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HUMAN RIGHTS COMMITTEE
Ninety-fifth session
16 March-3 April 2009

VIEWS

Communication No. 1457/2006

Submitted by:	Ángela Poma Poma (represented by counsel, Tomás Alarcón)
Alleged victim:	The author
State party:	Peru
Date of the communication:	28 December 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 28 February 2006 (not issued in document form)
Date of adoption of Views:	27 March 2009
Subject matter:	Withdrawal of water from indigenous land
Procedural issues:	Examination under another procedure of international investigation or settlement; insufficient substantiation of the complaint

* Made public by decision of the Human Rights Committee.

Substantive issues:	Right to an effective remedy, right to equality before the courts, right to privacy and family life, right of minorities to enjoy their own culture
Articles of the Covenant:	1, paragraph 2; 2, paragraph 3; 17; and 27
Articles of the Optional Protocol:	2 and article 5, paragraph 2 (a)

On 27 March 2009 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1457/2006.

[ANNEX]

Annex

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninety-fifth session

concerning

Communication No. 1457/2006**

Submitted by: Ángela Poma Poma (represented by counsel, Tomás Alarcón)

Alleged victim: The author

State party: Peru

Date of the communication: 28 December 2004 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2009,

Having concluded its consideration of communication No. 1457/2006, submitted on behalf of Ángela Poma Poma under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 28 December 2004, is Ángela Poma Poma, a Peruvian citizen born in 1950. She claims to be a victim of a violation by Peru of article 1,

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, and Mr. Krister Thelin.

In accordance with rule 90 of the Committee's rules of procedure, Mr. José Luis Pérez Sanchez-Cerro did not take part in the adoption of this decision.

paragraph 2; article 2, paragraph 3 (a); article 14, paragraph 1; and article 17 of the Covenant. The Optional Protocol entered into force for the State party on 3 January 1981. The author is represented by counsel, Tomás Alarcón.

Factual background

2.1 The author and her children are the owners of the "Parco-Viluyo" alpaca farm, situated in the district of Palca, in the province and region of Tacna. They raise alpacas, llamas and other smaller animals, and this activity is their only means of subsistence. The farm is situated on the Andean altiplano at 4,000 metres above sea level, where there are only grasslands for grazing and underground springs that bring water to the highland wetlands. The farm covers over 350 hectares of pasture land, and part of it is a wetland area that runs along the former course of the river Uchusuma, which supports more than eight families.

2.2 In the 1950s, the Government of Peru diverted the course of the river Uchusuma, a measure which deprived the wetlands situated on the author's farm of the surface water that sustained the pastures where her animals grazed. Nevertheless, the wetlands continued to receive groundwater that came from the Patajpujo area, which is upstream of the farm. However, in the 1970s the Government drilled wells (known as the Ayro wells) to draw groundwater in Patajpujo, which considerably reduced the water supply to the pastures and to areas where water was drawn for human and animal consumption. The author claims that this caused the gradual drying out of the wetlands where llama-raising is practised in accordance with the traditional customs of the affected families, who are descendants of the Aymara people, and which has been part of their way of life for thousands of years.

2.3 In the 1980s, the State party continued its project to divert water from the Andes to the Pacific coast in order to provide water for the city of Tacna. In the early 1990s, the Government approved a new project entitled the Special Tacna Project (Proyecto Especial Tacna (PET)), under the supervision of the National Institute for Development (INADE). This project involved the construction of 12 new wells in the Ayro region, and a plan to build a further 50 wells subsequently. The author observes that this measure accelerated the drainage and degradation of 10,000 hectares of the Aymaras' pastures and caused the death of large quantities of livestock. The work was carried out despite the fact that no decision had been taken to approve an environmental impact assessment, which is required under article 5 of the Code on the Environment and Natural Resources. In addition, the wells were not registered in the Water Resources Register kept by the National Institute of Natural Resources (INRENA).

2.4 In 1994 various members of the Aymara community held demonstrations in the Ayro region, which were broken up by the police and armed forces. The author contends that the leader of the community, Juan Cruz Quispe, who prevented the construction of the 50 wells planned under PET, was murdered in the Palca district and that his death was never investigated.

2.5 According to the author, following a series of protests by the indigenous community, including a collective complaint addressed to the Government on 14 December 1997, 6 of the 12 wells built in Ayro were closed down, including well No. 6, which was believed to be

especially harmful to the interests of the indigenous community. This well was transferred to the Empresa Prestadora de Servicios de Saneamiento de Tacna, or EPS Tacna, part of the municipal administration.

