A Briefing on
Indigenous Peoples’ Rights
and the
United Nations Human Rights Committee

December 2001

Fergus MacKay

Forest Peoples Programme

This Briefing has been produced with the support of a grant from the Ford Foundation
Contents

Summary 1

I. Introduction 2

II. The International Covenant on Civil and Political Rights & the Human Rights Committee 3
   A. Background 3
   B. The Human Rights Committee 4
      1. State party Article 40 Reports 4
      2. Individual Communications/Complaints 8
   C. Rights set out in the ICCPR 8
      1. Implementation of the rights in the ICCPR 8
      2. Article 1 – Self-determination 10
      3. Article 27 – Minority rights 11

III. Optional Protocol I to the ICCPR 14

IV. Filing a Complaint with the HRC: Procedures and Considerations 16
   A. General Requirements 16
   B. Admissibility 17
   C. Merits 19
   D. Rule 86 – Interim Measures 20

V. Cases Reviewed by the Human Rights Committee 20
   A. Mikmaq Tribal Society vs. Canada 20
   B. Lovelace vs. Canada 22
   C. Ominayak and the Lake Lubicon Band vs. Canada 23
   D. Kitok vs. Sweden 24
   E. Ilmari Lansman et al. vs. Finland 26
   F. J. Lansman et al. vs. Finland 28
   G. Hopu & Bessert v. France 29
   H. Apirana Mahuika et al v. New Zealand 32
   J. Äärelä and Näkkäläjärvi v. Finland 37
   K. Summary of Article 27 Jurisprudence 40
      1. Scope of Article 27 40
      2. Tests for violations 43
      3. Factors assessed in determining if a violation occurred 44

VI. Annexes 46
   A. General Comment No. 12, 1984 – Self-Determination 46
   B. General Comment No. 23, 1994 – Article 27 48
   C. Ratifications 51
   D. Training and helpful institutions and information 53
Summary

Indigenous peoples throughout the world continue to suffer serious abuses of their human rights. In particular, they are experiencing heavy pressure on their lands from logging, mining, roads, conservation activities, dams, agribusiness and colonization. Although many states have laws which recognize and protect Indigenous peoples’ rights, to varying degrees, these laws are often violated. In other cases, adequate laws are not in place. Also, in many states, national laws are inconsistent with the binding obligations of these same states under international human rights law.

The United Nations human rights system has mechanisms designed to address these very real problems. The system places binding obligations on states to comply with ratified human rights instruments, such as the International Covenant on Civil and Political Rights. The UN has put in place a procedure to allow individuals to complain if they believe that their state is not fulfilling these obligations. The UN Human Rights Committee has been empowered to receive and review these complaints. It has looked at a number of cases involving Indigenous peoples in the past, which have resulted in jurisprudence recognizing Indigenous rights. This jurisprudence includes the rights of Indigenous peoples, among others:

- To lands, territories and resources traditionally occupied and used, and to a healthy environment;
- To protection of sites of cultural and religious significance;
- To cultural and physical integrity;
- To meaningful participation in decisions that affect them;
- To maintain and use their own cultural, social and political institutions;
- To be free from discrimination and to equal protection of the law.

This Briefing paper sets out in detail how the Human Rights Committee’s procedure works. It summarizes what rights are protected, with a focus on those of particular importance to Indigenous peoples. It also provides guidance on how to submit reports and petitions to the Human Rights Committee. Summaries of relevant cases and judgments that have already passed through the system are also included. These cases and decisions show how the system deals with Indigenous rights and provide concrete examples of how a case can be moved through the system as a way of illustrating some of the points made in the section on how to submit a petition.

We hope that this Briefing will provide Indigenous peoples with a better understanding of their rights and encourage them to use these international procedures to gain redress. We also hope it will help spur states throughout the world to reform their domestic laws and judicial procedures so that they provide effective and meaningful protections for the rights of the Indigenous peoples within their jurisdictions.
I. Introduction

Indigenous peoples’ rights have assumed an important place in international human rights law and a discrete body of law confirming and protecting the individual and collective rights of Indigenous peoples has emerged and concretized in the past 20 years. This body of law is still expanding and developing through Indigenous advocacy in international fora; through the decisions of international human rights bodies; through recognition and codification of Indigenous rights in international instruments presently under consideration by the United Nations and Organization of American States; through incorporation of Indigenous rights into conservation, environmental and development-related instruments and policies; through incorporation of these rights into domestic law and practice; and through domestic judicial decisions. Taken together, this evolution of juridical thought and practice has led many to conclude that some Indigenous rights have attained the status of customary international law and are therefore generally binding on states.¹

International bodies mandated with protection of human rights have paid particular attention to Indigenous rights in recent years. These bodies have contributed to progressive development of Indigenous rights by interpreting human rights instruments of general application to account for and protect the collective rights of Indigenous peoples.² Even the African Commission on Human and Peoples’ Rights, by far the weakest human rights body, has begun to address Indigenous peoples’ rights by taking the important step of establishing a working group on Indigenous peoples in Africa.³ The UN Committee on the Elimination of Racial Discrimination, the UN Human Rights Committee, the International Labour Organization’s Committee of Experts and the Inter-American Commission on Human Rights all stand out in this respect.

Despite these advances in international law, violations of Indigenous rights are all too common. Much of this abuse is associated with heavy pressure to exploit the natural resources in Indigenous peoples’ territories. Indigenous peoples in tropical forest areas have suffered especially severely from this intensifying pressure on their lands, which is resulting in rapid deforestation as a result of logging, mining, agricultural expansion, colonization and infra-


² Instruments of general application refer to those human rights instruments applying to all persons rather than instruments focused exclusively on the rights of Indigenous peoples.

³ African Commission on Human and Peoples’ Rights, Resolution on the Rights of Indigenous People/Communities in Africa, Cotonou, Benin, 6 November 2000. The mandate of the Working Group is described in the resolution as to: “examine the concept of indigenous people and communities in Africa; study the implications of the African Charter on Human Rights and well being of indigenous communities especially with regard to: the right to equality (Articles 2 and 3) the right to dignity (Article 5) protection against domination (Article 19) on self-determination (Article 20) and the promotion of cultural development and identity (Article 22); [and to] consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.”
structure projects. Environmental conservation initiatives also often do not account for Indigenous rights. Further, many of the international developments related to Indigenous rights have yet to be translated into concrete changes at the national and local levels. National laws in many countries, for instance, continue to be substantially at odds with international human rights standards.

This Briefing on Indigenous Peoples’ Rights and the United Nations Human Rights Committee, one of a series produced by the Forest Peoples Programme, aims to provide Indigenous peoples and organizations with practical information to support their effective use of United Nations human rights mechanisms and procedures for the vindication of their rights. While these procedures are far from perfect and certainly will not remedy all human rights problems, their use by Indigenous peoples has led to concrete gains at the national and local level in the past and can be expected to continue to do so in the future. Their use also further reinforces and develops Indigenous rights norms at the international level, which provides additional strength to local and national advocacy and reform efforts.

Part II of the Guide provides an overview of the International Covenant on Civil and Political Rights (ICCPR), the primary instrument used by the UN Human Rights Committee and discusses the Human Rights Committee itself. Part III briefly discusses Optional Protocol I to the ICCPR, which permits the Committee to receive complaints from individuals concerning violations of their rights under the ICCPR. Part IV provides an overview of the procedures and requirements for filing complaints with the Committee and Part V discusses and summarizes the jurisprudence of the Committee pertaining to Indigenous rights. Throughout the text links are made to web sites containing relevant documents and the full text of cases or reports discussed.

II. The International Covenant on Civil and Political Rights

A. Background

Traditionally, how a state treated its population was generally considered to be an internal affair, which other states, and the international community in general, were not to interfere with. However, this situation changed in the aftermath of World War II and the discovery of extensive, human rights violations committed by the Axis powers. At this time, it was decided that the protection of human rights was much too important to be left solely to individual states and that some form of collective international action was necessary if these rights were to be effectively protected in the future. Consequently, Article 1(3) of the 1945 Charter of the United Nations, the organization’s constitution, defines one of the primary purposes and principles of the UN to be “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Other references to human rights include:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED … to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…. (preamble)

Guides have also been written on the inter-American human rights system, the International Labour Organization and the African Commission on Human and Peoples’ Rights. See, www.forestpeoples.org/
With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: …
(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. (Art. 55(c))

All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. (Art. 56)

In 1946, the UN Commission on Human Rights was created as a subsidiary body of the Economic and Social Council (ECOSOC) to supervise the protection of human rights in UN member-states. This was followed in 1948, by the adoption of the Universal Declaration of Human Rights by the UN General Assembly. This Declaration was not legally binding on UN member-states at the time of its adoption; it simply recommended standards that should be followed by states. Therefore, the UN decided to develop a legally binding treaty based upon the Universal Declaration for its members to sign. In the end, two international covenants on human rights were drafted and approved by the UN General Assembly in 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Together with the Universal Declaration, the two Covenants are known as the International Bill of Rights as they set out the basic fundamental rights pertaining to all persons.

B. The Human Rights Committee

The Human Rights Committee (HRC) was established under Article 28 of the ICCPR. It is composed of 18 independent experts in the field of human rights, elected by the states parties to the ICCPR (see, Arts. 28-34, ICCPR). Although they are nominated and elected by the states parties to the ICCPR, the members of the HRC “serve in their personal capacity,” meaning that they are independent and do not represent the states that nominated them (Art. 28(3), ICCPR).

The HRC is the body authorized to oversee state compliance with the rights set forth in the ICCPR. It normally meets three times a year at the UN offices in New York (only the March-April session) and Geneva. The HRC has two primary functions that are relevant to this Briefing:

1. State party Article 40 Reports

State reports: Article 40 of the ICCPR requires states parties to submit reports on measures taken to give effect to the rights defined therein. An initial report is required, which is submitted one year after the state ratifies the ICCPR, as well as periodic reports (normally every five years). Government delegations usually attend the sessions of the HRC at which their report is submitted.

---

5 Today, the Universal Declaration, wholly or in part, is widely considered to express general principles of international law and binding rules of customary international law despite its non-binding status when adopted. The International Court of Justice, for instance, recognized the binding force of the Declaration in, among others, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), ICJ Rep. 3, 42, 1980.
6 The ICCPR entered into force in March 1976. As of November 2001, it has been ratified by 147 states.
7 The initial report is published in the form of a core document, which sets out general information on the state related to human rights. These core documents can be accessed at the following web site: All languages: http://www.unhchr.ch/tbs/doc.nsf/Documentsfrset?OpenFrameSet
considered and are questioned by members of the HRC. The HRC reviews these state reports and issues comments and recommendations, known as Concluding Observations, that address the positive progress made by the state as well as areas in which it is falling short of its obligations under the ICCPR. The HRC has recommended that states consult with NGOs and others during the writing of their reports. This is one way that Indigenous peoples may be able to influence the content of the state report.

