yupsanis, Article 27 of the ICCPR Revisited - The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee, in: 26 Hague Yearbook of International Law / Annuaire de La Haye de Droit International (2013), pp. 358-409, at p. 371; C. Holder, Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law, in: 33 Alternatives (2008), pp. 10 et seq., at pp. 19 et seq.; see also A. Verstichel, Recent Developments in the UN Human Rights Committee's Ap-proach to Minorities, with a Focus on Effective Participation, 12 International Journal on Minority and Group Rights (2005), pp. 28 et seq.

45. See also Athanasios Yupsanis, Article 27 of the ICCPR Revisited - The Right to Culture as a Normative Source for Minority / Indigenous Participatory Claims in the Case Law of the Human Rights Committee, in: 26 Hague Yearbook of International Law / Annuaire de La Haye de Droit International (2013), pp. 358-409.

46. Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), 27 July 1988, para.9.8.

47. On the question of recognition as an indigenous individual in Finland see in more detail Tanja Joona, The Definition of a Sami Person in Finland and its Application, in: Christina Allard / Susann Funderud Skogvang (eds.), Indigenous Rights in Scandinavia: Autonomous Sami Law, 1st ed., Ashgate, Farnham / Burlington (2015), pp. 155-172; Tanja Joona, ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach, 1st ed., Lapland University Press, Rovaniemi (2012), available online at <https://lauda.ulapland.fi/bitstream/handle/10024/59455/Juridica_Lapponica_37_Joona.pdf?sequence=1>, pp. 139 et seq.; Tanja Joona, The Subjects of the Draft Saami Convention, in: Nigel Bankes / Timo Koivurova (eds.), The Proposed Nordic Saami Convention - National and International Dimensions of Indigenous Property Rights, 1st ed., Hart Publishing, Oxford / Portland (2013), pp. 255-279.

48. On the acceptance by the state of indigenous ways to make decisions which differ from that of the state see Russell A. Miller, Collective Discursive Democracy as the Indigenous Right to Self-Determination, Washington & Lee Public Legal Studies Research Paper Series, Accepted Paper No. 2011-38, 10 January 2012, <http://ssrn.com/abstract=1982671>.

and if no human rights are violated.[49] Establishing clear criteria which do not aim at discrimination but which are necessary to actually serve the purpose of protecting indigenous identity can help generate legal certainty for all parties involved.

However, a solution is possible already under the existing law, in particular Article 27 ICCPR. The best way to conceptualize this web of rights and obligations between the group, the individual and the state (or states, in case of transboundary indigenous peoples like the Sámi) is through self-identification. As said at the beginning, self-identification can be both collective (the group decides that it as a group is indigenous) and individual (the individual person considers him- or herself to be indigenous). There is, though, also a third dimension to self-identification: the identification of the individual as indigenous by the indigenous community.[50] In some communities, e.g. among some First Nations in Canada, this identification can include clear rules for the inclusion of new members into an indigenous community:

"When recruiting non-descendants, most Canadian First Nations express a preference for applicants who are Indian or Aboriginal. They variously refer to persons who were members of other First Nations (transferees), are Indians or are of Indian descent, Aboriginals or of Aboriginal descent, or members of other pan-tribal groupings. A sizable minority of First Nations who use 'Indianness' as a criterion, apparently in accordance with the Indian Act, define it in a way that differs from federal definitions. As in the United States, First Nation references to indigeneity may be narrower than official definitions, (for instance, prescribing Indian blood quantum rules or referring to pan-tribal collectives) or wider (for instance, identifying persons of Aboriginal or 'North American Indian' descent. First Nations preference for indigenous adoptees extends to legally and customarily adopted children and spouses."[51] It can be concluded that "when tribes define indigenity, they sometimes do so in ways that differ from the definitions used in public law and policy."[52] Such a "right and power of indigenous people[s] to disregard objective ethnic criteria in determining their members [has already been] by the [former] Special Rapporteur"[53] of the United Nations on Discrimination against Indigenous Peoples, Jose R. Martinez Cobo, in his famous definition, according to which

> "On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (accepted by the group). This preserves for the communities the sovereign right and power to decide who belongs to them, without external interference."[54]

In other words, like defining the content of indigenousness,[55] "[t]he question of 'who is indigenous?' is best answered by indigenous communities themselves".[56] The exercise of this "sovereign right"[57] is not just outside

49. See also Wenona T. Singel, Indian Tribes and Human Rights Accountability, in: 49 San Diego Law Review (2012), pp. 567-625.

50. Ana Filipa Vrdoljak, Liberty, Equality, Diversity: States, Cultures, and International Law, in: Ana Filipa Vrdoljak (ed.), The Cultural Dimension of Human Rights, 1st ed., Oxford University Press, Oxford (2013), pp. 26-72, at p. 42; cf. Patrick Thornberry, Indigenous Peoples and Human Rights, 1st ed., Manchester University Press, Manchester (2002), p. 410.

51. Kirsty Gover, Tribal Constitutionalism: States, Tribes, and the Governance of Membership, 1st ed., Oxford University Press, Oxford (2010), p. 42, footnotes omitted.

