

A reply to calls for an extension of the definition of Sámi in Finland

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Abstract: In Finland the legal definition of the indigenous Sámi has been debated heatedly for years and more recently it has entered academic circles. Some scholars submit that the current law-based definition in Finland is all too narrow, and argue that there should be more emphasis on self-identification by the individual. Further claims state that the ILO Convention No. 169 identifies the subjects of the Convention, also on an individual level; wherefore it follows from the Convention which individuals in Finland are Sámi. The present article analyses these arguments critically and establishes certain legal parameters that the discussion on Sámi definition needs to follow in order to comply with international law, and especially indigenous peoples' right to self-determination.

Key words: Sámi rights, Sámi definition, ILO Convention No. 169, indigenous peoples' self-determination, Sámi in Finland.

1. Introduction¹

For some time a number of legal and other scholars in Finland have heatedly argued for a reformulation of the Sámi definition in Finland. These scholars submit that the present definition by which individuals qualify as Sámi in Finland, i.e. the Sámi definition found in the Sámi Parliament Act Section 3, is far too narrow.² The claim is that the present Sámi definition excludes a large number of individuals in Finland that are in fact of Sámi origin, but are nonetheless presently not recognized as such. These scholars conclude their line of argument by calling for the introduction of a new definition by which individuals can qualify as Sámi in Finland. This definition, they maintain, should rely less on the language criterion presently employed by the Finnish Sámi Parliament Act (SPA) Section 3. Rather, it is asserted, a more relevant definition of Sámi should focus more on whether an individual self-identifies as Sámi, and is engaged in traditional Sámi livelihoods such as reindeer herding, hunting and fishing. Some scholars further argue that one can read out of the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (ILO 169) who are the beneficiaries of the rights the Convention sets forth, both peoples and at the individual level. Building on this conclusion, these scholars further maintain that ILO 169 therefore also indirectly defines who is Sámi at the individual level.

In this article we respond to the line of argument presented above. More specifically, we will direct our comments to what Tanja Joona submits in her doctoral dissertation, “The ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach”,³ as well as in her article “The Subjects of the Draft Nordic Saami Convention” published in the anthology *The Proposed Nordic Saami Convention; National and International Dimensions of Indigenous Property Rights*.⁴ In the latter publication one also finds Juha Joona’s article entitled

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1. The authors would like to extend their gratitude to PhD Laura Junka-Aikio and Jur. Dr. Susann Skogvang for their valuable comments on this article.
 2. Regarding the present Sámi definition in the Finnish Sámi Parliament Act, see further Section 2.1, below.
 3. Joona, Tanja, “The ILO Convention No. 169 in a Nordic Context with Comparative Analysis: An Interdisciplinary Approach”, *Juridica Lapponica* 37, University of Lapland, Rovaniemi 2012.
 4. Joona, Tanja, “The Subjects of the Draft Nordic Saami Convention” in Bankes, Nigel and Koivurova, Timo (eds.) *The Proposed Nordic Saami Convention; National and International Dimensions of Indigenous Property Rights*, Hart Publishing, Oxford and Portland 2013.

“The Draft Nordic Saami Convention and the Indigenous Population in Finland”,⁵ which we will also comment upon.

Tanja Joonas and Juha Joonas works exemplify a broader call for extended Sámi definition in Finland. Our issue is not specifically with Tanja Joonas and Juha Joonas publications, but rather with the line of argument that suggests a broader Sámi definition in Finland in general. Further, our intention is not to claim that the present Sámi definition in Finland cannot, or should not, be scrutinized or perhaps even criticized. Indeed, it is healthy to debate whether the present Sámi definition found in SPA Section 3 is in fact the most relevant. But this debate must be held within certain legal parameters. This article aims to establish some of those.

2. Tanja Joonas and Juha Joonas line of argument

2.1 There are substantially more Sámi in Finland than Finland presently recognizes

Tanja Joonas and Juha Joonas assert that there are a great deal more Sámi individuals in Finland than those officially recognized as such through appearing on the electoral roll of the Sámi parliament.⁶ At present, SPA Section 3 defines a Sámi as follows:

For the purposes of this Act, a Sámi means a person who considers himself as Sámi, provided:

- 1) That he himself or at least one of his parents or grandparents has learnt Sámi as his first language,⁷
- 2) That he is a descendant of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or

5. Joonas, Juha, “The Draft Nordic Saami Convention and the Indigenous Population in Finland” in Bankes, Nigel and Koivurova, Timo (eds.) *The Proposed Nordic Saami Convention; National and International Dimensions of Indigenous Property Rights*, Hart Publishing, Oxford and Portland 2013.

6. Joonas, Tanja, “The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach” and “The Subjects of the Draft Nordic Saami Convention” pp. 255–280, and Joonas, Juha, “The Draft Nordic Saami Convention and the Indigenous Population in Finland” pp. 229–254. In addition, Tanja Joonas asserts that the same is true in Norway and Sweden. In these countries too, there are many more Sámi individuals than the electoral rolls to the respective Sámi parliaments suggest, she posits. In this article, however, we will only focus on Tanja Joonas’s argumentation with regard to Finland.

7. As opposed to three generations in Finland and Sweden, in Norway the language criterion reaches the fourth generation, to applicant’s great grandparents.

- 3) That at least one of his parents has or could have been registered as an elector for an election to the Sámi delegation or the Sámi Parliament.