2.6 The case file contains a copy of a letter from INADE dated 31 May 1999 addressed to INRENA, which is part of the Ministry of Agriculture, as a result of an enquiry from a member of Congress. It indicates that EPS Tacna, in agreement with the former ONERN (now INRENA), had carried out an environmental impact study which had concluded that the foreseeable overall environmental impact was moderate, and that the quantity of underground water resources to be withdrawn would be less than the calculated renewable reserves as established in hydrogeological studies.

2.7 Also in the file is a copy of a letter from INRENA dated April 2000, pointing out that INRENA had not received any environmental impact study from PET and that consequently no authorization had been given for the drilling of the wells.

2.8 The author also sent the Committee a copy of a report prepared by the Ombudsman in 2000 recommending that the Executive Director of PET should submit the environmental impact study and the reports on PET activities to INRENA so that it could issue the necessary evaluation.

2.9 In 2002, the company reopened well No. 6 in order to obtain more water, whereupon the author filed a criminal complaint with Tacna Prosecutor's Office No. 1 against the manager of EPS Tacna for an environmental offence, unlawful appropriation and damages; the complaint was dismissed by the prosecutor. On 17 September 2003, the author appealed to the Senior Prosecutor, who ordered that the wells should be inspected by the prosecutor and the police. After the inspection, Tacna Prosecutor's Office No. 1 concluded that there was evidence of an offence and instituted criminal charges in Tacna Criminal Court No. 1 against the manager of EPS Tacna for the environmental offence of damage to the natural, rural or urban landscape, as provided for in the Criminal Code.

2.10 Approximately one year after the complaint had been filed, the judge of Criminal Court No. 1 recused himself from the case because he was married to the company's legal adviser, and the case was referred to Tacna Criminal Court No. 2. On 13 July 2004, the court declared that the trial would not open because of failure to fulfil a procedural requirement - the submission of a report from the competent State authority, INRENA. This legal requirement provides that before the opening of a trial the competent authority must submit a report on the allegation of an environmental offence. The author maintains that although the prosecutor insisted that the preliminary investigation should go ahead, claiming that the case file contained a report from INRENA, the judge shelved the case.

2.11 On 10 January 2005 the prosecutor filed additional charges with Criminal Court No. 2, for the offence of unlawful appropriation of water under article 203 of the Criminal Code. The prosecutor claimed that the surface waters and groundwater of the Ayro area had been used peacefully in accordance with customs and usages and that by taking the water without

consultation or authorization by the relevant agency, PET had diverted the waters from their normal course, adversely affecting the author. That charge was dismissed. The prosecutor lodged an application for reconsideration and an appeal against that decision, which were dismissed. He subsequently instituted complaint proceedings, which were declared to be without merit on 24 June 2005, since the prosecutor had not appealed against the decision of 13 July 2004 and the addition of charges was improper.

2.12 The author also submitted a complaint to the National Development Institute (INADE), which replied that officials of the PET project were under investigation for irregularities, after it had been observed that they had been negotiating to share the underground water along the Tacna coast with Chile. The author thus realized that surplus quantities of water were to be found underground along the Tacna coast and that it was unnecessary for the Ayro wells to continue operating. On 11 November 2004, INADE informed her that it was not possible to launch an investigation. This left the author without any means of throwing light on the facts. Three years previously the facts had also been drawn to the attention of CONAPA, the Peruvian Government agency responsible for indigenous affairs, which did nothing.

2.13 The author submits that she has exhausted all available domestic remedies without her case being brought to trial. She adds that the Code of Constitutional Procedure allows for amparo and habeas corpus proceedings against judges only for denial of justice, which is not applicable in the present case.

The complaint

3.1 The author alleges that the State party violated article 1, paragraph 2, because the diversion of groundwater from her land has destroyed the ecosystem of the altiplano and caused the degradation of the land and the drying out of the wetlands. As a result, thousands of head of livestock have died and the community's only means of survival - grazing and raising llamas and alpacas - has collapsed, leaving them in poverty. The community has therefore been deprived of its livelihood.

3.2 The author also claims that she was deprived of the right to an effective remedy, in violation of article 2, paragraph 3 (a), of the Covenant. By requiring the submission of an official report before the judge can open proceedings, the State becomes both judge and party and expresses a view on whether or not an offence has been committed before the court itself does so. She also complains that the Criminal Code contains no provision for the offence of dispossession of waters used by indigenous people for their traditional activities, and states that she has exhausted domestic remedies.

3.3 The author alleges that the facts described constitute interference in the life and activities of her family, in violation of article 17 of the Covenant. The lack of water has seriously affected their only means of subsistence, that is, alpaca- and llama-grazing and raising. The State party cannot oblige them to change their way of family life or to engage in an activity that is not their own, or interfere with their desire to continue to live on their traditional lands. Their private and family life consists of their customs, social relations, the Aymara language and methods of grazing and caring for animals. This has all been affected by the diversion of water.

