EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

III. JURISPRUDENCE

ICCPR

- *Lovelace v. Canada* (6/24) (24/1977), ICCPR, A/36/40 (30 July 1981) 166 at paras 13.1 and 14-18.

...

13.1 The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve...In this respect the significant matter is her last claim, that "the major loss to a person ceasing to be Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity".

...

14. The rights under article 27 of the Covenant have to be secured to "persons belonging" to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as "belonging" to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. The right to live on a reserve is not as such guaranteed by article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language "in community with the other members" of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant...

16. In this respect, the Committee is of the view that statutory restrictions affecting the right

to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions mentioned above, such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be...

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked...The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles...

- *Kitok v. Sweden* (197/1985), ICCPR, A/43/40 (27 July 1988) 221 at paras. 9.1-9.8.

...

9.1 The main question before the committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of this communication has been denied the right to "enjoy [his] own culture", as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant...

9.3 ...[T]he right to enjoy one's own culture in community with the other members of the group cannot be determined *in abstracto* but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much between a conflict between the author as a Sami and the State party, but rather between the author and the Sami community...[T]he Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged...[A] decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership...[T]he right of the Ländsstyrelsen to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with Article 27 of the Covenant...

9.7 ...[T]he Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought be the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible...for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the *ratio decidendi* in the Lovelace case (No. 24/1977, *Lovelace v. Canada*), d/ namely, that a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective

justification and to be necessary for the continued viability and welfare of the minority as a whole. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party...

_____

Notes

...

d/ Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex XVIII.

_____

- *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at paras. 2.2, 2.3, 32.2 and 33.

...

2.2 Chief Ominayak is the leader and representative of the Lubicon Lake Band, a Cree Indian band living within the borders of Canada in the Province of Alberta. They are subject to the jurisdiction of the Federal Government of Canada, allegedly in accordance with a fiduciary relationship assumed by the Canadian Government with respect to Indian peoples and their lands located within Canada's national borders. The Lubicon Lake Band is a self-identified, relatively autonomous, socio-cultural and economic group. Its members have continuously inhabited, hunted, trapped and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta since time immemorial. Since their territory is relatively inaccessible, they have, until recently, had little contact with non-Indian society. Band members speak Cree as their primary language. Many do not speak, read or write English. The Band continues to maintain its traditional culture, religion, political structure and subsistence economy.

2.3 It is claimed that the Canadian Government, through the Indian Act of 1970 and Treaty 8 of 21 June 1899 (concerning aboriginal land rights in northern Alberta), recognized the right of the original inhabitants of that area to continue their traditional way of life. Despite these laws and agreements, the Canadian Government had allowed the provincial government of Alberta to expropriate the territory of the Lubicon Lake Band for the benefit of private corporate interests (e.g., leases for oil and gas exploration). In so doing, Canada is accused of violating the Band's right to determine freely its political status and to pursue its economic, social and cultural development, as guaranteed by article 1, paragraph 1, of the Covenant. Furthermore, energy exploration in the Band's territory allegedly entails a violation of article 1, paragraph 2, which grants all peoples the right to dispose of their natural wealth and resources. In destroying the environment and undermining the Band's economic base, the Band is allegedly being deprived of its means to subsist and of the enjoyment of the right of self-determination guaranteed in article 1.

...

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes 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...

33. Historical inequities...and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band and constitute a violation of article 27 so long as they continue.

For dissenting opinion in this context, see Ominayak v. Canada (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at Individual Opinion by Mr. Nisuke Ando, 28.

- *Davidson and McIntyre v. Canada* (359 and 385/1989), ICCPR, A/48/40 vol. II (31 March 1993) 91 (CCPR/C/47/D/359/1989/385/1989) at paras. 2.1, 2.2, 4.4, 11.2-11.4, 13, Individual Opinion by Mr. Kurt Herndl (concurring in part), 107, Individual Opinion by Mr. Bertil Wennergren (concurring), 108 and Individual Opinion by Mrs. Elizabeth Evatt cosigned by Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring), 109.

...

2.1 The authors of the first communication (No. 359/1989), Mr. Ballantyne and Ms. Davidson, sell clothes and paintings to a predominantly English-speaking clientele, and have always used English signs to attract customers.

2.2 The author of the second communication (No. 385/1989), Mr. McIntyre, states that in July 1988, he received notice from the Commissioner-Enquirer of the "Commission de protection de la langue française" that following a "checkup" it had been ascertained that he had installed a sign carrying the firm name "Kelly Funeral Home" on the grounds of his establishment, which constituted an infraction of the Charter of the French Language. He was requested to inform the Commissioner within 15 days in writing of measures taken to correct the situation and to prevent the recurrence of a similar incident. The author has since removed his company sign.

...

4.4 Section 58 of the Charter, as modified in 1989 by section 1 of Bill No. 178, now reads:

> "58. Public signs and posters and commercial advertising, outside or intended for the public outside, shall be solely in French...

...

11.2 As to article 27, the Committee observes that this provision refers to minorities in

States; this refers, as do all references to the "State" or to "States" in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.

11.3 Under article 19 of the Covenant, everyone shall have the right to freedom of expression; this right may be subjected to restrictions, conditions for which are set out in article 19, paragraph 3. The Government of Quebec has asserted that commercial activity such as outdoor advertising does not fall within the ambit of article 19. The Committee does not share this opinion. Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.

11.4 Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3 (a) and (b) of article 19, and must be necessary to achieve the legitimate purpose. While the restrictions on outdoor advertising are indeed provided for by law, the issue to be addressed is whether they are necessary for the respect of the rights of others. The rights of others could only be the rights of the francophone minority within Canada under article 27. This is the right to use their own language, which is not jeopardized by the freedom of others to advertise in other than the French language. Nor does the Committee have reason to believe that public order would be jeopardized by commercial advertising outdoors in a language other than French. The Committee notes that the State party does not seek to defend Bill 178 on these grounds. Any constraints under paragraphs 3 (a) and 3 (b) of article 19 would in any event have to be shown to be necessary. The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a

language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.

...

13. The Committee calls upon the State party to remedy the violation of article 19 of the Covenant by an appropriate amendment to the law.

...

C. Individual Opinion by Mr. Kurt Herndl (concurring in part)

I agree with the Committee's Views that the facts of the McIntyre case disclose a violation of article 19 of the Covenant. As to the communication of Mr. Ballantyne and Ms. Davidson, I believe that a question remains whether they are indeed "victims" within the meaning of article 1 of the Optional Protocol.

With respect to the Committee's rationale in paragraph 11.2 of its Views, the communications in my opinion do not raise issues under article 27 of the Covenant. The question as to whether the authors can or cannot be considered as belonging to a "minority" in the sense of article 27 would seem to be moot in as much as the rights that the authors invoke are not "minority rights" as such, but rather rights pertaining to the principle of freedom of expression, as protected by article 19 of the Covenant, which obviously must be taken to include commercial advertising. On this account, as the Committee rightly states in paragraphs 11.3 and 11.4 of its Views, there has been violation of a provision of the Covenant, i.e. article 19.

D. Individual Opinion by Mr. Bertil Wennergren (concurring)

I concur with the Committee's findings...that the authors have no claim under article 27 of the Covenant, but I do so because a prohibition to use any other language than French for commercial outdoor advertising in Quebec does not infringe on any of the rights protected under article 27. It is, under the circumstances, of no relevance, whether English speaking persons in Quebec are entitled to the protection of article 27 or not. I feel, however, that...the issue of what constitutes a minority in a State must be decided on a case by case basis, due regard being given to the particular circumstances of each case.

E. Individual Opinion by Mrs. Elizabeth Evatt, Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring)

...

It may be correct to conclude that the authors are not members of a linguistic minority whose right to use their own language in community with the other members of their group have been violated by the Quebec laws in question. This conclusion can be supported by reference to the general application of those laws - they apply to all languages other than French - and to their specific purpose - which attracts the protection of article 19.

My difficulty with the decision is that it interprets the term "minorities" in article 27 solely on the basis of the number of members of the group in question in the State party. The reasoning is that because English speaking Canadians are not a numerical minority in Canada they cannot be a minority for the purposes of article 27.

I do not agree, however, that persons are necessarily excluded from the protection of article 27 where their group is an ethnic, linguistic or cultural minority in an autonomous province of a State, but is not clearly a numerical minority in the State itself, taken as a whole entity. The criteria for determining what is a minority in a State (in the sense of article 27) has not yet been considered by the Committee, and does not need to be foreclosed by a decision in the present matter, which can in any event be determined on other grounds. The history of the protection of minorities in international law shows that the question of definition has been difficult and controversial and that many different criteria have been proposed. For example, it has been argued that factors other than strictly numerical ones need to be taken into account. Alternatively, article 50, which envisages the application of the Covenant to "parts of federal States" could affect the interpretation of article 27.

To take a narrow view of the meaning of minorities in article 27 could have the result that a State party would have no obligation under the Covenant to ensure that a minority in an autonomous province had the protection of article 27 where it was not clear that the group in question was a minority in the State considered as a whole entity. These questions do not need to be finally resolved in the present matter and are better deferred until the proper context arises.

For dissenting opinion in this context, see Davidson and McIntyre v. Canada (359 and 385/1989), ICCPR, A/48/40 vol. II (31 March 1993) 91 (CCPR/C/47/D/359/1989/385/1989) at Individual Opinion by Mr. Birame Ndiaye, 105 and Individual Opinion by Mr. Kurt Herndl (dissenting in part), 107.