Tanja Joonas argues that this Sámi definition is much too narrow. She posits that a large group of individuals presently not recognized as Sámi should be acknowledged as such, and should be allowed to enlist on the Sámi parliament's electoral roll. Put simply, Tanja Joonas submits that the excessive emphasis on the language criterion in SPA Section 3 excludes from recognition as Sámi a large group of "Sámi" that live in the "Sámi traditional areas" and are involved in traditional "Sámi livelihoods" such as reindeer herding, hunting and fishing. This group, Tanja Joonas maintains, are excluded from the Sámi community only because their ancestors lost the Sámi language generations ago.⁸ Tanja Joonas does not present any theory in support of her claim. Indeed, she admits that her research is based on the underlying presumption that "there are more existing Sámi than merely the ones marked by ... Finland's Sámi Parliament's electoral roll".⁹

Juha Joonas concurs that there are substantially more Sámi in Finland, both within and south of the Finnish Sámi Homeland area, than the group that is presently acknowledged as Sámi. These Sámi are not recognized as such due to their family having being deprived of the Sámi language generations ago, he argues. Juha Joonas seeks to substantiate this claim by presenting an extensive description over how northern Finland was settled. With this historical account, he aims to demonstrate how the "original" Sámi inhabitants of northern Finland were deprived of the Sámi language, and how the Sámi-speaking population residing within the Sámi Homeland Area¹⁰ today essentially are descendants of Sámi that have immigrated from Norway. He concludes that it follows from this historical background that the definition of who qualifies as a Sámi individual in Finland must be re-evaluated.¹¹

Tanja Joonas too contests the focus on the Sámi Homeland area in Finnish Sámi policy. She argues that – when or if ratified – ILO 169 must geographically-speaking apply also to land areas south of the current Sámi Homeland territory.¹²

8. See e.g. Joonas, Tanja, "The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach", pp. 308–309 and 313.

9. Ibid, p. 58.

10. The Sámi Homeland area is defined by the Finnish Sámi Parliament Act Section 4. The area consists of the municipalities of Enontekiö, Inari and Utsjoki, as well as of the Lappi Reindeer Herding District in the municipality of Sodankylä.

11. See Joonas, Juha, "The Draft Nordic Saami Convention and the Indigenous Population in Finland" pp. 231–245.

12. See Joonas, Tanja, "The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach", p. 58.

2.2 It can be read out of ILO 169 which individuals can claim rights under the Convention

As Section 3.1.2 below elaborates, ILO 169 does not include any formal definition of which individuals can claim rights under the Convention. ILO 169 only defines which groups the Convention applies to. Despite the absence of a formal definition, Tanja Joonas submits that it nonetheless follows from, or at least can be read out of, ILO 169's material provisions which individuals can claim rights under the Convention. As a consequence, her line of argument continues, it also indirectly follows from ILO 169 who qualifies as a Sámi individual in a Finnish context.

More specifically, Tanja Joonas argues that ILO 169 Article 14 on indigenous (and tribal) peoples' land and resource rights identifies the individual beneficiaries of the Convention. Article 14 reads:

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

Tanja Joonas suggests that when ILO 169 prescribes that indigenous (and tribal) peoples' pursuit of subsistence and land based activities results in rights to land, ILO 169 also identifies who can claim rights under the Convention – on an individual level. In essence, she submits that it follows from ILO 169 Article 14 that if a person is engaged in such subsistence and traditional land based activities that Article 14 protects, that person can, based purely on pursuing such land uses, claim all the rights enshrined in the Convention. That person is of indigenous origin, according to her.

Tanja Joonas then turns to the specific situation in Finland. She points to that in Finland, many more individuals and groups of individuals than are today recognized as Sámi engage in "Sámi" land-based traditional and subsistence activities such as reindeer herding, hunting and fishing. Thus, she concludes, ILO 169 identifies these individuals as Sámi as well, wherefore they should be formally recognized as Sámi in Finland.¹³

13. See Joonas, Tanja, "The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach", pp. 166, 192–193 and 277–314.

2.3 Proposed alternate Sámi definition in Finland

Tanja Joonas and Juha Joonas conclude the analysis of the Sámi definition in Finland with a harsh criticism of the current Sámi definition employed by the SPA Section 3. Both infer that the electoral roll of the Sámi parliament does not adequately represent who the Sámi in Finland really are. Juha Joonas asserts that the fact that the Sámi definition in the SPA relies heavily on the language criterion when seeking to objectively define which individuals qualify as Sámi perpetuates injustices towards certain segments of the Sámi society in Finland. As an alternative to the language criterion, which he perceives to be inherently discriminatory, Juha Joonas suggests that the objective criterion should be based on involvement in traditional “Sámi” livelihoods. He submits that Finland should officially define Sámi individuals as persons who (i) were marked in the land register of 1741,¹⁴ (ii) live in the areas of the former Lapp villages, and (iii) practice traditional “Sámi” livelihoods such as reindeer herding, hunting or fishing.¹⁵

In her doctoral dissertation, Tanja Joonas essentially concurs with Juha Joonas and suggests that all persons that live in the Sámi areas and engage in traditional “Sámi” subsistence activities, such as reindeer herding, hunting or fishing, should qualify as Sámi individuals in Finland.¹⁶ In her subsequent article “The Subjects of the Draft Nordic Saami Convention”, Tanja Joonas takes one step further. Here she presents a concrete definition of which individuals should qualify as Sámi, as an alternative to the Sámi definition currently found in the draft Nordic Convention Article 4. Tanja Joonas’s proposed definition of Sámi individuals reads as follows:

The Convention applies to persons residing in Finland, Norway or Sweden who identify themselves as Saami and who:

1. have Saami as their domestic language or have at least one parent or grandparent who has or has had Saami as his or her domestic language, or
2. is a reindeer herder in Finland of Saami origin or a person who has a right to pursue Saami reindeer husbandry in Norway or Sweden, or

14. Lapps were, e.g. in the 17th and 18th centuries, listed in records (“Lapp registers”) maintained by state officials. These records were typically land registers, tax rolls or census lists. See e.g. Hyvärinen, Heikki, “Saamelaisten kulttuurin ja elinkeinojen sääntely” in Kokko, Kai T. (ed.) *Kysymyksiä saamelaisten oikeusasemasta*, Lapin yliopiston oikeustieteellisiä julkaisuja, Sarja B no 30, Rovaniemi 2010 p. 122.