**Counter-reports:** Indigenous peoples may also submit reports (known sometimes as ‘counter-reports’) to the HRC describing how their state is complying with the ICCPR as well as proposing questions that HRC members can ask state representatives. Indeed, the HRC has stated that it is particularly interested in receiving reports from Indigenous peoples and NGO about actual country conditions. These reports will be reviewed by the HRC as part of its overall consideration of the state’s report and may lead to direct questions to government delegations. Indigenous peoples can also attend the HRC’s sessions when their state’s report is reviewed and can arrange to meet and brief members of the HRC. This occurs both a few days prior to the country review and during the morning and afternoon sessions of the HRC.

**How to prepare and present a counter-report:** While a counter-report can be presented in any format, it is most useful to write a report which provides an article-by-article comment on the state report itself. In the case of Indigenous peoples, only a few articles may need to be compared (i.e., Articles 1, 26 and 27). Copies of laws and other documents believed to be relevant to the report can also be attached as annexes. It may also be useful to follow the same guidelines used by states for preparing their reports (these guidelines can be accessed at the web site in the footnote below). Copies of the state’s report can be obtained either from the UN (from the web site below) or directly from the state itself. If the state refuses to provide a copy of the report, notify the HRC and this will be raised during the session. Finally, make sure that 20 copies of the counter-report are submitted to the Secretary of the HRC (at the address below) **at least six weeks** prior to the session at which the state in question will be reviewed.

The following list contains a few suggestions on how to write a counter-report and what to include therein.

- Give a brief description of your people or organization including contact information (the HRC does not disclose to states the sources of information its receives);
- Provide an executive summary at the beginning of the report;
- Be brief and to the point; generally do not exceed 20 pages excluding annexes;
- Avoid confrontational language;
- Begin with a general introduction containing your perceptions about the human rights situation in your country as well as your general thoughts about the state’s report (is it accurate, missing information, etc.).

---

8 The procedures for reviewing Article 40 reports are set out in Rules 66-71 of the Rules of Procedure of the Human Rights Committee.

9 HRC’s Guidelines for submitting state reports (CCPR/C/20/Rev.2. (Basic Reference Document)):

- English: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/01038df528e56e72802566120035cd69?Opendocument
- French: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/c964a0dd4642e44980256612003778bf?Opendocument
- Spanish: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/172a0aeefa74a9e2380256612003827cf?Opendocument
• Follow this with a clear article-by-article commentary on the state’s report that notes inaccuracies or clarifies information provided by the state and highlight any concerns that you have related to enjoyment of rights under the article in question. Use headings and clearly divide the report for ease of reading.
• When referring to a specific section of the state’s report, refer to the paragraph instead of the page number as these may change in translated versions; and
• Annex copies of relevant legislation, decrees or orders and proposed laws and other measures (i.e. court decisions, administrative rules, etc.) that may be inconsistent with rights recognized in the ICCPR.

Counter-reports and other information should be sent to:
Secretary, Human Rights Committee
Room D-204
Support Services Branch
Office of the High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10
SWITZERLAND
Tel: 41. 22. 917. 3965
Fax: 41. 22. 917. 0099
E-mail: etistounet.hchr@unog.ch

Concluding Observations: While excerpts of some of the HRC’s Concluding Observations are included below, two examples are given here, the first on Australia concerning self-determination, participation and land rights, the second on Guyana concerning land rights, participation, discrimination and failure to adopt legislation concerning minority rights.

In its Concluding Observations on Australia’s Third and Fourth Periodic reports, the HRC said the following (the recommendations are italicized):10

9. With respect to article 1 of the Covenant, the Committee takes note of the explanation given by the delegation that rather than the term “self-determination” the Government of the State party prefers terms such as “self-management” and “self-empowerment” to express domestically the principle of indigenous peoples exercising meaningful control over their affairs. The Committee is concerned that sufficient action has not been taken in that regard.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (article 1, para 2).

10. The Committee is concerned, despite positive developments towards recognising the land rights of the Aboriginals and Torres Strait Islanders through judicial decisions (Mabo 1992, Wik 1996) and enactment of the Native Title Act of 1993, as well as actual demarcation of considerable areas of land, that in many areas native title rights and interests remain unresolved and that the Native Title Amendments of 1998 in some respects limits the rights of indigenous persons and communities, in particular in the field of effective participation in

---

all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands.

The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of the exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

11. The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, that must be protected under article 27, are not always a major factor in determining land use.

The Committee recommends that in the finalization of the pending Bill intended to replace the Aboriginal and Torres Strait Islander Heritage Protection Act (1984), the State party should give sufficient weight to the above values.

12. While noting the efforts of by the State party to address the tragedies resulting from the previous policy of removing indigenous children from their families, the Committee remains concerned about the continuing effects of this policy.

The Committee recommends that the State party intensify these efforts so that the victims themselves and their families will consider that they have been afforded a proper remedy. (articles 2, 17 and 24).

On Guyana’s Second Periodic report, the HRC stated that it regrets the delay by the State party in amending the Amerindian Act, and is concerned that members of the indigenous Amerindian minority do not enjoy fully the right to equality before the law. It is particularly concerned that the right of Amerindians to enjoy their own culture is threatened by logging, mining and delays in the demarcation of their traditional lands, that in some cases insufficient land is demarcated to enable them to pursue their traditional economic activities and that there appears to be no effective means to enable members of Amerindian communities to enforce their rights under article 27.

The State party should ensure that there are effective measures of protection to enable members of indigenous Amerindian communities to participate in decisions which affect them and to enforce their right to enjoy their rights under the Covenant.11

State party Article 40 reports, the HRC’s Concluding Observations and reports to be reviewed at upcoming sessions of the HRC can be found at the following web site:


---

2. Individual Communications/Complaints

Under Article 1 of the First Optional Protocol to the ICCPR (see Section III below), the HRC is competent to receive and examine complaints, known as communications, from individuals or groups of individuals that allege violations of rights defined in the ICCPR. The HRC is also authorized to reach and publish decisions on the status of human rights violations alleged in the complaints, however, these decisions are not legally binding (discussed in greater detail in Section IV below).

C. Rights set out in the International Covenant on Civil and Political Rights

The ICCPR contains civil and political rights such as: rights to vote and participate in the political life of the state; prohibitions of torture and inhumane treatment; the right to self-determination; equal protection and non-discrimination; rights to life, liberty and security; fair trial standards; rights to commune with family, religious, linguistic, social and cultural communities; and freedom of expression and thought. Of particular relevance to Indigenous peoples are Article 1, the right to self-determination and Article 27, the rights of persons belonging to minorities (these are discussed in greater detail below).

1. Implementation of the rights in the ICCPR

The rights recognized in the ICCPR must be given effect in national law and individuals must be able to enforce those right in domestic courts and administrative bodies. This is explicitly stated in Article 2 of the ICCPR, which reads:

2(1). Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

The HRC has explained what this means in its General Comment No. 3 of 1981 entitled, *Implementation at the National Level*:
1. The Committee notes that article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles … but in principle this undertaking relates to all rights set forth in the Covenant.

2. In this connection, it is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training. It is desirable also to give publicity to the State party’s cooperation with the Committee.¹²

A complete set of the HRC’s General Comments can be accessed at the following web site:

All languages: http://www.unhchr.ch/tbs/doc.nsf/Documentsfrset?OpenFrameSet

**Positive and negative rights:** Civil and political rights are often referred to as negative rights meaning that they do not require action by states to be respected: all that is required is that the state refrain from acting. For example, the prohibition of torture requires only that the state not torture someone or the right to religious freedom requires only that the state not interfere with the effective enjoyment of religious activities. In practice, however, civil and political rights may require both positive and negative measures to ensure their effective enjoyment. For instance, the UN Secretary-General, in discussing Article 27 of the ICCPR (the rights of persons belonging to minorities), states that

The protection of minorities … requires a positive action: a concrete service is offered to a minority group, such as the establishment of schools in which education is given in the native language of the members of the group. The protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question … wish to maintain their distinction of language and culture.¹³

**Reservations:** As with other treaties, states may register reservations and declarations to the application of certain provisions in the ICCPR by the HRC. This means that a state may declare that it rejects the application of, or interprets an article or articles in a certain way and the HRC is normally bound to follow the terms of the reservation in rendering a decision either on admissibility or on the substance of the petition. For instance, France has registered a reservation to the ICCPR stating that Article 27 on minority rights is inapplicable to France as it conflicts with the French Constitution (see, *Hopu & Bessert v. France* in Section V, below).

¹² UN Human Rights Committee, *Implementation at the national level (Art. 2) : 31/07/81. CCPR General comment 3.*

¹³ UN Secretary-General: *The Main Types and Causes of Discrimination*, UN Publication 49.XIV.3, at paras. 6-7.
Therefore, it should be ascertained whether the state in question has registered a reservation that may have some bearing on the submission of a petition.

States of emergency: Finally, the rights recognized in the ICCPR must always be respected except in exceptional periods of national emergency “that threaten the life of the nation” (Art. 4(1) ICCPR). Even then, certain rights – the rights to life, freedom from torture or inhumane treatment, freedom from slavery and servitude, to recognition before the law, freedom of thought conscience and religion, among others – are non-derogable, meaning that they can not be violated at any time or under any circumstances.

With this brief introduction in mind, I will now turn to Articles 1 (self-determination) and 27 (rights of persons belonging to minorities).

The text of the ICCPR may be found at the following web site:

2. Self-Determination

Article 1 of the ICCPR contains the right to self-determination. It reads:

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

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

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

Recognition of Indigenous peoples’ right to self-determination within the UN has been (and still is) contentious and is resisted by many states. These states argue either that Indigenous peoples are not peoples, and therefore not entitled to the right, or that self-determination only applies to the entire population of a state or to peoples in non-self-governing territories rather than peoples within existing states. However, the jurisprudence of the HRC has confirmed that Indigenous peoples do have the right to self-determination and that states are obligated to respect that right. In its Concluding Observations on Canada’s Fourth Periodic report, for instance, the HRC stated that

---

14 For an explanation of this provision, see, Human Rights Committee, General Comment No.29, States of Emergency (Article 4). UN Doc.CCPR/C/21/Rev.1/Add.11, 31 August 2001
15 The UN Working Group on Indigenous Populations and the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (as it was then called) have also endorsed application of the right to
With reference to the conclusion by the [Royal Commission on Aboriginal Peoples] that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

The HRC reached similar conclusions – that the State implement and respect the right of Indigenous peoples to self-determination, particularly in connection with their traditional lands – in its Concluding Observations on the reports of Mexico and Norway issued in 1999 and Australia in 2000 (quoted above). In its complaints-based jurisprudence, the HRC has also related the right to self-determination to the right of Indigenous people to enjoy their culture under Article 27 of the ICCPR – this case is described in Section V below. The HRC’s 1984 General Recommendation on self-determination also illustrates that Article 1 applies to peoples within existing states. Therein the HRC stated that Article 1(3) “imposes specific obligations on States parties, not only in relation to their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination” (emphasis added). The full text of this General Recommendation is contained in Annex C below.

