

HUMAN RIGHTS COMMITTEE

Jonassen v. Norway

Communication No. 942/2000

25 October 2002

CCPR/C/76/D/942/2000

ADMISSIBILITY

Submitted by: Mr. Jarle Jonassen and members of the Riast/Hylling reindeer herding district represented by Law firm Hjort DA by Attorney Erik Keiserud

Alleged victim: The authors

State party: Norway

Date of communication: 9 February 2000 (initial submission)

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

Meeting on 25 October 2002,

Adopts the following:

Decision on admissibility

1. The authors of the communication, are the herdsman of the Riast/Hylling reindeer herding district, Norwegian citizens, of Sami ethnic origin. They claim to be victims of a violation by Norway 1/ of article 27 in conjunction with article 2, article 26, and article 2 of the International Covenant on Civil and Political Rights (the Covenant). They are represented by counsel.

The facts as submitted by the authors

2.1 The Samis are an indigenous people constituting an ethnic minority in Norway, and reindeer breeding

is recognized as an essential part of Sami culture. This activity constitutes the main material precondition for settlement in Sami areas. In Norway there are six different reindeer herding areas. These areas are divided into smaller units called reindeer herding districts, in which one or several groups of Sami are entitled to let their herds graze.

2.2 The authors are Sami reindeer herdsman. They belong to the reindeer district of Riast/Hylling, an area which is traditionally used for reindeer grazing grounds every year from March/April to December/January. The boundaries of the Riast/Hylling reindeer herding district were determined by a Royal Decree dated 10 July 1894, and covers approximately 1,900 square kilometres. For winter herding, the authors use the Femund reindeer herding district, together with the Essand reindeer herding district, the latter also being used for summer herding. The Femund reindeer herding district is approximately 1,100 square kilometres. The Riast/Hylling and the Femund reindeer herding districts have been used by the authors and their ancestors since the beginning of the seventeenth century. The reindeer herding districts of Riast/Hylling, Essand and Femund constitute, together with the boundary of Elgaa, the Soer-Troendelag/Hedmark reindeer herding area. This is the southernmost of the Norwegian reindeer herding areas.

2.3 At present, the authors possess 10 herds, amounting to a total of approximately 4,500 animals (winter stock before calving). Within the district of Riast/Hylling, traditional Sami reindeer husbandry is the main livelihood and source of income for approximately 45 people of Sami origin.

2.4 Pursuant to the Norwegian Reindeer Husbandry Act of 9 June 1978, the Sami herdsman are entitled to engage in reindeer husbandry within their designated districts. However, following the decision of the Norwegian Supreme Court on 18 November 1988, the "*Korssjøfjell Case*", the Sami herdsman are only entitled to let their reindeers graze within the district if they have acquired a right to use the specific area in question according to Norwegian law. This implies that if the owner of the land in question claims that the Sami herdsman are not entitled to let their herd graze on their land, the Sami herdsman have to prove that they have acquired such rights according to Norwegian law on the acquisition of rights by use since time immemorial. According to a new rule adopted by the Parliament in 1996, the Sami's claim shall prevail if the judge - after having evaluated all evidence before him - is still in doubt.

2.5 The "*Korssjøfjell Case*" concerned a large part of the Femund reindeer herding district. The landowners claimed that the authors were not entitled to let their herds graze in the western parts of the district, which are suitable for winter herding. The Supreme Court decided that the authors were not entitled to let their reindeer graze in this area. The area in question covers approximately 119 square kilometres, and constitutes approximately 11 per cent of the district's total gross area (not including Lake Store Korssjø).

2.6 On 24 October 1997, the Supreme Court rendered its judgement in the "*Aursunden Case 1997*", concerning reindeer grazing rights in the summer reindeer herding district of Riast/Hylling. The landowners had claimed that the authors were not entitled to reindeer grazing on the privately owned out farm fields in the area. In the first instance, the Midtre Gauldal District Court, on 25 October 1994, had ruled against the authors. The authors appealed to the Frostating Court of Appeal, which dismissed the appeal on 15 December 1995. The authors then appealed the case to the Supreme Court, claiming error both in the

application of law and in the establishment of facts made by the Frostating Court of Appeal. On 24 October 1997, the Supreme Court concluded that the authors were not entitled to reindeer herding on the area in question and dismissed the appeal by a majority decision (4-1).

2.7 In the "*Aursunden Case 1997*", the Supreme Court attached substantial importance to its previous judgement of 6 July 1897, concerning the rights to reindeer grazing in the western part of the disputed area. The Court considered that "*the courts were considerably closer to the evidence a century ago*" and that "*one must be wary of disregarding the Supreme Court's 1897 assessment of the evidence*". The area under dispute in 1897 did, however, extend further to the west than the claim presented in the 1997 Supreme Court case. Regarding the question of reindeer grazing rights in the eastern part of the area under dispute in the 1997 case, which had not been covered by the 1897 judgement, the Court found that the Supreme Court's 1897 ruling "*must have more or less the same legal force*".