See also:

- *Singer v. Canada* (455/1991), ICCPR, A/49/40 vol. II (26 July 1994) 155 (CCPR/C/51/D/455/1991) at paras. 12.1 and 12.2.

- *Länsman v. Finland* (511/1992), ICCPR, A/50/40 vol. II (26 October 1994) 66 (CCPR/C/52/D/511/1992) at paras. 9.1-9.8 and 10.

  ...
  9.1 ...The issue to be determined by the Committee is whether quarrying on the flank of Mt. Etelä-Riutusvaara, in the amount that has taken place until the present time or in the amount that would be permissible under the permit issued to the company which has expressed its

intention to extract stone from the mountain (i.e. up to a total of 5,000 cubic metres), would violate the authors' rights under article 27 of the Covenant.

9.2 It is undisputed that the authors are members of a minority within the meaning of article 27 and as such have the right to enjoy their own culture; it is further undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community. 21/

9.3 The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In this connection, the Committee observes that article 27 does not only protect traditional means of livelihood of national minorities, as indicated in the State party's submission. Therefore that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant. Furthermore, mountain Riutusvaara continues to have a spiritual significance relevant to their culture. The Committee also notes the concern of the authors that the quality of slaughtered reindeer could be adversely affected by a disturbed environment.

9.4 A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.

9.5 The question that therefore arises in this case is whether the impact of the quarrying on Mount Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region. The Committee recalls paragraph 7 of its General Comment on article 27, according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or, as in the instant case, reindeer husbandry, and that measures must be taken "to ensure the effective participation of members of minority communities in decisions which affect them".

9.6 Against this background, the Committee concludes that quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture. It notes in particular that the interests of the Muotkatunturi Herdsmens' Committee and of the authors were considered during the proceedings leading to the delivery of the quarrying permit, that the authors were

consulted during the proceedings, and that reindeer herding in the area does not appear to have been adversely affected by such quarrying as has occurred.

9.7 As far as future activities which may be approved by the authorities are concerned, the Committee further notes that the information available to it indicates that the State party's authorities have endeavoured to permit only quarrying which would minimize the impact on any reindeer herding activity in Southern Riutusvaara and on the environment; the intention to minimize the effects of extraction of stone from the area on reindeer husbandry is reflected in the conditions laid down in the quarrying permit. Moreover, it has been agreed that such activities should be carried out primarily outside the period used for reindeer pasturing in the area. Nothing indicates that the change in herding methods by the Muotkatunturi Herdsmens' Committee...could not be accommodated by the local forestry authorities and/or the company.

9.8 With regard to the authors' concerns about future activities, the Committee notes that economic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, if mining activities in the Angeli area were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.

10. The Human Rights Committee...is of the view that the facts as found by the Committee do not reveal a breach of Article 27 or any other provision of the Covenant.

_____

Notes

...

21/ Views on Communication No.197/1985 (*Kitok v. Sweden*), adopted on 27 July 1988, paragraph 9.2.

_____

- *Länsman v. Finland* (671/1995), ICCPR, A/52/40 vol. II (30 October 1996) 191 (CCPR/C/58/D/671/1995) at paras. 10.5-10.7.

...

10.5 After careful consideration of the material placed before it by the parties, and duly noting that the parties do not agree on the long-term impact of the logging activities already carried out and planned, the Committee is unable to conclude that the activities carried out as well as approved constitute a denial of the authors' right to enjoy their own culture. It is

uncontested that the Muotkatunturi Herdsmen's Committee, to which the authors belong, was consulted in the process of drawing up the logging plans and in the consultation, the Muotkatunturi Herdsmen's Committee did not react negatively to the plans for logging. That this consultation process was unsatisfactory to the authors and was capable of greater interaction does not alter the Committee's assessment. It transpires that the State party's authorities did go through the process of weighing the authors' interests and the general economic interests in the area specified in the complaint when deciding on the most appropriate measures of forestry management, i.e. logging methods, choice of logging areas and construction of roads in these areas. The domestic courts considered specifically whether the proposed activities constituted a denial of article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it.

10.6 As far as future logging activities are concerned, the Committee observes that on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsmen, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

- *Waldman v. Canada* (694/1996), ICCPR, A/55/40 vol. II (3 November 1999) 86 (CCPR/C/67/D/694/1996) at paras. 10.2, 10.4-10.6 and Individual Opinion by Martin Scheinin (concurring), 100 at paras. 3-5.

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

...
10.2 The issue before the Committee is whether public funding for Roman Catholic schools, but not for schools of the author's religion, which results in him having to meet the full cost of education in religious school, constitutes a violation of the author's rights under the Covenant.
...
10.4 The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective. In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.

10.5 With regard to the State party's argument that it is reasonable to differentiate in the allocation of public funds between private and public schools, the Committee notes that it is not possible for members of religious denominations other than Roman Catholic to have their religious schools incorporated within the public school system. In the instant case, the author has sent his children to a private religious school, not because he wishes a private non-government dependent education for his children, but because the publicly funded school system makes no provision for his religious denomination, whereas publicly funded religious schools are available to members of the Roman Catholic faith. On the basis of the facts before it, the Committee considers that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the author's religion, which are private by necessity, cannot be considered reasonable and objective.

10.6 The Committee has noted the State party's argument that the aims of the State party's secular public education system are compatible with the principle of nondiscrimination laid down in the Covenant. The Committee...notes, however, that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools...[T]he Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria. In the instant case, the Committee concludes that the material before it does not show that the differential treatment between the Roman Catholic faith and the author's religious denomination is based on such criteria. Consequently, there

has been a violation of the author's rights under article 26 of the Covenant to equal and effective protection against discrimination.

Individual Opinion by Martin Scheinin

While I concur with the Committee's finding that the author is a victim of a violation of article 26 of the Covenant, I wish to explain my reasons for such a conclusion.

...

3. In the present case the Committee correctly focussed its attention on article 26. Although both General Comment No. 22 [48] and the *Hartikainen* case are related to article 18, there is a considerable degree of interdependence between that provision and the non-discrimination clause in article 26. In general, arrangements in the field of religious education that are in compliance with article 18 are likely to be in conformity with article 26 as well, because non-discrimination is a fundamental component in the test under article 18 (4). In the cases of *Blom v. Sweden* (Communication No. 191/1985) and *Lundgren et al. and Hjord et al. v. Sweden* (Communications 288 and 299/1988) the Committee elaborated its position in the question what constitutes discrimination in the field of education. While the Committee left open whether the Covenant entails, in certain situations, an obligation to provide some public funding for private schools, it concluded that the fact that private schools, freely chosen by the parents and their children, do not receive the same level of funding as public schools does not amount to discrimination.

4. In the Province of Ontario, the system of public schools provides for religious instruction in one religion but adherents of other religious denominations must arrange for their religious education either outside school hours or by establishing private religious schools. Although arrangements exist for indirect public funding to existing private schools, the level of such funding is only a fraction of the costs incurred to the families, whereas public Roman Catholic schools are free. This difference in treatment between adherents of the Roman Catholic religion and such adherents of other religions that wish to provide religious schools for their children is, in the Committee's view, discriminatory. While I concur with this finding I wish to point out that the existence of public Roman Catholic schools in Ontario is related to a historical arrangement for minority protection and hence needs to be addressed not only under article 26 of the Covenant but also under articles 27 and 18. The question whether the arrangement in question should be discontinued is a matter of public policy and the general design of the educational system within the State party, not a requirement under the Covenant.

5. When implementing the Committee's views in the present case the State party should in my opinion bear in mind that article 27 imposes positive obligations for States to promote religious instruction in minority religions, and that providing such education as an optional arrangement within the public education system is one permissible arrangement to that end.

Providing for publicly funded education in minority languages for those who wish to receive such education is not as such discriminatory, although care must of course be taken that possible distinctions between different minority languages are based on objective and reasonable grounds. The same rule applies in relation to religious education in minority religions. In order to avoid discrimination in funding religious (or linguistic) education for some but not all minorities States may legitimately base themselves on whether there is a constant demand for such education. For many religious minorities the existence of a fully secular alternative within the public school system is sufficient, as the communities in question wish to arrange for religious education outside school hours and outside school premises. And if demands for religious schools do arise, one legitimate criterion for deciding whether it would amount to discrimination not to establish a public minority school or not to provide comparable public funding to a private minority school is whether there is a sufficient number of children to attend such a school so that it could operate as a viable part in the overall system of education. In the present case this condition was met. Consequently, the level of indirect public funding allocated to the education of the author's children amounted to discrimination when compared to the full funding of public Roman Catholic schools in Ontario.

- *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140 at paras. 2.3-2.6, 10.2, 10.4, 10.6, 10.8, Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga (concurring), 157 and Individual Opinion by Martin Scheinin (concurring), 160.

...
2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted "self-government in accordance with the Paternal Law of 1872". The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a 'Volksraad' (Council of the people), consisting of nine members.

2.4 According to counsel, in 1989, the Rehoboth Basters accepted under extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as to comply with UN Security Council resolution nr.435 (1978)...

2.5 ...According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with protecting the communal properties of the people at all cost. Subsequently, the Rehoboth

Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the community's *locus standi*. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community's claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters' appeal...

...

10.2 The Committee regrets that the State party has not provided any information with regard to the substance of the authors' claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations to the extent that they are substantiated.

