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Lubicon Lake Band v Canada, Ominayak (on behalf of Lubicon Lake Band) v Canada, Merits, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984, IHRL 2431 (UNHRC 1990), 26th March 1990, Human Rights Committee [UNHRC]

Date: 26 March 1990
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Parties: Bernard Ominayak
Canada

Judges/Arbitrators: Francisco José Aguilar Urbina; Nisuke Ando; Miss Christine Chanet; Joseph AL Cooray; Vojin Dimitrijevic; Omran El Shafei; János Fodor; Rosalyn Higgins; Rajsoomer Lallah; Andreas V Mavrommatis; Joseph A Mommersteeg; Rein A Myullerson; Birame Ndiaye; Fausto Pocar; Julio Prado Vallejo; Alejandro Serrano Caldera; S Amos Wako; Bertil Wennergren

Procedural Stage: Merits

Subject(s):

Indigenous peoples — Self-determination — Minorities — Economic, social, and cultural rights — Exhaustion of local remedies — Cultural property / heritage — Provisional measures

Core Issue(s):

Whether a people's right to self-determination in Article 1 of the International Covenant on Civil and Political Rights ('ICCPR') was justiciable under the Optional Protocol to the ICCPR.

Whether Canada had violated minority rights under Article 27 of the ICCPR by allowing the provincial government to sign industrial development leases on traditional native lands.

Whether domestic remedies had been exhausted, when industrial development threatened destruction of the Lubicon Lake Band's traditional way of life, but there had been no final domestic judicial decision and settlement negotiations between the parties were still underway.

Whether the UN Human Rights Committee would issue provisional measures to stave off further damage to the traditional lifestyle of an indigenous group, while it considered the communication.

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Facts

F1 The Lubicon Lake Band ('Band') was a Cree Indian band whose native lands encompassed territory in the northern part of Alberta province, Canada. The Band had continuously inhabited the land and maintained a traditional way of life since time immemorial. Chief Bernard Ominayak was the unanimously elected leader of the Band.

F2 In 1975 in response to impending private development from oil and gas exploration leases signed with Alberta, the Band filed an action with the Alberta Provincial Land Registration District to assert aboriginal title to the land. A subsequent legislative amendment precluded the filing of such actions and was made retroactive.

F3 The Band filed a request for declaratory judgment in Federal Court regarding its title to the land. The case was dismissed for lack of jurisdiction. An appeal to the Federal Court of Appeal was dismissed in May 1981.

F4 The Band filed a new action for an interim injunction against Alberta and private entities in the Queen's Bench Court of Alberta. The Band claimed that the oil and gas development was destroying its traditional way of life and economic base.

F5 In 1983 the interim injunction was denied. The Band appealed the ruling at the Court of Appeal of Alberta; this was dismissed on the grounds that the petition presented questions of law to be resolved at trial. The Court of Appeal found that the Band had not demonstrated irreparable harm. The Band's request for leave to appeal to the Supreme Court of Canada was denied. No further action, including a trial on the merits, was taken.

F6 Chief Ominayak contended that Canada had allowed Alberta to expropriate the Band's lands for private exploration in a way that was destroying its traditional way of life and cultural heritage, and had prevented the Band from disposing of its natural wealth and resources. These actions were said to violate the Band's right to self-determination under Article 1 of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR') as well as minority rights under Article 27.

F7 The UN Human Rights Committee ('HRC') requested that Canada adopt interim measures to prevent irreparable damage to the band's rights while the complaint was being considered.

F8 Canada argued that the communication was inadmissible as domestic remedies had not yet been exhausted, and had been hampered by delays caused by the Band. Furthermore, negotiations between the parties failed to result in settlement. In October 1988 the Band withdrew its recognition of the jurisdiction of Canadian courts over the dispute. Further negotiations resulted in a formal land offer by Canada, without prejudice to the Band's right to pursue further claims for cash compensation in Canadian courts. However, continued disagreement as to the modalities of the transfer had again resulted in a breakdown of talks.

F9 Canada submitted that the allegations of ICCPR violations were unfounded. It was continuing negotiations with the Band and its offer remained valid. It had recognized other native groups in the area and acknowledged similar legal obligations with respect to them. A trial on the merits remained an effective and viable remedy, as no irretrievable destruction had occurred and there was no imminent danger of irreparable harm.

F10 Chief Ominayak responded that Canada was negotiating in bad faith, with no intention of reaching a final settlement. He submitted that Canada had purposely organized other native groups to compete with the Band for entitlements and to dispossess the Band of its land.

Held

H1 Domestic remedies had been unreasonably prolonged so admissibility was not precluded

under Article 5(2)(b) of the Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('Optional Protocol'). (paragraph 13.2)

H2 The claim under Article 1 of the ICCPR was inadmissible as that collective right was not justiciable under the Optional Protocol. (paragraph 13.3)

H3 However, the communication was admissible to the extent it raised issues under Article 27. (paragraph 14)

H4 The persistent disagreement of the parties over the factual basis of the dispute made it very difficult for the HRC to consider the claim on the merits. (paragraph 30)

H5 Regarding a review of admissibility, Canada had convincingly argued that the Band could have done more to reduce delays, which were unreasonably prolonged, in domestic judicial proceedings. However, domestic judicial proceedings would not have constituted an effective remedy under Article 5(2)(b) of the Optional Protocol for the Band, whose way of life was allegedly on the brink of collapse. Therefore, the decision on admissibility was upheld. (paragraph 31.1)

H6 On the merits, both historical inequities and recent developments threatened the Band's traditional culture and way of life, and constituted a violation of Article 27 for as long as they continued. (paragraph 33)

H7 Canada's proposed remedy for the violation was deemed appropriate within the meaning of Article 2 of the ICCPR. (paragraph 33)

H8 Mr Ando, in a separate opinion: The right to preserve one's culture, as found in Article 27 of the ICCPR, was not absolute. Technical developments throughout human history had resulted in changes to existing ways of life and cultural practices. Mr Ando expressed a reservation about the HRC's categorical statement that Article 27 had been violated. (paragraph 1)

H9 Mr Wennergren dissenting: The case was inadmissible; the matter remained before Canadian domestic authorities and courts. (paragraph 1)

Date of Report: 09 October 2009

Reporter(s): Rajika L Shah

Analysis

A1 The facts of this case were extremely complex, and hampered by fundamental disagreement between the parties over the interpretation of facts. Ultimately, the Band won its claim that historical and recent developments had undermined its traditional way of life, contrary to Article 27. However, the HRC then found that Canada's proposed solution, which was to transfer land and other benefits to the Lubicon Lake Band, was sufficient, despite arguments to the contrary by the Band. Therefore, the victory for the indigenous group was somewhat pyrrhic.

A2 In later cases regarding development projects which allegedly infringed indigenous minority rights, the HRC agreed with Mr Ando that Article 27 rights were not absolute, and were not breached by measures which had only a proportionate and limited impact on those rights. See, eg, *Länsman and ors v Finland*, UN Doc CCPR/C/83/D/1023/2001, *Länsman and ors v Finland*, UN Doc CCPR/C/58/D/671/1995, *Länsman and ors v Finland*, UN Doc CCPR/C/52/D/511/1992, and *Äärelä and Näkkäläjärvi v Finland*, UN Doc CCPR/C/73/D/779/1997. Compare *Poma Poma v Peru*, UN Doc CCPR/C/95/D/1457/2006.

A3 The HRC confirmed that Article 1 of the ICCPR is not justiciable under the Optional Protocol. See also *Kitok v Sweden*, UN Doc CCPR/C/33/D/197/1985.

A4 The HRC requested that Canada take interim measures to prevent irreparable damage to the rights of the Lubicon Lake Band while it considered the communication. See also *Länsman and ors v Finland,* UN Doc CCPR/C/58/D/671/1995.

