

4-28-2004

Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights

Martin Scheinin

Follow this and additional works at: <http://ir.lib.uwo.ca/aprci>



Part of the [Indian and Aboriginal Law Commons](#)

Citation of this paper:

Scheinin, Martin, "Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights" (2004).
Aboriginal Policy Research Consortium International (APRCi). Paper 195.
<http://ir.lib.uwo.ca/aprci/195>

Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights

By Martin Scheinin

Torkel Oppsahls minneseminar April 28 2004
Norwegian Centre for Human Rights
University of Oslo

1. INTRODUCTION

This paper presents the evolving understanding of indigenous peoples' land rights under the International Covenant on Civil and Political Rights (ICCPR), as reflected in the practice of the Human Rights Committee (HRC), the monitoring body established under the ICCPR. The discussion is based on cases decided under the Optional Protocol to the Covenant, on the Committee's general comments and on the Committee's consideration of periodic reports by States parties. As to the points of entry to the discussion on land rights, two provisions of the ICCPR are identified: the right of all peoples to self-determination (Article 1) and the protection afforded, under the notions of 'culture' and 'minority' in Article 27, to indigenous peoples' rights related to lands and resources.

Somewhat paradoxically, the ICCPR which is a human rights treaty with neither a property clause nor a land rights clause – nor, to that matter, any explicit reference to 'indigenouness', has become one of the main tools in positive human rights treaty law for indigenous peoples' land rights claims.

The relevant provisions of the ICCPR read as follows:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

As is noted, neither one of these provisions includes the notion of indigenouness, which fact raises the question whether indigenous groups constitute 'minorities' under article 27 or 'peoples' under article 1. On the basis of the practice of the Human Rights Committee

the answer can be summarized as follows: Groups identifying themselves as indigenous peoples generally fall under the protection of article 27 as 'minorities'. In addition, at least some of them constitute 'peoples' for the purposes of article 1 and are beneficiaries of the right of self-determination. Hence, the ICCPR does *not* give support to a position according to which indigenous peoples are a specific category between minorities and peoples, not entitled to the right of self-determination. In the light of the practice of the Human Rights Committee, it is asserted that indigenous groups that are in a 'minority situation', i.e. subject to a greater or lesser degree of dispossession or subordination by another now dominant group, are entitled to protection as minorities under ICCPR article 27. At the same time, those of these groups that are ethnically, linguistically, geographically, historically and politically – all things considered – sufficiently distinct from the dominant population to qualify as 'peoples' under public international law, are entitled to the right of self-determination under ICCPR article 1. In the same breath, it must however be emphasized that in most cases the ultimate form of exercising the right of self-determination, unilateral secession, is not available to indigenous peoples. For this reason, they usually have to satisfy themselves with other arrangements that allow for their exercise of the right of self-determination, including autonomy and land management regimes based on the role of freely chosen political structures of the indigenous people itself.

2. INDIGENOUS PEOPLES' LAND RIGHTS UNDER ICCPR ARTICLE 27

The ICCPR is the only universally applicable human rights treaty that includes a specific provision on the rights of minorities, or to be more exact, on the rights of *members* of minorities.¹ Here the Covenant also differs from the Universal Declaration of Human Rights which does not include a clause on minorities, due to its emphasis on the universality of human rights but also the partly negative experiences of the minority protection arrangements under the League of Nations.

Article 27 is a rather modest provision in that it primarily addresses the negative obligation of states not to *deny* members of minorities the right to enjoy their culture, to profess and practice their religion or to use their own language. In legal scholarship and in the practice of the Human Rights Committee, however, also positive obligations have been derived from the provision. For instance, the Committee's General Comment No. 23,² adopted in 1994, explicitly refers to such a dimension in its paragraph 6.1:

'Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a 'right' and requires that it shall not be denied.

¹ However, see article 30 of the International Convention of the Rights of the Child.

² HRC General Comment No. 23 (50), reproduced in UN doc. HRI/GEN/1/Rev.5, pp. 147–150.

Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.'