3. Article 27 of the ICCPR

Article 27 is the ICCPR’s so-called minority rights provision. It states that “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” This article protects linguistic, cultural and religious rights and, in the case of Indigenous peoples, includes, Indigenous peoples when approving the UN draft Declaration on the Rights of Indigenous Peoples in 1993 and 1995, respectively. Article 3 of the draft Declaration provides that, “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely determine their economic, social and cultural development.” The Inter-American Commission on Human Rights recognized some measure of this right in its Proposed American Declaration on the Rights of Indigenous Peoples (1997), art. XV(1): “States acknowledge that indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development, and that accordingly they have the right to autonomy and self-government with regard to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, the environment and entry by non-members; and to the ways and means for financing these autonomous functions.”

---

among others, land and resource, subsistence and participation rights. These rights are held by individuals, but exercised “in community with other members of the group,” thereby providing some measure of collectivity. As similar language is found in article 30 of the UN Convention on the Rights of the Child, the points made here are also relevant to the rights of Indigenous children, and by implication the larger community, under that instrument.

Article 27 expresses the protection of minority rights in the negative – “shall not be denied” – nonetheless, the HRC has recognised that Article 27 does require some measure of positive action by states if the rights found therein are to be respected and enjoyed. Furthermore, this article is limited in its scope, protecting only cultural, linguistic and religious rights, although the scope of these rights has been somewhat increased or elaborated upon in HRC decisions.

The HRC has decided six cases involving Indigenous Peoples under Article 27 (see, Lovelace, Kitok, Ominayak, I. Lansman, J. Lansman, Apirana Mahuika and, Äärelä and Näkkäläjärvi discussed in Section V, below): in two cases it found violations and recommended that the state take remedial measures. A number of these petitions originally alleged violations of the right to self-determination under Article 1, however, the HRC declared that individuals could not raise claims based upon that article as the right of self-determination only applies to, and can only be invoked by, peoples. It then proceeded to examine the complaints under Article 27.

The HRC has interpreted article 27 to include the “rights 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.” In reaching this conclusion, the HRC recognized that Indigenous peoples’ subsistence and other traditional economic activities are an integral part of their culture, and substantial interference with those activities can be detrimental to their cultural integrity and survival. By necessity, the land, resource base and the environment thereof also require protection if subsistence activities are to be safeguarded.

Many of the cases brought by Indigenous peoples under Article 27 challenge state- or corporate-directed resource exploitation. In this context, the HRC has observed that a state’s freedom to

---


21 The CRC has been ratified by 191 States as of November 2001. CRC article 30 reads: “In those states in which ethnic, linguistic or religious minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right in community with other members of the group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”


23 One case brought by Saami citing violations of Article 27 was declared inadmissible by the HRC in 1994. This communication complained of violations due to logging and road building in reindeer breeding and herding areas used by Saami. See, O. Sara et al. v. Finland, Revised decision on admissibility, 23 March 1994. UN Doc. CCPR/C/50/D/431/1990, 24 March 1994.

24 See, infra, notes 32-3 and accompanying text.
encourage economic development is limited by the obligations it has assumed under Article 27. However, the rights guaranteed by that article are not absolute. The HRC employs a threshold test to determine if the complained of activity constitutes a denial of the rights protected or merely an infringement of those rights. An activity that amounts to a denial of the right to enjoy culture, for Indigenous peoples this includes land, subsistence and other rights, is prohibited under Article 27. Such activities include forcible relocation, severe environmental degradation and denial of access to subsistence areas and areas of cultural and religious significance. In its 1999 Concluding Observations on Chile, for instance, the HRC stated that

The Committee takes note of the various legislative and administrative measures taken to respect and ensure the rights of persons belonging to indigenous communities in Chile to enjoy their own culture. Nevertheless, the Committee is concerned by hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities. Relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant. Therefore: When planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them. (emphasis added)

In a 1994 General Comment (No.23; see, Annex B for full text), the HRC further elaborated upon the scope of, and state obligations under, Article 27 by stating that

one or other aspects of the rights of individuals protected [under Art. 27] – for example to enjoy a particular culture – may consist in a way of life which is closely associated with a territory and its use of resources. This may particularly be true of members of indigenous communities constituting a minority . . . . With regard to the exercise of the cultural rights protected under Article 27, the committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specifically in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them . . . . The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole….27

In July 2000, the HRC added that article 27 requires that “necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands ...” and that “securing continuation and sustainability of traditional forms of economy of indigenous

---

26 Concluding observations of the Human Rights Committee : Chile. 30/03/99. CCPR/C/79/Add.104. (Concluding Observations/Comments) CCPR/C/79/Add.104, 30 March 1999, at para. 22
27 General Comment No. 23 (50) (art. 27), adopted by the Human Rights Committee at its 1314th meeting (fiftieth session), 6 April 1994. UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), at 3.
minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities … must be protected under article 27….”

While Article 27 has been of some use to Indigenous peoples in the past, the HRC’s jurisprudence, although it has evolved in a positive direction in recent decisions, has generally been disappointing. The extent of collective rights recognized under Article 27 is minimal and in no way sufficient to accord the level of protection required for the effective enjoyment of Indigenous peoples’ rights. Moreover, Indigenous peoples have gone to great lengths to distinguish themselves from minorities and to have their inherent rights as peoples recognized. This distinction is also recognized by the UN, which has separate procedures and separate legal instruments concerning Indigenous peoples and minorities. This, coupled with the limited scope of the rights protected under Article 27, leads to the conclusion that Article 27 should only be used, if (as is often the case) no other more appropriate approach is available. In particular, for Indigenous peoples with access to Inter-American human rights bodies, which have developed substantial and positive jurisprudence on Indigenous rights, it is recommended that those bodies be approached in preference to the HRC.

A more extensive summary of HRC jurisprudence on Article 27, identifying the important features and tests, is contained in Section V(K), below.

III. Optional Protocol I to the ICCPR

Optional Protocol I (OP I) to the ICCPR allows individuals or groups of individuals to submit complaints to the HRC alleging violations of the rights found in the ICCPR. OP I is a separate treaty that must be ratified by states parties to the ICCPR in order for the HRC to receive communications or petitions concerning alleged violations of the ICCPR’s rights. As its title implies, ratification of OP I is not mandatory. Nevertheless, as of November 2001, 100 of the 147 states parties to the ICCPR have ratified OP I.

---

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

**Article 1**

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

**Article 2**

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

**Article 3**

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

**Article 4**

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.
2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

**Article 5**

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.
2. The Committee shall not consider any communication from an individual unless it has ascertained that:
   (a) The same matter is not being examined under another procedure of international investigation or settlement;
   (b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.
3. The Committee shall hold closed meetings when examining communications under the present Protocol.
4. The Committee shall forward its views to the State Party concerned and to the individual.

**Article 6**

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

The full text of the Optional Protocol can be found at the following web site:

IV. Filing a complaint with the HRC: procedures and considerations

OP I sets out the procedure for the HRC to follow when receiving complaints from individuals. The HRC has adopted Rules of Procedure that further elaborate how it examines and processes complaints. Only persons living within states that have ratified both the ICCPR and OP I may make use of this complaints procedure. Special care is required to ascertain if the state in question has registered a reservation or declaration to an article(s) at issue (see, Section IIC(1) above, for discussion on reservations and declarations).

The HRC’s Rules of Procedure can be found at the following web site:


Spanish:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9111eab585a8efbbc1256a5b0050f292?Opendocument

French:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d39c6e1b3498077cc1256a5b0050dfd1?Opendocument

NOTE: If use of the OP I procedure is contemplated, collaboration with an organization that has experience working with this procedure and the HRC is important. This is the case because unlike other intergovernmental procedures the HRC formally looks to previous decisions as authority for deciding issues before it. Therefore, a careful evaluation of previous cases that may be relevant to the substance of the complaint and to issues pertaining to admissibility is required.

The procedure for examining and processing complaints under OP I can be divided into two main components: the admissibility phase and the merits phase.

A. General Requirements

Prior to turning to the discussion on the admissibility phase, the following general requirements for submitting a complaint to the HRC need to be noted. The following information must be included in a petition to the HRC:

• name, address and citizenship of the victim (the person against whom the alleged violation was perpetrated);


30 A list of all reservations and declarations to the ICCPR (as of October 2001) can be accessed at the following web site (only in English and French):


To OP I (English and French only):


• if the victim and the author (the person submitting the complaint) are different individuals, the petition must include the name, address and citizenship of the author, and information detailing why the author is acting on behalf of the victim;
• the state against which the complaint is made;
• information concerning the exhaustion of domestic remedies;
• the provisions of the ICCPR that have allegedly been violated;
• information about whether the matter is currently being examined under another international procedure;
• a detailed description of the facts and circumstances, including relevant dates, that substantiate the allegations contained in the petition; and,
• the signature of the victim or author and date that the petition was signed.

B. Admissibility (Rules 87-92, HRC Rules of Procedure)

During the admissibility phase, the HRC determines if a complaint meets the requirements that allow it to formally consider the merits of the case and determine if a violation has occurred. The admissibility requirements for the HRC are much more stringent for petitions under OP I than they are in other intergovernmental procedures. The following are requirements for submitting a petition to the HRC. If these requirements are not met, the HRC will declare the petition inadmissible and will not examine the merits to determine if a violation has occurred.

1. In general, the petition must be submitted by an individual or a group of similarly affected individuals (the victims), subject to the jurisdiction of a state party to OP I.31 A victim is someone directly and personally affected by a violation. The petition may also be submitted by a representative of the individual, or by a close family member, if circumstances preclude the victim personally submitting the petition. A representative should have some documentation showing that they are the lawful representative of the victim or be able to show that they are acting with the agreement of the victim. The petition may not be submitted anonymously, but the name of the petitioner need not be revealed by the HRC. If a lawyer submits the case, a signed power of attorney document should be submitted together with the petition.

2. The alleged violation must involve one or more of the rights defined in Part III of the ICCPR (Arts. 6-27). This limitation precludes alleging violations of the right to self-determination (Art. 1). This is not stated in the ICCPR or the OP I, but has been decided by the HRC in communications brought by Indigenous peoples complaining of violations of the right to self-determination and deprivations of their means of subsistence.32 The HRC’s jurisprudence on this issue is summarized in R.L. et al v. Canada, which stated that

With respect to the authors’ claim of a violation of article 1 of the Covenant, the Committee recalls its constant jurisprudence that pursuant to article 1 of the Optional Protocol, it may receive and consider communications only if the emanate from individuals who claim that their individual rights have been violated by a State Party to the Optional Protocol. While

31 In one case declared admissible, 6,588 persons authored a petition alleging a violation of Article 6 of the ICCPR. See, E.W. et al v. The Netherlands.
all peoples have the right to self-determination and the right to freely determine their political status, pursue their economic, social and cultural development (and they may for their own ends, freely dispose of their natural wealth and resources) the Committee has already decided that no claim for self-determination may be brought under the Optional Protocol.33

3. The HRC will not consider a petition concerning the same subject matter and petitioner if it is simultaneously being considered by another international procedure. For instance, if a petition is being considered by the Inter-American Commission on Human Rights, the HRC cannot examine the petition if it alleges the same violations committed against the same petitioners. This does not, however, preclude submitting a petition to the HRC after a decision has been reached under another procedure, provided that the other procedure has concluded its examination and the state in question has not registered a reservation, as some states have, denying this option.