...

10.4 The authors have made available to the Committee the judgement which the Supreme Court gave on 14 May 1996 on appeal from the High Court which had pronounced on the claim of the Baster community to communal property. Those courts made a number of findings of fact in the light of the evidence which they assessed and gave certain interpretations of the applicable domestic law. The authors have alleged that the land of their community has been expropriated and that, as a consequence, their rights as a minority are being violated since their culture is bound up with the use of communal land exclusive to members of their community. This is said to constitute a violation of Article 27 of the Covenant.

...

10.6 ...[T]he Committee observes that it is for the domestic courts to find the facts in the context of, and in accordance with, the interpretation of domestic laws. On the facts found, if "expropriation" there was, it took place in 1976, or in any event before the entry into force of the Covenant and the Optional Protocol for Namibia on 28 February 1995. As to the related issue of the use of land, the authors have claimed a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the *de facto* exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples. 4/ However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of

self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.

...

10.8 The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under Article 25(a) and (c) of the Covenant. The right under Article 25(a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under Article 25(c) is a right to have equal access, on general terms of equality, to public service in one's country. These are individual rights. Although it may very well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

Notes

...

4/ See *Kitok v. Sweden* (197/1985), *Ominayak v. Canada* (167/1984), *I. Länsman et al. v. Finland* (511/1992), *J. Länsman et al. v. Finland* (671/1995), as well as General Comment No. 23 [50], para. 7.

Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga

It is clear on the facts and from the 1996 decision of the High Court that the ownership of the communal lands of the community had been acquired by the government of Namibia before the coming into force of the Covenant and the Optional Protocol and that the authors cannot substantiate a claim on the basis of any expropriation. However, the significant aspect of the authors' claim under article 27 is that they have, since that date, been deprived of the use of lands and certain offices and halls that had previously been held by their government for the exclusive use and benefit of members of the community. Privatization of the land and overuse by other people has, they submit, deprived them of the opportunity to pursue their traditional pastoral activities. The loss of this economic base to their activities has, they claim, denied them the right to enjoy their own culture in community with others. This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often

show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27.

Individual Opinion by Martin Scheinin

I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.

Irrespective of what has been said above, I concur with the Committee's finding that there was no violation of article 25. In my opinion, the authors have failed to substantiate how the 1996 law on regional government has adversely affected their exercise of article 25 rights, in particular the operation and powers of local or traditional authorities. On the basis of the material they presented to the Committee, no violation of article 25 can be established.

- *Mahuika et al. v. New Zealand* (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at paras. 5.1-5.13, 9.3-9.11 and 10

...
5.1 The Maori people of New Zealand number approximately 500,000, 70% of whom are

affiliated to one or more of 81 iwi. 1/ The authors belong to seven distinct iwi (including two of the largest and in total comprising more than 140,000 Maori) and claim to represent these. In 1840, Maori and the predecessor of the New Zealand Government, the British Crown, signed the Treaty of Waitangi, which affirmed the rights of Maori, including their right to self-determination and the right to control tribal fisheries. In the second article of the Treaty, the Crown guarantees to Maori:

> "The full exclusive and undisturbed possession of their lands, forests, fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession..." 2/

The Treaty of Waitangi is not enforceable in New Zealand law except insofar as it is given force of law in whole or in part by Parliament in legislation. However, it imposes obligations on the Crown and claims under the Treaty can be investigated by the Waitangi Tribunal. 3/

5.2 No attempt was made to determine the extent of the fisheries until the introduction of the Quota Management System in the 1980s. That system, which constitutes the primary mechanism for the conservation of New Zealand's fisheries resources and for the regulation of commercial fishing in New Zealand, allocates permanent, transferable, property rights in quota for each commercial species within the system.

5.3 The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers. By the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry. Since the efforts to manage the commercial fishery fell short of what was needed, in 1986 the Government amended the existing Fisheries Act and introduced a quota management system for the commercial use and exploitation of the country's fisheries. Section 88 (2) of the Fisheries Act provides "that nothing in this Act shall affect any Maori fishing rights". In 1987, the Maori tribes filed an application with the High Court of New Zealand, claiming that the implementation of the quota system would affect their tribal Treaty rights contrary to section 88(2) of the Fisheries Act, and obtained interim injunctions against the Government.

5.4 In 1988, the Government started negotiations with Maori, who were represented by four representatives. The Maori representatives were given a mandate to negotiate to obtain 50% of all New Zealand commercial fisheries. In 1989, after negotiation and as an interim

measure, Maori agreed to the introduction of the Maori Fisheries Act 1989, which provided for the immediate transfer of 10% of all quota to a Maori Fisheries Commission which would administer the resource on behalf of the tribes. This allowed the introduction of the quota system to go ahead as scheduled. Under the Act, Maori can also apply to manage the fishery in areas which had customarily been of special significance to a tribe or sub-tribe, either as a source of food or for spiritual reasons.

5.5 Although the Maori Fisheries Act 1989 was understood as an interim measure only, there were limited opportunities to purchase any more significant quantities of quota on the market. In February 1992, Maori became aware that Sealords, the largest fishing company in Australia and New Zealand was likely to be publicly floated at some time during that year. The Maori Fisheries Negotiators and the Maori Fisheries Commission approached the Government with a proposition that the Government provide funding for the purchase of Sealords as part of a settlement of Treaty claims to Fisheries. Initially the Government refused, but following the Waitangi Tribunal report of August 1992 on the Ngai Tahu Sea Fishing, in which the Tribunal found that Ngai Tahu, the largest tribe from the South Island of New Zealand, had a development right to a reasonable share of deep water fisheries, the Government decided to enter into negotiations. These negotiations led on 27 August 1992 to the signing of a Memorandum of Understanding between the Government and the Maori negotiators.

5.6 Pursuant to this Memorandum, the Government would provide Maori with funds required to purchase 50% of the major New Zealand fishing company, Sealords, which owned 26% of the then available quota. In return, Maori would withdraw all pending litigation and support the repeal of section 88 (2) of the Fisheries Act as well as an amendment to the Treaty of Waitangi Act 1975, to exclude from the Waitangi Tribunal's jurisdiction claims relating to commercial fishing. The Crown also agreed to allocate 20% of quota issued for new species brought within the Quota Management System to the Maori Fisheries Commission, and to ensure that Maori would be able to participate in "any relevant statutory fishing management and enhancement policy bodies." In addition, in relation to non-commercial fisheries, the Crown agreed to empower the making of regulations, after consultation with Maori, recognizing and providing for customary food gathering and the special relationship between Maori and places of customary food gathering importance.

5.7 The Maori negotiators sought a mandate from Maori for the deal outlined in the memorandum of understanding. The memorandum and its implications were debated at a national hui 4/ and at hui at 23 marae 5/ throughout the country. The Maori negotiators' report showed that 50 iwi comprising 208,681 Maori, supported the settlement. 6/ On the basis of this report, the Government was satisfied that a mandate for a settlement had been given and on 23 September1992, a Deed of Settlement was executed by the New Zealand Government and Maori representatives. The Deed implements the Memorandum of

Understanding and concerns not only sea fisheries but all freshwater and inland fisheries as well. Pursuant to the Deed, the Government pays the Maori tribes a total of NZ$ 150,000,000 to develop their fishing industry and gives the Maori 20% of new quota for species. The Maori fishing rights will no longer be enforceable in court and will be replaced by regulations. Paragraph 5.1 of the Deed reads:

> "Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal."

Paragraph 5.2 reads:

> "The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights."

The Deed recorded that the name of the Maori Fisheries Commission would be changed to the "Treaty of Waitangi Fisheries Commission", and that the Commission would be accountable to Maori as well as to the Crown in order to give Maori better control of their fisheries guaranteed by the Treaty of Waitangi.

5.8 According to the authors the contents of the Memorandum of Understanding were not always adequately disclosed or explained to tribes and sub-tribes. In some cases, therefore, informed decision-making on the proposals contained in the Memorandum of understanding was seriously inhibited. The authors emphasize that while some of the Hui were supportive of the proposed Sealords deal, a significant number of tribes and sub-tribes either opposed

the deal completely or were prepared to give it conditional support only. The authors further note that the Maori negotiators have been at pains to make clear that they had no authority and did not purport to represent individual tribes and sub-tribes in relation to any aspect of the Sealords deal, including the conclusion and signing of the Deed of Settlement.

5.9 The Deed was signed by 110 signatories. Among the signatories were the 8 Maori Fisheries Negotiators (the four representatives and their alternates), two of whom represented pan-Maori organisations; 7/ 31 plaintiffs in proceedings against the Crown relating to fishing rights, including representatives of 11 iwi; 43 signatories representing 17 iwi; and 28 signatories who signed the Deed later and who represent 9 iwi. The authors observe that one of the difficulties of ascertaining the precise number of tribes who signed the Deed of Settlement relates to verification of authority to sign on behalf of the tribes, and claim that it is apparent that a number of signatories did not possess such authority or that there was doubt as to whether they possessed such authority. The authors note that tribes claiming major commercial fisheries resources, were not among the signatories.