Already the wording of article 27 implies that although protection is afforded to the individual members of minorities, the substance of minority rights entails a collective dimension: they are to be enjoyed 'in community with other members of the group'. In its general comment the Committee uses this collective dimension as the starting-point for its reasoning in favour of positive or affirmative measures of protection: 'as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria'.³

Article 27 of the Covenant represents a broad understanding of minorities and minority rights, when compared to some other instruments that use the notion of 'national minorities' and may limit themselves to protecting well-established groups that have a long history in the country concerned and whose members must be citizens of the state. The Covenant speaks of 'ethnic, religious or linguistic minorities' and applies even to groups that are recent or even temporary in the country in question.⁴ The Committee has also emphasized that the protection of article 27 does not depend on any formal recognition by the state of the existence of a minority but is, rather, an objective fact.⁵

Although article 27 does not employ the notion of 'indigenous peoples', much of the case law developed under the provision has been related to claims by such groups. In General Comment No. 23 the Committee emphasized the applicability of article 27 in respect of indigenous peoples.⁶ In particular, the notion of 'culture' has been interpreted as affording protection to the nature-based way of life, land rights and economy of indigenous peoples. In the terms of paragraph 7 of the general comment:

'With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.'

³ *Idem*, paragraph 6.2.

⁴ *Idem*, paras 5.1 and 5.2.

⁵ *Idem*, para. 5.2.

⁶ *Idem*, paras. 3.2 and 7.

Turning now to the case-law by the Human Rights Committee under the Optional Protocol, the case of *Lovelace v. Canada*⁷ focuses on an individual dimension of article 27, namely the right of the individual not to be denied membership in an indigenous group with which she wishes to identify herself, and into which she belongs according to some objective criteria of, for example, ethnicity. In the particular case, the Committee found a violation of article 27 due to the permanent exclusion of the female author from her aboriginal community after marrying an outsider. The exclusion resulted from a rule enacted by the State Party in the form of federal legislation and not applicable to male persons who married an outsider. In the specific circumstances of the case the Committee's conclusion was formulated as follows:

'17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does 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. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.'

Another case related to the same dimension of article 27 is *Kitok v. Sweden*.⁸ Although Mr Kitok had, because of his absence from his local community, lost full membership in the Sami village and consequently full reindeer herding rights, he was not prevented from moving back to the community and from participating in the reindeer herding activities which are constitutive for the Sami culture. In the circumstances, the Committee considered that there was no violation of article 27. However, the Committee expressed its concern over the operation of Swedish legislation, and emphasized the need to apply (also) objective criteria in the determination of whether an individual who wishes to identify himself with the group is recognized as a member.⁹

Through its reference to reindeer herding as an important element of the indigenous culture of the Sami, the *Kitok* case illustrates another important dimension of article 27, the recognition of traditional or otherwise typical economic activities as 'culture', in particular in regard to indigenous peoples.¹⁰ This dimension was developed in the case

⁷ *Sandra Lovelace v. Canada* (Communication No. 24/1977), Views adopted 30 July 1981, Report of the Human Rights Committee, GAOR, Thirty-sixth session, Suppl. No. 40 (A/36/40), pp. 166-175.

⁸ *Ivan Kitok v. Sweden* (Communication No. 197/1985), Views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third Session, Suppl. No. 40 (A/43/40), pp. 221-230.

⁹ See para. 9.7 of the Committee's Views.

¹⁰ See paras. 4.3 and 9.2 of the Committee's Views.

Lubicon Lake Band v. Canada,¹¹ in which a violation of article 27 was established because ‘historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band’.¹² The factual background of the case related to the exploitation of oil, gas and timber resources in areas traditionally used by the Band for hunting and fishing. Over a long period of time the cumulative effect of these forms of competing use of land and resources had effectively destroyed the resource basis of traditional hunting and fishing for the Lubicon Band.