15. See Joonas, Juha, “The Draft Nordic Saami Convention and the Indigenous Population in Finland” pp. 251–252.

16. See Joonas, Tanja “The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach”, pp. 308–309 and 313.

3. is a person of Saami origin who practices another traditional Saami livelihood in Norway, Sweden or Finland, or
4. fulfils the requirements to be eligible to vote in elections to the Saami parliament in Finland, Norway or Sweden, or
5. are children of a person referred to in 1, 2, 3, or 4.¹⁷

3. Comments on Tanja Joonas and Juha Joonas lines of argument

3.1 On international law

3.1.1 Introduction

In this section we respond to Tanja Joonas and Juha Joonas line of argument, as outlined in Section 2 above, from an international legal perspective. We first address Tanja Joonas suggestion that one can read out of ILO 169 which individuals can claim rights under the Convention, and therefore are indigenous. Subsequently, we survey what implications indigenous peoples' rights to a collective cultural identity and to self-determination have for the validity of Tanja Joonas and Juha Joonas assertions.

Section 3.2 then addresses Tanja Joonas and Juha Joonas factual submission that there are substantially more Sámi in Finland than is presently reflected in the electoral roll to the Sámi parliament.

3.1.2 On the claim that ILO 169 identifies which individuals can claim rights under the Convention and hence are indigenous

With regard to the suggestion that one can read out of ILO 169 which individuals can claim rights under the Convention, one can note, as mentioned at the outset, that ILO 169 at least does not contain any formal definition of which *individuals* fall under the scope of the Convention. ILO 169 only identifies which *groups* the Convention applies to. Articles 1.1 and 1.2 define the beneficiaries of the Convention, i.e. indigenous and tribal peoples, in the following manner:

1. This Convention applies to:
 - (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

17. See Joonas, Tanja, "The Subjects of the Draft Nordic Saami Convention" p. 279.

- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.¹⁸

For the present purposes, it is not necessary to further analyse which groups ILO 169 identifies as indigenous (or tribal). Notwithstanding, one can note in passing that ILO 169 Article 1 contains both subjective (self-identification) and objective criteria. What really matters in this context, however, is that Article 1 does not proceed to define which individuals belong to such groups that fall under the Convention. Neither can a formal definition of which individuals can claim rights under the Convention be found elsewhere in ILO 169.

As Section 2.2 above elaborates, Tanja Joona nonetheless submits that one can read out of ILO 169, or more precisely, out of ILO 169 Article 14, which individuals fall under the scope of the Convention. Tanja Joona maintains that from the fact that pursuit of traditional subsistence activities results in indigenous rights to lands and natural resources, it follows that if an individual engages in a subsistence activity common to a particular indigenous people, one is a member of that indigenous people. This line of argument, however, clearly cannot be substantiated. It amounts to placing the cart before the ox.

As mentioned, ILO 169 Article 1 defines the applicability of the Convention in terms of legal subjects. Any analysis of which individuals can claim rights under the Convention *must* therefore start with Article 1. In order to determine whether an *individual* can claim rights under ILO 169, one first has to determine whether the *group* that the individual belongs to qualifies as an indigenous (or tribal) people for the purposes of the Convention. Only when this question has been answered in the affirmative can one turn to the individual level, and ask whether the individual

18. In addition, Article 1.3 provides that “[t]he use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.” This provision was included to underscore that at the time of the adoption of ILO 169, states were not prepared to recognize indigenous peoples as “peoples” proper, for international legal purposes. This limitation, however, is not relevant for the present purposes.

in question belongs to that indigenous (or tribal) people. If so, the individual can claim the individual rights the ILO 169 sets forth.

It is not possible to, as Tanja Joonas does, start the analysis of whom the Convention applies to on an individual level with the material provisions such as Article 14. It is simply erroneous that “it would be reasonable to defend an arrangement where the Convention would apply to peoples descending from the area’s original inhabitants and who maintain a considerable amount of their subsistence via traditional livelihood.”¹⁹ It is irrelevant for the purposes of ILO 169 that an individual pursues subsistence livelihoods common to an indigenous (or tribal) people, if it cannot first be established that that person actually belongs to the group qualifying as indigenous (or tribal) pursuant to Article 1 of the Convention.

ILO 169 itself does not offer any guidance as to who qualify as members of such groups that fall under Article 1. One cannot seek the answer to the question of which individuals can claim rights under ILO 169 in the Convention itself. Consequently, ILO 169 offers no information as to which individuals in Finland are Sámi either.