4. With one exception, the petition may not complain of a violation that occurred before the ICCPR and Optional Protocol entered into force for the state in question. For example, if the ICCPR and the Optional Protocol entered into force for state A on 12 January 1966, a petition may not complain of an act that occurred before that date. The one exception to this rule is if the alleged violation occurred before entry into force, but continued or has a continuing effect after the relevant date. For instance, if a person was disappeared prior to entry into force and remains disappeared after the date of entry into force, the violation has continued or has a continuing effect and will be examined by the HRC (for example, see, Lovelace, below).

- The ICCPR enters into force for each state 3 months from the date they became party to the Covenant (Art. 49); the same is also the case for OP I (Art. 9). See, Annex C for dates that states became party to these instruments.

5. All domestic remedies must be exhausted prior to the HRC examining the petition. This means that the petitioner must have attempted to seek redress for alleged violations in the domestic legal system or under other available domestic procedures prior to submitting the petition to the HRC. Only when the petitioner has exhausted all available domestic options will the HRC examine the petition. This is required only in so far as the domestic remedies are effective, accessible and not of an excessive duration. Therefore, if a particular legal system is proved to be so corrupt or biased that the petitioner cannot receive a fair and impartial hearing, the domestic remedy would be deemed ineffective and exhaustion would not be required. Similarly, if the right which is alleged to have been violated is not guaranteed or recognized in a particular legal system, the remedy would be considered unavailable.34


34 An inclusive definition of the exhaustion of domestic remedies is beyond the scope of this Briefing. Needless to say, there are a number of nuances and subtleties, some of which are elaborated upon in the HRC’s previous decisions, that need to be considered. Consequently, with regard to this, and admissibility requirements in general, we strongly recommend consulting with an experienced organization on these matters. Useful works on this subject are: T. Zwart, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS. THE CASE LAW OF THE EUROPEAN COMMISSION OF HUMAN RIGHTS AND THE HUMAN RIGHTS COMMITTEE. (Martinus Nijhoff: Dordrecht, 1995) and P.R. Ghandhi,
After the petition has been received, the HRC will forward the petition to the state in question to request information on admissibility. The state has two months to respond. The petitioner is then given the opportunity to respond to the information received from the state. Either a Working Group of at least five members of the HRC or the entire HRC will then examine the petition to determine whether it is admissible. Should the petition be declared inadmissible, the proceeding is terminated. If the HRC determines the petition to be admissible, the state has six months to respond to the merits of the petition, after which the petitioner has six weeks within which to respond to the information submitted by the state. Subsequent to receiving the requisite information, the HRC will examine the petition on its merits to determine if the alleged violations are substantiated.

C. Merits (Rules 93-95, HRC Rules of Procedure)

Once a petition has been declared admissible and the state and petitioner have had the opportunity to submit information about the petition, the HRC will examine the merits of the case to determine if a violation has occurred. The findings of the HRC are set forth in a report on the case that contains an overview of the facts, the decision on admissibility, the proceedings before the HRC, the HRC’s reasoning about the merits and (if a violation has been found) recommendations to the state party on how to remedy the violation(s). The decisions, or “views” as they are known, of the HRC are published in its Annual Report to the UN General Assembly, although some decisions regarding admissibility are not made public.

The authority the HRC has to enforce and implement its decisions is limited. Its decisions are not legally binding and are frequently ignored by states. However, as of 1990, the HRC has required states to submit information concerning measures taken to remedy violations detailed in its decisions. It will publicly make known those states that fail to remedy violations or that fail to respond to requests for information. The HRC can also appoint a Special Rapporteur to work in cooperation with states and victims in an attempt to enforce the decisions of the HRC and remedy violations. More recently, the HRC has stated that states parties to the ICCPR and OP I do have an obligation to give effect to its recommendations. In two death penalty cases against Barbados, the HRC stated that

By ratifying the Covenant and Optional Protocol, Barbados has undertaken to fulfil its obligations thereunder and has recognised the Committee’s competence to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violations by the State Party of any of the rights set forth in the Covenant. While the Covenant is not part of the domestic law of Barbados which can be applied directly by the courts, the State Party has nevertheless accepted the legal obligation to make the provisions of the Covenant effective. To this extent, it is an obligation for the State Party to adopt appropriate measures to give legal effect to the views of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol. This includes the Committee’s views under Rule 86 of the Rules of Procedure on the desirability of interim measures of protection to avoid irreparable damage to the victim of the alleged violation.35

---

Similar language appears in almost all recent HRC reports.

D. Rule 86 – Interim Measures

Rule 86 of the HRC’s Rules of Procedure states that

The Committee may, prior to forwarding its views on the communication to the State party concerned, inform that State of its views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its views on interim measures does not imply a determination on the merits of the communication.

In cases where it appears that the victim may suffer irreparable harm, the HRC may request that the state involved suspend its activities, take preventative action or provide other remedial measures to protect the person or persons in question. These measures are non-binding. Generally, precautionary measures are only issued in cases where life or other fundamental rights are threatened. However, in the case of Indigenous peoples the HRC has employed an expansive interpretation of life and fundamental rights. In Ominayak, Chief of the Lubicon Lake Bank v. Canada, the HRC requested Rule 86 interim measures to protect the Lubicon Cree’s economic base and aboriginal way of life. The Lubicon Cree alleged that Canadian government policy caused and continued to cause irreparable harm to their traditional culture, religion, political structure and subsistence economy and threatened their very survival as a distinct people.36

All petitions under the ICCPR and the Optional Protocol should be sent to:
Human Rights Committee
Support Services Branch, Office of the High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10
SWITZERLAND
Tel: 41. 22. 917 3226
Fax: 41. 22. 917 0099
E-mail: cedelenbos.hchr@unog.ch

V. Cases Involving Indigenous Peoples Reviewed by the Human Rights Committee

A. Mikmaq Tribal Society vs. Canada 37

In Mikmaq Tribal Society vs. Canada, the Mikmaq Tribal Society (Mikmaq) alleged, among others, violations of Articles 1 (self-determination) and 25 (political participation) of the ICCPR because they were excluded from Canada’s constitutional reform process. Art. 25, in part, states that “[e]very citizen shall have the right and the opportunity … without reasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives.”

The facts: From 1984-1987, Canada was engaged in a Constitutional reform process. Part of this process involved matters of direct concern to Indigenous peoples. National Indigenous organizations, representative of Indigenous peoples in general, were asked to participate in the reform process, however, individual Indigenous peoples were not accorded representation beyond their ability to participate through national organizations. The Mikmaq argued that this policy was racist in that it failed to recognize the distinct identities, histories and needs of Indigenous peoples as individual peoples, but rather classified all Indigenous peoples as one and the same along racial lines. The Mikmaq further argued that this policy violated their right to self-determination, in that it assumed that any Indigenous people could exercise the Mikmaq’s right to self-determination, which by definition is a right of peoples, not a right based upon race. The Canadian government rejected these arguments stating that it would be impractical for each individual person to be represented at the negotiations and that the national organizations adequately represented the interests of Indigenous peoples as a whole.

The Mikmaq further alleged that exclusion from the reform process violated their right to participate in the political life of the state, because they were unable to directly participate in discussions that would determine their future relationship with the Canadian state.

The decision: The HRC decided that it was incompetent to review the allegations under Article 1. It also stated that self-determination, as a right of peoples, could not be invoked by individuals. Consequently, the focus shifted to an examination of the alleged violation of Article 25. The HRC defined the issue to be resolved as “whether the right under Article 25(a) is available only to individual citizens, or to groups or representatives of groups also.” In finding that Canada had not violated Art. 25(a), the Committee stated, “article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens far beyond the scope of Art. 25(a).”

By virtue of this opinion it would appear that Art. 25(a) endorses a right to political participation only in its narrowest sense. Not only does it not accord Indigenous peoples a collective right to directly participate in matters of concern to them, but it also denies them a right to participate in excess of the rights of individuals in the political system. No doubt this is a reflection of the individualistic bias of the rights defined in the ICCPR and the reluctance of the HRC to recognize collective rights. This decision also reflects the limited utility of this procedure to Indigenous peoples and illustrates the failure of individual rights to protect the collective nature of the rights and needs of Indigenous peoples.

ILO 169 and the UN Draft Declaration’s provisions are significantly more expansive than ICCPR Art. 25(a) and go far in addressing some of the problems revealed in the Mikmaq decision. Articles 19 and 20 of the Draft Declaration, for instance, do confer, to a certain extent, “the right to choose the modalities of participation.” These articles recognize the right to

38 Id. at Section 5.5.
“participate fully through representatives chosen by [Indigenous peoples] in accordance with their own procedures” (Art. 19) and, through “procedures determined by them, in devising legislative and administrative measures” (Art. 20) (emphasis added). Clearly, the Draft Declaration is expressing a substantially higher standard than that of ICCPR Art 25(a). This is no doubt a recognition of the importance of these rights to the exercise of Indigenous peoples’ self-determination and autonomy rights.

Web links:
English: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6dc358635454e5fac12569de00492e1b?Opendsocument
French: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ae3e6d12d92e5dbfc1256acd002c89bb?Opendsocument
Spanish: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4d7c76908effb1c6c1256acd002ebd82?Opendsocument

B. Lovelace vs. Canada
The Lovelace petition was submitted in 1977. It challenges the application of certain provisions of the Canadian Indian Act as discriminatory and alleges violations of the following articles of the ICCPR: 2(1), non-discrimination on the basis of race, sex, language, religion, national or social origin, property, political or other opinion, birth or status; 3, equal rights of men and women; 23(1) and (4), protection of family and equal rights of spouses, respectively; 26, equal protection of the law without regard to race, sex, language, religion, national or social origin, property, political or other opinion, birth or status and; 27, right of minorities to enjoy and use culture, language and religion in community with other members.

The facts: Sandra Lovelace was born and registered, under Canadian law, as a Maliseet Indian. Registration entitles an Indigenous person to live on a designated reserve and to enjoy subsidized social benefits. However, after marrying a non-Indigenous man in 1970, she lost her official status as an Indian and the attendant benefits, including the right to live on the reserve, that attach to that status under section 12(1)(b) of the Indian Act. Section 12(1)(b) essentially states that an Indigenous woman who marries a non-Indigenous man loses her status under Canadian law, but an Indigenous man who marries a non-Indigenous woman retains his status.

The decision: The HRC decided to review the allegations on the basis of Article 27, with reference to other provisions of the ICCPR. In doing so, it defined the relevant question as “whether Sandra Lovelace, because she is denied the legal right to reside [on her] reserve, has by that fact been denied the right guaranteed by Article 27 to persons belonging to minorities, to enjoy their own culture and to use their own language in community with other members of their group.” In finding that Canada had violated Article 27, the HRC determined Ms Lovelace was denied her right to enjoy her culture in community with other members thereof.