2.8 The dissenting Supreme Court Justice Matningsdal, stated however, that "*In evaluating the facts of the case, I assign less importance to the 1897 Supreme Court judgement than the first-voting Justice does. If the starting point is that the grazing rights are not legally binding on the eastern part of the area, there will have to be a complete reassessment of the evidence without prejudice to the result of the Supreme Court's 1897 evaluation of evidence.*" Although the majority in the "*Aursunden Case 1997*" stated that the question in dispute in many respects implied a recurrence of the dispute that led to the Supreme Court's 1897 ruling, it made its decision on the basis of current legislation.

2.9 The disputed area in the "*Aursunden Case 1997*" constitutes 4-5 per cent of the Riast/Hylling reindeer herding district, but according to the authors, its grazing value is far more important. Furthermore, the authors' loss of the herding rights in the "*Storskarven area*", that was disputed in both the "*Aursunden Case 1997*" and the 1897 ruling and which is quite limited in size, makes it impossible for them to gain access to large continuous surrounding areas which in practice only may be accessed by encroaching on the forbidden area.

2.10 As a consequence of the Supreme Court's ruling in the "*Aursunden Case 1997*", the authors lost approximately 120 square kilometres of grazing fields in the reindeer district of Ryast/Hylling. Additionally, the authors have lost approximately 33 square kilometres in another court case, the "*Tamnes Case*" of 6 November 1997.

2.11 There are also other cases pending which, due to the practice of the Supreme Court, could result in further loss of grazing fields for the authors.

2.12 First, the authors and herdsmen of the Essand reindeer herding district are engaged in a new court case concerning the North/West parts of the district, the "*Selbu Case*", covering approximately 90 square kilometres of the Riast/Hylling area. In this case, the Frostating Court of Appeal on 17 August 1999 ruled in favour of the authors by a majority (3-2). The minority voted against the authors and argued in terms of the Supreme Court's majority in the "*Aursunden Case 1997*". An appeal was lodged to the Supreme Court on 19 October 1999. At the time of the authors' initial submission, the Supreme Court had yet not decided whether the appeal should be admitted.

2.13 Second, a new conflict has arisen in the "Holt len", in the eastern part of Riast/Hylling reindeer herding district, covering approximately 450 square kilometres. However in another dispute, the so-called "Kvipsdal Case", concerning a small area in the middle of the Femund reindeer herding district, the court ruled in favour of the authors.

2.14 In the aforesaid "Aursunden Case 1997", the Supreme Court relied on the 1897 judgement, and in the latter case, the Supreme Court made reference to a Supreme Court decision from 1892 in respect of the same area. Part of the material submitted to the Supreme Court both in the 1897-case and the 1892-case, was a study on the Sami population in southern Norway published in 1888 by Professor in ethnology Yngvar Nielsen. In this study, Professor Nielsen launched a new theory in opposition to the common view up till then, implying that the Sami people had migrated from the north to the Roros area in the middle of the eighteenth century and were intruders to the area. The theory gained support from the Lap Commission which was appointed in 1889. According to the authors, the Supreme Court attached great importance to this theory, and based its judgement on the fact that farmers had settled in the area in question before the Samis entered the area. Recent research, however, shows that the Samis entered southern Norway more than 150 years earlier, and archaeological studies indicate that the Sami people has been present in southern Norway since before the Middle Ages.

2.15 To illustrate the Lap Commission's approach to the Samis, the authors have submitted the following translation of its report, page 33: "*Another matter is that one should respect the laps' rights. But also, when evaluating the laps and the inhabitants' mutual rights and obligations towards one another, one must keep in mind the various circumstances of their trade, and the farmer, during his hard and difficult cultivating work, often carries hard burdens, while the lap, whose life style changes from hardship to laziness, usually escapes those.*"

2.16 The Lap Commission continues as follows on page 41: "*when it comes to the communities of Sondre Trondhjem and Hedemarken, the farmers began cultivating land long before the laps arrived, and had to a large extent started to exploit valleys and mountains. Therefore, there is no doubt that it is the laps who forced themselves on the farmers and have been a nuisance ever since. In later times, the farmers apparently have cultivated acres, established mountain farms and carried out other clearance work in the mountain areas where the laps previously might have wandered without restrictions, but usually the laps' rights cannot be assumed to have been violated, due to the fact - as stated in the Commission's proposal of 1883 - that these rights cannot be recognized to be of such nature that they might exclude or prevent a rational development of agriculture and progress.*"

2.17 At the end of the nineteenth century, the Norwegian Government issued instructions denying Sami children the right to use the Sami language in school and adopted provisions entailing that only persons who spoke Norwegian were entitled to have properties apportioned. The Ministry of Interior stated 2/ on 2 February 1869 that: "*in the economic respect and, except for the nomads of Finmark County, who remain in Norway all year round, there can be no doubt that the nomadic culture is such a great burden for Norway and that it has no corresponding advantages, that one must unconditionally desire its cessation.*"

2.18 The communication is supported by the Sami Assembly, the Board of Reindeer Husbandry and the Sami Reindeer Herder's Association of Norway.

The Complaint

3.1 The authors allege violations of their Covenant rights because the State party has failed to recognize and protect their right to let their herds graze on their traditional grazing grounds, in violation of article 27 in conjunction with article 2 of the Covenant. Furthermore, they allege a violation of article 26, because the Norwegian Supreme Court based its considerations on establishment of facts made in the nineteenth century when the Samis were discriminated against and the Norwegian landowners' claim for private property rights were favoured.