Much of the Committee's subsequent case law under article 27 has been related to this dimension of article 27, the link between the notion of 'culture' in the treaty provision and traditional forms of indigenous peoples' economic life on their historical lands. The case *Länsman v. Finland No. 1*¹³ was related to the harmful effects of a stone quarry in relation to reindeer herding activities of the indigenous Sami. Although no violation of article 27 was found, the Committee established several general principles for the interpretation of article 27. It emphasized that article 27 does not protect only traditional means of livelihood but even their adaptation to modern times.¹⁴ As to what kind of interference with a minority culture constitutes ‘denial’ in the sense of article 27, the Committee developed the combined test of meaningful consultation of the group¹⁵ and the sustainability of the indigenous or minority economy.¹⁶

The Committee's Views in the cases of *Länsman v. Finland No. 2*¹⁷ related to governmental logging activities in the reindeer herding lands of the same Sami community and *Apirana Mahuika et al. v. New Zealand*¹⁸ build on and develop the same

¹¹ *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada* (Communication 167/1984), Views adopted 26 March 1990, Report of the Human Rights Committee, GAOR, Thirty-eighth session, Suppl. No. 40 (A/38/40), pp. 1-30.

¹² Paragraph 33 of the Committee's Views.

¹³ *Ilmari Länsman et al. v. Finland* (Communication 511/1992), Views adopted: 26 October 1994, Report of the Human Rights Committee, Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40), pp. 66–76.

¹⁴ Paragraph 9.3 of the Committee's Views: 'The right to enjoy one's culture cannot be determined in abstracto but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore, that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant.'

¹⁵ See para. 9.6 of the Committee's Views.

¹⁶ See para. 9.8 of the Committee's Views: 'With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry.'

¹⁷ *Jouni E. Länsman et al. v. Finland* (Communication No. 671/1995), Views adopted 30 October 1996, Report of the Human Rights Committee, Vol. II, UN doc. A/52/40 (Vol. II), pp. 191-204. See, in particular, paragraphs 10.4 to 10.7.

¹⁸ *Apirana Mahuika et al. v. New Zealand* (Communication No. 547/1993), Views adopted 27 October 2000, Report of the Human Rights Committee, Vol. II, UN doc. A/56/40 (Vol. II), pp. 11–29. See, in particular, paragraphs 9.4 to 9.9.

principles.

Still today, the *Lubicon Band* case remains as the sole one where the Committee has found a violation of article 27 because of competing use of land and resources interfering with the economy and life of the indigenous community. The case of *Äärelä and Näkkäljärvi v. Finland*¹⁹ can be seen as a response to this problem and as a shift in the litigation strategy of the Finnish Sami. The case itself was very similar to *Länsman No. 2*, relating to government logging in the reindeer herding lands of the herdsman's cooperative in which the two authors were members. Although the authors based their case before domestic courts on ICCPR article 27 and comparable provisions of domestic law, they also addressed the Supreme Court of Finland and later the Committee with their misgivings of how they had been treated by the Finnish courts, claiming a violation of the fair trial clause in ICCPR article 14.

After establishing a violation of article 14 in two respects, the Committee then stated that considers that it did not have sufficient information in order to be able to draw independent conclusions on the factual importance of the lands in question to reindeer husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Hence, the Committee was 'unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant'.²⁰ However, when addressing the authors' right to an effective remedy for the violations of fair trial they had suffered, the Committee called for a reconsideration of the article 27 claim on the domestic level:

'[T]he Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims.'²¹ The implementation of this part of the Committee's Views will most likely be discussed when the HRC later this year considers the periodic report by Finland.

Compared to certain other treaty regimes, notably ILO Convention No. 169, the weakness of ICCPR Article 27 as a basis for indigenous land rights lies in the absence of any reference to the right of property in Article 27 or elsewhere in the ICCPR. For purposes of compliance with Article 27, it is sufficient to secure the use of indigenous lands so that the combined test of effective participation by the indigenous group and the sustainability of its economic activities is secured. Article 27 would give support to

¹⁹ *Anni Äärelä and Jouni Näkkäljärvi v. Finland* (Communication No. 779/1997), Views adopted 24 October 2001, Report of the Human Rights Committee, Vol. II, UN doc. A/57/40 (Vol. II), pp. 117-130.

²⁰ *Idem*, paragraph 7.6.