40 Id. at para. 13.2.
because her culture did not exist beyond the bounds of the reserve on which she was denied a legal right to reside. It also found that the section of the Indian Act in question, was not reasonable or required “to preserve the identity of the tribe.”

Lovelace raises a number of issues of interest. First, the essential issue here is one of identity and the power of the state to define a person as Indigenous or non-Indigenous, including the power to deny any benefits that may accompany such a definition. It should be noted that the classificatory scheme used by the Canada that was challenged in this case, was justified by the state on the basis that it represented traditional Indigenous classifications or customs, which traced membership through the male line. The appropriateness of the use of this sexually discriminatory scheme was debated by Indigenous peoples in Canada, who were divided on the issue. The Maliseet people themselves were also divided as to Ms Lovelace’s right to reside on the reserve and to enjoy the same benefits as other members.

Second, Lovelace provides an example of the application of a treaty to events that occurred before the treaty entered into force for the state in question. The ICCPR came into force for Canada on August 19, 1976, but the alleged violation arose in connection with events occurring in 1970. Normally, therefore, Canada should not be accountable under the ICCPR for the alleged violations. However, the HRC determined that the violations related to the 1970 event had continued or had effects that continued to constitute possible violations and, therefore, admissible.

Web links: English (only):
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc245da4e1c73a55c1256a16003b21a8?Opendocument

C. Ominayak and the Lake Lubicon Band vs. Canada

The Lake Lubicon communication was submitted in 1984. It alleged violations of the right to self-determination, the right to dispose of natural wealth and resources and the right to have the means of subsistence safeguarded (Art. 1). The claim arose in connection with state-sanctioned, resource exploration and extraction operations in the territory of the Lake Lubicon Cree (Lubicon Cree).

The Facts: The provincial government of Alberta (a province of Canada), granted leases to private corporations to exploit oil, gas, timber and other resources on the lands and territories of the Lubicon Cree. It also gave permission for construction of a pulp mill to process raw timber. These operations, and the attendant environmental degradation, had a devastating effect on the Lubicon Cree’s health and on their traditional, subsistence practices by which a majority of them satisfied many of their basic needs. These operations impacted upon the enjoyment of the Lubicon Cree’s traditional way of life and culture to such an extent that they stated that their survival as a distinct people was at risk. Despite federal laws and treaties guaranteeing the Lubicon Cree the right to enjoy their traditional way of life, the Canadian government did nothing to alleviate the situation.

41 Id. at para. 17.
The Decision: The HRC reached its decision on this communication in 1990, six years after it was originally submitted. It rejected the allegation of a violation of the right to self-determination on the grounds that the right to self-determination and the other rights protected under Article 1 attach to peoples and, therefore, cannot be invoked under the OP I, which is designed to protect individual rights. However, the HRC declared the communication admissible to examine a possible violation of Article 27 (the protection of minorities). In finding that Canada had violated Article 27, the HRC stated that “the rights protected by Article 27 include the rights 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.” In reaching this conclusion, the HRC recognized that Indigenous Peoples’ subsistence and traditional, economic activities are an integral part of their culture, and interference with those activities, in certain cases, may be detrimental to cultural integrity and survival.

In response to the HRC’s decision, Canada offered to remedy the violation by recognizing a 95 square mile territory for the Lubicon Cree and by recognizing sub-surface mineral rights to approximately two thirds of that territory. It also offered a sizable package of programs, benefits and money. The HRC deemed this remedy to be appropriate and published its views.

Web links:
French: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/750d146488937439c1256ac50051a3d3?OpenDocument
Spanish: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5720beb5129d3aa2c1256ac6004a5cad?OpenDocument

D. Kitok vs. Sweden

The Kitok petition was submitted to the HRC in 1985. It alleged violations of Articles 1 (self-determination) and 27 (protection of minorities). This petition challenges the application of Sweden’s 1971 Reindeer Husbandry Act because it denied the petitioner, a member of the Saami people, the right to participate in his culture (reindeer herding) with the other members thereof. Also, the petitioner complains of a violation of the right to self determination, including the right to freely dispose of natural wealth.

Facts: The Reindeer Husbandry Act defines the Saami people according to whether they are actively engaged in reindeer herding – an activity considered by the Saami and the Swedish government alike to be of vital importance to Saami culture. Under the 1971 Act, reindeer herding and rights to hunt, fish and water are reserved for those Saami that live in a recognized Saami community. The Saami who live outside these communities and those that have been absent from reindeer herding for a period of more than three years are denied the same rights as

43 Id. at para. 32.2.
those Saami living in a community. The Saami that live within the community have the right to admit or deny membership to other Saami wishing to join the community. If the Saami deny membership, the applicant can appeal under the Act and claim that special circumstances exist that should compel the court to overturn the decision of the Saami community. However, as stated in the legislation, appeals of this nature are treated restrictively by the courts.

The stated rationale behind the 1971 Act was the protection and preservation of Saami culture. Sweden stated that this was the case because the Act protected the land and resources of the Saami from over use and safeguarded an adequate income by restricting the number of Saami permitted to herd reindeer to those who were recognized members of a Saami community. The Act treated the Saami communities as economic associations with closed membership and allotted voting rights in the community on the basis of the number of reindeer owned by each member.

Kitok, the petitioner, came from a long tradition of reindeer herders, but due to financial difficulties was forced to give up herding in order to seek other employment. He remained away from herding for more than three years although he had the intent to return as soon as he was financially able. The Saami community to which he applied denied his membership. Consequently, he also lost his rights to hunt, fish and water on the community’s lands. He was, however, permitted to graze his reindeer and participate in other traditional activities associated with herding, and to hunt and fish on community lands in exchange for a payment. Kitok appealed to the Swedish courts hoping that they would overrule the community’s decision. The courts refused and Kitok filed a petition with the HRC hoping to have the 1971 Act declared in violation of the rights defined in the ICCPR.

**The Decision:** The HRC dismissed the claim under Article 1 in the same manner that it did in the Lake Lubicon and Mikmaq cases above. It then declared the petition admissible to examine issues raised under Article 27. Although it expressed reservations as to whether certain provisions of the 1971 Act complied with Article 27 and found that reindeer herding was an activity suitable to be included in Article 27’s protection of culture, the HRC nonetheless decided that Sweden had not violated that article. In reaching this decision, the HRC made reference to the Lovelace case above, in which it stated that “a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.” The HRC was satisfied that the 1971 Act was a justifiable restriction on the right of Kitok to membership in the Saami community and to participate in his culture, because the ultimate objective of the Act was the protection and preservation of the Saami as a whole. It did note that Kitok was permitted, “albeit not by right,” to participate in his culture as he was able to herd his reindeer on the community’s lands. This raises the question of whether the HRC would have decided otherwise if Kitok has been completely denied access to the community’s lands to herd his reindeer.

---

45 *Id.* at 230, para. 9.8.
Web links:
English:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d9332db8dfce2f63c1256ab50052d2ff?OpenDocument
Spanish:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/56348ec384c1c443c1256ab60031a2d9?OpenDocument
French:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/11fb8e3a24b069ffec1256ab60028b283?OpenDocument

E. Ilmari Lansman et al. vs. Finland

The Lansman petition, submitted in 1992, alleged violations of Article 27 of the ICCPR by Finland. Lansman, a Saami, along with 47 other Saami, who were members of the Muotkatunturi Reindeer Herdsman Committee and the Saami community of Angeli, filed the petition asserting that a stone quarry licensed by Finland denied their rights to enjoy their culture under Article 27.

Facts: The petitioners were Saami reindeer herders living on traditional Saami lands in the far north of Finland. Saami ownership of the lands in question is disputed by the Government. In 1990, the Government issued a permit to a private company authorizing extraction of 5000 cubic meters of anorthocite, a valuable stone from a mountain near the Saami community. This mountain is considered to be sacred by the Saami and is located in traditional reindeer herding area, which contains numerous fences and pens for controlling the reindeer. In order to extract stone, a road was built to the quarry interfering with the pens and fences. The petitioners asserted that the quarry and transport of stone on the road disturbed both reindeer herding activities and the fences and pens used by the herders in violation of Article 27’s protection of the right to enjoy culture as reindeer herding has traditionally and remains an essential and fundamental part of Saami culture. In making this argument they cited Ominayak, Kitok and Lovelace.

While acknowledging that Saami reindeer herding was an “essential component of Saami culture,” Finland contended that the quarry had a minimal impact on reindeer herding, and Saami cultural rights, and that any damages would be compensated according to the law and the conditions found in the permit. It added that the petitioners were consulted about the quarry; that the area of the quarry was small in relationship to the full extent of the lands used by the Saami; that quarrying was not permitted during the time that herding was conducted in the area, and therefore, that the impacts of the activities were so minor that they could not constitute a denial of the right to culture found in Article 27. In support of this, Finland cited Lovelace, which states that “not every interference [with the right to enjoy culture] can be regarded as a denial of the rights within the meaning of article 27….”

---

47 Id. at 7.
48 Id.
The Decision: The HRC declared the petition admissible in 1993 and issued its views in 1994. It determined that the issue to be resolved in this case was “whether quarrying on the flank of Mt. Etela-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.”

The HRC reaffirmed that economic activities, “if they an essential element of the culture of an ethnic community” are covered by Article 27 and added that the right to enjoy culture must be viewed in context and “does not only protect traditional means of livelihood … 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.” It then stated that a States freedom to encourage economic development is limited by the obligations it has assumed under Article 27. Therefore, activities that deny the right of minorities to enjoy their culture are prohibited, but activities that only have a certain limited impact are not necessarily contrary to Article 27. Having said this, the HRC then redefined the issue to be resolved as “whether the impact of the quarrying on Mt. Riutusvaara is so substantial that it does effectively deny to the authors the right to enjoy their cultural rights in that region.”

The HRC held that Finland had not violated Article 27 because the quarrying was not substantial enough to constitute a denial of the right to enjoy culture. In deciding this, it paid particular attention to the following factors: that the interests of the petitioners were considered prior to issuance of the permit; that the authors were directly consulted; that reindeer herding did not appear to have been adversely affected by the quarry and; that it appeared that Finland had taken appropriate steps to minimize the impact of the quarry in the conditions contained in the permit. Other than mentioning that the mountain bears some religious significance to the Saami, the HRC did not address the human rights implications of this issue. In concluding, the HRC stated that an expansion of activities in the area may lead to violations of Article 27 and warned that “economic activities must, in order to comply with article 27, be carried out in a way that enables the authors to continue to benefit from reindeer husbandry.”

Web links: English:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/7e86ee6323192d2f802566e30034e775?Opendocument
French:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/8eac0dd733269a14802566e3003a2aac?Opendocument
Spanish:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/5490af096942eb15802567890035ddad?Opendocument

49 Id. at 9.
50 Id. at 10.
F. J. Lansman et al. vs. Finland

The second Lansman case was filed in 1995 and is largely related to the first Lansman case. The petitioners once again claimed that their rights under Article 27 had been violated due to logging and road building that threatened their reindeer herding activities.