5.10 Following the signing of the Deed of Settlement, the authors and others initiated legal proceedings in the High Court of New Zealand, seeking an interim order to prevent the Government from implementing the Deed by legislation. They argued *inter alia* that the Government's actions amounted to a breach of the New Zealand Bill of Rights Act 1990.8/ The application was denied on 12 October 1992 and the authors appealed by way of interlocutory application to the Court of Appeal. On 3 November 1992, the Court of Appeal held that it was unable to grant the relief sought on the grounds that the Courts could not interfere in Parliamentary proceedings and that no issue under the Bill of Rights had arisen at that time.

5.11 Claims were then brought to the Waitangi Tribunal, which issued its report on 6 November 1992. The report concluded that the settlement was not contrary to the Treaty except for some aspects which could be rectified in the anticipated legislation. In this respect, the Waitangi Tribunal considered that the proposed extinguishment and/or abrogation of Treaty interests in commercial and non-commercial fisheries was not consistent with the Treaty of Waitangi or with the Government's fiduciary responsibilities. The Tribunal recommended to the Government that the legislation make no provision for the extinguishment of interests in commercial fisheries and that the legislation in fact affirm those interests and acknowledge that they have been satisfied, that fishery regulations and policies be reviewable in the courts against the Treaty's principles, and that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.

5.12 On 3 December 1992, the Treaty of Waitangi (Fisheries Claims) Settlement Bill 1992 was introduced. Because of the time constraints involved in securing the Sealords bid, the

Bill was not referred to the competent Select Committee for hearing, but immediately presented and discussed in Parliament. The Bill became law on 14 December 1992.... The Act provides *inter alia* for the payment of NZ$ 150,000,000 to Maori. The Act also states in section 9, that "all claims (current and future) by Maori in respect of commercial fishing ... are hereby finally settled" ... With respect to the effect of the settlement on non-commercial Maori fishing rights and interests, it is declared that these shall continue to give rise to Treaty obligations on the Crown and that regulations shall be made to recognise and provide for customary food gathering by Maori. The rights or interests of Maori in non-commercial fishing giving rise to such claims shall no longer have legal effect and accordingly are not enforceable in civil proceedings and shall not provide a defence to any criminal, regulatory or other proceeding, except to the extent that such rights or interests are provided for in regulations. According to the Act, the Maori Fisheries Commission was renamed to Treaty of Waitangi Fisheries Commission, and its membership expanded from seven to thirteen members. Its functions were also expanded. In particular, the Commission now has the primary role in safeguarding Maori interests in commercial fisheries.

5.13 The joint venture bid for Sealords was successful. After consultation with Maori, new Commissioners were appointed to the Treaty of Waitangi Fisheries Commission. Since then, the value of the Maori stake in commercial fishing has grown rapidly. In 1996, its net assets had increased to a book value of 374 million dollars. In addition to its 50% stake in Sealords, the Commission now controls also Moana Pacific Fisheries Limited (the biggest in-shore fishing company in New Zealand), Te Waka Huia Limited, Pacific Marine Farms Limited and Chatham Processing Limited. The Commission has disbursed substantial assistance in the form of discounted annual leases of quota, educational scholarships and assistance to Maori input into the development of a customary fishing regime. Customary fishing regulations have been elaborated by the Crown in consultation with Maori.

...

9.3 The first issue before the Committee therefore is whether the authors' rights under article 27 of the Covenant have been violated by the Fisheries Settlement, as reflected in the Deed of Settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community. 14/ The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture. However, the compatibility of the 1992 Act with the treaty of Waitangi is not a matter for the Committee to determine.

9.4 The right to enjoy one's culture cannot be determined *in abstracto* but has to be placed in context. In particular, article 27 does not only protect traditional means of livelihood of

minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology. In this case the legislation introduced by the State affects, in various ways, the possibilities for Maori to engage in commercial and non-commercial fishing. The question is whether this constitutes a denial of rights. On an earlier occasion, the Committee has considered that:

> "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his own culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27." 15/

9.5 The Committee recalls its general comment on article 27, according to which, especially in the case of indigenous peoples, the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them. 16/ In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority 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.17/ The Committee acknowledges that the Treaty of Waitangi (Fisheries Settlement) Act 1992 and its mechanisms limit the rights of the authors to enjoy their own culture.

9.6 The Committee notes that the State party undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. The Settlement was enacted only following the Maori representatives' report that substantial Maori support for the Settlement existed. For many Maori, the Act was an acceptable settlement of their claims. The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals

who claim to be adversely affected. 18/

9.7 As to the effects of the agreement, the Committee notes that before the negotiations which led to the Settlement the Courts had ruled earlier that the Quota Management System was in possible infringement of Maori rights because in practice Maori had no part in it and were thus deprived of their fisheries. With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control. In regard to non-commercial fisheries, the Crown obligations under the Treaty of Waitangi continue, and regulations are made recognising and providing for customary food gathering.

9.8 In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, *inter alia* to securing the possibility of Maori individuals and communities to engage themselves in non-commercial fishing activities. While it is a matter of concern that the settlement and its process have contributed to divisons amongst Maori, nevertheless, the Committee concludes that the State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the Fisheries Settlement and its enactment through legislation, including the Quota Management System, are compatible with article 27.

9.9 The Committee emphasizes that the State party continues to be bound by article 27 which requires that the cultural and religious significance of fishing for Maori must deserve due attention in the implementation of the Treaty of Waitangi (Fisheries Claims) Settlement Act. With reference to its earlier case law 19/, the Committee emphasizes that in order to comply with article 27, measures affecting the economic activities of Maori must be carried out in a way that the authors continue to enjoy their culture, and profess and practice their religion in community with other members of their group. The State party is under a duty to bear this in mind in the further implementation of the Treaty of Waitangi (FisheriesClaims) Settlement Act.

9.10 The authors' complaints about the discontinuance of the proceedings in the courts concerning their claim to fisheries must be seen in the light of the above. While in the abstract it would be objectionable and in violation of the right to access to court if a State party would by law discontinue cases that are pending before the courts, in the specific circumstances of the instant case, the discontinuance occurred within the framework of a nation wide settlement of exactly those claims that were pending before the courts and that had been adjourned awaiting the outcome of negotiations. In the circumstances, the

Committee finds that the discontinuance of the authors' court cases does not amount to a violation of article 14(1) of the Covenant.

9.11 With regard to the authors' claim that the Act prevents them from bringing claims concerning the extent of their fisheries before the courts, the Committee notes that article 14(1) encompasses the right to access to court for the determination of rights and obligations in a suit at law. In certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14(1). In the present case, the Act excludes the courts' jurisdiction to inquire into the validity of claims by Maori in respect to commercial fishing, because the Act is intended to settle these claims. In any event, Maori recourse to the Courts to enforce claims regarding fisheries was limited even before the 1992 Act; Maori rights in commercial fisheries were enforceable in the Courts only to the extent that s 88(2) of the Fisheries Act expressly provided that nothing in the Act was to affect Maori fishing rights. The Committee considers that whether or not claims in respect of fishery interests could be considered to fall within the definition of a suit at law, the 1992 Act has displaced the determination of Treaty claims in respect of fisheries by its specific provisions. Other aspects of the right to fisheries, though, still give the right to access to court, for instance in respect of the allocation of quota and of the regulations governing customary fishing rights. The authors have not substantiated the claim that the enactment of the new legislative framework has barred their access to court in any matter falling within the scope of article 14, paragraph 1. Consequently, the Committee finds that the facts before it do not disclose a violation of article 14, paragraph 1.

10. The Human Rights Committee...is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

Notes

1/ Iwi: tribe, incorporating a number of constituent hapu (sub-tribes).

2/ Counsel submits that the Maori text contains a broader guarantee than is apparent from a bare reading of the English text. He explains that one of the most important differences in meaning between the two texts relates to the guarantee, in the Maori text, of "te tino rangatiratanga" (the full authority) over "taonga" (all those things important to them), including their fishing places and fisheries. According to counsel, there are three main elements embodied in the guarantee of rangatiratanga: the social, cultural, economical and spiritual protection of the tribal base, the recognition of the spiritual source of taonga and the fact that the exercise of authority is not only over property, but of persons within the kinship group and their access to tribal resources. The authors submit that the Maori text of the Treaty of Waitangi is authoritative.

3/ The Waitangi Tribunal is a specialized statutory body established by the Treaty of Waitangi Act 1975 having the status of a commission of enquiry and empowered *inter alia* to inquire into certain claims in relation to the principles of the Treaty of Waitangi.

4/ Hui: assembly.

5/ Marae: area set aside for the practice of Maori customs.

6/ The report showed also that 15 iwi representing 24,501 Maori, opposed the settlement and 7 iwi groups comprising 84,255 Maori were divided in their views.

7/ The National Maori Congress, a non-governmental organisation comprising representatives from up to 45 iwi, and the New Zealand Maori Council, a body which represents district Maori councils throughout New Zealand.

8/ Breaches were claimed of sections 13 (freedom of thought, conscience and religion), 14 (freedom of expression), 20 (rights of minorities) and 27 (right to justice).

...

14/ See *inter alia* the Committee's Views in *Kitok v. Sweden*, communication No. 197/1985, adopted on 27 July 1988, CCPR/C/33/D/197/1985, paragraph 9.2. See also the Committee's Views in the two Länsman cases, Nos. 511/1992, 26 October 1994 (CCPR/C/52/D/511/1992) and 671/1995, 30 October 1996 (CCPR/C/58/D/671/1995).

15/ Committee's Views on case No. 511/1992, *Lansmann et al. v. Finland*, CCPR/C/52/D/511/1992, para. 9.4.