²¹ *Idem*, paragraph 8.2.

indigenous title to land only in cases where it is proven that no other arrangement will meet this test. Hence, it was in my view correct that the Norwegian Supreme Court referred in the *Svartskog* case²² to the non-incorporated ILO Convention No. 169 as a subsidiary source of law in support of its conclusion of the existence of a collective title to traditional Sami lands, instead of basing itself on Article 27 of the duly incorporated ICCPR and the priority clause in Section 3 of the Human Rights Act (*Menneskerettighetsloven*). The latter line of argument would result in the recognition of effective Sami control of the lands, to secure the continued well-being of their way of life, rather than in affording title to land.

3. THE RIGHT OF SELF-DETERMINATION AND INDIGENOUS LAND RIGHTS

Moving now to the question of the right of self-determination as a basis of indigenous land rights and having just referred to ILO Convention No. 169, it needs to be clarified that the fact that this convention does not include a clause on the right of self-determination does not mean that any indigenous peoples, or the Sami in particular, would not qualify as beneficiaries of that right. Just as the absence of the right of property in the ICCPR does not exclude the possibility of indigenous peoples' claims on land title being successful on other legal grounds such as Article 14 of the ILO Convention, the absence of a self-determination clause from the ILO Convention does not prevent indigenous peoples from raising the banner of self-determination on the basis of other treaties, such as the twin Covenants of 1966. Article 1, paragraph 3, of ILO Convention No. 169 should be taken as meaning what it says, namely that the use of the term 'peoples' in that Convention does not have 'any implications' as regards the rights which may attach to the term 'peoples' under public international law. Just as the reference to 'peoples' in the ILO Convention does not have positive implications in respect of turning into peoples groups that otherwise would fall short of the distinctiveness required under international law, the same reference does not have the negative implication of denying the status of a people to a group that irrespective of the ILO Convention qualifies as a people under public international law. The reason for Article 1, paragraph 3, in the ILO Convention is obvious: the broad and inclusive criteria for indigenous and tribal peoples in the preceding parts of Article 1, resulting in that the Convention is applicable in respect of a number of minorities and groups that would *not* qualify as peoples under public international law. Nevertheless, within that broad scope of application of the ILO Convention there is a smaller group of 'indigenous peoples' that do qualify as 'peoples' also under international law.

²² Rt. 2001 s. 1229.

The case of *Mahuika et al. v. New Zealand* mentioned in the previous section of this paper is one of the instances where the Human Rights Committee has recognized a link between article 27 and article 1 through the interpretive effect of the right of self-determination when addressing the application of article 27 in a case brought by indigenous authors.¹ This dimension of interdependence between articles 1 and 27 was present already in the *Lubicon Lake Band* case and in the combined test of sustainability and participation developed in *Länsman No. 1*. But it was only in *Mahuika* that the Committee formally recognized the relevance of article 1 in addressing article 27 claims. This is why a presentation of the position and substance of the right of self-determination in the Covenant needs to be addressed in a historical perspective in order to understand to what extent indigenous peoples are entitled to that right.

In addition to a wide range of individual human rights the ICCPR affords protection to the right of ‘all peoples’ to self-determination (article 1). The provision which is identical to article 1 in the Covenant on Economic, Social and Cultural Rights, comprises of three paragraphs that relate to the various dimensions of self-determination. Paragraph 1 proclaims the right of self-determination and its main dimensions: all peoples’ right ‘to freely determine their political status’ (*political dimension*) and to pursue their ‘economic, social and cultural development’ (*resource dimension*). The political dimension, in turn, includes an external aspect of sovereignty and an internal aspect of governance which in turn can be linked to article 25 that requires *democratic* governance. This link has on occasion been emphasized by the Committee in its Concluding Observations.²

As already mentioned earlier in this paper, a people’s right to self-determination does not automatically entail a right of unilateral secession (statehood) for every group that qualifies as a distinct people. The right of secession is recognized only under specific conditions, for instance as was done by the Supreme Court of Canada in the *Quebec Secession Case*:

‘In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are

¹ *Mahuika* (footnote 18, *supra*), paragraph 9.2: ‘Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.’