3.4 She maintains that the political and judicial authorities did not take into account the arguments put forward by the community and its representatives because they are indigenous people, thereby violating their right to equality before the courts under article 14, paragraph 1.

State party's observations on admissibility and on the merits

4.1 On 26 May 2006, the State party challenged the admissibility and merits of the complaint. It maintains that the author's daughter referred a case to the United Nations Commission on Human Rights under the 1503 procedure, containing the same allegations, and that the complaint should therefore be declared inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.2 With regard to the merits, the State party observes that the withdrawal of water by EPS Tacna is not subject to approval of an environmental impact study, but is carried out in accordance with a scale of priorities established in the General Water Act. This Act lays down an order of preference in water use, setting drinking water supply to the public as a priority use. In addition, most of the wells were sunk before the entry into force of the Code on the Environment and Natural Resources, Legislative Decree No. 613, promulgated in September 1990, which established the requirement for an environmental impact assessment before any work may commence.

4.3 As a result of the recommendations made by the Ombudsman, PET entrusted INRENA with the task of carrying out an environmental impact assessment, and the recommendations and technical measures it contains have been applied by PET since 1997. Moreover, it was updated in December 2000 and passed to INRENA for evaluation. Meanwhile, a report from the Tacna Regional Agricultural Department dated 12 July 2001 confirmed that although the drawing of groundwater by EPS Tacna was illegal, the way it was done did not affect the natural reserves, and that the water resources in question were an essential source for meeting the domestic and agricultural water requirements of the Tacna valley, so that the drawing of water should continue. By a letter dated 20 February 2006, the Office of the Ombudsman informed the author of the steps taken and the measures adopted by PET to comply with the environmental impact assessment. By a further letter dated 20 March 2006, the Office of the Ombudsman informed the author that the case was closed.

4.4 The State party points out that the wells are being operated by PET in accordance with the Constitution and legislation in force in Peru, and with the Covenant. It stresses that the Office of the Ombudsman pointed out, after the construction of the wells, that the State had passed legislation on the need to carry out environmental impact assessments, and therefore considered that it had concluded its work without finding any infringement of fundamental rights by the State. In cases where the State had considered that harm had been caused as a result of the activities carried out by PET, the reports and complaints had been dealt with.

4.5 The State party adds that the alleged damage caused to the ecosystem has not been technically or legally substantiated, and that the violation of the rights of the author, her family and other members of the Ancomarca community has not been established.

4.6 In relation to the alleged violation of article 2 of the Covenant, the State party considers that the author's complaint was dismissed because it was not technically substantiated. The State party considers that the imposition of the above-mentioned technical requirement is not a violation of the author's right to an effective remedy but is a procedural requirement that is related to the nature of the offence and is provided for by law. The requirement is based on the need for technical information which will enable the Public Prosecutor to make a proper assessment of the situation.

Author's comments

5.1 In her comments of 12 July 2006 the author reiterates that, despite the charges brought by the Public Prosecutor's Office, the Tacna Criminal Court ordered that the trial should not be opened on the basis of a procedural requirement, holding that it cannot initiate criminal proceedings in cases of environmental offences which have not been previously categorized as such by the competent authority, namely INRENA. INRENA is an administrative State body, and in this case is playing the dual role of "judge and party". She points out that the investigating judge ensured impunity by not allowing the case against the manager of the company to proceed, so that the author was left without any possibility of judicial remedy. She adds that the reason for this refusal was that the State itself and the public agencies of the regional and municipal authorities were chiefly responsible for the environmental offences.

5.2 The author submits that legislation relating to the environment is the only means the indigenous communities have to safeguard their land and natural resources. She maintains that the State party has violated International Labour Organization (ILO) Convention No. 169, given that there is no national law to protect the Peruvian indigenous communities who are adversely affected by development projects.

5.3 The author forwarded to the Committee a report prepared privately at the request of the community in 2006 by a Swiss geologist, entitled "Environmental impact of the Vilavilani project - some geological and hydrological aspects". The report states, inter alia, that the diversion of water considerably intensifies the processes of erosion and transport of sediments, affecting not only the infrastructure for withdrawal, irrigation and drinking water, but also exacerbating the serious problems of desertification and morphodynamic stability facing the area, producing a major negative impact on the ecosystem of the entire region.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As far as the examination of the matter by another procedure of international investigation or settlement is concerned, the Committee takes note of the State party's claim that the case was referred to the Commission on Human Rights under the procedure established by Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970. However, the Committee points out

that this does not constitute a procedure of international investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol,[1] since the 1503 procedure is very different in nature from the one provided for under the Optional Protocol and does not allow for an examination of the individual case resulting in a decision on the merits.