16/ General Comment No. 23, adopted during the Committee's 50th session in 1994, paragraph 3.2.

17/ Committee's Views on case 511/1992, *I. Länsman et al. v. Finland*, paras. 9.6 and 9.8 (CCPR/C/52/D/511/1992).

18/ See the Committee's Views in case No. 197/1985, *Kitok v. Sweden*, adopted on 27 July 1988, CCPR/C/33/D/197/1985.

19/ Committee's Views on case 511/1992, *I. Länsman et al. v. Finland*, para. 9.8, CCPR/C/52/D/511/1992.

For dissenting opinion in this context, see Mahuika et al. v. New Zealand (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11 at Individual Opinion by Mr. Martin Scheinin (partly

dissenting), 29.

- *Äärelä and Näkkäläjärui v. Finland* (779/1997) ICCPR, A/57/40 vol. II (24 October 2001) 117 (CCPR/C/73/D/779/1997) at paras. 2.1-2.5, 4.11, 7.2-7.7, 8.1, 8.2, Individual Opinion by Prafullachandra N. Bhagwati (concurring), and Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting).

  ...
  2.1 The authors are reindeer breeders of Sami ethnic origin and members of the Sallivaara Reindeer Herding Co-operative. The Co-operative has 286,000 hectares of State-owned land available for reindeer husbandry. On 23 March 1994, the Committee declared a previous communication, brought by the authors among others and which alleged that logging and road-construction activities in certain reindeer husbandry areas violated article 27 of the Covenant, inadmissible for non-exhaustion of domestic remedies. 1/ In particular, the Committee considered that the State party had shown that article 27 could be invoked in the relevant domestic proceedings, which the authors should have engaged before coming to the Committee. Thereafter, following unsuccessful negotiations, the authors brought a suit in the Lappi District Court of first instance against the National Forestry and Park Service (Forestry Service). The suit sought the enjoinder, on the basis *inter alia* of article 27 of the Covenant, of any logging or road-construction in the Mirhaminmaa-Kariselkä area. This area is said to be amongst the best winter herding lands of the Sallivara Co-operative.

  2.2 On 30 August 1996, the District Court decided, following an on-site forest inspection at the authors' request, to prohibit logging or road construction in the 92 hectare Kariselkä area, but to allow it in the Mirhaminmaa area. 2/ The Court applied a test of "whether the harmful effects of felling are so great that they can be deemed to deny to the Sami a possibility of reindeer herding that is part of their culture, is adapted to modern developments, and is profitable and rational". The Court considered that logging in the Mirhaminmaa area would be of long-term benefit to reindeer herding in the area and would be convergent with those interests. In the Kariselkä area, differing environmental conditions meant that there would be a considerable long-term decrease in lichen reserves. Relying *inter alia* on the decisions of the Committee, 3/ the Court found that these effects of logging, combined with the fact that the area was an emergency feeding ground, would prevent reindeer herding in that area. A factor in the decision was the disclosure that an expert testifying for the Forestry Service disclosed he had not visited the forest in question. After the decision, logging duly proceeded in the Mirhaminmaa area.

  2.3 On appeal by the Forestry Service to the Rovaniemi Court of Appeal, the Forestry Board sought the then exceptional measure of oral hearings. The Court granted this motion, while

rejecting the author's motion that the appellate court itself conduct an on-site inspection. The expert witness, having in the meanwhile examined the forest, repeated his first instance testimony for the Forestry Service. Another expert witness for the Forestry Service testified that the authors' herding co-operative would not suffer greatly in the reduction of herding land through the logging in question, however the Court was not informed that the witness already had proposed to the authorities that the authors' herd should be reduced by 500 owing to serious overgrazing.

2.4 On 11 July 1997, the Appeal Court, reversing the first instance decision, allowed logging also in the Kariselkä area, and awarded costs of 75,000 Finnish marks against the authors.4/ The Court took a different view of the expert evidence. It found that the small area of logging proposed (which would not involve further roadworks) would have minimal effects on the quantities of arboreal lichen and, over time, increase the amounts of ground lichen. In light of the finding that the area was not the main winter pasture and in recent years had not been used as a back-up area, the Court concluded it had not been shown that there would be adverse effects on reindeer in the long run and even the immediate effects would be small. The authors were not made aware by the Appeal Court or the Forestry Service that the latter had presented allegedly distorted arguments to the Court based on the Committee's finding of no violation of article 27 of the Covenant in the separate case of *Jouni Länsman et al. v. Finland*. 5/ The authors learned of this brief only upon receiving the Appeal Court's judgement, in which it stated that the material had been taken into account, but that an opportunity for the authors to comment was "manifestly unnecessary". On 29 October 1997, the Supreme Court decided, in its discretion and without giving reasons, not to grant leave to appeal. Thereafter, logging took place in the Kariselkä area, but no roads were constructed.

2.5 On 15 December 1997, the Ombudsman decided that the municipality of Inari and its mayor had exerted inappropriate pressure on the authors by formally asking them to withdraw from their legal proceedings, but did not find that the Forestry Service had acted unlawfully or otherwise wrongly. 6/ The Ombudsman limited his remedy to bringing this conclusion to the attention of the parties. On 1 June 1998, a decision of the Ministry of Agriculture and Forestry (of 13 November 1997) entered into effect reducing the permissible size of the Sallivaara herd by 500 head from 9,000 to 8,500 animals. On 3 and 11 November 1998, the Forestry Service required a total sum of over 20,000 Finnish marks from the authors towards meeting the costs judgement. 7/ This sum distrained by the Forestry Service corresponds to a major share of the authors' taxable income.

...

4.11 As to the imposition of costs, the State party points out that under its law there is an obligation for the losing party to pay, when sought, the reasonable legal costs of the successful party. 15/ The law does not alter this situation when the parties are a private individual and public authority, or when the case involves human rights issues. These principles are the same in many other States, including Austria, Germany, Norway and

Sweden, and are justified as a means of avoiding unnecessary legal proceedings and delays. The State party argues this mechanism, along with free legal aid for lawyers' expenses, ensures equality in the courts between plaintiffs and defendants. The State party notes however that, from 1 June 1999, an amendment to the law will permit a court *ex officio* to reduce a costs order that would otherwise be manifestly unreasonable or inequitable with regard to the facts resulting in the proceedings, the position of the parties and the significance of the matter.

...

7.2 As to the authors' argument that the imposition of a substantial award of costs against them at the appellate level violated their rights under article 14, paragraph 1, to equal access to the courts, the Committee considers that a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts. In the particular case, the Committee notes that the authors were private individuals bringing a case alleging breaches of their rights under article 27 of the Covenant. In the circumstances, the Committee considers that the imposition by the Court of Appeal of substantial costs award, without the discretion to consider its implications for the particular authors, or its effect on access to court of other similarly situated claimants, constitutes a violation of the authors' rights under article 14, paragraph 1, in conjunction with article 2 of the Covenant. The Committee notes that, in the light of the relevant amendments to the law governing judicial procedure in 1999, the State party's courts now possess the discretion to consider these elements on a case by case basis.

7.3 As to the authors' claims under article 14 that the procedure applied by the Court of Appeal was unfair in that an oral hearing was granted and an on-site inspection was denied, the Committee considers that, as a general rule, the procedural practice applied by domestic courts is a matter for the courts to determine in the interests of justice. The onus is on the authors to show that a particular practice has given rise to unfairness in the particular proceedings. In the present case, an oral hearing was granted as the Court found it necessary to determine the reliability and weight to be accorded to oral testimony. The authors have not shown that this decision was manifestly arbitrary or otherwise amounted to a denial of justice. As to the decision not to pursue an on-site inspection, the Committee considers that the authors have failed to show that the Court of Appeal's decision to rely on the District Court's inspection of the area and the records of those proceedings injected unfairness into the hearing or demonstrably altered the outcome of the case. Accordingly, the Committee is unable to find a violation of article 14 in the procedure applied by the Court of Appeal in these respects.

7.4 As to the author's contention that the Court of Appeal violated the authors' right to a fair trial contained in article 14, paragraph 1, by failing to afford the authors an opportunity to comment on the brief containing legal argument submitted by the Forestry Authority after

expiry of filing limits, the Committee notes that it is a fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party.17/ The Court of Appeal states that it had "special reason" to take account of these particular submissions made by the one party, while finding it "manifestly unnecessary" to invite a response from the other party. In so doing, the authors were precluded from responding to a brief submitted by the other party that the Court took account of in reaching a decision favourable to the party submitting those observations. The Committee considers that these circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.

7.5 Turning to the claim of a violation of article 27 in that logging was permitted in the Kariselkä area, the Committee notes that it is undisputed that the authors are members of a minority culture and that reindeer husbandry is an essential element of their culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that it has failed to properly protect the authors' right to enjoy their culture. The question therefore before the Committee is whether the logging of the 92 hectares of the Kariselkä area rises to such a threshold.