² For example: ‘20. The Committee notes with concern that the Congolese people have been unable, owing to the postponement of general elections, to exercise their right to self-determination in accordance with article 1 of the Covenant and that Congolese citizens have been deprived of the opportunity to take part in the conduct of public affairs in accordance with article 25 of the Covenant’. Concluding Observations on the Republic of the Congo (2000), UN doc. CCPR/C/ 79/Add.118.

entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.³

In the context of the case it is clear that by 'external self-determination' the Supreme Court of Canada was referring to the possible unilateral secession by the province of Quebec from the union of Canada. It should, however, be emphasized that there might be other 'external' forms of self-determination that are not subject to the very demanding conditions international law attaches to secession, for instance the right to represent internationally an indigenous people in relevant international negotiations or conferences.⁴

Paragraph 2 of ICCPR article 1 elaborates further the resource dimension of self-determination through proclaiming the right of all peoples to dispose of their natural wealth and resources. This clause and especially its last sentence according to which a people may not be deprived of its own means of subsistence has been relied in support of land rights by many groups that proclaim themselves as distinctive indigenous peoples in countries where other ethnic groups, typically of European descent, are in a dominant position.

Paragraph 3 of article 1 relates to a further dimension of self-determination, namely the collective responsibility of States Parties to promote the realization of self-determination elsewhere than within their own territory. The Human Rights Committee has relied on this *solidarity dimension* of the right of self-determination in the reporting procedure under article 40, through questions on the States Parties' measures to promote the self-determination of the Palestinian people and in South Africa.⁵

In 1984, the Human Rights Committee adopted a general comment on article 1.⁶ Due to its date of adoption, the general comment does not reflect later developments in the Committee's approach to article 1 under the reporting procedure and the Optional Protocol.

The word 'people' is not defined in article 1 or elsewhere in the Covenant. Hence, the Covenant leaves room for different interpretations as to whether the whole population of a state party constitutes 'a people' in the meaning of article 1, or whether several distinct peoples exist in at least some of the States Parties to the Covenant. The Committee's pronouncements in relatively recent Concluding Observations on reports by countries with indigenous peoples reflect an understanding that at least certain

³ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paragraph 128.

⁴ For instance, section 6 of the Sami Parliament Act of Finland (Act No. 974 of 1995) recognizes this external form of self-determination to the Sami, to be exercised by the elected Sami Parliament.

⁵ See, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: N. P. Engel, 1993), p. 23.

⁶ HRC General Comment No. 12 (21), reproduced in UN doc. HRI/GEN/1/Rev.5, pp. 121–122.

indigenous groups qualify as 'peoples' under article 1. As this approach was first made explicit in the Committee's concluding observations on Canada, a quotation is justified:

'The Committee notes that, as the State party acknowledged, the situation of the aboriginal peoples remains "the most pressing human rights issue facing Canadians". In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.'⁷

It is to be noted that the recognition of the existence of more than one 'people' within the territory of the country and the enjoyment by them of the right of self-determination (albeit not of its extreme manifestation, secession), had been expressed by the highest judicial authority of the country concerned, in the *Quebec Secession Case* decided in 1998. The Supreme Court of Canada stated, *inter alia*:

'It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.'⁸

Although the applicability of article 1 on self-determination to indigenous peoples was first recognized by the Committee when dealing with the report by Canada when the country's own Supreme Court had first affirmed that several 'peoples' may exist within

⁷ Concluding Observations on Canada, paragraph 8. UN doc. CCPR/C/79/Add.105 (1999).

⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paragraph 124. In para. 139 of the opinion the Court refers to the importance of the rights and concerns of aboriginal peoples in the event of a unilateral secession by the province of Quebec, with an explicit reference to the issue of 'defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples'. However, as the Court came to the conclusion that the hypothetical right of self-determination of Quebec could not carry as far as to unilateral secession, it was 'unnecessary to explore further the concerns of the aboriginal peoples'.

one state, the Committee has followed the same approach also in respect of other countries with distinct indigenous peoples within their boundaries. Explicit references to either article 1 or to the notion of self-determination have been made in the Committee's concluding observations on Mexico,⁹ Norway,¹⁰ Australia,¹¹ Denmark¹² and Sweden.¹³ As in the case of Canada, paragraph 2 of article 1, i.e. the resource dimension of self-determination has received particular emphasis in the context of indigenous peoples. For instance, in its concluding observations on Australia, the Committee stressed that the State party 'should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources'. The Committee's concluding observations on Norway and Sweden have made it clear that the Human Rights Committee recognizes the Sami as a 'people' under ICCPR article 1, i.e. as a beneficiary of the right of self-determination.