3.2 The authors allege that the State party has violated article 27 in conjunction with article 2 of the Covenant by failing to ensure the authors' right to enjoy their own culture. They refer to the Committee's General Comments No. 23 and 18,^{3/} and to the cases of *Ominayak v. Canada*,^{4/} (*Sara et al. v. Finland*),^{5/} *Ilmari L nsman et al. v. Finland*,^{6/} *Kitok v. Sweden*,^{7/} and *Jouni E. L nsman v. Finland*,^{8/} which concern the rights of indigenous people under the Covenant.

3.3 In particular, the authors recall that the Committee has recognized that article 27 imposes an obligation on the State parties, not only to protect immaterial aspects of indigenous culture, but also to offer legal protection for the material foundation of such culture.^{9/} Subsequently, for the interpretation of article 27 of the Covenant, the authors refer to article 1, paragraph 2 of the Covenant which requires 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.^{10/}

3.4 With regard to the two cases of *L nsman v. Finland*, where the Committee did not find violations of article 27, the authors point to four differences between those cases and the present case. First, they allege that the question at issue in the two *L nsman* cases was whether or not an isolated action from the State party represented a denial of the rights under article 27, whereas in the present case the authors claim that the current system of justice violates these rights. Second, the reindeer herding activities in the *L nsman* cases were only disturbed by activities in the area, whereas the authors are deprived of reindeer herding areas. Due to the negative outcome of the "*Aursunden Case 1997*", the "*Korssjøfjell Case*" and the "*Tamnes Case*", as well as possible negative outcomes of the pending "*Selbu*" and "*Holtaalen*" cases, the authors have experienced several reductions of their reindeer grazing rights.

3.5 Furthermore, since the Aursunden area is an integrated part of a herding area of vital importance for the district of Riast/Hylling, and by denying the authors access to Aursunden, they have practically no access to attached areas. Thus, the authors run a risk of having to close down their entire reindeer husbandry. They contend that the only means to prevent the reindeer from grazing in the area in dispute in the "*Aursunden Case 1997*" and the "*Korssjøfjell Case*", would be to either fence in the outer boundary of the area, or to intensify the watching of the herds. According to the authors, neither one of the alternatives would be realistic, since the fences would be covered by snow in the winter season, and the expenses of upkeep would be unduly heavy.

3.6 Third, it should be noted that contrary to the two *L nsman* cases, the Supreme Court in the "*Aursunden Case 1997*", dismissed the appeal without discussing the authors' rights under article 27 of the Covenant. Finally, the authors point to that the Supreme Court in the "*Aursunden Case 1997*" attached decisive importance to the judgement of the Supreme Court in 1897, when the Samis were subjected to blatant discrimination.

3.7 They contend that the Norwegian Supreme Court and the State party in general have failed to protect the material foundation of the southern Sami culture in accordance with the provisions set forth in article 27 and article 2 of the Covenant, by attaching crucial importance to assessments made in a period of time characterized by discrimination and forced integration of the Sami people and by an official view that Sami reindeer breeding was a burden to the Norwegian farming population.

3.8 The authors' also contend that Norwegian law regarding the acquisition of rights derived by use since time immemorial, as it has been interpreted and practised by the Norwegian courts, in itself constitutes a violation of article 27. By failing to recognize Sami culture and perception of law, and by setting the same requirements for the acquisition of the right to herd reindeer as it sets in other matters of property law, Norwegian courts have, in effect, made it impossible for the authors and Sami people in many areas, due to their nomadic lifestyle, to acquire legal grazing rights and thereby to enjoy their own culture.

3.9 To acquire legal grazing rights on the basis of use since time immemorial, the authors will have to prove to the Court that they have used the area in question for more than a hundred years. This has proven to be difficult in practice, since the requirements for the acquisition of grazing rights derived by use since time immemorial, do not take into its consideration either the specific features of reindeer herding, nor Sami culture and perception of land rights. The requirements are established on the basis of grazing rights for livestock, thus, sporadic grazing is not considered sufficient for establishing legal grazing rights.

3.10 Reindeer herding makes heavy demands on acreage, and reindeers virtually never graze in the same area year after year. Instead, reindeers make use of the whole area fitted for grazing. It is the nature for reindeer to adapt to their surroundings, the topography, the pasture situation, weather and wind conditions. These conditions determine the extensiveness of the area needed for grazing. Since the use of land is necessary for the maintenance of the authors' culture, the effect of the Norwegian requirements for land acquisition is that the authors are deprived of their fundamental rights under article 27 of the Covenant. The authors refer to the Sami Parliament's statement of 27 November 1997.

3.11 The authors contend that it is difficult to prove earlier settlements in disputed areas, since their huts and fences have been made of material that decomposes, and the Sami people has never had a written culture.

3.12 They further claim that the State party has failed to take an active role in protecting their rights, by not intervening in the numerous conflicts that have been brought before the courts by landowners of the authors' reindeer herding districts over the past 10 years. The authors and Samis in general endure years of conflicts, court actions, and personal suffering, both economically and personally, because of the State party's reluctance to intervene before the conflict is determined by a Supreme Court judgement.

3.13 The authors have requested that the State party expropriate the right to reindeer grazing in the areas of the "*Korssjofjell Case*" and the "*Aursunden Case 1997*", but the petitions are still pending before the administrative authorities.