7.6 The Committee notes that the authors, and other key stakeholder groups, were consulted in the evolution of the logging plans drawn up by the Forestry Service, and that the plans were partially altered in response to criticisms from those quarters. The District Court's evaluation of the partly conflicting expert evidence, coupled with an on-site inspection, determined that the Kariselkä area was necessary for the authors to enjoy their cultural rights under article 27 of the Covenant. The appellate court finding took a different view of the evidence, finding also from the point of view of article 27, that the proposed logging would partially contribute to the long-term sustainability of reindeer husbandry by allowing regeneration of ground lichen in particular, and moreover that the area in question was of secondary importance to husbandry in the overall context of the Collective's lands. The Committee, basing itself on the submissions before it from both the authors and the State party, considers that it does not have sufficient information before it in order to be able to draw independent conclusions on the factual importance of the area to husbandry and the long-term impacts on the sustainability of husbandry, and the consequences under article 27 of the Covenant. Therefore, the Committee is unable to conclude that the logging of 92 hectares, in these circumstances, amounts to a failure on the part of the State party to properly protect the authors' right to enjoy Sami culture, in violation of article 27 of the Covenant.

7.7 In the light of the Committee's findings above, it is not necessary to consider the authors' additional claims brought under article 2 of the Covenant.

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

8.1 The Human Rights Committee...is of the view that the facts before it reveal a violation by Finland of article 14, paragraph 1, taken in conjunction with article 2 of the Covenant, and additionally a violation of article 14, paragraph 1, of the Covenant taken alone.

8.2 Pursuant to article 2, paragraph 3 (a), of the Covenant, the Committee considers that the authors are entitled to an effective remedy. In terms of the award of costs against the authors, the Committee considers that as the costs award violated article 14, paragraph 1, of the Covenant and, moreover, followed proceedings themselves in violation of article 14, paragraph 1, the State party is under an obligation to restitute to the authors that proportion of the costs award already recovered, and to refrain from seeking execution of any further portion of the award. As to the violation of article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims. The State party is also under an obligation to ensure that similar violations do not occur in the future.

_____

Notes

1/ *Sara et al. v. Finland*, Communication 431/1990.

2/ The State party points out that the 92 hectare area amounts to some 3 per cent of the 6,900 hectares of the Co-operative's lands used for forestry.

3/ *Sara v. Finland* (Communication 431/1990), *Kitok v. Sweden* (Communication 197/1985), *Ominayak v. Canada* (Communication 167/1984), *Ilmari Länsman v. Finland* (Communication 511/1992); and moreover the Committee's General Comments 23 (50).

4/ Costs, for which the authors were jointly liable, totalled 73,965.28 Finnish marks, with 11 per cent annual interest.

5/ Communication 671/1995.

6/ The complaint had been submitted almost three years earlier.

7/ No information is provided on whether the Forestry Service is pursuing the outstanding portion of costs awarded to it (some 55,000 Finnish marks).

...

15/ Chapter 21, section 1, *Code of Judicial Procedure* 1993.

...

17/ In *Jansen-Gielen v. The Netherlands* (Communication 846/1999), the Committee stated:

"Consequently, it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings. In the absence of the guarantee of equality of arms between the parties in the production of evidence for the purposes of the hearing, the Committee finds a violation of article 14, paragraph 1 of the Covenant."

_____

...

Individual Opinion by Prafullachandra N. Bhagwati (concurring)

I have gone through the text of the views expressed by the majority members of the Committee. I agree with those views save in respect of paragraph 7.2 and, partly, in respect of paragraph 8.2. Since I am in substantial agreement with the majority on most of the issues, I do not think it necessary to set out the facts again in my opinion and I will therefore straightaway proceed to discuss my dissenting opinion in regard to paragraphs 7.2 and 8.2.

So far as the alleged violation of article 14, paragraph 1, in conjunction with article 2, by the imposition of substantial costs is concerned, the majority members have taken the view that such imposition, on the facts and circumstances of the case, constitutes a violation of those articles. While some of the members have expressed a dissenting view, I agree with the majority view but I would reason in a slightly different way.

It is clear that under the law as it then stood, the Court had no discretion in the matter of award of costs. The Court was under a statutory obligation to award costs to the winning party. The Court could not tailor the award of costs - even refuse to award costs - against the losing party taking into account the nature of the litigation, the public interest involved, and the financial condition of the party. Such a legal provision had a chilling effect on the exercise of the right of access to justice by none too wealthy litigants, and particularly those pursuing an *actio popularis*. The imposition of substantial costs under such a rigid and blind-folded legal provision in the circumstances of the present case, where two members of the Sami tribe were pursuing public interest litigation to safeguard their cultural rights against what they felt to be a serious violation, would, in my opinion, be a clear violation of article 14, paragraph 1, in conjunction with article 2. It is a matter of satisfaction that such a situation would not arise in the future, because we are told that the law in regard to the imposition of costs has since been amended. Now the Court has a discretion whether to award costs at all to the winning party, and, if so, what the amount of such costs should be depending upon various circumstances such as those I have mentioned above.

So far as paragraph 8.2 is concerned, I would hold that the authors are entitled to the relief set out in paragraph 8.2 in regard to the costs, not only because the award of costs followed upon the proceedings in the appellate Court which were themselves in violation of article

14, paragraph 1, for the reasons set out in paragraph 7.4, but also because the award of costs was itself in violation of article 14, paragraph 1, read in conjunction with article 2, for the reasons set out in paragraph 7.2. I entirely agree with the rest of paragraph 8.2

Individual Opinion by Abdelfattah Amor, Nisuke Ando, Christine Chanet, Eckart Klein, Ivan Shearer and Max Yalden (partly dissenting)

While we share the Committee's general approach with regard to the award of costs (see also *Lindon v Australia* (Communication 646/1995), we cannot agree that in the present case it has convincingly been argued and proven that the authors were in fact so seriously affected by the relevant decision taken at the appellate level that access to the court was or would in future be closed to them. In our view, they have failed to substantiate a claim of financial hardship.

Concerning possible deterrent effects in future on the authors or other potential authors, due note must be given to the amendment of the code of judicial procedure according to which a court has the power to reduce a costs order that would be manifestly unreasonable or inequitable, having regard to the concrete circumstances of a given case (see paragraph 4.11 above).

However, given that we share the view that the Court of Appeal's judgment is vitiated by a violation of article 14, paragraph 1, of the Covenant (see paragraph 7.4 above), its decision relating to the costs is necessarily affected as well. We therefore join the Committee's finding that the State party is under an obligation to refund to the authors that proportion of the costs award already recovered, and to refrain from executing any further portion of the award (see paragraph 8.2 of the Committee's views).

- *Länsman III v. Finland* (1023/2001), ICCPR, A/60/40 vol. II (17 March 2005) 90 at paras. 2.1-2.4, 3.1, 3.2, 10.1-10.3 and 11.

...

2.1 On 30 October 1996, the Committee delivered its Views in *Länsman et al. v. Finland* ("the earlier communication") 1/. The Committee found, on the evidence then before it, no violation of the rights under article 27 of the current two individual authors (and others) in the completed logging of some 250 hectares in Pyhäjärvi and the proposed logging of some further 250 hectares in Kirkko-outa (both are in the Angeli area).

2.2 The Committee went on to find:

> 10.6 As far as future logging activities are concerned, the Committee observes that

on the basis of the information available to it, the State party's forestry authorities have approved logging on a scale which, while resulting in additional work and extra expenses for the authors and other reindeer herdsmen, does not appear to threaten the survival of reindeer husbandry. That such husbandry is an activity of low economic profitability is not, on the basis of the information available, a result of the encouragement of other economic activities by the State party in the area in question, but of other, external, economic factors.

10.7 The Committee considers that if logging plans were to be approved on a scale larger than that already agreed to for future years in the area in question or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of the authors' right to enjoy their own culture within the meaning of article 27. The Committee is aware, on the basis of earlier communications, that other large-scale exploitations touching upon the natural environment, such as quarrying, are being planned and implemented in the area where the Sami people live. Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.

2.3 By 1999, all 500 hectares of the two areas at issue in the earlier communication had been logged. Moreover, in 1998, a further 110 hectares were logged in the Paadarskaidi area of the Herdsmen's Committee (not part of the areas covered by the earlier communication).

2.4 By the date of submission of the communication, yet another logging operation in Paadarskaidi had been proposed, with minimal advance warning to the Herdsmen's Committee and with an imminent commencement date. At that point, the Herdsmen's Committee had yet to receive a written plan of the nature and scope of the logging operation. The National Forest & Park Service had indicated that it would send the plans to the Herdsmen's Committee at a later date, having indicated in its previous plan that the next logging operation would be due to take place only after a year and in a different location.

...

3.1 The authors allege a violation of their rights as reindeer herders under article 27 of the Covenant, both inasmuch as it relates to logging already undertaken and to logging proposed. At the outset, they complain that since the 1980s, some 1,600 hectares of the Herdsmen's Committee's grazing area in Paadarskaidi have been logged, accounting for some 40 per cent of lichen (utilized for feeding reindeer) in that specific area.

3.2 As to the effect of the logging on the author's herd, it is submitted that reindeer tend to avoid areas being logged or prepared for logging. They therefore stray to seek other pastures and thereby incur additional labour for the herders. After logging, logging waste prevents reindeer grazing and compacted snow hampers digging. The logging operations result in a complete loss of lichen in the areas affected, allegedly lasting for hundreds of years.

...

10.1 As to the claims relating to the effects of logging in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas of the territory administered by the Muotkatunturi Herdsmen's Committee, the Committee notes that it is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture and that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community 6/. Article 27 requires that a member of a minority shall not be denied the right to enjoy his culture. Measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27. As noted by the Committee in its Views on case No. 511/1992 of *Länsman et al. v. Finland*, however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.