Although it is nowadays clear that many indigenous peoples qualify as beneficiaries of the right of self-determination under ICCPR article 1 there still exist some confusion in the matter, due to the fact that article 1 is *procedurally* in a different position than other human rights affirmed in the Covenant. While article 1 is covered by the mandatory reporting obligation of all States parties under article 40, as well as under the (never utilized) inter-State complaint procedure under article 41, the Optional Protocol to the ICCPR, allowing for individual complaints, excludes cases directly under article 1 of the Covenant due to the narrow formulation of the so-called victim requirement in article 1 of the Optional Protocol. According to that provision, the Committee may consider 'communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant'. While the right of self-determination (ICCPR article 1) falls under the notion of 'any of the rights set forth in the Covenant', it is a truly collective right proclaimed to 'all peoples', and individuals cannot, in the interpretation of the Committee, claim to be individually affected as victims of a violation of that right.

This approach was taken in the *Lubicon Lake Band* case under which the Band's original claim under article 1 was declared inadmissible with the following reasoning in 1987:

⁹ Concluding Observations on Mexico, UN doc. CCPR/C/79/Add.109 (1999).

¹⁰ Concluding Observations on Norway, UN doc. CCPR/C/79/Add.112 (1999).

¹¹ Concluding Observations on Australia, UN doc. CCPR/CO/69/AUS (2000).

¹² Concluding Observations on Denmark, UN doc. CCPR/CO/70/DNK (2000).

¹³ Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002), para. 15: "The Committee is concerned at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the indigenous Sami people, such as projects in the fields of hydroelectricity, mining and forestry, as well as the privatization of land (arts. 1, 25 and 27 of the Covenant). The State party should take steps to involve the Sami by giving them greater influence in decision-making affecting their natural environment and their means of subsistence."

'13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.¹⁴

The Committee's Views in the same case, adopted in 1990, follow this approach as it is quite clear that article 1 was of relevance in the Committee's argumentation on other alleged violations of the Covenant. Before reaching its conclusion that article 27 had been violated the Committee stated: 'Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27'.¹⁵

Between *Lubicon* and *Mahuika* there have been cases in which the Committee's approach of article 1 not being subject to the Optional Protocol procedure was expressed in more straightforward terms. These cases include *A. D. v. Canada* and *Kitok v. Sweden*.¹⁶ However, in its recent case law the Committee has returned to the approach reflected in *Lubicon*, now even explicitly recognizing that although article 1 cannot itself be the basis for a claim by an individual the right of self-determination may affect the interpretation of other provisions of the Covenant, including the right of members of a minority to enjoy their own culture (article 27). The same approach as in *Mahuika* was followed in the case of *Diergaardt et al. v. Namibia*.¹⁷

¹⁴ *Lubicon Lake Band v. Canada* (footnote 11, *supra*).

¹⁵ *Idem*, para. 32.2 of the Committee's Views.

¹⁶ *A.D. v. Canada* (Communication No. 78/1980), Views adopted 20 July 1984, Report of the Human Rights Committee, GAOR, Thirty-ninth Session, Suppl. No. 40 (A/39/40), pp. 200–204. *Ivan Kitok v. Sweden* (Communication No. 197/1985), Views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third Session, Suppl. No. 40 (A/43/40), pp. 221–241.

¹⁷ 'Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27'. Para. 10.3 in *J.G.A. Diergaardt et al. v. Namibia* (Communication

Further light on the issue of interdependence between the right of self-determination and other provisions of the Covenant is shed by the case of *Gillot et al. v. France*, decided in 2002.¹⁸ The complaint was related to restrictions in the right to participate in referendums in New Caledonia, allegedly in violation of article 25 of the Covenant (right of public participation). Interpreting article 25 in the light of article 1, the Committee considered that in the context of referendums arranged in a process of decolonization and self-determination, it was legitimate to limit participation to persons with sufficiently close ties with the territory whose future was being decided. As the residence requirements for participation in the referendums in question were neither disproportionate nor discriminatory, the Committee concluded that there was no violation of article 25.