3.14 Finally, the authors claim that the State party has violated article 2 in conjunction with article 27, by failing to ensure the authors' rights to enjoy their own culture.

3.15 In respect of their claim of a violation under article 26 of the Covenant, the authors claim that the Supreme Court in the "*Aursunden Case 1997*" judgement, failed to protect the authors from discrimination, since it based its establishment of facts on those made by the Supreme Court in 1897, at a time where the general opinion of the Samis was discriminatory. They contend that the distinction between the authors and the private landowners in the disputed area is not based on objective and reasonable criteria.

3.16 The authors contend that the domestic remedies have been exhausted through the national lawsuits of the "*Korssjofjell Case*", the "*Aursunden Case 1997*", and the "*Tamnes Case*" which have all been decided finally by the Norwegian Supreme Court. There is still a lawsuit pending, in the "*Selbu Case*", and a new conflict has arisen in a large area between Aursunden and Selbu called "*Holtaalen*". Although the authors primarily request the Committee to evaluate whether the Supreme Court in the "*Aursunden Case 1997*" and the "*Korssjofjell Case*", and whether the State party in general have failed to protect the material foundation of the southern Sami culture, and whether the Norwegian legal system in itself comprises violations of the Covenant, the authors contend that the Committee should take both final and pending cases into its consideration. The authors believe that they cannot be expected to continue to make the same requests to the same national courts, on the basis of almost the same facts for each and every area within their district, before the Committee can decide whether or not the Covenant has been violated.

3.17 The authors have filed an application for expropriation to the administrative authorities in Norway so as to ensure that lands for reindeer grazing is available. Nevertheless, they consider it practically impossible to avoid that reindeer enter the areas covered by the decisions in the "*Korssjofjell Case*" and the "*Aursunden Case 1997*", and thus they run a constant risk of being charged for illegal use of these areas. The authorities have a discretionary power to decide the application for expropriation. The examination is expected to be long and the outcome is uncertain. According to the authors, it has yet not occurred that Sami herdsmen in a similar position to the authors' have been given full reparation by expropriation. In spite of the fact that the expropriation case is pending, the authors consider that after more than a hundred years of dispute with private landowners, domestic remedies should be considered exhausted or ineffective.

The State party's submission on the admissibility of the communication

4.1 By note verbale of 16 November 2000, the State party made its submission on the admissibility of the communication. The State party contests the admissibility of the claims under articles 2 and 26 for lack of substantiation, and the claim under article 27 for non-exhaustion of domestic remedies and because the authors cannot be deemed victims within the meaning of article 1 of the Optional Protocol.

4.2 In relation to the claim under article 27 and the requirement under article 1 of the Optional Protocol,

it points to the authors' *"main argument is that Norwegian law regarding the acquisition of rights derived by use since time immemorial, as it has been interpreted and practised by the Norwegian courts, in itself constitutes a violation of article 27."* and considers this to be an *actio popularis* which should not be addressed by the Committee. The State party contends that the issue before the Committee should be whether the authors' rights under the Covenant have been violated by the decisions of the courts in the specific cases, which concern the authors.

4.3 Furthermore, the State party recalls that all the court cases referred to in the communication, concern the authors' grazing rights on privately owned land, under Norwegian private law. The State party emphasizes that such cases involve the balancing of legitimate private interests, on the one hand that of the Sami population, and, on the other hand, the landowners' right to protection of their property. It recalls that private ownership is protected by the Norwegian Constitution, and as part of the First Protocol to the European Convention on Human Rights, which is incorporated into Norwegian law, and considers that these provisions should be regarded when considering to what extent the State parties are under an obligation to implement standards in civil law, whereby a group enjoys preferential treatment due to their ethnicity.

4.4 The State party recalls that the establishment of a reindeer herding district does not in itself establish grazing rights within that district. The herdsmen must in addition to belonging to the particular herding district, have a legal basis in Norwegian law for their grazing rights in relation to the landowners, such as use since time immemorial, contract or expropriation. In this context, it emphasizes that in both the *"Korssjofjell Case"* and the *"Aursunden Case 1997"*, the Supreme Court found that the authors had not acquired grazing rights in the disputed area, i.e. the authors had never had such rights to the areas in question. This is contrary to the apparent supposition of the communication, that the grazing rights have been lost.

4.5 With regard to the authors' claims under articles 2 and 26, the State party argues that the evidential weight given by the Supreme Court in the *"Aursunden Case 1997"* to the findings in the 1897 judgement was based on the authors' arguments that the Supreme Court's assessment of the facts in 1897 had been wrongful. The essence of the authors' claims was, as opposed to the 1897 ruling, that they had acquired grazing rights to the area through sufficient use of the land since time immemorial. As regards the 1897 case, the Supreme Court stated in 1997:

4.6 *"This case involved the submission of copious evidence, with testimony from parties and witnesses on behalf of the Samis and the landowners alike. In addition, the court of first instance visited the site. At that time, a question regarding the remains of Sami settlements was also at issue. I attach importance to the fact that the courts were considerably closer to the evidence a century ago, mainly the alleged use of the area under dispute for the purpose of grazing reindeer. Several of the witnesses who testified in the court of first instance, on whose ruling the Supreme Court founded its judgement, had experience (of the situation) dating all the way back to the 1820s."*