Date of Analysis: 06 January 2010
Analysis by: Sarah Joseph; Castan Centre for Human Rights Law

Further analysis:

Dominic McGoldrick, 'Canadian Indians, Cultural Rights, and the Human Rights Committee' (1991) 40 International and Comparative Law Quarterly 658 Find it in your Library

Instruments cited in the full text of this decision:

International

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Articles 1, 6, 7, 14, 17, 18(1), 23(1), 26, 27

Optional Protocol to the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Articles 1, 2, 3, 5(1), 5(2)(b), 5(4)

General Comment on Article 1, UN Doc CCPR/C/21/Add 3, UN Human Rights Committee, 5 October 1984

Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev 5, Human Rights Committee, 11 August 1997, Rules 86, 93(4), 94(3)

Domestic

Treaty 8, 21 June 1899 (Canada)

Indian Act, 1970 (Canada), Section 17

Land Title Act, 25 March 1977 (Canada)

Constitutions

Constitution, 1930 (Canada)

Constitution, 1982 (Canada)

Cases cited in the full text of this decision:

UN Human Rights Committee

Lovelace v Canada, Merits, UN Doc CCPR/C/13/D/24/1977; IHRL 1729 (UNHRC 1981), 30 July 1981

Muñoz Hermoza v Peru, Merits, UN Doc CCPR/C/34/D/203/1986; IHRL 2474 (UNHRC 1988), 4 November 1988

Canadian domestic courts

Erickson v Wiggins Adjustments Ltd, (1980) 6 WRR 188

Joe, Decision of the Supreme Court of Canada, 1986

To access full citation information for this document, see the Oxford Law Citator record

Decision - full text

Paragraph numbers have been added to this decision by OUP

Views under article 5. paragraph 4. of the Optional Protocol*/

1 . The author of the communication (initial letter dated 14 February 1984 and subsequent correspondence) is Chief Bernard Ominayak (hereinafter referred to as the author) of the Lubicon Lake Band, Canada. He is represented by counsel.

2.1 The author alleges violations by the Government of Canada of the Lubicon Lake Band's right of self-determination and by virtue of that right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence. These violations allegedly contravene Canada's obligations under article 1, paragraphs I to 3, of the International Covenant on Civil and Polltical Rights.

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

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

3.1 The author states that the same matter has not been submitted for examination under another procedure of international investigation or settlement.

3.2 With respect to the exhaustion of domestic remedies, it is stated that the Lubicon Lake Band has been pursuing its claims through domestic political and legal avenues. It is alleged that the domestic political and legal process in Canada is being used by government officials and energy corporation representatives to thwart and delay the Band's actions until, ultimately, the Band becomes incapable of pursuing them, because industrial development at the current rate in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people for many more years.

3.3 On 27 October 1975, the Band's representatives filed with the Registrar of the Alberta (Provincial) Land Registration District a request for a caveat, which would give notice to all parties

dealing with the caveated land of their assertion of aboriginal title, a procedure foreseen in the Provincial Land Title Act. The Supreme Court of Alberta received arguments on behalf of the Provincial Government, contesting the caveat, and on behalf of the Lubicon Lake Band. On 7 September 1976, the provincial Attorney General filed an application for a postponement, pending resolution of a similar case; the application was granted. On 25 March 1977, however, the Attorney General introduced in the provincial legislature an amendment to the Land Title Act precluding the filing of caveats; the amendment was passed and made retroactive to 13 January 1975, thus predating the filing of the caveat involving the Lubicon Lake Band. Consequently, the Supreme Court hearings were dismissed as moot.

3.4 On 25 April 1980, the members of the Band filed an action in the Federal Court of Canada, requesting a declaratory judgement concerning their rights to their land, its use, and the benefits of its natural resources. The claim was dismissed on jurisdictional grounds against the provincial government and all energy corporations except one (Petro-Canada). The claim with the federal Government and Petro-Canada as defendants was allowed to stand.

3.5 On 16 February 1982, an action was filed in the Court of Queen's Bench of Alberta requesting an interim injunction to halt development in the area until issues raised by the Band's land and natural resource claims were settled. The main purpose of the interim injunction, the author states, was to prevent the Alberta government and the oil companies (the "defendants") from further destroying the traditional hunting and trapping territory of the Lubicon Lake people. This would have permitted the Band members to continue to hunt and trap for their livelihood and subsistence as a part of their aboriginal way of life. The provincial court did not render its decision for almost two years, during which time oil and gas development continued, along with rapid destruction of the Band's economic base. On 17 November 1983, the request for an interim injunction was denied and the Band, although financially destitute, was subsequently held liable for all court costs and attorneys' fees associated with the action:

3.6 The decision of the Court of Queen's Bench was appealed to the Court of Appeal of Alberta; it was dismissed on 11 January 1985. In reaching its decision, the Court of Appeal agreed with the lower court's finding that the Band's claim of aboriginal title to the land presented a serious question of law to be decided at trial. None the less, the Court of Appeal found that the Lubicon Lake Band would suffer no irreparable harm if resource development continued fully and that the balance of convenience, therefore, favoured denial of the injunction.

3.7 The author states that the defendants attempted to convince the Court that the Lubicon Lake Band has no right to any possession of any sort in any part of the subject lands, which, logically, included even their homes. In response, the Court pointed out that any attempt to force the members of the Lubicon Lake Band from their dwellings might indeed prompt interim relief, as would attempts to deny them access to traditional burial grounds or other special places, or to hunting and trapping areas. In its complaint, the Band alleged denial of access to all of these areas, supporting its allegations with photographs of damage and with several uncontested affidavits. Yet, the Court overlooked the Band's evidence and concluded that the Band had failed to demonstrate that such action had been taken or indeed threatened by the defendants.

3.8 The author further states that the legal basis for the Court of Appeal's decision was its own definition of irreparable injury. This test was: injury that is of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice. The author submits that the Lubicon Lake Band clearly met this test by demonstrating, with uncontested evidence, injury to their livelihood, to their subsistence economy, to their culture and to their way of life as a social and political entity. Yet, the Court found that the Band had not demonstrated irreparable harm.

3.9 On 18 February 1985, the Band presented arguments to a panel of three judges of the Supreme Court of Canada, requesting leave to appeal from the judgement of the Alberta Court of

Appeal. On 14 March 1985, the Supreme Court of Canada refused leave to appeal. Generally, the author states, the criteria for granting leave to appeal are: whether the questions presented are of public importance, whether the case contains important issues of law or whether the proceedings are for any reason of such a nature or significance as to warrant a decision by the Supreme Court of Canada. He states that the issues presented by the Lubicon Lake Band involved such questions as the interpretation of the constitutional rights of aboriginal peoples, the existence of which was recently confirmed by the Constitution Act, 1982; the remedies available to aboriginal peoples; the rights of aboriginal peoples to carry out traditional subsistence activities in traditional hunting and trapping grounds; the legal regime applicable to a large area of land in northern Alberta; conflicts between Canada's traditional, land-based societies and its industrial society; public interests and minority interests; the competing rights of public authorities and individuals; considerations of fundamental and equitable justice; equality before the law; and the right to equal protection and benefit of the law. The author submits that at least the first four questions have not yet been adjudicated by the Supreme Court of Canada and that they undeniably fall within the criteria for granting leave to appeal.

4 . By decision of 16 October 1984, the Working Group of the Human Rights Committee transmitted the communication under rule 91 of the rules of procedure to the State party, requesting information and observations relevant to the question of the admissibility of the communication. The main points reflected in the information and observations received from the State party are set out in paragraphs 5.1 to 5.7 and 6.1 to 6.4 below.

Exhaustion of domestic remedies

5.1 In its submission dated 31 May 1985, the State party contends that the Lubicon Lake Band has not pursued to completion domestic remedies commenced by it and that responsibility for any delays in the application of such remedies does not lie with the Government of Canada. The State party recalls that the Lubicon Lake Band, suing in its own legal right, and Chief Bernard Ominayak, suing in his personal capacity, and with other Band councillors in a representative capacity, have initiated three different legal procedures and points out that only the litigation concerning the caveat filed by the Band has been finally determined. Two other legal actions, one in the Federal Court of Canada and one in the Alberta Court of Queen's Bench, were said to be still pending.

5.2 With regard to the Federal Court action referred to in the communication, the State party recalls that the Band and its legal advisers, in April 1980, sought to sue the Province of Alberta and private corporations in proceedings in the Federal Court of Canada. It is submitted that in the circumstances of this case, neither the province nor private entities could have been sued as defendants in the Federal Court of Canada. Rather than reconstitute the proceedings in the proper forum, the State party submits, the Band contested interlocutory proceedings brought by the defendants concerning the issue of jurisdiction. These interlocutory proceedings resulted in a determination against the Band in November 1980. An appeal by the Band from the decision of the Federal Court of Canada was dismissed by the Federal Court of Appeal in May 1981.