Facts: In this case, the petitioners attempted to stop the Finnish Central Forestry Board from continuing and approving logging operations and road construction on about 3000 hectares of traditional Saami land. They also raised the issue of the stone quarry again. They argued that present and future logging operations as well as proposed mining operations, were restricting and would severely restrict their ability to “continue to benefit from reindeer herding,” as stated by the HRC in the first Lansman case, thereby denying their cultural rights as protected by Article 27. Finland argued that the impact was minimal; that the operation had been designed in consultation with the Saami, to the extent possible, not to interfere with Saami reindeer herding activities, and therefore, following the decision in the first Lansman case could not be considered a denial of the right to enjoy culture.

The Decision: The HRC determined that “[t]he crucial question to be determined in the present case is whether the logging that has already taken place within the area specified in the communication, as well as such logging as has been approved for the future and which will be spread over a number of years, is of such proportions as to deny the authors the right to enjoy their culture in that area.”52 The HRC then recalled “the terms of paragraph 7 of its 1994 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 reindeer husbandry, and that measures must be taken to ‘ensure the effective participation of members of minority communities in decisions which may affect them.’”53

As with the first Lansman case, the HRC found that the activities complained of did not have a substantial enough impact on the Saami to constitute a denial of their rights under Article 27. In reaching this decision, it used essentially the same factors as in the Lansman case: that the authors were consulted; and that Finland did account for and evaluate the authors rights and interests in determining the best way for the logging operations to proceed. The HRC then warned Finland that if logging were to occur on a larger scale or if the effects turned out to be worse than planned or if other activities such as mining were to take place, that “such activities, taken together, may erode the rights of the Sami people to enjoy their own culture.”

Web links: English:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/67b455218cb622d80256714005cfdad?Opendocument
French:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/a5adb18467c59f8a80256713005f6b69?Opendocument

52 Id. at 15.
53 Id.
Spanish:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/515f9faeb9a9bea98025679e004d4110?Opendocument

G. Hopu & Bessert v. France

Hopu and Bessert v. France was submitted in June 1993; a decision on admissibility was reached in June 1994 and subsequently amended in October 1995. The views of the HRC were issued in July 1997. The authors were two Indigenous persons from Tahiti, a French overseas territory. They alleged violations of Articles 2(1) and (3)(a) (respect for rights in the ICCPR), 14 (right to due process), 17(1) (prohibition of interference with privacy and the family), 23(1) (protection of the family) and 27 in connection with construction of a hotel complex on their ancestral lands that would also entail destruction of an ancestral burial ground.

Facts: The authors are the descendants of the owners of a piece of land in Nuuroa on the Island of Tahiti. They were dispossessed of this land by order of court in 1961 when it was awarded to a corporation. The land was subsequently leased and then sub-leased to two other companies in 1990. One of these companies intended to construct a luxury hotel complex and had begun to clear the land for construction. The authors and others occupied the land in protest in 1992, maintaining that the land and the lagoon bordering it represented “an important place in their history, their culture and their life. … encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground and provides the means of subsistence for some thirty families living next to the lagoon.”

The company obtained an order of court in July 1992 requiring the authors to vacate the area and to pay compensation to the company. This decision was affirmed by the Court of Appeal in 1993. Shortly thereafter the authors submitted a complaint to the HRC. The case was declared admissible in 1994 and, after France had requested a review of the decision challenging the admissibility of the case, again in 1995. Two months later, a large number of police accompanied by military personnel seized the site and put a fence around it. The authors and others again protested “to express their opposition to the hotel complex, as well as the violation of the supposedly sacred nature of the site, on which human remains pointing to the existence of an ancient burial ground had been found in 1993.”

The Decision: The HRC began with stating that it could not determine if a violation of Article 27 had occurred because France had registered a reservation to that article:

In respect of the claim under article 27 of the Covenant, the Committee recalled that France, upon acceding to the Covenant, had declared that “in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable as far as the Republic is concerned”. It confirmed its previous jurisprudence that the French “declaration” on article 27 operated as a

55 Id., at para. 2.3.
56 Id., at para. 8.1.
reservation and, accordingly, concluded that it was not competent to consider complaints directed against France under article 27 of the Covenant.\textsuperscript{57}

While the majority of the HRC held that this reservation precluded examination of a possible violation of Article 27, five members disagreed stating that

Whatever the legal relevance of the declaration made by France in relation to the applicability of article 27 may be in relation to the territory of metropolitan France, we do not consider the justification given in said declaration to be of relevance in relation to overseas territories under French sovereignty. The text of said declaration makes reference to article 2 of the French Constitution of 1958, understood to exclude distinctions between French citizens before the law. Article 74 of the same Constitution, however, includes a special clause for overseas territories, under which they shall have a special organization which takes into account their own interests within the general interests of the Republic. That special organization may entail, as France has pointed out in its submissions in the present communication, a different legislation given the geographic, social and economic particularities of these territories. Thus, it is the Declaration itself, as justified by France, which makes article 27 of the Covenant applicable in so far as overseas territories are concerned.

In our opinion, the communication raises important issues under article 27 of the Covenant which should have been addressed on their merits, notwithstanding the declaration made by France under article 27.\textsuperscript{58}

Having decided against an examination of Article 27, the HRC proceeded to evaluate possible violations of the rights to family and privacy (Arts. 17(1) and 23(1)). Finding that a violation of these articles had occurred, the HRC explained that

The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term “family” be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term “family” in a specific situation. It transpires from the authors’ claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors’ history, culture and life. The State party has disputed the authors’ claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors’ failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors’ ancestral burial grounds did interfere with their right to family and

\textsuperscript{57}Id., at para. 4.3.

\textsuperscript{58}Individual Opinion of Committee members Elizabeth Evatt, Cecilia Medina Quiroga, Fausto Pocar, Martin Scheinin and Maxwell Yalden (partly dissenting).
privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex.\textsuperscript{59} 

Observing that the authors were “entitled, under article 2, paragraph 3(a), of the Covenant, to an appropriate remedy,” the HRC stated that France “is under an obligation to protect the authors’ rights effectively and to ensure that similar violations do not occur in the future.”\textsuperscript{60} It then gave France 90 days in which to provide information on what measures had been taken to give effect to its views in the case, in particular what remedies had been provided to the authors.

While the HRC’s decision in finding violations of family and privacy rights is consistent with the importance attached to ancestral relationships by Polynesian peoples, \textit{Hopu} is perhaps more interesting for what it says about Article 27 and the guarantees provided by that article. At least nine members of the HRC believed that this case should have been resolved by reference to a violation of Article 27. The views of five of the nine members are quoted above – finding that the reservation would not apply to French overseas territories. The other four members, in a dissenting opinion finding no violation of Article 17 and 23, stated that

\begin{quote}
The authors’ claim is that the State party has failed to protect an ancestral burial ground, which plays an important role in their heritage. It would seem that this claim could raise the issue of whether such failure by a State party involves denial of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion.\textsuperscript{61}
\end{quote}

Further,

\begin{quote}
The Committee mentions the authors’ claim “that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.” Relying on the fact that the State party has challenged neither this claim nor the authors’ argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds interferes with the authors’ right to family and privacy. The reference by the Committee to the authors’ history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.\textsuperscript{62}
\end{quote}

That at least nine members of the HRC believed that Article 27 should apply in this case is very instructive for future cases of a similar nature. If this case were analyzed under Article 27, it is likely that destruction of an ancestral burial ground and the attendant interference with the ability of the authors to maintain their ancestral relationships, would amount to a denial of the

\begin{footnotes}
\item[59] \textit{Hopu and Bessert v. France, at para. 10.3.}
\item[60] \textit{Id., at para. 12.}
\item[61] \textit{Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville (dissenting), at para. 3.}
\item[62] \textit{Id., at para. 5.}
\end{footnotes}
right to enjoy culture and the right to practice religion accorded to members of minorities under Article 27.

Web links: English: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/b98833de2f293df0802566e1003bf274?Opendocument
French: http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0c902a138ddadbd8f02566e1003a95e9?Opendocument
Spanish: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3599cfa1d8726e89802566e1003b0f0?Opendocument

H. **Apirana Mahuika et al v. New Zealand**

**Apirana Mahuika et al v. New Zealand** was submitted in December 1992. The authors were 19 Maori persons alleging violations by New Zealand of Articles 1 (self-determination), 2 (enjoyment of rights), 16 (recognition of legal personality), 18 (freedom of thought, religion and conscience), 26 (equality before the law and prohibition of discrimination) and 27 (minority rights). The authors claimed to represent seven different Maori iwi (tribes comprised of a number of sub-tribes (hapu)) totaling more than 140,000 Maori. This case is both a very important development of the HRC’s jurisprudence on Indigenous peoples and a very disappointing decision for the authors that again illustrates the HRC’s limitations in understanding and adequately protecting Indigenous peoples’ cultural and other rights.

**Facts:** This case revolves around a settlement reached in 1992 on Maori commercial fishing rights. Maori fishing rights were first recognized by the British crown (the predecessor to the present state of New Zealand) in the 1840 Treaty of Waitangi. These rights were also guaranteed in the Section 88(2) of the 1983 *Fisheries Act*, which provided “that nothing in this Act shall affect any Maori fishing rights.” Amendments to the latter in 1986 introduced a quota management system to regulate and control commercial fisheries. A number of iwi filed cases in the courts in 1987 challenging the quota system as contrary to iwi rights as guaranteed under Section 88(2).

Following a decision favourable to Maori in the courts, the government began negotiating with Maori in 1988 about allocating a certain amount of the quota exclusively to Maori. This resulted in the enactment of the 1989 *Maori Fisheries Act*, which, as a temporary measure, transferred 10 percent of the fishing quota to a Maori Fisheries Commission that would administer fisheries for the benefit of the iwi. In 1992, the largest fishing company in Australia and New Zealand was offered for sale and the government and Maori began negotiating for the purchase by the government and subsequent transfer of the company to Maori. This was in part prompted by an official recognition that Ngai Tahu, the largest iwi on Aotearoa-New Zealand’s South Island had rights to off-shore fisheries. The negotiations concluded on 27 August 1992 with the signing

---


64 This was decided by the Waitangi Tribunal, a non-judicial body charged with evaluating violations of the 1840 Treaty of Waitangi and making recommendation to the New Zealand parliament to remedy those violations. See, *The Ngai Tahu Sea Fishing Report*, August 1992.
of a Memorandum of Understanding (MOU) between the government and Maori negotiators. This agreements stated that

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.65

The Maori negotiators were charged with conducting a series of consultation meetings aimed obtaining a mandate supporting the agreement from iwi throughout Aotearoa-New Zealand. A series of meetings were held (four national and 23 local/regional) and the Maori negotiators reported that 50 iwi comprising 208,681 persons supported the agreement. The government and the negotiators then concluded a Deed of Settlement implementing the MOU on 23 September 1992. The Deed was signed by 110 signatories, including the 8 Maori fisheries negotiators, two of whom represented pan-Maori organizations; 31 plaintiffs in proceedings against the government relating to fishing rights, including representatives of 11 iwi; 43 signatories representing 17 iwi; and 28 signatories who later signed the Deed later and represented 9 iwi.66 This represents 37 of the 81 Maori iwi, the latter comprising around 70 percent of the 500,000 Maori presently identifying themselves as such in Aotearoa-New Zealand.