4.7 According to the State party, the Supreme Court in 1997, also considered the authors' claims put forward to the Committee under articles 26 and 2, and found that there was no evidence supporting that

the Supreme Court judges in 1897 had been biased in their assessment of evidence. The Supreme Court in 1997, stated that:

4.8 *"It is clear from the Supreme Court's judgement (of 1897) that the court attached decisive importance to comprehensive testimony on the existence and frequency of reindeer grazing in the disputed area itself. There are no grounds for the view that the court was biased from the outset in the weighing of evidence."*

4.9 The State party submits that the authors de facto request review of the court's findings as to the evidence of the case. On the basis that the authors have not adduced any material, which could give basis for a review of the Supreme Court's findings, the State party contends that the authors' claims under articles 26 and 2 of the Covenant should be declared inadmissible for lack of substantiation.

4.10 In relation to article 27 of the Covenant, the State refers to the authors' allegations that the State party has failed to fulfil its positive obligations imposed by that article, in particular by setting the same requirements for the acquisition of rights to the use of land by the Samis as it would in other matters of property law. In this connection, the State party submits that even if one presupposes that such obligations are applicable in the present case, it does not necessarily follow that the State would have to fulfil them by lowering the requirements in domestic property law with regard to the Samis. Instead, the Samis interests have been safeguarded through the institute of expropriation if sufficient grazing rights have not been established previously within the reindeer herding areas.

4.11 To that effect, the authors have been afforded the right to petition the State party to secure necessary grazing rights through expropriation. The State party submits that this option constitutes an available and effective remedy that has not been exhausted in the present case.

4.12 In that connection, pursuant to the "*Korssjøfjell Case*" in which the Supreme Court stated that the administrative designation of herding districts was not decisive for grazing rights under private law, the Reindeer Husbandry Act Section 31 was amended in 1996. In order to extend the Sami users' rights within the herding areas, the law was amended to allow for expropriation of land to ensure such users' rights. According to the preparatory works of the law,^{11/} the purpose of the amendment was to:

4.13 *"give governmental authorities the necessary means of taking active steps to secure Sami reindeer herding interests. Current legislation provides no such powers. Without such an extension of the statutory provision for expropriation, it will not be possible for the authorities to prevent or resolve conflicts"*.

4.14 Following this amendment, the principle of securing necessary grazing rights through expropriation has been part of the State party's policy, and of the Ministry of Agriculture's instructions to the concerned authorities. Furthermore, with particular regard to the areas concerned in the "*Aursunden Case 1997*" and the "*Korssjøfjell Case*", the Ministry of Local Government and Regional Development in a report to the Parliament,^{12/} states that expropriation of reindeer herding rights may be introduced to secure the Sami situation, but that before going to the extent of expropriation, every effort should be made to achieve

amicable arrangements like leasing agreements in which the State takes a part.

4.15 On 2 April 1998, the authors filed claims for expropriation to the Norwegian Government, concerning the disputed land in the "*Aursunden Case 1997*", and on 9 April 1999, concerning the "*Korssjøfjell Case*". At the date of the State party's submission, these were the only petitions received by the Norwegian Government after the 1996 law amendment. In relation to the other cases invoked by the authors, they won the "*Kvipsdal Case*" and the "*Selbu Case*", the latter is still pending before the Supreme Court, and they have not filed a claim for expropriation in the "*Tamnes Case*".

4.16 According to Section 12 of the Expropriation Act of 23 October 1959, the parties shall be encouraged to try and reach amicable settlements before expropriation proceedings are initiated. Regarding the "*Aursunden Case 1997*", the Ministry of Agriculture therefore appointed a negotiating committee on 4 November 1998, and the landowners appointed their own representative negotiating committee. The authors were heard during the negotiating process through meetings with the government appointed committee, and through written comments on a draft agreement and the proposed agreement with the landowners. On 4 February 2000, these committees reached an agreement that they recommended to their respective groups.

4.17 The agreement includes approximately 80 per cent of the 121 square kilometres grazing land comprising the subject of the petition for expropriation, and the erection of a reindeer fence of approximately 40 kilometres. The purpose of the fence is to facilitate the fulfilling of the herdsmen's statutory obligation to keep their reindeer under adequate control and on legal grazing land. According to the proposed agreement, the State party will pay the annual grazing rent and the cost of erecting and maintaining the reindeer fence. The State party has paid all the negotiating costs, amounting to NOK 430,000, and the stipulating cost of erecting the reindeer fence is NOK 4.2 million.

4.18 In spite of this recommended agreement, the authors advised the Ministry of Agriculture in May 2000, that they maintained their petition for expropriation. The Government is confident that the Ministry of Agriculture will secure the authors' interests either by entering into the recommended agreement and/or by deciding to expropriate. Either way, the Norwegian Government will propose to the Parliament to grant the costs involved.

4.19 The same procedure as described above will probably be applied to the petition for expropriation concerning the disputed land in the "*Korssjøfjell Case*". Furthermore, the State party submits that the court decisions at issue so far have had no effect on the authors' actual use of the disputed land for reindeer herding purposes, and that the recommended agreement in the "*Aursunden Case 1997*" presupposes that the State party shall pay for the Sami use of the disputed land from the date of the Aursunden judgement of 24 October 1997.