6.3 The Committee takes note of the author's complaint that the diversion of water caused the drying out and degradation of her community's land, some of which belonged to her, and the death of livestock, which violated her right not to be deprived of her livelihood under article 1, paragraph 2, and her right to privacy and family life under article 17 of the Covenant. The Committee recalls its jurisprudence whereby the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated, but that these rights do not include those set out in article 1 of the Covenant.[2] Concerning the author's reference to article 17, the Committee considers that the facts as presented by the author raise issues that are related to article 27.[3] In this regard it points out that the State party's observations are general in nature and do not refer to the violation of a specific article of the Covenant.

6.4 As for the author's complaint that she was deprived of her right to an effective remedy, the Committee notes that this has been sufficiently substantiated for the purposes of admissibility insofar as it raises issues under article 2, paragraph 3 (a) taken together with article 27, of the Covenant. In contrast, the allegation of a violation of article 14, paragraph 1, in that the authorities did not take into account the complaints because they were made by members of an indigenous community, has not been sufficiently substantiated for the purposes of admissibility, and must be declared inadmissible under article 2 of the Optional Protocol.

6.5 Therefore, the Committee declares the communication admissible in respect of the complaints under article 27, taken alone and read in conjunction with article 2, paragraph 3 (a), of the Covenant.

Consideration of the merits

7.1 The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol. The issue it must clarify is whether the water diversion operations which caused degradation of the author's land violated her rights under article 27 of the Covenant.

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[1] See the decisions adopted by the Committee on communications Nos. 1/1976, *A. et al. v. Uruguay*, adopted on 26 January 1978, and 910/2000, *Randolph v. Togo*, adopted on 27 October 2003, para. 8.4.

[2] See, among others, the Committee's Views in communications Nos. 167/1984, *Lubicon Lake Band v. Canada*, 26 March 1990, para. 32.1; 547/1993, *Mahuika et al. v. New Zealand*, 27 October 2000, para. 9.2; and 932/2000, *Gillot v. France*, adopted on 15 July 2002, para. 13.4.

[3] See communication No. 167/1984, op. cit., para. 32.2.

7.2 The Committee recalls its general comment No. 23, according to which article 27 establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant. Certain of the aspects of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This might particularly apply in the case of the members of indigenous communities which constitute a minority. This general comment also points out, with regard to the exercise of the cultural rights protected under article 27, 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. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. The protection of these rights is directed to ensure the survival and continued development of cultural identity, thus enriching the fabric of society as a whole.

7.3 In previous cases, the Committee has recognized that the rights protected by article 27 include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.[4] In the present case, it is undisputed that the author is a member of an ethnic minority and that raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child. The author herself is engaged in this activity.

7.4 The Committee recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may not undermine the rights protected by article 27. Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.[5]

7.5 In the present case, the question is whether the consequences of the water diversion authorized by the State party as far as llama-raising is concerned are such as to have a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs. In this connection the Committee takes note of the author's allegations that thousands of head of livestock died because of the degradation of 10,000 hectares of Aymara pasture land - degradation caused as a direct result of the

[4] *Lubicon Lake Band v. Canada*, op. cit., para. 32.2.

[5] Communications Nos. 511/1992 and 1023/2001, *Länsman v. Finland*, Views adopted on 26 October 1994 and 15 April 2005 respectively.

implementation of the Special Tacna Project during the 1990s - and that it has ruined her way of life and the economy of the community, forcing its members to abandon their land and their traditional economic activity. The Committee observes that those statements have not been challenged by the State party, which has done no more than justify the alleged legality of the construction of the Special Tacna Project wells.

7.6 In the Committee's view, the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.

7.7 In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells. Moreover, the State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantively compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with article 27 of the Covenant.

7.8 With regard to the author's allegations relating to article 2, paragraph 3 (a), the Committee takes note of the case referred by the author to the Tacna Prosecutor No. 1 and the Senior Prosecutor. It observes that, although the author filed a complaint against the EPS Tacna company, the competent criminal court did not allow the case to open because of a procedural error, namely the alleged lack of a report that the authorities themselves were supposed to submit. In the particular circumstances, the Committee considers that the State party has denied the author the right to an effective remedy for the violation of her rights recognized in the Covenant, as provided for in article 2, paragraph 3 (a), read in conjunction with article 27.

7.9 In light of the above findings, the Committee does not consider it necessary to deal with the author's complaint of a violation of article 17.

8. In light of the above, the Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 27 and article 2, paragraph 3 (a), read in conjunction with article 27.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to provide the author an effective remedy and reparation measures that are commensurate with the harm sustained. The State party has an obligation to take the necessary measures to ensure that similar violations do not occur in future.

10. By becoming a party to the Optional Protocol, Peru recognized the competence of the Committee to determine whether there has been a violation of the Covenant. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to furnish them with an effective and applicable remedy should it be proved that a violation has occurred. The Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