5.3 Following the interlocutory proceedings relating to the jurisdiction of the Federal Court, a new action was instituted on 21 February 1982 against the province and certain corporate defendants in the Court of Queen's Bench of Alberta. As indicated in the communication, the Band sought an interim injunction. In November 1983, after extensive proceedings, the Band's interim application was dismissed by the Court of Queen's Bench based on the case of Erickson v. Wiggins Adjustments Ltd. (1980) 6 W.R.R. 188, which set out the criteria that must be present for a court to grant an interim injunctlon. Pursuant to that case, an applicant for an interim injunction must establish:

(a) That there exists a serious issue to be tried;

(b) That irreparable ham will be suffered prior to trial if no injunction is granted;

(c) That the balance of convenience between the parties favours relief to the applicant.

The State party points out that the Alberta Court denied the Band's application on the grounds that the Band had failed to prove irreparable ham and that it could be adequately compensated in damages if it was ultimately successful at trial.

5.4 Rather than proceed with a trial on the merits, the Band appealed against the dismissal of the interim application. Its appeal was dismissed by the Alberta Court of Appeal of 11 January 1985. The Band's application for leave to appeal the dismissal of the interim injunction to the Supreme Court of Canada was refused on 14 March 1985. Almost two months later, on 13 May 1985, the State party adds, the Supreme Court of Canada denied another request by the Band that the Court bend its own rules to rehear the application. Thus, the State party states, the Court upheld its well-estab1ished rule prohibiting the rehearing of applications for leave to appeal.

5.5 The State party submits that, after such extensive delays caused by interim proceedings and the contesting of clearly settled procedural matters of law, the author's claim that the application of domestic remedies is being unreasonably prolonged has no merit. It submits that it has been open to the Band as plaintiff to press on with the substantive steps in either of its legal actions so as to bring the matters to trial.

Additional remedies

5.6 The State party submits that the term "domestic remedies", in accordance with the prevailing doctrine of International law, should be understood as applying broadly to all established municipal procedures of redress. Article 2, paragraph 3 (b), of the Covenant, it states, recognizes that in addition to 3udicial remedies a State party to the Covenant can also provide administrative and other remedies. Following the filing of its defence In the Federal Court action, the federal Government proposed late in 1981 that the claim be settled by providing the Band with reserve land pursuant to the treaty concluded in 1899. The conditions proposed by the province (which holds legal title to the lands) were not acceptable to the Band and it accordingly rejected the proposed resolution of the dispute.

5.7 The Band's claim to certain lands in northern Alberta, the State party submits, is part of a complex situation that involves competing claims from several other native communities in the area. In June 1980, approximately two months after the Band commenced its action in the Trial Division of the Federal Court, six other native communities filed a separate land claim with the Department of Indian Affairs asserting aboriginal title to lands that overlap with the property sought by the Lubicon Lake Band's claim. Subsequently, in June 1983, the Big Stone Cree Band filed a claim with the Department of Indian Affairs — this time claiming treaty entitlement — to an area that also overlaps with land claimed by the Lubicon Lake Band. The Big Stone Cree Band allegedly represents five of the native communities that filed the June 1980 claim based on aboriginal title. To deal with this very complex situation, in March 1985 the Minister of Indian and Northern Affairs appointed a former judge of the British Columbia Supreme Court as a special envoy of the Minister to meet with representatives from the Band, other native communities and the province, to review the entire situation and to formulate recommendations. The State party submits that consideration of the Lubicon Lake Band's claim in isolation from the competing claims of the other native communities would jeopardize the domestic remedy of negotiated settlement selected by the latter.

Right of self-determination

6.1 The Government of Canada submits that the communication, as it pertains to the right of self-determination, is inadmissible for two reasons. First, the right of self-determination applies to a "people" and it is the position of the Government of Canada that the Lubicon Lake Band is not a people within the meaning of article 1 of the Covenant. It therefore submits that the communication is incompatible with the provisions of the Covenant and, as such, should be found inadmissible

under article 3 of the Protocol. Secondly, communications under the Optional Protocol can only be made by individuals and must relate to the breach of a right conferred on individuals. The present communication, the State party argues, relates to a collective right and the author therefore lacks standing to bring a communication pursuant to articles I and 2 of the Optional Protocol.

6.2 As to the argument that the Lubicon Lake Band does not constitute a people for the purposes of article I of the Covenant and it therefore is not entitled to assert under the Protocol the right of self-determination, the Government of Canada points out that the Lubicon Lake Band comprises only one of 582 Indian bands in Canada and a small portion of a larger group of Cree Indians residing in northern Alberta. It is therefore the position of the Government of Canada that the Lubicon Lake Indians are not a "people" within the meaning of article 1 of the Covenant.

6.3 The Government of Canada submits that while self-determination as contained in article 1 of the Covenant is not an individual right, it provides the necessary contextual background for the exercise of individual human rights. This view, it contends, is supported by the following phrase from the Committee's general comment on article 1 (*CCPR/C/21/Add.3*, 5 October 1984), which provides that the realization of self-determination is "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". This general comment, the State party adds, recognizes that the rights embodied in article I are set apart from, and before, all the other rights in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. The rights in article 1, which are contained in part I of the Covenant on Civil and Political Rights are, in the submission of Canada, different in nature and kind from the rights in part III, the former being collective, the latter individual. Thus, the structure of the Covenant, when viewed as a whole, further supports the argument that the right of self-determination is a collective one available to peoples. As such, the State party argues, it cannot be invoked by individuals under the Optional Protocol.

6.4 The Government of Canada contends that the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right. It therefore contends that the present communication pertaining to self-determination for the Lubicon Lake Band should be dismissed.

7 . In a detailed reply, dated 8 July 1985, to the State party's submission, the author summarized his arguments as follows. The Government of Canada offers three principal allegations in its response. It alleges, first, that the Lubicon Lake Band has not exhausted domestic remedies. However, the Band has, in fact, exhausted these remedies to the extent that they offer any meaningful redress of its claims concerning the destruction of its means of livelihood. Secondly, the Government of Canada alleges that the concept of self-determination is not applicable to the Lubicon Lake Band. The Lubicon Lake Band is an indigenous people who have maintained their traditional economy and way of life and have occupied their traditional territory since time immemorial. At a minimum, the concept of self-determination should be held to be applicable to these people as it concerns the right of a people to their means of subsistence. Finally, the Government of Canada makes allegations concerning the identity and status of the communicant. The "communicant" is identified in the Band's original communication. The "victims" are the members of the Lubicon Lake Band, who are represented by their unanimously elected leader, Chief Bernard Ominayak.

8.1 By interim decision of 10 April 1986, the Committee, recalling that the State party had informed it that the Minister of Indian and Northern Affairs had appointed a special envoy and given him the task to review the situation, requested the State party to furnish the Committee with the special envoy's report and with any information as to recommendations as well as measures which the State party had taken or intended to take in that connection.

8.2 In the same decision the Committee requested the author to inform it of any developments in the legal actions pending in the Canadian courts.

9.1 In his reply, dated 30 June 1986, to the Committee's interim decision, the author claims that there has been no substantive progress in any of the pending court proceedings. He reiterates his argument that:

> "The Band's request for an interim injunction to halt the oil development, which has destroyed the subsistence livelihood of its people, was denied and the Supreme Court of Canada refused to grant leave to appeal the denial ... The development and the destruction, therefore, continue unabated. The Band's attorney is continuing to pursue the claims through the courts despite the fact that the Band is unable to provide financial support for the effort and that there is no possible hope of resolution for the next several years. Therefore, the Band has no basis for altering its previous conclusion that, for all practical purposes, its domestic judicial remedies have been exhausted."

9.2 The Band also points out that the Federal Government's special envoy, Mr. E. Davie Fulton, was relieved of his responsibilities following the submission of his "discussion paper".