10.2 The Committee recalls that in the earlier case No. 511/1992, which related to the Pyhäjärvi and Kirkko-outa areas, it did not find a violation of article 27, but stated that if logging to be carried out was approved on a larger scale than that already envisaged or if it could be shown that the effects of logging already planned were more serious than can be foreseen at present, then it may have to be considered whether it would constitute a violation of article 27. In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time - either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group.

10.3 The authors and the State party disagree on the effects of the logging in the areas in question. Both express divergent views on all developments that have taken place since the logging in these areas, including the reasons behind the Minister's decision to reduce the number of reindeer kept per herd: while the authors attribute the reduction to the logging,

the State party invoke the overall increase in reindeer threatening the sustainability of reindeer husbandry generally. While the Committee notes the reference made by the authors to a report by the Finish Game and Fisheries Research Institute that "loggings - even those notified as relatively mild - will be of greater significance for reindeer husbandry" if such husbandry is based on natural pastures only...it also takes note of the fact that not only this report but also numerous other references in the material in front of it mention other factors explaining why reindeer husbandry remains of low economic profitability. It also takes into consideration that despite difficulties the overall number of reindeers still remains relatively high. For these reasons, the Committee concludes that the effects of logging carried out in the Pyhäjärvi, Kirkko-outa and Paadarskaidi areas have not been shown to be serious enough as to amount to a denial of the authors' right to enjoy their own culture in community with other members of their group under article 27 of the Covenant.

11. The Human Rights Committee...is of the view that the facts before the Committee do not reveal a breach of article 27 of the Covenant.

Notes

1/ Case No. 671/1995.

...

6/ Views on case No. 197/1985 (*Kitok v. Sweden*), Views adopted 27 July 1988, para. 9.2; on case No. 511/1992 (*I. Länsman et al. v. Finland*), adopted 26 October 1994, para. 9.2.

- *Howard v. Canada* (879/1998), ICCPR, A/60/40 vol. II (26 July 2005) 12 at paras. 12.4-12.11 and 13.

...

12.4 The Committee notes that it is undisputed that the author is a member of a minority enjoying the protection of article 27 of the Covenant and that he is thus entitled to the right, in community with the other members of his group, to enjoy his own culture. It is not disputed that fishing forms an integral part of the author's culture.

12.5 The question before the Committee, as determined by its admissibility decision, is thus whether Ontario's Fishing Regulations as applied to the author by the courts have deprived him, in violation of article 27 of the Covenant, of the ability to exercise, individually and in community with other members of his group, his aboriginal fishing rights which are an integral part of his culture.

12.6 The State party has submitted that the author has the right to fish throughout the year

on and adjacent to his Nation's reserves and that, with a fishing licence, he can also fish in other areas in the region which are open for fishing when the area surrounding the reserves is closed. The author has argued that there is not enough fish on and adjacent to the reserves to render the right meaningful and that the other areas indicated by the State party do not belong to his Nation's traditional fishing grounds. He has moreover argued that fishing with a licence constitutes a privilege, whereas he claims to fish as of right.

12.7 Referring to its earlier jurisprudence, the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right 16/. The Committee must therefore reject the author's argument that the requirement of obtaining a fishing licence would in itself violate his rights under article 27.

12.8 The Committee notes that the evidence and arguments presented by the State party show that the author has the possibility to fish, either pursuant to a treaty right on and adjacent to the reserves or based on a licence outside the reserves. The question whether or not this right is sufficient to allow the author to enjoy this element of his culture in community with the other members of his group, depends on a number of factual considerations.

12.9 The Committee notes that, with regard to the potential catch of fish on and adjacent to the reserves, the State party and the author have given different views. The State party has provided detailed statistics purporting to show that the fish in the waters on and adjacent to the reserves are sufficiently abundant so as to make the author's right to fish meaningful and the author has denied this. Similarly, the parties disagree on the extent of the traditional fishing grounds of the Hiawatha First Nation.

12.10 The Committee notes in this respect that these questions of fact have not been brought before the domestic courts of the State party. It recalls that the evaluation of facts and evidence is primarily a matter for the domestic courts of a State party, and in the absence of such evaluation in the present case the Committee's task is greatly impeded.

12.11 The Committee considers that it is not in a position to draw independent conclusions on the factual circumstances in which the author can exercise his right to fish and their consequences for his enjoyment of the right to his own culture. While the Committee understands the author's concerns, especially bearing in mind the relatively small size of the reserves in question and the limitations imposed on fishing outside the reserves, and without prejudice to any legal proceedings or negotiations between the Williams Treaties First Nations and the Government, the Committee is of the opinion that the information before it is not sufficient to justify the finding of a violation of article 27 of the Covenant.

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

13. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of the International Covenant on Civil and Political Rights.

_____

Notes

...

16/ See *inter alia Kitok v. Sweden*, communication No. 197/1985, Views adopted on 27 July 1988, CCPR/C/33/D/197/1985 and *Länsmann v. Finland*, communication No. 511/1992, Views adopted on 26 October 1994, CCPR/C/52/D/511/1992 and communication No. 671/1995, Views adopted on 30 October 1996, CCPR/C/58/D/671/1995.

_____

For dissenting opinions in this context generally see:

- *Hopu v. France* (549/1993) (549/1997), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at Individual Opinion by David Kretzmer and Thomas Buergenthal, Nisuke Ando and Lord Colville (dissenting), 81 at paras. 1-7.
- *T.K. v. France* (220/1987), ICCPR, A/45/40 vol. II (8 November 1989) 118 at Individual Opinion by Mrs. Rosalyn Higgins (dissenting in part), 125.

CAT

- *Hajrizi Dzemajl et al. v. Serbia and Montenegro* (161/2000), CAT, A/58/44 (21 November 2002) 85 (CAT/C/29/D/161/2000) at paras. 2.1-2.24, 9.2-9.6, 10, 11 and Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete (concurring), 97.

...

2.1 On 14 April 1995 at around 10 p.m., the Danilovgrad Police Department received a report indicating that two Romani minors had raped S.B., a minor ethnic Montenegrin girl. In response to this report, around midnight, the police entered and searched a number of houses in the Bozova Glavica Roma settlement and brought into custody all of the young male Romani men present in the settlement (all of them presently among the complainants to this Committee).

2.2 The same day, around midnight, two hundred ethnic Montenegrins, led by relatives and neighbours of the raped girl, assembled in front of the police station and publicly demanded that the Municipal Assembly adopt a decision expelling all Roma from Danilovgrad. The crowd shouted slogans addressed to the Roma, threatening to "exterminate" them and "burn down" their houses.

2.3 Later, two Romani minors confessed under duress. On 15 April, between 4 and 5 a.m.,

all of the detainees except those who confessed were released from police custody. Before their release, they were warned by the police to leave Danilovgrad immediately with their families because they would be at risk of being lynched by their non-Roma neighbours.

2.4 At the same time, police officer Ljubo Radovic came to the Bozova Glavica Roma settlement and told the Romani residents of the settlement that they must evacuate the settlement immediately. The officer's announcement caused panic. Most residents of the settlement fled towards a nearby highway, where they could take buses for Podgorica. Only a few men and women remained in the settlement to safeguard their homes and livestock. At approximately 5 a.m., police officer Ljubo Radovic returned to the settlement, accompanied by police inspector Branko Micanovic. The officers told the remaining Roma still in their homes (including some of the complainants) to leave Danilovgrad immediately, as no one could guarantee their safety or provide them with protection.

2.5 The same day, at around 8 a.m., a group of non-Roma residents of Danilovgrad entered the Bozova Glavica Roma settlement, hurling stones and breaking windows of houses owned by the complainants. Those Roma who had still not left the settlement (all of them among the complainants) hid in the cellar of one of the houses from which they eventually managed to flee through the fields and woods towards Podgorica.

2.6 In the course of the morning of 15 April, a police car repeatedly patrolled the deserted Bozova Glavica settlement. Groups of non-Roma residents of Danilovgrad gathered in different locations in the town and in the surrounding villages. Around 2 p.m. the non-Roma crowd arrived in the Bozova Glavica settlement - in cars and on foot. Soon a crowd of at least several hundred non-Roma (according to different sources, between 400 and 3,000 persons were present) assembled in the then deserted Roma settlement.

2.7 ...Shortly after 3 p.m., the demolition of the settlement began. The mob, with stones and other objects, first broke windows of cars and houses belonging to Roma and then set them on fire. The crowd also destroyed and set fire to the haystacks, farming and other machines, animal feed sheds, stables, as well as all other objects belonging to the Roma. They hurled explosive devices and "Molotov" cocktails that they had prepared beforehand, and threw burning cloths and foam rubbers into houses through the broken windows. Shots and explosions could be heard amid the sounds of destruction. At the same time, valuables were looted and cattle slaughtered. The devastation endured unhindered for hours.

2.8 Throughout the course of the destruction, the police officers present failed to act in accordance with their legal obligations. Shortly after the attack began, rather than intervening to halt the violence, the officers simply moved their police car to a safe distance and reported to their superior officer. As the violence and destruction unfolded, police officers did no more than feebly seek to persuade some of the attackers to calm down pending a final

decision of the Municipal Assembly with respect to a popular request to evict Roma from the Bozova Glavica settlement.

2.9 The outcome of the anti-Roma rage was the levelling of the entire settlement and the burning or complete destruction of all properties belonging to its Roma residents. Although the police did nothing to halt the destruction of the Roma settlement, they did ensure that the fire did not spread to any of the surrounding buildings, which belonged to the non-Roma.