To illustrate the problem with Tanja Joonas’s line of argument, to mention just one example, a comparison can be made with the right to education. ILO 169 Article 27 proclaims that indigenous (and tribal) children have the right to education. Since all children in Finland have the right to attend school, they should all qualify as Sámi children, if one accepts Tanja Joonas’s line of argument with regard to Article 14. This comparison illustrates how all roads to ILO 169 Article 14 (as well as to all other material provisions in the Convention) must go through Article 1. One must first establish that an individual belongs to a group that qualifies as indigenous (or tribal) under Article 1 before that individual can claim rights under the material provisions contained in ILO 169. If the individual does not belong to such a group, Article 14 simply never comes into play. That an individual engages in activities that ILO 169 addresses, be it subsistence activities, education, health care or any other affair covered by the Convention, does not in itself make that person indigenous, including, in our case, Sámi. Since ILO 169 takes no position on which individuals belong to indigenous (or tribal) peoples, this issue has to be determined on a domestic level, i.e. by indigenous (and tribal) peoples themselves and by national law.

19. See Joonas, Tanja, “The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach”, p. 166.

3.1.3 *The relevance of indigenous peoples' right to a collective cultural identity to the validity of Tanja Joona's and Juha Joona's line of argument*

Tanja Joona aptly cautions that the conventional liberal approach towards law and policy allows privileges to the individual as the primary political and legal subject.²⁰ Conventional liberalism fails to do justice to indigenous peoples and their rights, which tend to be collective in nature. Yet, in her own analysis of ILO 169, it appears that Tanja Joona in fact remains uncritical of the tradition of thought she cautions us about in principle.

Tanja Joona focuses on which individuals can claim rights under the Convention despite the fact that ILO 169 – in keeping with the indigenous rights discourse in general – addresses, above all, indigenous groups and group rights. In doing so, she points out that an individual's right not to be deprived of her or his membership in an indigenous people has a human rights dimension.²¹

It is certainly correct that the right of each individual to her or his cultural identity must be respected. But should a human rights analysis of whether individual persons have the right to membership in an indigenous people be complete, and thus relevant, one must also consider the collective cultural identity of the group the individual claims membership in. The UN Human Rights Committee's (HRC) decisions in the *Kitok Case* provide a useful example here.²² This case concerned a Sámi individual who was seeking to return to a Sámi reindeer herding community to which he had once belonged, but had subsequently left voluntarily. The HRC balanced the interest of the indigenous Sámi reindeer herding community as such on one hand, and that of the individual wishing to return to the group, on the other. The Committee inferred that although membership in the reindeer herding community was important to the individual, he could nonetheless not be granted membership due to the impact it might have on the cultural identity of the group as such. Mentioned in this context can also be *Apirana Mahuika v. New Zealand*. Here too, the HRC found no violation of the individual right to culture, due to the fact that the action under scrutiny was held necessary in order to protect the cultural identity of the indigenous people as such.²³ References can also be made to the HRC's application of the International Covenant on Civil and Political Rights (CCPR) Article 27 in a number of instances, where the Committee has highlighted the need to protect the collective cultural identity of indigenous peoples. The HRC has interpreted CCPR Article 27 to imply that states have a positive obligation to

20. Ibid, pp. 69–72.

21. Ibid, pp. 233 and 308.

22. See *Ivan Kitok v. Sweden*, Comm. No. 197/1985, views adopted 27 July 1988.

23. See *Apirana Mahuika et al v. New Zealand*, Comm. No. 547/1993, views adopted 27 October 2000.

prevent any activity that poses a serious threat to indigenous peoples' cultural identity.²⁴ Similarly, the UN Committee on Economic, Social and Cultural Rights has interpreted the UN Covenant on Economic, Social and Cultural Rights Article 15 to envelop a right of indigenous peoples to have their distinct collective cultural identities respected and protected.²⁵

When Tanja Joonas refrains from considering the effects on the cultural identity of the Sámi as a *group* of an expanded Sámi definition she in fact fails to adopt the human rights approach she is advocating for. This renders her argument incomplete. As indigenous peoples' rights are first and foremost collective in nature, discussions on individuals' right to membership in an indigenous group must always be coupled with a careful analysis of the implications on the group as such.

3.1.4 *The relevance of indigenous peoples' right to self-determination to the validity of Tanja Joonas' and Juha Joonas' line of argument*

Closely associated with indigenous peoples' right to protection of their respective collective cultural identities is the right to self-determination. Any discussions on what constitutes a relevant Sámi definition must be held in the light of this right. A key element of indigenous peoples' right to self-determination is the right to determine the membership of their own group. For instance, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 33.1 proclaims that:

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.²⁶

Consequently, when the Finnish Supreme Administrative Court in four separate rulings of 26 September 2011 overruled the Sámi parliament's decision not to include four applicants on the Sámi parliament's electoral roll, Finland attracted criticism from the United Nations. With regard to the ruling, the UN Committee on the Elimination of Racial Discrimination (CERD Committee) held that

24. See e.g. *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No. 167/1984, views adopted 26 March 1990, *Ilmari Lämsman et al v. Finland*, Comm. No. 511/1992, views adopted 26 October 1994, *Jouni E. Lämsman et al v. Finland* Comm. No. 671/1995, views adopted 30 October 1996, Concluding Observations on Finland, UN Doc. CCPR/C/79/Add. 91, on New Zealand, UN Doc. CCPR/C/75/NZL, on Guatemala, UN Doc. CCPR/CO/72/GTM, and on the Philippines, UN Doc. CCPR/CO/79/PHIL.