In December of the same year, the 1992 Treaty of Waitangi (Fisheries Claims) Settlement Act was enacted giving legislative force to the Deed of Settlement. The Act provides payment of NZ$150 million and, in Section 9, provides that “all claims (current and future) by Maori in respect of commercial fishing .... are hereby finally settled.” With regard to non-commercial fishing, the Act provides that “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.”67

The authors contended that the Treaty of Waitangi (Fisheries Claims) Settlement Act expropriates their fishing resources in violation of Articles 1 and 27 of the ICCPR. They further alleged that the provisions of the Act denying the possibility of seeking the assistance of the courts to address rights and claims over commercial and non-commercial fisheries and terminating existing cases before the courts violated Article 14 in that it denied them a hearing before the courts and due process of the law to protect their rights. They stated that the September 1992 MOU was not adequately explained during the consultation meetings and that a

65 Apirana Mahuika et al v. New Zealand, at para. 5.6.
66 Id., at para. 5.9.
67 Id., at para. 5.12.
significant number of *iwi* and *hapu* either opposed the deal or has serious reservations about it. The authors also maintained that a number of persons who signed the Deed of Settlement on behalf of their *iwi* had no authority to do so and that *iwi* claiming major commercial fisheries resources did not sign at all. In essence, the authors assert that in Maori culture individual *iwi* and/or *hapu* have the right to their own resources and to control those resources, rather than decisions of this nature being made in the name of all Maori.

With regard to Article 27, the HRC records the authors position as follows: “article 27 of the Covenant requires the State party to take positive steps to assist Maori to enjoy their own culture. They argue that, far from fulfilling this aspect of its obligations under article 27 of the Covenant, the State party has, by its enactment of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, seriously interfered with the enjoyment by the authors, and their tribes or sub-tribes, of their rights or freedoms under article 27. … The authors emphasize that fishing is a fundamental aspect of Maori culture and religion.”

The HRC repeats one of the authors’ submissions citing a report of the Waitangi Tribunal to explain the cultural significance of fishing to Maori in general and the various *iwi*:

In the Maori idiom “taonga” (special resources) in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and water. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna (ancestors) and kaitiaki (guardians). The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution, the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past. …

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or “belonging”, but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a “hurt” to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

With regard to the right to self-determination, the authors assert that the *Treaty of Waitangi (Fisheries Claims) Settlement Act* “confiscates their fishing resources, denies them their right to freely determine their political status and interferes with their right to freely pursue their economic, social and cultural development” and “that the right to self-determination under

---

68 *Id.*, at para. 8.2.

article 1 of the Covenant is only effective when people have access to and control over their resources.\textsuperscript{70}

\textbf{The Decision:} The HRC issued its views in this case in October 1997, almost five years after the complaint was submitted. The HRC’s reasoning is very instructive as to its understanding of Article 27 and is repeated at length here. Finding that Article 27 had not been violated the HRC stated that

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. 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.”

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. 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. 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.

\textsuperscript{70} \textit{Id.}, at para. 6.1.
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.

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 divisions 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 emphasises 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, the Committee emphasises 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 (Fisheries Claims) Settlement Act.\textsuperscript{71}

The HRC made a number of important and groundbreaking statements concerning the possible application of the right to self-determination in this case. For instance, it stated that “When

\textsuperscript{71} \textit{Id.}, at paras. 9.3 – 9.9 (footnotes omitted).
declaring the authors’ remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors’ claims under article 27. Further,

The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee’s jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.

This is a major and potentially very significant departure from the HRC’s previous jurisprudence concerning the applicability of the right to self-determination in individual cases. Previously, the HRC has ruled out any reference to self-determination stating that it could not be relied upon under OP I’s individual complaint procedure as it was a collective right. In this case, the HRC stated that self-determination can be used to aid in interpreting other rights recognized by the ICCPR, particularly those guaranteed by Article 27. It explicitly stated that Article 27 could be read in “conjunction with article 1.” Unfortunately, the HRC did not elaborate upon these statements in reaching its decision. Hopefully, this issue will be addressed in future cases.

Web links: English:
http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/ae41739262a9ca2dc12569ad00329e41?OpenDocument
French:
http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/266fb46c7173f2fbc1256a1c0030ce28?OpenDocument
Spanish:
http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/86457a9de1b7354ac12569ff003b68bb?OpenDocument

J. Äärelä and Näkkäläjärvi v. Finland

This case was submitted in December 1990 by three Saami persons alleging a violation of Article 27 due to logging and road building activities in areas used for reindeer herding. It was declared admissible in July 1991 under the name O. Sara v. Finland (Communication No. 431/1990). However, pursuant to Rule 93(4) of the HRC’s Rules of Procedure, Finland requested that the HRC review its decision on admissibility arguing, among others, that Article 27 had been incorporated into Finnish law, but had not be invoked before the courts by the authors. In March 1994, the HRC agreed and set aside its earlier finding of admissibility on the basis of failure to exhaust domestic remedies, namely failure to invoke and exhaust Article 27.

72 Id., at para. 3.
73 Id., at para. 9.2 (footnotes omitted).
The case was resubmitted to the HRC in November 1997 under the name Äärelä and Näkkäläjärvi v. Finland, after the Finland Supreme Court refused to review the decision of the Finland Court of Appeal ruling against the authors. The Court of Appeal found that no violation of Article 27 had occurred and dismissed the case requiring the authors to pay the state’s costs related to the case. The authors alleged violations of Articles 2(3) (obligation to ensure rights set out in the ICCPR), 14(1)(2) (right to a fair trial and due process of the law) and 27. The authors argued that Article 14 was violated because:

the Appeal Court was not impartial, having pre-judged the outcome of the case and violated the principle of equality of arms in (i) allowing oral hearings while denying an on-site inspection and (ii) taking into account material information without providing an opportunity to the other party to comment. The authors also contend that the award of costs against the authors at the appellate level, having succeeded at first instance, represents bias and effectively prevents other Sami from invoking Covenant rights to defend their culture and livelihood.75

Facts: The authors were Saami reindeer herders and members of a recognized Reindeer Herding Cooperative. Their complaint is related to state authorized logging and road building in the Kariselkä area, an area which amounted to 92 hectares out of a total of 286,000 hectares of the Cooperative’s land. According to the authors, Kariselkä comprised “the best winter lands of the authors’ herding co-operative,”76 that were “especially crucial during crisis situations in winter and spring, when the reindeer are suffering from lack of nourishment essential for herding activities….77 The authors also maintain that Kariselkä’s “significance has also increased since other activities in the area limit the possibilities for herding, including large-scale gold mining, other mineral mining, large-scale tourism, and the operation of a radar station. They point out that the reduced amount of land available for herding after such encroachments has contributed to overgrazing of the remaining pastures.”78

The Decision: The HRC declared this case admissible and issued its views in October 2001, almost four years after the case was resubmitted and almost 11 years after it was initially submitted. Its decision evaluated violations of Articles 14 and 27. Beginning with Article 27, the HRC stated that

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.79 (emphasis added)

Noting that the authors had been consulted about the logging plans and that those plans had been partially modified in response to the authors’ criticisms, the HRC then stated that

75 Id., at para. 3.2.
76 Id., at para. 3.1.
77 Id., at para. 5.3.
78 Id.
79 Id., at para. 7.5.
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.80

It did, however, find a violation of Article 14(1), in conjunction with Article 2, because of the failure of the Court of Appeal to allow the authors the opportunity to challenge one of the submissions of the state during the proceedings therein.81 This article was also violated because Finnish law required that the loser in court proceeding pay the costs of the winner without allowing the judge any discretion to lower the amount of costs awarded. In this respect, the HRC stated 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.82

To conclude, this case is interesting for two main reasons. First, the case was declared inadmissible for failure to exhaust domestic remedies due to the failure of the authors to invoke Article 27 in domestic proceedings. This was possible because the ICCPR had been made directly applicable in Finland allowing the authors to invoke Article 27 as a remedy before local courts. Other countries have also incorporated the ICCPR into domestic law. Consequently, when preparing and pursuing domestic legal action and prior to filing a case with the HRC, it should be ascertained whether the ICCPR can be invoked before national courts for domestic remedies purposes.

Second, that the HRC was unable to determine if a violation of Article 27 had occurred on the basis of the information before it indicates either that enough information had not been submitted or simply that the HRC was unable to properly determine the extent of the interference with the authors’ herding activities and their attendant rights under Article 27. Whatever the reason, this case again demonstrates the limitations of the HRC to adequately protect Indigenous peoples’ rights. It also illustrates another shortcoming of the HRC process: its inability to conduct on-site investigations to gain first hand information about the situation. Had the HRC been able to conduct an on-site visit, it could have acquired further information about the case, which should have enabled it to make a decision.

80 Id., at para. 7.6.
81 Id., at para. 7.4.
82 Id., at para. 7.2.
Web links: O. Sara et al v. Finland
English:
French:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bff2b77f113316968025672f003df7a9?OpenDocument
Spanish:
http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/24558849db507390802567940058bbb8?OpenDocument

Web links: Äärelä and Näkkäläjärvi v. Finland
English:
http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0369100d485aba08c1256b0900513a39?OpenDocument
Spanish:
http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/13d84c4e19d53858c1256b090056555e?OpenDocument
French:
http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/ecd454022df5df0e1256b0e00388e4b?OpenDocument

K. Summary of Article 27 Jurisprudence
Having reviewed the HRC’s jurisprudence on Article 27, this section will provide a summary of the main points and tests set out therein.