2.10 The police and the investigating magistrate of the Basic Court in Danilovgrad subsequently drew up an on-site investigation report regarding the damage caused by those who took part in the attack.

2.11 Official police documents, as well as statements given by a number of police officers and other witnesses, both before the court and in the initial stage of the investigation, indicate that the following non-Roma residents of Danilovgrad were among those who took part in the destruction of the Bozova Glavica Roma settlement: Veselin Popovic, Dragisa Makocevic, Gojko Popovic, Bosko Mitrovic, Joksim Bobicic, Darko Janjusevic, Vlatko Cacic, Radojica Makocevic.

2.12 Moreover, there is evidence that police officers Miladin Dragas, Rajko Radulovic, Dragan Buric, Djordjije Stankovic and Vuk Radovic were all present as the violence unfolded and did nothing or not enough to protect the Roma residents of Bozova Glavica or their property.

2.13 Several days following the incident, the debris of the Roma settlement was completely cleared away by heavy construction machines of the Public Utility Company. All traces of the existence of the Roma in Danilovgrad were obliterated.

2.14 Following the attack, and pursuant to the relevant domestic legislation, on 17 April 1995, the Podgorica Police Department filed a criminal complaint with the Basic Public Prosecutor's Office in Podgorica. The complaint alleged that a number of unknown perpetrators had committed the criminal offence of causing public danger under article 164 of the Montenegrin Criminal Code and, *inter alia*, explicitly stated that there are "reasonable grounds to believe that, in an organized manner and by using open flames … they caused a fire to break out ... on 15 April 1995 … which completely consumed dwellings … and other propert[ies] belonging to persons who used to reside in … [the Bozova Glavica] settlement".

2.15 On 17 April 1995 the police brought in 20 individuals for questioning. On 18 April 1995, a memorandum was drawn up by the Podgorica Police Department which quoted the statement of Veselin Popovic as follows: "... I noticed flames in a hut which led me to conclude that the crowd had started setting fire to huts so I found several pieces of foam

rubber which I lit with a lighter I had on me and threw them, alight, into two huts, one of which caught fire."

2.16 On the basis of this testimony and the official police memorandum, the Podgorica Police Department, on 18 April 1995, ordered that Veselin Popovic be remanded into custody, on the grounds that there were reasons to believe that he had committed the criminal offence of causing public danger in the sense of article 164 of the Montenegrin Criminal Code.

2.17 On 25 April 1995, and with respect to the incident at the origin of the present complaint, the Public Prosecutor instituted proceedings against one person only - Veselin Popovic.

2.18 Veselin Popovic was charged under article 164 of the Montenegrin Criminal Code. The same indictment charged Dragisa Makocevic with illegally obtaining firearms in 1993 - an offence unrelated to the incident at issue notwithstanding the evidence implicating him in the destruction of the Roma Bozova Glavica settlement.

2.19 Throughout the investigation, the investigating magistrate of the Basic Court of Danilovgrad heard a number of witnesses all of whom stated that they had been present as the violence unfolded but were not able to identify a single perpetrator. On 22 June 1995, the investigating magistrate of the Basic Court of Danilovgrad heard officer Miladin Dragas. Contrary to the official memorandum he had personally drawn up on 16 April 1995, officer Dragas now stated that he had not seen anyone throwing an inflammable device, nor could he identify any of the individuals involved.

2.20 On 25 October 1995, the Basic Public Prosecutor in Podgorica requested that the investigating magistrate of the Basic Court of Danilovgrad undertake additional investigation into the facts of the case. Specifically, the prosecutor proposed that new witnesses be heard, including officers from the Danilovgrad Police Department who had been entrusted with protecting the Bozova Glavica Roma settlement. The investigating magistrate of the Basic Court of Danilovgrad then heard the additional witnesses, all of whom stated that they had seen none of the individuals who had caused the fire. The investigating magistrate took no further action.

2.21 Due to the "lack of evidence", the Basic Public Prosecutor in Podgorica dropped all charges against Veselin Popovic on 23 January 1996. On 8 February 1996, the investigating magistrate of the Basic Court of Danilovgrad issued a decision to discontinue the investigation. From February 1996 up to and including the date of filing of this complaint, the authorities took no further steps to identify and/or punish those individuals responsible for the incident at issue - "civilians" and police officers alike.

2.22 In violation of domestic legislation, the complainants were not served with the court decision of 8 February 1996 to discontinue the investigation. They were thus prevented from assuming the prosecution of the case themselves, as was their legal right.

2.23 Even prior to the closing of the proceedings, on 18 and 21 September 1995, the investigating magistrate, while hearing witnesses (among them a number of the complainants), failed to advise them of their right to assume the prosecution of the case in the event that the Public Prosecutor should decide to drop the charges. This contravened domestic legislation which explicitly provides that the Court is under an obligation to advise ignorant parties of avenues of legal redress available for the protection of their interests.

2.24 On 6 September 1996, all 71 complainants filed a civil claim for damages, pecuniary and non-pecuniary, with the first instance court in Podgorica - each plaintiff claiming approximately US$ 100,000. The pecuniary damages claim was based on the complete destruction of all properties belonging to the plaintiffs, while the non-pecuniary damages claim was based on the pain and suffering of the plaintiffs associated with the fear they were subjected to, and the violation of their honour, reputation, freedom of movement and the right to choose their own place of residence. The plaintiffs addressed these claims against the Republic of Montenegro and cited articles 154, 180 (1), 200, and 203 of the Federal Law on Obligations. More than five years after the submission of their claim, the civil proceedings for damages are still pending.

...

9.2 As to the legal qualification of the facts that have occurred on 15 April 1995, as they were described by the complainants, the Committee first considers that the burning and destruction of houses constitute, in the circumstances, acts of cruel, inhuman or degrading treatment or punishment. The nature of these acts is further aggravated by the fact that some of the complainants were still hidden in the settlement when the houses were burnt and destroyed, the particular vulnerability of the alleged victims and the fact that the acts were committed with a significant level of racial motivation. Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" ... Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.

9.3 Having considered that the facts described by the complainants constitute acts within the meaning of article 16, paragraph 1 of the Convention, the Committee will analyse other alleged violations in the light of that finding.

9.4 Concerning the alleged violation of article 12 of the Convention, the Committee, as it has underlined in previous cases (see *inter alia*, *Encarnacion Blanco Abad v. Spain*, Case No. 59/1996, decided on 14 May 1998), is of the opinion that a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein. In the present case, the Committee notes that, despite the participation of at least several hundred non-Roma in the events of 15 April 1995 and the presence of a number of police officers both at the time and at the scene of those events, no person nor any member of the police forces has been tried by the courts of the State party. In these circumstances, the Committee is of the view that the investigation conducted by the authorities of the State party did not satisfy the requirements of article 12 of the Convention.

9.5 Concerning the alleged violation of article 13 of the Convention, the Committee considers that the absence of an investigation as described in the previous paragraph also constitutes a violation of article 13 of the Convention. Moreover, the Committee is of the view that the State party's failure to inform the complainants of the results of the investigation by, *inter alia*, not serving on them the decision to discontinue the investigation, effectively prevented them from assuming "private prosecution" of their case. In the circumstances, the Committee finds that this constitutes a further violation of article 13 of the Convention.

9.6 Concerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16, paragraph 1, of the Convention while specifically referring to articles 10, 11, 12, and 13, does not mention article 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate the victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complainants to obtain redress and to provide them with fair and adequate compensation.

10. The Committee...is of the view that the facts before it disclose a violation of articles 16, paragraph 1, 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

EQUALITY AND DISCRIMINATION - MINORITY RIGHTS

11. In pursuance of rule 111, paragraph 5, of its rules of procedure, the Committee urges the State party to conduct a proper investigation into the facts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, including fair and adequate compensation and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

Individual Opinion by Mr. Fernando Mariño and Mr. Alejandro González Poblete

We are issuing this opinion to emphasize that, in our judgement, the illegal incidents for which the State party is responsible constitute "torture" within the meaning of article 1, paragraph 1, of the Convention, not merely "cruel, inhuman or degrading treatment" as covered by article 16. The failure of the State authorities to react to violent evictions, forced displacement and the destruction of homes and property by individuals amounts to unlawful acquiescence which, in our judgement, violates article 1, paragraph 1, particularly when read in conjunction with article 2, paragraph 1, of the Convention.

We believe that, in fact, the suffering visited upon the victims was severe enough to qualify as "torture", because:

(a) The inhabitants of the Bozova Glavica settlement were forced to abandon their homes in haste given the risk of severe personal and material harm;

(b) Their settlement and homes were completely destroyed. Basic necessities were also destroyed;

(c) Not only did the resulting forced displacement prevent them from returning to their original settlement, but many members of the group were forced to live poorly, without jobs or fixed places of abode;

(d) Thus displaced and wronged, these nationals of Serbia and Montenegro have still not received any compensation, seven years after the fact, although they have approached the domestic authorities;

(e) All the inhabitants who were violently displaced belong to the Romani ethnic group, which is known to be especially vulnerable in many parts of Europe. In view of this, States must afford them greater protection.

The above amounts to a presumption of "severe suffering", certainly "mental" but also inescapably "physical" in nature even if the victims were not subjected to direct physical aggression.

We thus consider that the incidents at issue should have been categorized as "torture".