> "In the discussion paper ... Mr. Fulton reached much the same conclusion as the Band itself, that the Canadian Government must bear the blame for the situation at Lubicon Lake and that the resolution of the problem is up to the Federal Government. His report also suggested a land settlement based on the Band's current population and recognized the importance of providing the Band with wildlife management authority throughout its hunting and trapping territory. The land settlement proposed by Mr. Fulton, which would result in a reserve significantly larger than the 25 square mile reserve the Band was promised in 1940, is consistent with the position of the Band with regard to this issue ... Mr. Fulton also recommended that Alberta compensate the Band for damage caused by the unrestricted oil and gas development for which it has issued leases wlthin the Band's territory. In addition to relieving Mr. Fulton of his responsibility in the matter, the Federal Government, to date, has refused to make his discussion paper public."

10.1 In its reply to the Committee's interim decision, dated 23 June 1986, the State party forwarded the text of Mr. Fulton's report and noted that it had appointed Mr. Roger Tasse to act as negotiator. Furthermore, it informed the Committee that on 8 January 1986 the Canadian Government had made an ex gratia payment of $1.5 million to the Band to cover legal and other related costs.

10.2 In a further submission of 20 January 1987, the State party argues that following the rejection of the Band's application for an interim injunction:

> "The Band should then have taken steps with all due speed to seek its permanent injunction before seeking international recourse. The Band alleges in its submission ... that the delay in the litigation will cause it irreparable harm. Its action for a permanent injunction would, if successful, permanently prevent that harm."

11.1 In submissions dated 23 and 25 February 1987, the author discussed, inter alia, matters of substance, such as the Fulton discussion paper, and argued that "Canada has abandoned key recommendations contained in the Fulton discussion paper", and that "Canada is attempting retroactively to subject the Band to a law which this Committee has held to be in violation of article 27 of the International Covenant on Civil and Political Rights and which Canada amended in accordance with the findings of this Committee".

11.2 With regard to the pending litigation proceedings, the Band contends that a permanent injunction would not constitute an effective remedy because it would come too late, explaining that:

> "The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's

traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life."

12 . In a further submission, dated 12 June 1987, the author states that:

"The Lubicon Lake Band is not requesting a territorial rights decision. Rather, the Band requests only that the Human Rights Committee assist it in attempting to convince the Government of Canada that:

"(a) The Band's existence is seriously threatened by the oil and gas development that has been allowed to proceed unchecked on their traditional hunting grounds and in complete disregard for the human community inhabiting the area;

"(b) Canada is responsible for the current state of affairs and for co-operating in their resolution in accordance with article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights."

13.1 Before considering a communication on the merits, the Committee must ascertain whether it fulfils all conditions relating to its admissibility under the Optional Protocol.

13.2 With regard to the requirement, in article 5, paragraph 2 (b), of the Optional Protocol, that authors must exhaust domestic remedies before submitting a communication to the Human Rights Committee, the author of the present communication had invoked the qualification that this requirement should be waived "where the application of the remedies is unreasonably prolonged". The Committee noted that the author had argued that the only effective remedy in the circumstances of the case was to seek an interim injunction, because "without the preservation of the status quo, a final judgement on the merits, even if favourable to the Band, would be rendered ineffectual", in so far as "any final judgement recognizing aboriginal rights, or alternatively treaty rights, [could] never restore the way of life, livelihood and means of subsistence of the Band". Referring to its established jurisprudence that "exhaustion of domestic remedies can be required only to the extent that these remedies are effective and available", the Committee found that, in the circumstances of the case, there were no effective remedies still available to the Lubicon Lake Band.

13.3 With regard to the State party's contention that the author's communication pertaining to self-determination should be declared inadmissible because "the Committee's jurisdiction, as defined by the Optional Protocol, cannot be invoked by an individual when the alleged violation concerns a collective right", the Committee reaffirmed that the Covenant recognizes and protects in most resolute terms a people's right of self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Committee observed that the author, as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article I of the Covenant, which deals with rights conferred upon peoples, as such.

13.4 The Committee noted, however, that the facts as submitted might raise issues under other articles of the Covenant, including article 27. Thus, in so far as the author and other members of the Lubicon Lake Band were affected by the events which the author has described, these issues should be examined on the merits, in order to determine whether they reveal violations of article 27 or other articles of the Covenant.

14 . On 22 July 1987, therefore, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under article 27 or other articles of the Covenant. The

State party was requested, under rule 86 of the rules of procedure, to take interim measures of protection to avoid irreparable damage to Chief Ominayak and other members of the Lubicon Lake Band.

15 . In its submission under article 4, paragraph 2, dated 7 October 1987, the State party invokes rule 93, paragraph 4, of the Committee's provisional rules of procedure and requests the Committee to review its decision on admissibility, submitting that effective domestic remedies have not been exhausted by the Band. It observes that the Committee's decision appears to be based on the assumption that an interim injunction would be the only effective remedy to address the alleged breach of the Lubicon Lake Band's rights. This assumption, in its opinion, does not withstand close scrutiny. The State party submits that, based on the evidence of the Alberta Court of Queen's Bench and the Court of Appeal — the two courts which had had to deal with the Band's request for interim relief — as well as the socio-economic conditions of the Band, its way of life, livelihood and means of subsistence have not been irreparably damaged, nor are they under imminent threat. Accordingly, it is submitted that an interim injunction is not the only effective remedy available to the Band, and that a trial on the merits and the negotiation process proposed by the Federal Government constitute both effective and viable alternatives. The State party reaffirms its position that it has a right, pursuant to article 5, paragraph 2 (b), of the Optional Protocol, to insist that domestic redress be exhausted before the Committee considers the matter. It claims that the terms "domestic remedies", in accordance with relevant principles of international law, must be understood as applying to all established local procedures of redress. As long as there has not been a final judicial determination of the Band's rights under Canadian law, there is no basis in fact or under international law for concluding that domestic redress is ineffective, nor for declaring the communication admissible under the Optional Protocol. In support of its claims, the State party provides a detailed review of the proceedings before the Alberta Court of Queen's Bench and explains its long-standing policy to seek the resolution of valid, outstanding land claims by Indian Bands through negotiation.

16.1 Commenting on the State party's submission, the author, in a letter dated 12 January 1988, maintains that his and the Lubicon Lake Band's allegations are well founded. According to Chief Ominayak, the State party bases its request for a review of the decision on admissibility on a mere restatement of the facts and is seeking to have the Committee reverse its decision under the guise of substantiation of its previous submissions, without adducing any new grounds. Recalling the Committee's statement that the communication is admissible in so far as it raises issues under article 27 "or other articles of the Covenant", the author spells out which articles of the Covenant he considers to have been violated. First, he claims that Canada has violated article 2, paragraphs 1 to 3, of the Covenant: paragraph 1, because the State party has treated the Lubicon Lake Band without taking into consideration elements of a social, economic and property nature inherent in the Band's indigenous community structure; paragraph 2, because it is said to continue to refuse to solve some issues complained of by the Band for which there remain means of redress; and paragraph 3, because it is said to have failed to provide the Band with an effective remedy with regard to its rights under the Covenant.

16.2 The author further alleges that the State party, through actions affecting the Band's livelihood, has created a situation which "led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births … has gone from near zero to near 100 per cent". This, it is submitted, constitutes a violation of article 6 of the Covenant. Furthermore, it is claimed that the appropriation of the Band's traditional lands, the destruction of its way of 1lie and livelihood. and the devastation wrought to the community constitute cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant for which the State party must be held accountable.

16.3 The author raises further questions about the State party's compliance with articles 14, paragraph 1, and 26, of the Covenant. He recalls that the domestic court proceedings instituted by the Lubicon Lake Band, founded on aboriginal rights and title to land, challenge certain of the State's asserted powers and jurisdiction, which he contends are "inherently susceptible to precisely the types of abuses that articles 14, paragraph 1, and 26 are intended to guard against". In this context, he claims that "the bias of the Canadian courts has presented a major obstacle to the Band's attempt to protect its land, community and livelihood, and that the courts' biases arises from distinctions based on race, political, social and economic status". He further claims that the economic and social biases the Band has been confronted with in the Canadian courts, especially in the provincial court system in Alberta, have been greatly magnified by the "fact that several of the judges rendering the decisions of these courts have had clear economic and personal ties to the parties opposing the Band in the actions".