25. See General Comment No. 17, paragraphs 2, 7, 10 and 12, and General Comment No. 21, paragraph 36.

26. In addition, UNDRIP Article 8 proclaims that indigenous peoples must not be subject to forced assimilation.

[T]he Committee is concerned that the definition adopted by the Court gives insufficient weight to the Sámi people's rights, recognized in the United Nations Declaration on the Rights of Indigenous Peoples, to self-determination (art. 3), in particular their right to determine their own identity or membership in accordance with their customs and traditions (art. 33), as well as their right not to be subjected to forced assimilation or destruction of their culture (art. 8) (art. 5 of the Convention).²⁷

Thus, the Sámi population in Finland – *as presently understood* – have the right to a decisive say both with regard to the formulation of the Sámi definition, and with regard to the application of that definition. True, the application of this aspect of the Sámi peoples' right to self-determination must reasonably be balanced against the right of the individual. For instance, the Sámi parliament can presumably not “expel” a Sámi individual that clearly belongs to the group. But it is equally clear that international law does not allow for an amended Sámi definition that opens up for large groups of individuals in Finland that has hitherto not been Sámi to all of a sudden qualify as such – against the Sámi's own will.

The right to determine membership of the group applies also on the community level. For instance, recall how in the previously referred to *Kitok Case*,²⁸ the HRC accepted that a person was denied membership in a Sámi reindeer herding community in Sweden because the Committee held that it was necessary to restrict the membership in the group in order to protect the collective welfare of the group as such.

In sum, under the right to self-determination, the Sámi people – as presently understood – has the right to determine the membership of its own group. As member of the CERD Committee Patrick Thornberry emphasizes, an individual's right to belong to a group does not apply to “... *absurd claims of belonging by those without community connection or acceptance*”.²⁹ In this instance, “*community acceptance*” is lacking, as the Sámi themselves do not accept Tanja Joonas' and Juha Joonas' argument that large groups in Finland presently not recognized as Sámi in fact belong to that group. As the article elaborates below, the arguments put

27. See CERD/C/FIN/CO/20–22. The CERD Committee has also in other instances interpreted the UN Convention on the Elimination of Racial Discrimination as embracing a duty on states to respect indigenous peoples' cultural identity. See e.g. CERD General Recommendation No. 23: Indigenous Peoples: 18/08/97.

28. See footnote 20, *ibid*.

29. See Thornberry, Patrick, “Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice” in Allen, Stephen and Xanthaki, Alexandra (eds.) *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Studies in International Law, Vol. 30, Oxford 2011 p. 83.

forward in favor of an expanded Sámi definition may also be considered an “absurd claim” in this light.

3.2 On the claim that there are substantially more Sámi in Finland than recognized as such – the framework for a discussion on the Sámi definition in Finland

3.2.1 *Introduction*

It follows from the above that Tanja Joonas’s and Juha Joonas’s argument that the Sámi definition in Finland is much too narrow and should be broadened substantially, is not supported by law. Notwithstanding, we shall nonetheless offer a few comments also with regard to their factual claim, i.e. that there are several groups of individuals in Finland that are Sámi although at present not recognized as such. In doing so, we shall essentially refrain from presenting arguments on who is Sámi and who is not. Rather, what we will do is to establish certain parameters within which any discussion on who is Sámi must be held. In establishing these parameters, we will demonstrate that the objective criteria put forward by Tanja Joonas and Juha Joonas to be employed in a Sámi definition in Finland cannot be substantiated.

We will thus not address Juha Joonas’s exposé over how northern Finland was settled, or what implications this historic background should have for the decision on who should be regarded as Sámi in Finland. That said, we find it pertinent to point to Pekka Sammallahti’s apt observation that if someone motivates her or his membership in an ethnic group solely with references to ancestors that are no longer with us, then this person is perhaps not a member of any continuously existing ethnic group.³⁰ Clearly, the fact that an individual has one or more ancestors that belonged to an ethnic group generations ago cannot in itself be enough to conclude that that individual is a member of that group today. Otherwise, taking this argument to the extreme, we could all claim status as Africans, since all humans originate from that continent. The suggestion that an individual must have some ties to living Sámi in order to be Sámi her- or himself is worthy of serious consideration.

Following this brief detour, we shall return to Tanja Joonas’s and Juha Joonas’s line of argument.

The fact that they do not present a ‘mathematic formula’ that backs up their position as to who should be regarded as Sámi in Finland is not problematic in itself. Defining which individuals are Sámi is not entirely a legal, or objective, issue. Any

30. See Sammallahti, Pekka, “Saamelaismääritelmästä”, in *AGON* no. 37–38/23.5.2013 p. 26.

definition of who qualifies as Sámi must necessarily involve a certain amount of subjective decision-making. That is at least so, as is the case in the Sámi context, if one bases the decision on who should be regarded as Sámi on cultural characteristics rather than on blood quota and/or genetics. Hence, that Tanja Joonas and Juha Joonas do not present an exact description of which groups in Finland should qualify as Sámi is not in itself a problem for the validity of their argument. Neither is it a concern that they do not present a ‘scientific formula’ to substantiate their claim. But what are problematic are the objective criteria Tanja Joonas and Juha Joonas opt for. Although there are a number of possible objective criteria that can be used to define Sámi individuals, depending on preferences, the objective criteria have to be chosen within certain parameters.