The novelty in the interpretive effect of article 1 in *Gillot* was that the complaint was not brought by the indigenous or minority group but by certain citizens of the State party who considered their rights violated by their exclusion from the self-determination process. Hence, the right of self-determination was invoked by the State party¹⁹ and then applied by the Committee as justification for an exclusion of newcomers from referendums. The key passages in the Committee's disposition of the case read:

'13.4 Although the Committee does not have the competence under the Optional Protocol to consider a communication alleging violation of the right to self-determination protected in article 1 of the Covenant, it may interpret article 1, when this is relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee is of the view, therefore, that, in this case, it may take article 1 into account in interpretation of article 25 of the Covenant.

...

13.16 The Committee recalls that, in the present case, article 25 of the Covenant must be considered in conjunction with article 1. It therefore considers that the criteria established are reasonable to the extent that they are applied strictly and solely to ballots held in the framework of a self-determination process. Such criteria, therefore, can be justified only in relation to article 1 of the Covenant, which the State party does. Without expressing a view on the definition of the concept of "peoples" as referred to in article 1, the Committee considers that, in the present case, it would not be unreasonable to limit participation in local referendums to persons "concerned" by the future of New Caledonia who have proven, sufficiently strong ties to that territory.'

No. 760/1997), Views adopted 25 July 2000, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-fifth Session, Suppl. No. 40 (A/55/40), pp. 140–160.

¹⁸ *Marie-Hélène Gillot et al. v France* (Communication No. 932/2000), Views Adopted 15 July 2002, Report of the Human Rights Committee, Vol. II, GAOR, Fifty-seventh Session, Suppl. No. 40 (A/57/40), pp. 270–293.

¹⁹ See, in particular, paragraphs 8.3, 8.9 and 8.31 of the Committee's Views.

The *Gillot* case is a logical continuation of the Committee's approach built through the reporting procedure under article 40 of the ICCPR and the recognition of the interpretive effect of article 1 also in cases under the Optional Protocol. Many of the indigenous peoples of the world qualify as 'peoples' for the purposes of ICCPR article 1 and are, hence, entitled to the right of self-determination. As is reflected in the practice of the Committee, the resource dimension of is of particular relevance for indigenous peoples' claims under the right of self-determination and makes the right of self-determination an important vehicle for indigenous peoples' claims on land rights.

4. THE ICCPR, THE FINNMARK BILL AND THE LAND RIGHTS OF THE SAMI

In their expert review on the Finnmark Bill, professors Hans Petter Graver and Geir Ulfstein gave main attention to ILO Convention No. 169. This is fully justified, and the present author agrees with the two experts that the specific land rights provisions in the ILO Convention should have main attention when designing a solution to Sami land rights in Norway, a country that is a party to the ILO Convention.

However, on the basis of the overview presented above in this paper it is possible to say more than Graver and Ulfstein do on the compatibility of the Finnmark Bill with the ICCPR. After referring to the concluding observations of the Human Rights Committee in respect of Canada and Norway, Graver and Ulfstein conclude that the Committee has been approaching article 1 in a cautious manner and that it is therefore not possible to make precise conclusions on the requirements of article 1. This conclusion is fair but does not exclude another expert going deeper into the material and trying to express a more definite conclusion. When expressing an opinion the present author who is both an academic and a member of the Human Rights Committee, of course, draws upon existing practice of the Committee, instead of trying to rush to advance determination of whether the Finnmark Act would violate internationally recognized rights of the Sami. Being a member of the Human Rights Committee, I have always avoided making any advance comment as to whether something is or is not a human rights violation under the Covenant. However, I feel quite free to comment, on the abstract level and in particular in relation to pending Bills that are subject to public discussion prior to their adoption, as to whether a law appears to be compatible or incompatible with the Covenant. This I do frequently in Finland, and I feel no hesitation to do it in Norway, either.