16.4 In addition to the above, it is submitted that in violation of articles 17 and 23, paragraph 1, of the Covenant, the State party has permitted the members of the Lubicon Lake Band to be subjected to conditions that are leading to the destruction of the families and the homes of its members. The author explains that in an indigenous community, the entire family system is predicated upon the spiritual and cultural ties to the land and the exercise of traditional activities. Once these have been destroyed, as in the case of the Band, the essential family component of the society is irremediably damaged. Similarly, it is alleged that the State party has violated article 18, paragraph 1, of the Covenant since, as a consequence of the destruction of their land, the Band members have been "robbed of the physical realm to which their religion — their spiritual belief system — attaches".

16.5 With respect to the requirement of exhaustion of domestic remedies, the author rejects the State party's assertion that a trial on the merits would offer the Band an effective recourse against the federal Government and redress for the loss of its economy and its way of life. First, this assertion rests upon the assumption that past human rights violations can be rectified through compensatory payments; secondly, it is obvious that the Band's economy and way of life have suffered irreparable harm. Furthermore, it is submitted that a trial on the merits is no longer available against the federal Government of Canada since, in October 1986, the Supreme Court of Canada held that aboriginal land rights within provincial boundaries involve provincial land rights and must therefore be adjudicated before the provincial courts. It was for that reason that, on 30 March 1987, the Lubicon Lake Band applied to the Alberta Court of Queen's Bench for leave to amend its statement of claim before that court so as to be able to add the federal Government as a defendant. On 22 October 1987, the Court of Queen's Bench denied the application. Therefore, despite the fact that the Canadian Constitution vests exclusive jurisdiction for all matters concerning Indians and Indian lands in Canada with the federal Government, it is submitted that the Band cannot avail itself of any recourse against the federal Government on issues pertaining to these very questions.

17.1 In a submission dated 3 March 1988, the State party submits that genuine and serious efforts continue to be made with a view to finding an acceptable solution to the issues raised by the author and the Band. In particular, it explains that:

> "On 3 February 1988, the Minister of Indian Affairs and Northern Development delivered to the Attorney General of Alberta a formal request for reserve land for the Lubicon Lake Band. In this request, he advised Alberta that a rejection of the request would require Canada to commence a legal action, pursuant to the Constitution Act, 1930, to resolve the dispute as to the quantum of land to which the Lubicon Lake Band is entitled. In any event, the Minister of Indian Affairs and Northern Development asked Alberta to consider, as an interim measure, the immediate transfer to the Band of 25.4 square miles of land … without prejudice to any legal action.

"By letter dated 10 February 1988, the federal negotiator advised counsel for the Band of the above developments and, as well, sought to negotiate all aspects of the claim not dependent on Alberta's response to the formal request … The communicant, by letter dated 29 February 1988, rejected this offer, but indicated that he would be prepared to consider an interim transfer of 25.4 square miles without prejudice to negotiations or any court actions. As a consequence of the above developments, negotiators for the federal and provincial Governments met on I and 2 March 1988 and concluded an interim agreement for the transfer of 25.4 square miles as reserve land for the Band, including mines and minerals. This agreement is without prejudice to the positions of all parties involved, including the Band …"

17.2 With respect to the effectiveness of available domestic remedies, the State party takes issue with the author's submission detailed in paragraph 16.5 above, which it claims seriously misrepresents the legal situation as it relates to the Band and the federal and provincial Governments. It reiterates that the Band has instituted two legal actions, both of which remain pending: one in the Federal Court of Canada against the federal Government; the other in the Alberta Court of Queen's Bench against the province and certain private corporations. To the extent that the author's claim for land is based on aboriginal title, as opposed to treaty entitlement, it is established case law that a court action must be brought against the province and not the federal Government.

17.3 The State party adds that in the action brought before the Alberta Court of Queen's Bench:

"The communicant sought leave to add the federal Government as a party to the legal proceedings in the Alberta Court of Queen's Bench. The Court there held that, based on existing case law, a provincial court is without jurisdiction to hear a claim for relief against the federal Government; rather, this is a matter properly brought before the Federal Court of Canada. The plaintiff has in fact done this and the action is, as already indicated, currently pending. Therefore, recourse against the Government of Canada is still available to the Band, as it has always been, in the Federal Court of Canada. Moreover, the communicant has appealed the decision of the Court of Queen's Bench to the Alberta Court of Appeal".

17.4 Finally, the State party categorically rejects most of the author's allegations detailed in paragraphs 16.2 and 16.3 above as unfounded and unsubstantiated; it submits that these allegations constitute an abuse of process that should result in the dismissal of the communication pursuant to article 3 of the Optional Protocol.

18.1 In a further submission dated 28 March 1988, the author comments on the State party's overview of recent developments in the case (see para. 17.1) and adds the following remarks: (a) the Lubicon Lake Band was not a party to the negotiation of the settlement offer; (b) the settlement offer rests on a "highly prejudicial" view of the Band's rights under Canadian law and an equally prejudicial determination of Band membership; (c) the federal Government would negotiate non-land issues such as housing with fewer than half of the Band members; (d) Canada has leased all but 25.4 square miles of the Band's traditional lands for development, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta; (e) the Daishowa project frustrates any hopes of the continuation of some traditional activity by Band members; and (f) the Parliamentary Standing Committee on Aboriginal Affairs, the oversight committee of the Canadian Parliament with respect to such matters, does not support the approach to negotiated settlement being taken by the Minister of Indian Affairs and Northern Development.

18.2 The author reaffirms that the essential part of the court actions initiated by the Band relates to aboriginal rights claims and that, with the decision of the Alberta Court of Queen's Bench of 22 October 1987 and in the light of recent Supreme Court decisions referred to by the State party, the Band continues to be denied redress against the federal Government.

18.3 The author further rejects the State party's contention that the claims made in his submission of 12 January 1988 are unsubstantiated and unfounded and constitute an abuse of the right of submission; he reaffirms his readiness to furnish detailed information on the "21 unnatural deaths resulting directly or indirectly from the destruction of the traditional Lubicon economy and way of life". Finally, he points out that the State party continues to disregard the Committee's request for interim measures of protection pursuant to rule 86 of its rules of procedure, as evidenced by Canadian backing of the Daishowa paper mill project. This means that far from adopting interim measures to avoid irreparable harm to the Band, Canada has endorsed a project that would contribute to the further degradation of the Band's traditional lands.

19.1 In another submission dated 17 June 1988, the State party points to further developments in the case and re-emphasizes that effective remedies continue to be open to the Lubicon Lake Band. It explains that, since 11 March 1988, the date of the Band's refusal of the Government's interim offer to transfer to it 25.4 square miles of reserve land, discussions:

> "have taken place between the federal Government, the Province of Alberta and the communicant. However, virtually no progress was made towards settlement. As a consequence, on 17 May 1988, the federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band in order to enable Canada to meet its lawful obligations to the Band under Treaty 8. The Statement of Claim, commencing the legal action, asks the Court of Queen's Bench of Alberta for a declaration that the Lubicon Lake Band is entitled to a reserve and a determination of the size of the reserve On 9 June 1988 the Lubicon Lake Band filed a Statement of Defence and Counterclaim. On 10 June 1988, all parties to the dispute appeared before Chief Justice Moore of the Alberta Court of Queen's Bench and agreed that best efforts should be made to expedite this case with a preliminary trial date to be set on 10 January 1989."

19.2 The State party accepts its obligation to provide the Lubicon Lake Band with a reserve pursuant to Treaty 8. It argues that the issue that forms the basis of the domestic dispute, as well as the communication under consideration, concerns the amount of land to be set aside as a reserve and related issues. As such, the State party asserts that the communication does not properly fall within any of the provisions of the Covenant and cannot therefore form the basis of a violation.