3.2.2 *Any definition of Sámi individuals must include some form of objective criteria*

In the outset it is worth reaffirming that any Sámi definition must include some form of objective criteria. As seen, it is true that an individual’s right to belong to an indigenous people has human rights dimensions.³¹ At the same time, as further seen, self-identification cannot be the only criterion when defining who belongs to an indigenous group, including the Sámi people. The subjective self-identification criterion *must* be coupled with some form of objective criteria. Otherwise, a large part of the Finnish population could potentially self-identify as Sámi, resulting in complete assimilation of the Sámi into the Finnish majority society. This is why all international working definitions of indigenous peoples include, in addition to the subjective self-identification criterion, objective criteria.³² That is also why all current definitions of Sámi individuals in Finland, Norway and Sweden (including in the draft Nordic Sámi Convention Article 3) encompass both subjective (self-identification) *and* objective criteria. One is of course free to argue – as Tanja Joonas and Juha Joonas do – that the current definition of Sámi in the SPA Section 3 is not the most relevant one. The problem is, however, that the alternative objective criteria they put forward cannot be substantiated.

31. See Section 3.1.3, above.

32. See e.g. ILO 169 and the probably most used international working definition of indigenous peoples, the so-called Cobo-definition, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1–4 (1986).

3.2.3 *On using engagement in reindeer herding, hunting and fishing and the 1741 land register as objective criteria in the Sámi definition*

As seen, Tanja Joonas and Juha Joonas suggest that a Sámi individual in Finland should be defined as a person who lives in the areas of the former Lapp villages and practice “Sámi traditional livelihoods” such as reindeer herding, hunting or fishing.³³ In addition, Juha Joonas also submits that the individual should be a descendant to a person marked in the land register of 1741.

As to the suggestion that pursuit of reindeer herding, hunting and fishing should be employed as objective criteria in the Sámi definition in Finland, it is self-evident that this argument cannot be substantiated. That is so since it is a fact that also Finnish persons engage in such activities. Any objective definition of “Sámi individuals” must obviously be based on elements that *distinguish* a Sámi from a Finnish person. A Sámi definition cannot employ objective criteria that are common to the Sámi and Finnish peoples. That would – per definition – not be a definition of Sámi individuals.

With regard to the suggestion that a Sámi individual should be defined by relation to a person registered in the 1741 land register, it is necessary to address the distinction between ‘Sámi’ and ‘Lapp’.

Throughout her works, Tanja Joonas uses the terms ‘Lapp’ and ‘Sámi’ as if they were synonyms. For instance, she (together with co-author Juha Joonas³⁴) writes that “... when the part of Lapland that is currently situated on the Finnish side was still mainly inhabited by indigenous peoples, or *Lapps*, as they were called at that time”.³⁵ In the same vein, she and Juha Joonas declare that the “[i]ndigenous peoples of Northern Fennoscandinavia were previously called Lapps”, and further that Lapp was “used to mean the original inhabitants of the area”.³⁶ Juha Joonas

33. See Section 2.3, above.

34. This part of her doctoral dissertation is an article co-written with Juha Joonas.

35. See Joonas, Tanja, “The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach”, p. 278.

36. Ibid, p. 280. See further pp. 191, 289–290 and 314, where the authors again confuse the terms “Lapp”, “Sámi” and “indigenous people”. It is worth noting that it is anachronistic to use the term *indigenous people* in historical context in this sense, as the whole concept derives from recent decades and modern international law: indigenous peoples refers to *living* groups of people today. See further Joonas, Tanja, “The Subjects of the Draft Nordic Saami Convention”, where the author also uses “Lapps” and “Saami” as interchangeable terms. For instance, on p. 255 she writes that “[p]reviously, others referred to the Saami as Lapps”. In footnote 2 she adds that “[i]ndigenous peoples of Northern Fennoscandia were previously called Lapps”. On p. 267 she repeats the claim that “Lapp” and “Sámi” have the same meaning.

does the same thing in his article “The Draft Nordic Saami Convention and the Indigenous Population in Finland”.³⁷

It is, however, erroneous to equate ‘Lapp’ with ‘Sámi’. The term ‘Lapp’ (or *lappalainen*) does not refer to ethnicity or culture. Nor does the term refer to originality to a particular geographical area. Historically the term was used for fiscal purposes. It referred to persons engaged in reindeer herding or other livelihoods originating from the Sámi culture. The intention was to distinguish individuals pursuing such livelihoods from persons engaged in agriculture.³⁸ Over the centuries many Finnish settlers began engaging in reindeer herding, fishing and hunting as well. Consequently, already hundreds of years ago, the ‘Lappish population’ included many ethnic Finns. This part of the Finnish population too, was then referred to as *lappalainen*. This implies that a substantial part of the Finnish population in Finland today descends from Lapps, particularly in northern Finland.³⁹

In sum, in Finland the fact that a person is or has been referred to as Lapp says nothing about her or his ethnic or cultural background. Consequently, that an individual in Finland today identifies as Lapp or *lappalainen*, and/or is a descendant of persons previously defined as Lapps, lacks relevance for the question of whether she or he is in fact Sámi.

It follows from the above that one cannot take the fact that an individual is a descendant of a person that was registered in the previous Lapp registers as evidence of that individual being of Sámi origin. Hence, Juha Joonas’s suggestion that relationship to persons that were included in the 1741 land register should be used as an objective criterion in the Sámi definition in Finland cannot be substantiated.

3.2.4 Further on Tanja Joonas’s proposed alternate definition of which individuals should be regarded as Sámi in Finland

Section 2.3 above outlines the alternative Sámi definition presented by Tanja Joonas. Of the criteria she puts forward, the above has explained why practicing reindeer herding, hunting or fishing cannot be used as an objective criterion in a definition of Sámi individuals in Finland. What remains to be commented on is Tanja

37. See Joonas, Juha, “The Draft Nordic Saami Convention and the Indigenous Population in Finland” pp. 229–253, in particular pp. 246 and 250.