1. Scope of Article 27: Based upon the HRC’s jurisprudence to date, the right of members of minorities to enjoy their culture under Article 27 extends to:

a. Economic and social activities, even if these activities are not conducted in a traditional manner:

the rights protected by Article 27 include the rights 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 (Ominayak)

economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community (Kitok and Apirana Mahuika)

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. (I. Lansman)
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. (Apirana Mahuika)

securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering) ... must be protected under article 27.... (Concluding observations: Australia, 2000)

b. Territorial and resource rights:

one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority. ... With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. (General Comment 23)

necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands .... (Concluding observations: Australia, 2000)

It is particularly concerned that the right of Amerindians to enjoy their own culture is threatened by logging, mining and delays in the demarcation of their traditional lands [and] that in some cases insufficient land is demarcated to enable them to pursue their traditional economic activities .... (Concluding observations: Guyana, 2000)

c. Access to and protection of cultural, sacred and religious sites and characteristics:

protection of sites of religious or cultural significance for such minorities ... must be protected under article 27.... (Concluding observations: Australia, 2000)

The Committee observes that the objectives of the Covenant require that the term “family” be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term “family” in a specific situation. It transpires from the authors’ claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors’ history, culture and life. (Hopu)

The authors’ claim is that the State party has failed to protect an ancestral burial ground, which plays an important role in their heritage. It would seem that this claim could raise the issue of whether such failure by a State party involves denial
of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion. (Hopu)

The Committee mentions the authors’ claim “that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life.” Relying on the fact that the State party has challenged neither this claim nor the authors’ argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds interferes with the authors’ right to family and privacy. The reference by the Committee to the authors’ history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. (Hopu)

The Committee emphasises 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, the Committee emphasises 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. (Apirana Mahuika).

d. Freedom from relocation:

the Committee is concerned by hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities. Relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant. Therefore: When planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them (Concluding Observations: Chile, 1999)

e. Relationship to Article 1, self-determination: Traditionally, the HRC has held that Article 1 may not be invoked under the Optional Protocol’s individual complaints procedure. However, in Apirana Mahuika it appeared to have modified its views.

As shown by the Committee’s jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27.
When declaring the authors’ remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case would enable the Committee to determine the relevance of article 1 to the authors’ claims under article 27.

**f. Positive measures needed to protect minority rights:**

Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party. (General Comment 23)

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. (Apirana Mahuika)

2. **Tests for violations:** The HRC employs two tests to determine if state action is compatible with Article 27. The first test applies where the rights of individual members of a minority are limited by state action which does not necessarily affect the other members of the minority. In this case, the HRC applies the following test:

   *a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole (Lovelace and Kitok).*

And, as restated in *Apirana Mahuika:*

   *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.*

The second test applies to state actions that affect members of a minority without purporting to benefit some or all members of that minority. This is a threshold test that requires that the state action in question rise to a sufficient level so as to constitute a denial of the right to culture rather than an mere interference with that right. The HRC has made a number of statements on this issue:

   *... not every interference can be regarded as a denial of the rights within the meaning of article 27. (Lovelace and I. Lansman)*
The crucial question to be determined in the present case is whether the logging that has already taken place within the area specified in the communication, as well as such logging as has been approved for the future and which will be spread over a number of years, is of such proportions as to deny the authors the right to enjoy their culture in that area. (J. Lansman)

Turning to the claim of a violation of article 27 in that logging was permitted in the Karisellä 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 Karisellä area rises to such a threshold. (Äärelä and Näkkäläjärvi)

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. (I. Lansman and Apirana Mahuika)

3. Factors assessed in determining if a violation occurred: In determining if a violation of Article 27 occurred, the HRC looks at a number of different factors.

a. Meaningful/Effective Participation:

The enjoyment of those rights [under Article 27] may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. (General Comment 23)

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 reindeer husbandry, and that measures must be taken to ‘ensure the effective participation of members of minority communities in decisions which may affect them.’ (J. Lansman)

the Committee concludes that quarrying on the slopes of Mt. Riutasvaara, 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 .... (I. Lansman)
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. (Äärelä and Näkkäläjärvi)

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. 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. ... 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. (Apirana Mahuika)

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. (Apirana Mahuika)

b. Continue to benefit:

With regard to the authors’ concerns about future activities, the Committee notes that economic activities [mining] must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. (I. Lansman)

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. (Apirana Mahuika)
VI. ANNEXES

A. General Comment No. 12, 1984 – Self-Determination

*The right to self-determination of peoples (Art. 1): 13/04/84. CCPR General comment 12. (General Comments)*

The right to self-determination of peoples

(Article 1)

(Twenty-first session, 1984)

1. In accordance with the purposes and principles of the Charter of the United Nations, article 1 of the International Covenant on Civil and Political Rights recognizes that all peoples have the right of self-determination. The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

2. Article 1 enshrines an inalienable right of all peoples as described in its paragraphs 1 and 2. By virtue of that right they freely “determine their political status and freely pursue their economic, social and cultural development”. The article imposes on all States parties corresponding obligations. This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.

3. Although the reporting obligations of all States parties include article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that States parties’ reports should contain information on each paragraph of article 1.

4. With regard to paragraph 1 of article 1, States parties should describe the constitutional and political processes which in practice allow the exercise of this right.

5. Paragraph 2 affirms a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”. This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural
wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant.

6. Paragraph 3, in the Committee’s opinion, is particularly important in that it imposes specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination. The general nature of this paragraph is confirmed by its drafting history. It stipulates that “The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”. The obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not. It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination. Such positive action must be consistent with the States’ obligations under the Charter of the United Nations and under international law: in particular, States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination. The reports should contain information on the performance of these obligations and the measures taken to that end.

7. In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).

8. The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.
B. General Comment No. 23, 1994 – Rights of Minorities

The rights of minorities (Art. 27) : . 08/04/94. CCPR General comment 23 (General Comments)

The rights of minorities
(Article 27)
(Fiftieth session, 1994)

1. Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.

2. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-determination proclaimed in article 1 of the Covenant. Further, in reports submitted by States parties under article 40 of the Covenant, the obligations placed upon States parties under article 27 have sometimes been confused with their duty under article 2.1 to ensure the enjoyment of the rights guaranteed under the Covenant without discrimination and also with equality before the law and equal protection of the law under article 26.

3.1 The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol.

3.2. The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article – for example, to enjoy a particular culture – may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.

4. The Covenant also distinguishes the rights protected under article 27 from the guarantees under articles 2.1 and 26. The entitlement, under article 2.1, to enjoy the rights under the Covenant without discrimination applies to all individuals within the territory or under the jurisdiction of the State whether or not those persons belong to a minority. In addition, there
is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not. Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.

5.1. The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone.

5.2. Article 27 confers rights on persons belonging to minorities which “exist” in a State party. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term “exist” connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practise their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the State party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria.

5.3. The right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14.3 (f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14.3 (f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings.

6.1. Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures
of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.

6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

8. The Committee observes that none of the rights protected under article 27 of the Covenant may be legitimately exercised in a manner or to an extent inconsistent with the other provisions of the Covenant.

9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. States parties, therefore, have an obligation to ensure that the exercise of these rights is fully protected and they should indicate in their reports the measures they have adopted to this end.
C. Ratifications

The Americas

International Covenant on Civil and Political Rights (1966)

Argentina (8/8/86), Belize (10/6/96), Bolivia (12/8/82), Brazil (24/1/92), Canada (19/5/76), Chile (10/2/72), Colombia (29/10/69), Costa Rica (29/11/68), Dominica (17/6/93), Ecuador (6/3/69), El Salvador (30/11/79), Guatemala (6/5/92), Guyana (15/2/77; withdrew and re-acceded 1998), Honduras (25/8/97), Jamaica (3/10/75), Mexico (23/3/81), Nicaragua (12/3/80), Panama (8/3/77), Paraguay (10/6/92), Peru (28/4/78), Suriname (28/12/76), Venezuela (10/5/78)

Optional Protocol I to ICCPR (1966)

Argentina (8/8/86), Bolivia (12/8/82), Canada (19/5/76), Chile (28/5/92), Colombia (29/10/69), Costa Rica (29/11/68), Ecuador (6/3/69), El Salvador (6/6/95), Guatemala (28/11/00), Guyana (10/5/93; withdrew and re-acceded 1998), Nicaragua (12/3/80), Panama (8/3/77), Paraguay (10/1/95), Peru (3/10/80), Suriname (28/12/76), Venezuela (10/5/78)

Asia

International Covenant on Civil and Political Rights (1966)

Bangladesh (7/9/00), Cambodia (26/5/92), China (5/10/98), India (10/4/79), Japan (21/6/79), Nepal (14/5/91), Philippines (23/10/86), Sri Lanka (11/6/80), Thailand (29/10/96), Vietnam (24/9/82)

Optional Protocol I to ICCPR (1966)

Nepal (14/5/91), Philippines (22/8/89), Sri Lanka (3/10/97)

Africa

International Covenant on Civil and Political Rights (1966)

Botswana (8/9/00), Burundi (9/5/90), Cameroon (27/6/84), Central African Republic (8/5/81), Congo-Brazzaville (5/10/83), DR Congo (1/11/76), Equatorial Guinea (25/9/97), Gabon (21/1/83), Kenya (1/5/72), Mali (16/7/74), Malawi (22/12/93), Namibia (28/11/94), Nigeria (29/7/93), Rwanda (16/4/75), Sierra Leone (23/8/96), South Africa (10/12/98), Tanzania (11/6/76), Uganda (21/6/95)

Optional Protocol I to ICCPR (1966)

Cameroon (27/6/84), Central African Republic (8/5/81), Congo-Brazzaville (5/10/83), DR Congo (1/11/76), Equatorial Guinea (25/9/87), Mali (24/10/01), Malawi (11/6/96), Namibia (28/11/94), Sierra Leone (23/8/96), Uganda (14/11/95)

Pacific

International Covenant on Civil and Political Rights (1966)

Australia (13/8/80), New Zealand (28/12/78),
Optional Protocol I to ICCPR (1966)
Australia (25/9/91), New Zealand (25/5/89),

Europe
International Covenant on Civil and Political Rights (1966)
Denmark (6/1/72), Estonia (21/10/91), Finland (19/8/75), France (4/11/80), Norway (13/9/72),
Russian Federation (16/10/73), Sweden (6/12/71),

Optional Protocol I to ICCPR (1966)
Denmark (6/1/72), Estonia (21/10/91), Finland (19/8/75), France (17/2/85), Norway (13/9/72),
Russian Federation (1/10/91), Sweden (6/12/71),
D. Training and helpful institutions and information

1. The International Service for Human Rights offers courses at different times during the year focused on the UN human rights system. It also offers a course for Indigenous peoples around the sessions of the UN Working Group on Indigenous Populations and the UN Subcommission on Human Rights in July and August. It also provides legal and strategic advice to Indigenous peoples and NGOs attending UN sessions in Geneva.

Contact:
GTC Co-ordinator
International Service for Human Rights
1, rue de Varembé P.O. Box 16
CH-1211 Geneva, Switzerland
Tel: (0041 22) 733 51 23
Fax: (0041 22) 733 08 26
http://www.ishr.ch/about ISHR/Training/training.htm

2. MANDAT International has developed a helpful guide for first time visitors to Geneva who are attending sessions of UN bodies.

English: http://www.mandint.org/english/cguidee.htm
Spanish: http://www.mandint.org/espanol/cguides.htm
French: http://www.mandint.org/francais/cguidef.htm

It also operates a Welcome Center for NGOs and Indigenous peoples in Geneva that provides reduced price accommodation, computer facilities and advice.

Contact:
MANDAT International
31, chemin William Rappard
CH-1293 Bellevue / SUISSE
Tel: (41 22) 959 88 55
Fax: (41 22) 959 88 51
E-Mail: info@mandint.org
Web: http://www.mandint.org