4.20 The State party submits that the possibility of petitioning for expropriation constitutes an available remedy within the meaning of article 5 of the Optional Protocol. It considers that the Committee is not in a position to consider whether the authors are victims of a violation of article 27 as long as their expropriation petitions are pending.

The Comments by the authors

5.1 By letter of 13 August 2001, the authors commented on the State party's submission.

5.2 The authors contest the State party's allegation that they are not victims within the meaning of article 1 of the Optional Protocol because it considers that the claim constitutes an *actio popularis*. They contend that they are personally affected by the law regarding the acquisition of rights derived by use since time immemorial as it has been interpreted in both the "*Aursunden Case 1997*" and the "*Korssjøfjell Case*". Thus, they do not ask the Committee to review national legislation *in abstracto*, but the loss of grazing rights in disputed areas should be seen in connection with prior reductions of grazing rights in the same district due to final court decisions, as well as possible reductions due to cases pending before the courts or administrative authorities.

5.3 In this context, the authors inform that the dispute with the landowners in the Selbu municipality, the "*Selbu Case*", was decided by the Supreme Court in plenary on 21 June 2001 in favour of the authors. The first-voting Justice Matningsdal, emphasized *inter alia* the significance of the topography and the reindeer's extensive use of the land when deciding the content of the criterion *use* as basis for the acquisition of grazing rights according to the rules on rights derived since time immemorial. He concluded that one has to adapt the requirement of land use to the specific nature of reindeer herding, thus opening for a less intensive use of land - as compared to the herding of sheep and cows - as a basis for the acquisition of reindeer grazing rights, and he emphasized the methodological problems for the Samis to prove former use of lands as grazing areas for reindeer husbandry.

5.4 The authors contend that the approach applied in the "*Selbu Case*", was not applied in either the "*Korssjøfjell Case*" or the "*Aursunden Case 1997*", thus leading to the loss of grazing areas of vital importance to the authors, in violation of their Covenant rights. Furthermore, the Supreme Court in the two latter cases seemed unwilling to pay the same attention to the topography when drawing a line between legal and illegal herding areas.

5.5 With regard to the State party's statement that the authors' claims under article 27 need to be balanced with legitimate private property interests, the authors submit that their rights under article 27 of the Covenant were not given due weight in the "*Aursunden Case 1997*" and the "*Korssjøfjell Case*" judgements. They find that the practice of the law regarding acquisition of rights derived by use since time immemorial in these decisions does not take into proper account the special characteristics of reindeer herding compared with e.g. the herding of sheep and cows, and is not fitted to secure the authors' rights to practice their culture. The authors contend that this lack of due regard to the special situation of the Sami people with respect to the application of Norwegian rules on users rights has led to a distinction between Norwegian farmers and the Sami reindeer herdsman which is not built on reasonable and objective criteria. On the contrary, the authors should have been subjected to preferential treatment pursuant to articles 26 and 27 in order to regain balance and equality between the authors and the landowners, to protect the Sami culture.

5.6 In response to the State party's allegation that the authors' supposition that they had lost the grazing

areas in the disputed areas of both the "Korssj fjell Case" and the "Aursunden Case 1997" is incorrect since the Supreme Court found that the authors had not acquired grazing rights in the disputed area in the first place, the authors state that the Supreme Court accepted that the Sami people had used the areas in question for more than 100 years, and thus maintain their allegation that the authors de facto lost their grazing rights in these areas.

5.7 In respect of their claim of a violation of articles 26 and 2 of the Covenant, the authors submit that they do not ask the Committee to evaluate all facts in the "Aursunden Case 1997", but maintain their allegation that the Supreme Court in that case did not make a full and independent evaluation of the facts, but instead attached decisive importance to prior evaluations of facts based upon unacceptable views of the Samis. This opinion has been supported by professor, and now Supreme Court justice Jens Edvin A. Skoghoy,^{13/} who states the following regarding the "Aursunden Case":

5.8 *"In my opinion the majority in the Riast/Hylling Case attached too great importance to the ruling from 1897. The view of the public authority on the Sami culture has changed since then, and one cannot rule out that the evaluation of evidence made by the Supreme Court in 1897 was influenced by the attitude of the public authorities at that time. In addition, recent historical research has supplied the Supreme Court's historical picture from that time. In my opinion, the Supreme Court should have made an independent assessment of evidence."*

5.9 In respect of the State party's allegation that the authors have not exhausted domestic remedies by not pursuing administrative avenues for expropriation, the authors recall the principle that only such remedies must be sought that are effective and available to the authors and the application of which is not unreasonably prolonged.

5.10 With regard to the recommended agreement for the disputed areas in the "Aursunden Case 1997", the authors attach two letters of January 2001 from the Ministry of Agriculture, where the Ministry informs that only 38 per cent of the landowners wish to enter into the agreement. In a letter from the landowners' attorney of 26 March 2001, the landowners object to the agreement on several grounds. The negotiations have thus so far failed, and the authors question that this agreement will secure their interests.