It is my view that in the light of existing practice by the Human Rights Committee the Finnmark Bill is *not* in accordance with articles 1 and 27 of the ICCPR, the two provisions taken together, if the Bill were to result, despite the opposition of the Sami, in the establishment of a new decision-making structure (*Finnmarkseidendommen*)

designed by the state through legislation and not by the Sami, aiming to co-opt the Sami in a mixed decision-making structure where they would not have a decisive role, and leaving it largely to that decision-making structure to protect and promote the Sami culture and economy. Such a parallel structure would, if put in place in the situation just described, would unavoidably compete with the decision-making structures of the Sami themselves. The right of an indigenous group that qualifies as a people under article 1 to control their traditional lands and the natural resources on those lands is an important dimension of self-determination. Self-determination also entails a people's right to design its own decision-making structures. Hence, the role of the elected Sami Parliament and other institutions created by the Sami themselves, in controlling the use of lands and resources as the material basis for Sami culture and means of livelihood is crucial for securing compliance with ICCPR article 1. The same goes for compliance with article 27 where effective participation by the indigenous group and the sustainability of the indigenous economy are the decisive criteria, instead of how the issue of ownership of lands is settled.

Let me remind what the Human Rights Committee has stated in its concluding observations on Norway and Sweden. In the case of Norway, the Committee explicitly referred to articles 1 and 27 together when taking positive note of the strengthening of the Sami Parliament and the then (1999) visible trend to ensure full consultation with the Sami in matters affecting their traditional means of livelihood.²⁰ When expressing its concerns in the same document, the Committee requested Norway “to report on the Sami people's right to self-determination under article 1 of the Covenant, including paragraph 2 of that article”.²¹

Similarly, in its concluding observations on Sweden the Committee expressed concern at the limited extent to which the Sami Parliament can have a significant role in the decision-making process on issues affecting the traditional lands and economic activities of the Sami, and explicitly referred to articles 1, 25 and 27 together. The Committee recommended that Sweden should give the Sami “greater influence in decision-making affecting their natural environment and their means of subsistence.”²² To me, it is surprising that the discussion in Norway gives so little attention to the right of self-determination in the discussion on the Finnmark Bill, despite of the pronouncements by the Human Rights Committee that have explicitly emphasized the importance of the powers of the Sami Parliament in assessing compliance with the Covenant.

Further, under both article 1 and article 27 the Human Rights Committee has expressed its support to regimes where certain rights related to a traditional indigenous territory

²⁰ HRC Concluding Observations on Norway, CCPR/C/79/Add.112, Paragraph 10.

²¹ Ibid, paragraph 17.

²² Concluding Observations on Sweden, UN doc. CCPR/CO/74/SWE (2002), para. 15:

are reserved to the members of the group. In its General Comment No. 23 on article 27, the Committee stated that in the case of indigenous peoples the right of the members of the group to enjoy their culture may entail reserving lands to them exclusively.²³ Such exclusive land rights will amount to permissible positive measures under article 27 as long as they are based on reasonable and objective criteria and are aimed at correcting conditions which prevent or impair the enjoyment of article 27 rights by the group.²⁴

Similarly, in the *Gillot* case that includes an interpretive reference to article 1, the Committee found permissible under article 25 that 'newcomers' were excluded from the decision-making on the future status and self-determination of New Caledonia. In its Concluding Observations on New Zealand, in turn, the Committee congratulated the state party for progress in the protection and promotion of Maori land rights, and specifically gave its support to providing compensation to affected third parties in order to facilitate this process:

"The approach of providing compensation from public funds helps to avoid tensions that might otherwise hamper the recognition of indigenous land and resource rights."²⁵

It is the position of the present author that in order to comply with ICCPR articles 1 and 27, taken together, any new arrangement for land ownership and management in Finnmark must be accepted by the Sami. As to what would constitute a proper form of such acceptance, reference is made to the *Mahuika* case in which the Human Rights Committee paid careful attention to the specific modalities of a broad nation-wide consultation process through which broad Maori support to a comprehensive fisheries settlement was obtained.

²³ HRC General Comment No. 23 (50), paragraph 7.

²⁴ *Idem*, paragraph 6.2.

²⁵ HRC Concluding Observations on New Zealand, CCPR/CO/75/NZL (2002), paragraph 7.