38. It can be added in passing that the situation was very similar in Sweden. In Sweden too, “Lapp” referred not to a Sámi individual, but to a person practicing reindeer herding or other traditional Sámi livelihoods. Of course, since contrary to Finland, in Sweden reindeer herding has always been a livelihood pursued only by Sámi, in Sweden all Lapps were also Sámi. But Sámi individuals not pursuing reindeer herding or other traditional Sámi livelihoods were not referred to as Lapps.

39. See Sammallahti, “Saamelaismääritelmästä”, Sections 2.1.1–2.1.2.

Joona's assertion that the criteria being of "Saami origin" and practicing "Sámi livelihoods" should be employed in the Sámi definition in Finland.

To use the criterion being of "Saami origin" to identify which individuals are Sámi makes little sense. It amounts to a circular argument. The purpose of any Sámi definition is precisely to identify which individuals are of "Sámi origin". Being of Sámi origin, therefore, cannot – per definition – be a criterion for identifying who is of Sámi origin.

For similar reasons, it is not possible to use engagement in "Sámi livelihoods" as an objective criterion for identifying who is Sámi either. This too constitutes a circular argument. No livelihood can be objectively defined as a "Sámi livelihood". A livelihood is a "Sámi livelihood" because members of the Sámi people subjectively identify the livelihood as an integral part of the Sámi culture. This can change over time. Reindeer herding is a fundamental Sámi livelihood today, but need not be so in the future. Naturally, only Sámi individuals can know what are Sámi ways of life and livelihoods. Sámi livelihoods are – per definition – those identified as Sámi by those that are Sámi, at any given time. To suggest that engagement in "Sámi livelihoods" should be used as an objective criterion for identifying which individuals are Sámi therefore again amounts to placing the cart before the ox. Before it has been determined that a person is indeed Sámi, one cannot say that that person is engaged in Sámi livelihoods. After all, millions of people around the world engage in reindeer herding, hunting and fishing without being Sámi.

In sum, Tanja Joona's suggestion that the criteria being of "Saami origin" and practicing "Sámi livelihoods" be employed in the Sámi definition in Finland cannot be substantiated either.

3.2.5 On the applicability of ILO 169 outside the Sámi Homeland Area and on the relevance of a comparison with the situation in Sweden

Tanja Joona's observation that when Finland ratifies ILO 169 the Convention will geographically apply also outside the Sámi Homeland Area⁴⁰ is correct, but lacks the implications she seems to attach to it. Following a Finnish ratification of ILO 169, also Sámi individuals having their domicile outside the Sámi Homeland Area can indeed invoke some of the rights enshrined in the Convention. In fact, certain rights, such as the right to be provided with education in and on the Sámi language, will probably be more frequently invoked outside than inside the Sámi Homeland Area. Other rights, however, such as the rights to lands and natural resources enshrined in Article 14, are most likely only relevant inside the Sámi Homeland Area, since it is there that the Sámi pursue reindeer herding and other Sámi land-based

40. See Section 2.1, above.

livelihoods. But that said, to the extent Sámi have established rights to lands and natural resources through traditional use also outside the Sámi Homeland Area, such rights too enjoy the protection of Article 14. Sámi individuals are entitled to these rights as members of the Sámi group, as the rights ILO 169 Article 14 sets forth are collective in nature. Obviously, however, for ILO 169 Article 14 (and other material provisions in the Convention) to apply to individuals situated outside the Sámi Homeland Area, it is a prerequisite that it can be established that these individuals are indeed Sámi, in line with what has been discussed above.

In their respective works, both Tanja Joonas and Juha Joonas make frequent references to the situation in Sweden. For instance, Tanja Joonas refers to Swedish rapporteur Sven Heurgren's conclusions in his proposal on a Swedish ratification of ILO 169. In his report, Heurgren infers that in Sweden, ILO 169 would apply to all individuals that hold reindeer herding rights based on immemorial prescription. Tanja Joonas takes this as evidence that in Finland too, all individuals involved in reindeer herding should be beneficiaries of ILO 169.⁴¹ In the same vein, she points out that the issue of individual subjects of ILO 169 in Sweden is strongly connected to reindeer herding, seemingly suggesting that in Finland too, those involved in reindeer herding are indeed Sámi.⁴² As yet another example, Tanja Joonas asserts that it is discriminatory that the draft Nordic Sámi Convention Article 4 uses involvement in reindeer herding as a criterion for "Sáminess" in Norway and Sweden, but not in Finland. Through a comparative analysis, she asserts that as in Sweden (and Norway), pursuing reindeer herding in Finland too should be conclusive evidence that a person is in fact Sámi.⁴³ Juha Joonas too, makes comparisons with Sweden. He suggests that the Swedish reindeer herding legislation conforms with normal understandings of what indigenous persons are, i.e. those involved in traditional subsistence activities, and argues that the same standard should apply in Finland as well.⁴⁴

Again, Tanja Joonas's and Juha Joonas's line of argument cannot be substantiated. It is simply conceptually wrong to compare the situation in Finland to that in Sweden, when it comes to whether the fact that an individual pursues reindeer herding can be taken as conclusive evidence that she or he is Sámi. In Sweden

41. See Joonas, Tanja, "The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach", pp. 309–311. Tanja Joonas also refers to Heurgren's conclusion in "The Subjects of the Draft Nordic Saami Convention" p. 275.