20.1 In a submission dated 5 July 1988, the author furnishes further information and comments on the State party's submission of 17 June 1988. He identifies "many problems" inherent in the court action initiated by the federal Government against the provincial government in the Alberta Court of Queen's Bench. Among these are: (a) the purported fact that it ignores the Band's aboriginal land claim; (b) the fact that it seeks a declaratory judgement with respect to Band membership "apparently based on the unique and highly controversial approach to determination of Band membership that has been discussed in previous submissions"; and (c) the fact that much of the substance of the issues addressed are already before the courts in the Band's pending actions. The author notes that since "the action was filed in the lowest court in Canada, and will entail subpoena of an argument over the extremely lengthy and complex Lubicon genealogical study, as well as appeals from any decision rendered, there is no basis for believing that the action will do anything but delay indefinitely [the] resolution of the Lubicon land issues". The author believes that the Government's action is intended to have precisely this effect.

20.2 By letter dated 28 October 1988, the author informs the Committee that on 6 October 1988, the Lubicon Lake Band asserted jurisdiction over its territory. He explains that this action was the result of the federal Government's failure to contribute to a favourable solution of the Band's problems. He adds that the State party has continuously delayed action on the issue, accusing it of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people. At the same time the Band has watched the Province of Alberta continue to grant leases for oil and gas development and now for timber development on the Lubicons'

traditional lands …".

20.3 The author further observes that the action of the Lubicon Lake Band has resulted in:

> "a positive response from the Alberta provincial government. Alberta Premier Don Getty negotiated an agreement with Chief Ominayak whereby Alberta will offer to sell to the Federal Government 79 square miles of land with surface and subsurface rights, to be designated as a reserve for the benefit of the Lubicon Lake Band. The province has agreed to sell an additional 16 square miles of land to the federal Government with surface rights only, and to make subsurface development on such land subject to Band approval. Thus the total area agreed to by the province is 95 square miles, the amount to which the Band is entitled, based on its present membership, under Canadian federal Indian law …. The federal Government has stated that it is willing to consider the transfer of 79 square miles of land for the benefit of the Lubicon people. However, it has refused to accept the remaining 16 square miles, recommending that such land be transferred to the Band to be held in free title. The effect of this would be to subject the land in question to taxation and alienation, while reducing the level of federal obligation to the Lubicon people …"

21.1 In a further submission dated 2 February 1989, the State party observes that in November 1988, following an agreement between the provincial government of Alberta and the Lubicon Lake Band to set aside 95 square miles of land for a reserve, the federal Government initiated negotiations with the Band on the modalities of the land transfer and related issues. During two months of negotiations, consensus was reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services. No agreement could, however, be found on the issue of cash compensation and on 24 January 1989 the Band withdrew from the negotiations when the federal Government presented its formal offer.

21.2 After reviewing the principal features of its formal offer (transfer to the Band of 95 square miles of reserve land: the acceptance of the Band's membership calculation; the setting aside of $C 34 million for community development projects; the granting of $C 2.5 million per year of federal support programmes; the proposal of a special development plan to assist the Band in establishing a viable economy on its new reserve; and the establishment of a $C 500,000 trust fund to assist Band elders wishing to pursue their traditional way of life), the State party observes that the Government's formal overall offer amounts to approximately $C 45 mi11ion in benefits and programmes, in addition to a 95 square mile reserve. The Band has claimed additional compensation of between $C 114 million and $C 275 mi11ion for alleged lost revenues. The State party has denied the Band's entitlement to such sums but has advised it that it is prepared to proceed with every aspect of its offer without prejudice to the Band's right to sue the federal Government for additional compensation.

21.3 The State party concludes that its most recent offer meets two tests of fairness, namely: that it is consistent with other recent settlements with native groups, and that it addresses the legitimate social and economic objectives of the Band. It adds that the community negotiation process must be considered as a practical vehicle and opportunity for Indian communities to increase their local autonomy and decision-making responsibilities. The federal policy provides for negotiations on a wide range of issues, such as government institutions, membership, accountability, financial arrangements, education, health services and social development. Based on the above considerations, the State party requests the Committee to declare the communication inadmissible on the grounds of failure to exhaust all available domestic remedies.

22.1 In a further submission dated 22 March 1989, the author takes issue with the State party's submission of 2 February 1989, characterizing it as not only misleading but virtually entirely untrue. He alleges that recent negotiations between the Lubicon Lake Band and the federal Government did not, on the Government's side, "in any way represent a serious attempt at settlement of the

Lubicon issues". Rather, he submits, the Government's "formal offer" was an exercise in public relations, which committed the Federal Government to virtually nothing. It is submitted that the offer, if accepted, would have stripped the community's members of any legal means of redressing their situation.

22.2 In substantiation of these allegations, the author argues that the Government's "formal offer" contains no more than a commitment to provide housing and a school. On the other hand, it lacks "any commitment to provide the facilities and equipment necessary for the Lubicon people to manage their own affairs, such as facilities for essential vocational training, support for commercial and economic development, or any basis from which the Band might achieve financial independence". It is further submitted that contrary to the State party's statement that an agreement had been reached on the majority of issues for which the Band seeks a viable solution, including membership, reserve size and community construction, no agreement or consensus had been reached on any of these issues. Furthermore, the author argues that while the State party has claimed that its offer would amount to approximately $C 45 million in benefits and programmes, it has failed to indicate that the majority of these funds remain uncommitted and that without adequate means of legal redress the Lubicon Lake Band would be incapable of seeking to obtain any future commitments from the Government.

23.1 By submission of 30 May 1989, the author recalls that the Band has been pursuing its domestic claims through the Canadian courts for over 14 years, and that the nature of the claims and the judicial process involved is bound to draw out these proceedings for another 10 years. He submits that the State party does not dispute that court actions and negotiations undertaken to ensure the Baud's livelihood have produced no results, and that court proceedings addressing the issues of land title and compensation would take years in resolution, if resolution ever occurred. It is pointed out that following the Band's refusal to endorse a settlement offer, which would force the Band to relinquish all rights to legal action involving a controversy with the State party in exchange for promises of future discussions between Canada and the Band, Canada terminated the negotiations. The author adds that: "Rather than continuing to seek a course of compromise and settlement, Canada has sent agents into non-native communities of northern Alberta, in the area immediately surrounding the traditional Lubicon territory." Working through a single individual who is said to retain some ties with the Band but who has not lived in the community for 40 years, these agents are said to try to induce other native individuals to strike their own private deals with the federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society.

23.2 In substantiation of earlier allegations, the author explains that the Band's loss of its economic base and the breakdown of its social institutions, including the transition from a way of life marked by trapping and hunting to a sedentary existence, has led to a marked deterioration in the health of the Band members:

> "... the diet of the people has undergone dramatic changes with the loss of their game, their reliance on less nutritious processed foods, and the spectre of alcoholism, previously unheard of in this community and which is now overwhelming it .... As a result of these drastic changes in the community's physical existence, the basic health and resistance to infection of community members has deteriorated dramatically. The lack of running water and sanitary facilities in the community, needed to replace the traditional systems of water and sanitary management .... is leading to the development of diseases associated with poverty and poor sanitary and health conditions. This situation is evidenced by the astonishing increase in the number of abnormal births and by the outbreak of tuberculosis, affecting approximately one third of the community."

24.1 In a submission dated 20 June 1989, the State party concedes "that the Lubicon Lake Band has suffered a historical inequity and that they are entitled to a reserve and related entitlements". It

maintains, however, that it has made offers to the Band which, if accepted, would enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency, and that its offer would provide an effective remedy to the violations of the Covenant alleged by the Band. However, a remedy of this nature cannot be imposed on the Band. The State party recalls that negotiations between the Lubicon Lake Band and senior government officials took place from November 1988 to January 1989; during the autumn of 1988, Chief Ominayak also met with the Prime Minister of Canada. It is submitted that the State party met virtually every demand of the author, either in full or to such an extent that equal treatment with other indigenous groups in Canada was approximated or exceeded. Thus, 95 square miles of land, mineral rights over 79 square miles, community facilities for each family living on the reserve, control over membership and an economic self-sufficiency package were offered in full to the Band. On the basis of a total of 500 Band members and a government package worth $C 45 million (non-inclusive of mineral and land rights), this offer amounted to $C 90,000 per person or almost $C 500,000 for each family of five. A number of the Band's demands, such as a request for an indoor ice arena or a swimming pool, were refused.