5.11 Furthermore, the authors note that their petition for expropriation in the "Aursunden Case 1997" was filed more than three years ago (on 2 April 1998), and is still pending in spite of the State party's statement, that the decision regarding the land under dispute is expected in the first part of 2001. The authors consider it uncertain whether the outcome of this petition will be satisfactory.

5.12 The State party argued that the court decisions at issue so far have had no effect on the authors' actual use of the disputed land for reindeer grazing purposes. However, while awaiting the outcome of their petitions for expropriation, the authors on 25 August 2000, were subjected to a criminal charge for illegal use of the land north of Aursunden, and they fear being subjected to further charges for illegal use of the disputed areas in question. On 23 April 2001, the Uttrondelag Police District followed up the criminal charge by issuing a fine of NOK 50,000, and the authors, rejecting this fine, are awaiting trial on 7-9 January 2002.

5.13 Finally, the authors draw attention to the economic impact the private lawsuits have on the authors. In principle the authors must personally cover expenses related to the lawsuits. However, these expenses have so far been recovered from the State funded Reindeer Herding Fund, with approximately NOK 1.3 million. The consequence is that the funding of other projects through the Reindeer Herding Fund suffers.

Additional observations by the State party

6. By note verbale of 7 March 2002, the State party informed the Committee that the court of the first instance on 21 January 2002, acquitted the authors in the criminal case regarding the illegal use of land north of Aursunden. The judgement has been appealed, and is thus not final. It contends, however, that these criminal proceedings have no relevance to the present case, since they stem from a dispute between private parties.

Issues and proceedings before the Committee

7. By decision of 21 December 2000, the Special Rapporteur on New Communications, decided to separate the Committee's consideration of the admissibility and the merits of the case.

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

8.3 In respect of articles 26 and 2, the Committee notes the authors' arguments that the Supreme Court in the "*Aursunden Case 1997*" attached importance to the Supreme Court decision in 1897, and that the latter decision was based upon discriminatory views of the Samis. However, the authors have not provided information which would call into doubt the finding of the Supreme Court in the "*Aursunden Case 1997*" that the Supreme Court in 1897 was not biased against the Samis. It is not for the Committee to re-evaluate the facts that have been considered by the Supreme Court in the "*Aursunden Case 1997*". The Committee is of the opinion that the authors have failed to substantiate this part of their claim, for the purposes of admissibility, and it is therefore inadmissible under article 2 of the Optional Protocol.

8.4 In respect of the alleged violation of article 27 in conjunction with article 2 of the Covenant, the State party objects to the admissibility on the grounds that the authors are not victims in the terms of article 1 of the Optional Protocol, and that the authors have failed to exhaust domestic remedies under article 5, paragraph 2 (b) of the Optional Protocol.

8.5 The Committee notes the State party's argument that the authors' claim constitutes an *actio popularis*,

since the authors cannot be considered victims of a violation by the State party of article 27 of the Covenant, in the terms of article 1 of the Optional Protocol. However, the Committee finds that the authors' claim relates to denial of their reindeer herding rights in specific areas. It therefore rejects the State party's claim that this part of the communication be rejected under article 1 of the Optional Protocol.

8.6 Regarding the State party's allegation under article 5, paragraph 2 (b) of the Optional Protocol, that the authors have failed to exhaust domestic remedies, the Committee notes that the State party has argued that the authors have not exhausted the remedy of claiming expropriation to the administrative authorities. Although the authors have pursued the domestic judicial remedies in their disputes with the landowners in the "*Tamnes Case*", the "*Aursunden Case 1997*" and the "*Korssjøfjell Case*", their petitions for expropriation in the two latter cases are still pending, whereas the authors have not petitioned for expropriation in the former case. The Committee recalls ^{14/} that for the purpose of article 5, paragraph 2 (b) of the Optional Protocol, an applicant must make use of all judicial or administrative avenues that offer him a reasonable prospect of redress. The application for expropriation, a remedy provided by the 1996 law, is still pending. It would therefore appear that domestic remedies have not been exhausted.

8.7 However, the question is whether the application of these remedies has been unreasonably prolonged. The Committee notes the authors' argument that they have pursued domestic judicial remedies for more than a century and that their petitions for expropriation, which were initiated in 1998 and 1999, are still pending, making the avenues for a remedy unreasonably prolonged.

8.8 The Committee considers that the period of time it has taken for the authors to obtain a remedy, may not be gauged from the time the Samis have litigated grazing rights, but from the time the authors themselves have sought a remedy. The Committee notes that the authors brought their claims for expropriation on 2 April 1998 in the "*Aursunden Case*" and on 9 April 1999 in the "*Korssjøfjell Case*". As part of the process, a negotiation was established which recommended an agreement in February 2000, but this agreement was rejected in May 2000. This forced the authorities to reopen the expropriation procedure.

8.9 The Committee considers that the amendment of the Reindeer Husbandry Act and the subsequent negotiations aiming at providing a remedy for the authors, provide a reasonable explanation for the length of the examination of the authors' claim. It cannot conclude that the Norwegian legislation, obliging the authors to follow the procedure of settling their claims with the landowners before bringing a claim of expropriation, is unreasonable. The Committee also notes that while the authors have been subjected to one case of a criminal charge for illegal use of the disputed land for which they have been acquitted, they have been able to continue their reindeer herding to the same extent as before the relevant Supreme Court judgements. The Committee therefore cannot conclude that the application of domestic remedies has been unduly prolonged. The authors' claim under article 27 is inadmissible for the non-exhaustion of domestic remedies, under article 5, paragraph 2 (b) of the Optional Protocol.