52. Kirsty Gover, Tribal Constitutionalism: States, Tribes, and the Governance of Membership, 1st ed., Oxford University Press, Oxford (2010), p. 42.

53. Kristian Myntti, The Beneficiaries of Autonomy Arrangements - With Special Reference to Indigenous Peoples in General and the Sami in Finland in Particular, in: Markku Suksi (ed.), Autonomy: Applications and Implications, 1st ed., Kluwer Law International, The Hague / London / Boston (1998), pp. 277-294, at p. 284.

54. Jose R. Martinez Cobo, Study of the Problem of Discrimination against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/21/Add.4, 14 July 1983, paras. 179 et seq., cited by Kristian Myntti, The Beneficiaries of Autonomy Arrangements - With Special Reference to Indigenous Peoples in General and the Sami in Finland in Particular, in: Markku Suksi (ed.), Autonomy: Applications and Implications, 1st ed., Kluwer Law International, The Hague / London / Boston (1998), pp. 277-294, at p. 284.

55. Amelia Cook / Jeremy Sarkin, Who is Indigenous? Indigenous Rights Globally, in Africa, and Among the San in Botswana, in: 18 Tulane Journal of International and Comparative Law (2009), pp.93-130, at pp. 114 et seq.

56. Jeff R. Corntassel, Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity, in: 9 Nationalism and Ethnic Politics (2003), pp. 75-100, at p. 75. In many other contexts, the state also refrains from establishing membership criteria, e.g. for membership in religious groups, cf. Stefan Kirchner, Gruppenmitgliedschaft, Dissens und Diskriminierung im Spannungsverhältnis zwischen individueller und kollektiver Freiheit aus Sicht der EMRK, in: 20 Kirche und Recht (2014), pp. 212-220. If a degree of self-organization is recognized for other groups, then such a right certainly exists for entities which had original sovereignty.

57. Jose R. Martinez Cobo, cited by Kristian Myntti, The Beneficiaries of Autonomy Arrangements - With Special Reference to Indigenous Peoples in General and the Sami in Finland in Particular, in: Markku Suksi (ed.), Autonomy: Applications and Implications, 1st ed., Kluwer Law International, The Hague / London / Boston (1998), pp. 277-294, at p. 284.

identification (which would be the case if the state would determine who is indigenous, regulating groups, individuals or both) but it is truly a form of self-identification as well because by identifying an individual as indigenous, the indigenous community recognizes the individual as one of their own. This element, the recognition of indigenous by the indigenous community, therefore is necessary in order to protect the rights of the community but laos serves to shape and establish the identity not only of the individual but also of the community. In so far the community also says something about itself as a collective when it makes a decision on the indigenousness of individuals. The state does not get to make this decision but has to respect Article 27 ICCPR. It can, and has to, establish the legal framework necessary for the protection of human rights and the rule of law within which such a decision is made by the indigenous people. The decision itself, however, can only be taken by the indigenous people.

When it comes to the Sámi people in Finland, the case law of the Human Rights Committee provides clear guidance. The key precedent is not Lovelace but Kitok. The decision to let non-Sámi fish in the rivers of Sápmi and herd reindeer across the north of the country has created the fundament on which the question of membership has to be decided: it is up to the Sámi people to decide who is Sámi. Even if a person who is of Sámi descent and who has connections to Sámi culture is denied the legal status of being a Sámi individual, it does not automatically mean a violation of Article 27 ICCPR because of these wide permissions which mean that participation in Sámi cultural activities such as reindeer herding[58] is not dependent on any kind of legal status. This also allows Sámi from outside Finland to enjoy Sámi culture in Finland without requiring any formal recognition as Sámi and appears to be appropriate for an indigenous people the homeland of which is governed by several countries. For individuals who consider themselves Sámi but who are not recognized as Sámi by the community the easy access to key elements of Sámi culture means that they will not be likely to be able to rely on Article 27 ICCPR in order to pursue their goals.

The current level of access enjoyed by individuals who are not legally recognized as Sámi under Finnish law effectively means that access to Sámi culture without recognition as Sámi already is sufficient to ensure compliance with Article 27 ICCPR and that there is no right to legal recognition as Sámi against the will of the Sámi collective in Finland (with the aforementioned caveat that any decision by the indigenous people in this regard has to pass the test outlined in Lovelace). To the contrary, the rights of the Sámi people as a whole under Article 27 ICCPR would be violated, would the state make the decision as to who is Sámi within the meaning of Finnish law.

58. On Sámi reindeer herding dee e.g. Peter Koch / Julia Miggelbrink, Being in the Frontline of a Sámi Culture and a Private Business: Cross-Border Reindeer Herding in Northern Norway and Sweden, in: 15 Nomadic Peoples (2011), pp. 1114-143; Stefan Kirchner, The Reindeer Herding Right in Norway and Sweden as a Protected Right under the European Convention on Human Rights, in: Doug Hodgson (ed.), International Human Rights and Justice, 1st ed., Nova Science Publishers, Hauppauge, New York (2016), forthcoming.

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