24.2 According to the State party, the major remaining point of contention between the federal Government and the Band is a claim by the Band for $C 167 million in compensation for economic and other losses allegedly suffered. In an endeavour to permit the resolution of the matters agreed on between the parties, the federal Government put forth a proposal that would enable the Band to accept the State party's offer in its entirety, while continuing to pursue their general claim for compensation in the Canadian courts. The State party rejects the contention that "virtually all items of any significance" in its offer "were left to future discussions", and contends that most of the Band's claims for land, mineral rights, community facilities, control over membership and an economic self-sufficiency package have been agreed to by the Government. Finally, the State party rejects the allegation that it negotiated in bad faith.

24.3 On procedural grounds, the State party indicates that, since the Committees's decision on admissibility, no clarifications have been put forward by the Committee to enable the State party to address specific allegations of violations of the Covenant. It therefore maintains that the proceedings have not progressed from the admissibility stage. It further submits that by acting within its jurisdiction and procedure, the Committee should (a) issue a ruling pursuant to rule 93, paragraph 4, indicating the outcome of its reconsideration of admissibility; (b) if finding the communication admissible, stipulate the articles and the evidence on which the finding is based; and (c) provide the federal Government with a six-month period during which to file its observations on the merits.

25 . By interlocutory decision of 14 July 1989, the Human Rights Committee invited the State party to submit to the Committee any further explanations or statements relating to the substance of the author's allegations, in addition to its earlier submissions, not later than by 1 September 1989. The State party was again requested, pursuant to rule 86 of the rules of procedure and pending the Committee's final decision, to take measures to avoid damage to the author and the members of the Lubicon Lake Band.

26.1 In its reply to the interlocutory decision, dated 31 August 1989, the State party asserts that it is being denied due process, since the principles of natural justice require that a party be aware of the specific charge and evidence on which the accusations of the author of the communication are based. It claims that since it was never informed of the articles of the Covenant and the evidence in respect of which the communication was declared admissible, the principles of procedural fairness have not been respected, and that the federal Government remains prejudiced in its ability to respond to the Band's claim.

26.2 In respect of the alleged violations of articles 14, paragraph 1, and 26, the State party rejects as "totally unfounded" the claim that it failed to provide the Band with an independent and impartial

tribunal for the resolution of its claims: the long tradition of impartiality and integrity of Canadian courts includes numerous cases won by aboriginal litigants. It is submitted that the Band has failed to adduce any evidence that would indicate that the judiciary acted any differently in proceedings concerning the Lubicon Lake Band. Furthermore, the State party claims that the responsibility for major delays in the resolution of the Band's court actions lies largely with the Band itself. Not only did the Band fail to take the necessary steps to move any of the actions it initiated forward and refuse to co-operate with the federal Government in the action it had initiated in an effort to resolve the matter, but, in addition, on 30 September 1988, the Band declared that it refused to recognize the jurisdiction of the Canadian courts, thus undermining any attempt to obtain a resolution through the judicial process.

26.3 The State party provides a detailed outline of the chronology of the judicial proceedings in the Band's case. Three court actions in respect of the Band remain outstanding. The first of these was initiated by the Band in the Federal Court of Canada against the federal Government. This action has not moved forward since 1981 although, according to the State party, it was the Band's responsibility to take the next step in this suit. The second action was initiated by the Band in the Alberta Court of Queen's Bench against the province and some private corporations. After the Band was denied an interim injunction in 1985, it did not take substantive steps in the proceedings and abandoned its appeal against the Court's refusal to add the federal Government as a party. The third action was initiated by the federal Government in May 1988 in an attempt to overcome jurisdictional wrangles, to bring both the provincial and federal Governments and the Band before the same courts, and to finally solve matters. The Band chose not to participate in this action, despite the efforts of the Chief Justice of the Court of Queen's Bench of Alberta to expedite matters — this action remains in abeyance. For the State party, each of the above court actions provides a vehicle by which the Band could resolve its claims.

26.4 In addition to judicial proceedings, the State party maintains, the federal Government has sought to settle matters with the Lubicon Lake Band by way of negotiation. Thus, the offers put forward during these negotiations (outlined in para. 24.1 above) met virtually all of the author's claim in full or to a large extent. The State party adds that a new round of negotiations has started and that "extensive efforts are being made in this regard". Discussions between the Band and the Alberta provincial government resumed on 23 August 1989, and further discussions with the federal Government were scheduled to start on 7 September 1989. The State party reiterates that its offer to the Band remains valid.

26.5 In respect of the determination of Band membership, the State party rejects as "completely incorrect" the Band's claim that "Canada has attempted to subject Lubicon Lake Band members to a retroactive application of the Canadian Indian Act as it stood prior to its amendment following the decision in Sandra Lovelace v. Canada". On the contrary, the State party submits, the Band submitted, in 1985, a membership code pursuant to the Indian Act (as amended following the Committee's decision in the Lovelace case), which was accepted by Canada and gave the Band total control over its membership. As a result, the federal Government's offer is based on the approximately 500 individuals considered by the Band leadership to be members of the Lubicon Lake community.

26.6 In respect of the alleged violations of articles 17 and 23, paragraph 1, 18 and 27, the State party rejects as inaccurate and misleading the Band's claim that "Canada is participating in a project by which virtually all traditional Lubicon lands have been leased for timber development". It points out that the Daishowa pulp mill, which is under construction north of Peace River, Alberta, is neither within the Band's claimed "traditional" lands nor within the area agreed to by the Band and the provincial government for a reserve. It is stated that the new pulp mill is located approximately 80 kilometres away from the land set aside for the Band. The State party continues:

> "As regards the area available to the pulp mill to supply its operations, the forest

management agreement between the province of Alberta and the pulp mill specifically excludes the land proposed for the Lubicon Lake Band. Moreover, in the interests of sound forest management practices, the area cut annually outside of the proposed Lubicon reserve will involve less than 1 per cent of the area specified in the forest management agreement."

26.7 Finally, the State party draws attention to recent developments in the Cadotte Lake/Buffalo Lake community, within which the majority of the Lubicon Lake Band members reside. In December 1988, the federal Government was informed of the existence of a new group within the community, which was seeking to solve the rights of its members under Treaty 8 independent of the Lubicon Lake Band. This group, composed of about 350 individuals, requested from the Government recognition of its status as the Woodland Cree Band. According to the State party, the group consists of Lubicon Lake Band members who formally expressed their intention of joining the new Band, former Lubicon Lake Band members whose names were removed by the Lubicon Lake Band in January 1989 from the list of Band members, and other native individuals living within the community. The federal Government agreed to the creation of the Woodland Cree Band. The State party adds that it recognizes the same legal obligations in respect of the Woodland Cree Band as it does in respect of the Lubicon Lake Band members.

26.8 In a further submission dated 28 September 1989, the State party refers to the tripartite negotiations between the federal Government, the provincial government and the Lublcon Lake Band, scheduled to take place at the end of August/early September 1989; it claims that although the Band had undertaken to provide a comprehensive counterproposal to the federal Government's outstanding offer and to provide a list of the persons it represented in the negotiations, it was informed, on 7 September 1989, that a counterproposal had not been prepared by the Band and that no list of the individuals purported to be represented by the Band would be forthcoming. The Band allegedly stated that it refused to negotiate in the presence of Mr. Ken Colby, a member of Canada's negotiating team, because of his activities as a government media spokesman. Thus, owing to the Band's refusal to continue a meaningful discussion of its claim, negotiations were not resumed.