42. See Joonas, Tanja, "The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach", p. 234.

43. See Joonas, Tanja, "The Subjects of the Draft Nordic Saami Convention" p. 272.

44. See Joonas, Juha, "The Draft Nordic Saami Convention and the Indigenous Population in Finland" p. 248, and, in particular, p. 251.

(and Norway), only individuals of Sámi origin have the right to pursue reindeer herding.⁴⁵ In other words, in Sweden (and Norway), if a person engages in reindeer herding, she or he should indeed also be a Sámi. The same conclusion simply cannot be reached with regard to Finland, since it is a fact that in Finland, Finnish individuals also engage in reindeer herding. In Finland, therefore, the fact that an individual pursues reindeer herding says nothing about her or his cultural and/or ethnic background. It is precisely because of this difference between the situation in Sweden and Norway on one hand, and in Finland on the other, that the draft Nordic Sámi Convention Article 4 uses engagement in reindeer herding as an objective criterion when defining Sámi in Sweden and Norway, but not in Finland.⁴⁶

4. Conclusions

Which individuals should qualify as Sámi is a much debated and sensitive topic, not least in Finland. It is therefore an issue well suited for academic debate, by scholars such as Tanja Joonas and Juha Joonas. It is certainly healthy to discuss whether the present Sámi definition employed by the SPA is indeed the most relevant one. There is no one correct answer. It is possible to imagine a number of ways to define who are Sámi, none of which is wrong. That is because any Sámi definition that is based on cultural characteristics rather than on blood quota/ethnicity, must necessarily involve a certain amount of subjective decision-making. It is partly a political – and not legal – issue to formulate a Sámi definition. Still, the decision must be made within certain legal parameters.

First, the Sámi definition cannot be based solely on a subjective self-identification criterion. That would open up for the possibility that a large part of the Finnish population suddenly self-identify as Sámi. This in turn would result in assimilation of the Sámi population into the majority Finnish society. Hence, any Sámi definition must include one or more objective criteria.

Second, the objective criteria must be based on elements that distinguish a Sámi individual from a Finnish person. One cannot use as objective criteria cultural traits that are common to the Sámi and Finnish peoples. That is why Tanja Joonas's and Juha Joonas's suggestion that all individuals who live in the traditional Sámi area and pursue reindeer herding, fishing and hunting should qualify as Sámi, cannot be substantiated. Since under Finnish law, Finnish persons are also entitled to engage in reindeer herding, hunting and fishing, and since it is a fact that many

45. See Swedish Reindeer Herding Act, Section 1.

46. One of the authors of this article, PhD Mattias Åhrén, was a member of the Expert Group that crafted the draft Nordic Saami Convention.

Finnish persons also do pursue such activities, it is self-evident that engagement in reindeer herding, hunting and fishing cannot be employed as an objective criterion in a Sámi definition in Finland.

Third, it is conceptually incorrect to, as Tanja Joonas and Juha Joonas do, use ‘Lapp’ and ‘Sámi’, as interchangeable terms. The term ‘Lapp’ does not refer to ethnicity or culture, but to persons engaged in reindeer herding or other livelihoods originally associated with the Sámi culture. In Finland, already hundreds of years ago, many ethnic Finns pursued reindeer herding and other “Sámi” livelihoods. Such Finnish individuals were then also referred to as “Lapps”. Consequently, one cannot use relationship to persons that were included in the 1741 land register as an objective criterion in a Sámi definition, as Juha Joonas suggests.

Fourth, it is self-evident that one cannot use “being of Sámi origin” as an objective criterion in a Sámi definition, as Tanja Joonas submits. This is a circular argument. The Sámi definition aims precisely to identify who is of Sámi origin.

Fifth, when formulating the Sámi definition, one must respect the Sámi people’s rights to self-determination and to a collective cultural identity. Under the right to self-determination, the Sámi have the right to determine the membership of their own group. True, this right is not absolute. It must be balanced against the right of the individual to belong. But clearly, the right to self-determination awards the Sámi people – as presently understood – the right to have a decisive say over the Sámi definition unless the right is used to “expel” individuals that obviously belong to the group. In addition, Sámi communities themselves must be allowed to determine the membership of their group, as necessary to protect the collective welfare and identity of the group as such.

Sixth, no proposal for a definition of Sámi individuals can find support in ILO 169. ILO 169 only defines which groups can claim rights under the Convention, but is silent as to the membership of such groups. ILO 169 presupposes that membership in indigenous (and tribal) peoples is determined in a domestic context by indigenous peoples themselves and national law.

As a final note, we would like to add a few words with regard to the claim that establishing the correct Sámi definition is of vital importance to Finland’s ratification of ILO 169, a submission made for instance by Tanja Joonas in “The ILO Convention No.169 in a Nordic Context with Comparative Analysis: An interdisciplinary Approach”. A similar claim has been made in Sweden, where some Sámi maintain that Sweden should not ratify ILO 169 until it has been settled who among the Sámi population hold rights to lands and natural resources. We would assert that these are nonsense arguments.

As demonstrated above, a Finnish ratification of ILO 169 will have no impact whatsoever on which individuals are identified as Sámi in Finland. A ratification

of ILO 169 will only protect the rights of those in Finland that are in fact Sámi. Neither will a Swedish ratification of ILO 169 change who within the Sámi group can claim rights over lands and natural resources. A ratification of ILO 169 will only protect those that in fact hold such rights. Who those Sámi are is not a political issue, but a legal one. Those groups within the Sámi people that have traditionally used lands and natural resources have established rights to such lands and resources. Neither political decisions nor a Swedish ratification of ILO 169 can change this fact.