8.10 The Committee is of the opinion that given the new remedy provided by the 1996 law, the claim must be considered inadmissible. Nevertheless, the State party is urged to complete all proceedings regarding the authors' herding rights expeditiously.

9. The Committee therefore decides:

- (a) that the communication is inadmissible under articles 2 and 5, paragraph 2 (b) of the Optional Protocol;
- (b) that this decision shall be communicated to the author and to the State party.

[Done in English, French and Spanish, the English 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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice G. I. Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden.

** The texts of a dissenting individual opinion signed by Committee members Mr. Louis Henkin, Mr. Martin Scheinin and Mr. Solari Yrigoyen is appended to the present document.

Dissenting individual opinion by Committee members Mr. Louis Henkin, Mr. Martin Scheinin and Mr. Solari Yrigoyen

We are of the view that the communication should have been heard on its merits. The main ground on which the majority bases its inadmissibility decision is article 5, paragraph 2 (b), of the Optional Protocol, i.e., non-exhaustion of domestic remedies. For several reasons, in our view this conclusion is erroneous.

First and foremost, we do not agree that petitioning the administrative authorities of the State party, for the purpose that they institute expropriation proceedings to secure the reindeer herding rights of the authors, is at all an effective remedy within the meaning of article 5 (2) (b) of the Optional Protocol. The authors have already exhausted one line of judicial remedies by having their case adjudicated up to the Supreme Court. The authors are not even a party in the expropriation proceedings (see paragraph 4.16), which, therefore, cannot be taken as constituting an effective domestic remedy to be pursued by the authors. At most, the authors have exhausted their additional remedy related to expropriation simply by *filing* the petition in a manner that allows the initiation of the expropriation proceedings. What *results* from those expropriation proceedings, and within which time frame, would be a matter for the consideration of *merits* when the Committee addresses the State party's measures aimed at giving effect to the article 27 rights of the authors.

Secondly, even assuming that the actual expropriation proceedings constitute a remedy that needs to be exhausted by the authors, those proceedings are already unreasonably prolonged within the meaning of the last sentence of article 5, paragraph 2, of the Optional Protocol. After losing the *Aursunden* case in the

Supreme Court - which process itself required some time - the authors filed their petition for expropriation on 2 April 1998. Almost three years later, on 26 March 2001, the proposed settlement was rejected by the landowners. Although the State party has since then made a submission to the Committee on 7 March 2002, it has not even informed the Committee of any later developments, given any explanation for the delay of four and a half years since the authors filed their petition, or presented any prospect of the time frame within which the matter will be decided. In the circumstances, the Committee should conclude that the remedy is unreasonably prolonged.

Thirdly, it appears that the article 27 rights of the authors are being affected by the Supreme Court rulings against them. Herding in areas previously used by them has become illegal, and the authors are subject to the risk of further legal proceedings and legal sanctions if they continue to herd their reindeer in those areas. It has not even been argued that the outcome of the expropriation proceedings would be relevant as a remedy for this part of the authors' claim under article 27.

Finally, in addition to the legal arguments above, there is also a reason of policy. Non-exhaustion of domestic remedies is a *recoverable* ground for inadmissibility. Even the majority of the Committee alludes to Rule 92.2 of the Committee's Rules of Procedure, according to which the authors may later request the Committee to review its inadmissibility decision. We find it unreasonable to declare the communication inadmissible although there is a clear expectation that the authors will in the near future request revitalization of their case.

As to the authors' claim under article 26, we find that it is unsubstantiated only if their claims under article 27 are declared inadmissible. In the context of their article 27 claims, which we find admissible, the article 26 claim is in our view also admissible.

(Signed): Mr. Louis Henkin

(Signed): Mr. Martin Scheinin

(Signed): Mr. Solari Yrigoyen

Notes

1/ The Covenant and the Optional Protocol to the Covenant entered into force for the State party on 23 March 1976.

2/ Reference is made to the proposition to the Odelsting (a part of the Parliament), from 1871, p. 31.

3/ Human Rights Committee's General Comment No. 23 (50), adopted on 6 April 1994 and Human Rights Committee's General Comment No. 18 (37), adopted on 9 November 1989.

4/ Communication No. 167/1984, adopted on 26 March 1990.

5/ Communication No. 431/1990, adopted on 23 March 1994.

6/ Communication No. 511/1992, adopted on 26 October 1994.

7/ Communication No. 197/1985, adopted on 27 July 1988.

8/ Communication No. 671/1995, adopted on 30 October 1996.

9/ Reference is made to *Ilmari L nsman et al. v. Finland*.

10/ See the Human Rights Committee's consideration of Canada of 7 April 1999 under article 40 of the Covenant.

11/ Proposition No. 28 to the Odelsting (1994-95) p. 31.

12/ Report to the Parliament No. 18/1997-98.

13/ Reference is made to his book "Tvistemaal" (1998), p. 757.

14/ Reference is made to *Pereira v. Panama*, Case No. 437/1990, adopted on 21 October 1994, paragraph 5.2.