27.1 In his comments of 2 October 1989 on the State party's reply to the Committee's interim decision, the author contends that the State party's claim of prejudice in conducting the case before the Human Rights Committee is unfounded, as all the factual and legal bases of the Band's claims have been thoroughly argued. As to whether domestic remedies continue to be available to the Band, it is pointed out that no domestic remedy exists which could restore the Lubicon Lake Band's traditional economy or way of life, which "has been destroyed as a direct result of both the negligence of the Canadian Government and its deliberate actions". The author submits that from the legal point of view, the situation of the Band is consistent with the Committee's decision in the case of Munoz v. Peru, a/ in which it was held that the concept of a fair hearing within the meaning of article 14, paragraph 1, of the Covenant necessarily entails that justice be rendered without undue delay. In that case, the Committee had considered a delay of seven years in the domestic proceedings to be unreasonably prolonged. In the case of the Band, the author states, domestic proceedings were initiated in 1975. Furthermore, although the Band petitioned the federal Government for a reserve for the first time in 1933, the matter remains unsettled. According to the Band, it was forced to bring 14 years of litigation to an end, primarily because of two decisions that effectively deny the Band an opportunity to maintain aboriginal rights claim against the federal Government. Thus, in 1986, the Supreme Court of Canada denied federal court jurisdiction in aboriginal rights cases arising within provincial boundaries in the Joe case. In the light of that decision, the Band requested the Alberta courts, in 1987, to include the federal Government as a necessary party in the Band's aboriginal rights claim; this request was opposed by the federal Government. In May 1988, the federal Government instituted proceedings, which, in the author's opinion, were intended to persuade the Alberta Court of Queen's Bench that the Band merely had treaty-based rights to 40 square miles of land. It is submitted that a favourable decision would, for

the Government, virtually clear the title to the Daishowa timber leases, encompassing nearly all of the traditional Lubicon territory, while not rendering "moot issues related to [the] destruction of the Band's economic base". The author submits that the Chief Justice of the Court of Queen's Bench recognized that aboriginal rights had to be determined before any decision on the issue of treaty rights, and that if the State party had wanted the courts to truly settle the Lubicon land issue, rather than using them so as to forestall any efforts to solve the matter, it would have referred the issue directly to the Supreme Court of Canada.

27.2 As to the State party's reference to a negotiated settlement, the author submits that the offer is neither equitable nor does it address the needs of the Lubicon community, since it would leave virtually all items of any significance to future discussions, decisions by Canada, or applications by the Band; and that the Band would be required to abandon all rights to present any future domestic and international claims against the State party, including its communication to the Human Rights Committee. The author further submits that the agreement of October 1988 between the Band and the Province of Alberta does not in the least solve the Band's aboriginal land claims, and that the State party's characterization of the agreement has been "deceptive". In this context, the author argues that, contrary to its earlier representations, the State party has not offered to implement the October 1988 agreement and that if it were willing to honour its provisions, several issues including the question of just compensation would have to be settled.

27.3 In substantiation of his earlier submissions concerning alleged violations of articles 14 and 26, the author claims that the State party has not only failed to provide the Band equal protection vis-a-vis non-Indian groups, but that it also attempted to deny it equal protection vis-a-vis other Indian bands. Thus, with' respect to the issue of Band membership, the author alleges, the effect of the formula proposed by Canada in 1986 for determining Band membership would deny aboriginal rights to more than half of the Lubicon people, thereby treating the Band members in an unequal and discriminatory way in comparison with the treatment of all other native people. It is submitted that as late as December 1988, the State party sought to apply to the Band criteria that were those of the legislation "prior to the Human Rights Committee's views in the case of Lovelace v. Canada, b/ which legislation was found to be contrary to article 27 of the Covenant.

27.4 With respect to the alleged violations of articles 17, 18, 23 and 27, the author reiterates that the State party has sought to distort the presentation of recent events and engaged in a misleading discussion of the Daishowa timber project, so as to divert the Committee's attention from "Canada's knowing and wilful destruction of Lubicon society". He recalls that only seven months after the Committee's request for interim protection under rule 86, virtually all of the traditional Lubicon land was leased for commercial purposes in connection with the Daishowa timber project. The relevant forest management agreement to supply the new pulp mill with trees, allegedly completely covers the traditional Lubicon hunting and trapping grounds, which cover 10,000 square kilometres, with the exception of 65 square kilometres set aside but never formally established as a reserve. It is submitted by the author that Canada has acted in violation of the Committee's request for interim protection when it sold the timber resources of the 10,000 square kilometres, allegedly traditionally used by the Band and never ceded by it, to a Japanese company. Moreover, Canada is alleged to portray wrongly the Impact of the Daishowa protect as minimal; the author points out that current production plans would call for the cutting of 4 million trees annually, and that plans to double the envisaged annual production of 340,000 metric tons of pulp in three years have recently been announced. This economic activity, if proceeding unabated, would, in the author's opinion, continue to destroy the traditional lifeground of the Lubicon community. He submits that the fact that the 95 square miles set aside under the October 1988 agreement are relatively intact would be irrelevant, since the game on which the Band members have traditionally depended for their livelihood has already been driven out of the entire 10,000 square kilometres area.

27.5 Finally, the author submits that the State party's creation of the "Woodland Cree Band", through which it is allegedly attempting to "fabricate" a competing claim to traditional Lubicon lands,

places the State party in further violations of articles 1, 26 and 27 of the Covenant. In this context, the author claims that the Woodland Cree Band is:

> "a group of disparate Individuals drawn together by Canada from a dozen different communities scattered across Alberta and British Columbia, who have no history as an organized aboriginal society and no relation as a group to the traditional territory of the Lubicon Lake Band [and that it] is Canada's most recent effort to undermine the traditional Lubicon society and to subvert Lubicon land rights."

The author adds that the federal Government has supported the Woodland Cree Band both financially and legally, recognizing it "with unprecedented dispatch", thereby bypassing more than 70 other groups, including six different homogenous Cree communities in northern Alberta that had been awaiting recognition as bands for over 50 years. Some of the alleged members of the "Woodland Cree" band are said to come from these very communities. The author refers to section 17 of the Indian Act, which gives the Canadian Indian Affairs Minister the power to constitute bands and to determine that "such portion of the reserve land and funds of the existing Band as the Minister determines" may be earmarked for the benefit of the new band. It is submitted by the author that the powers conferred under section 17 of the Indian Act are "extraordinary and unconstitutional" and that they have been invoked "in order to create [the] 'Woodland Cree Band' and to dispossess the Lubicon Lake Band of its traditional territory and culture". Furthermore, while the State party claims that the Woodland Cree Band represents some 350 individuals, the author alleges that the new Band has steadfastly refused to release the names of its members, so that its claims might be verified. He states that the federal Government has recognized that the Woodland Cree Band members comprise only 110 individuals.

27.6 The author concludes that the State party has been unable to refute his allegations of violations of articles 2, 6, paragraph 1, 7, 14, paragraph 1, 17, 18, paragraph 1, 23, paragraph 1, 26 and 27, as set out in his submissions of 12 January 1988 and 30 May 1989, and requests the Committee to find against the State party in respect of these articles. In respect of an alleged violation of article 1, he points out that while he has, as the representative of the Band, signed all the submissions to the Committee, he merely acts in his capacity as a duly elected representative of the Band and not on his own behalf. In this context, he notes that while article 2 of the Optional Protocol provides for the submission of claims to the Committee by individuals, article I of the Covenant guarantees "all peoples … the right of self-determination". He adds that "if the Committee determines that an individual submitting a claim on behalf of a group, in compliance with the provisions of article 2 of the Optional Protocol, may not state a case on behalf of that group under article I of the Covenant, the Committee effectively has determined that the rights enumerated in article 1 of the Covenant are not enforceable". The author further adds that it "clearly could not be the intent of the Committee to reach such a result" and that "therefore, the Band respectfully submits that as a people, represented by their duly elected leader, Chief Bernard Ominayak, the Lubicon Lake Band has been the victim of violations by the federal Government of Canada of the Band's rights as enumerated in article I of the Covenant on Civil and Political Rights".

28.1 In a final submission dated 8 November 1989, the State party recalls that in any assessment of the judicial proceedings in the case of the Lubicon Lake Band, the State party's constitutional division of powers between the federal and provincial governments and the respective jurisdiction of the courts has to be borne in mind. Where provincially owned lands are claimed, as in the case of the Lubicons, the Supreme Court of Canada has held that claims must be filed in the provincial courts against provincial governments. The Supreme Court's ruling clearly defines, the State party submits, the proper judicial forum for the Band's claim to aboriginal land rights. The State party emphasizes that the failure of the Band's representatives to initiate proceedings in the competent courts does not imply that Canadian courts are either unable or unwilling to guarantee a fair hearing in the case.

28.2 Regarding the distinction between aboriginal rights and treaty rights, the State party explains that under Canadian constitutional law, aboriginal rights may be superseded by treaty rights. Whenever this occurs, Indian bands may claim benefits under the superseding treaties. The State party acknowledges that the Lubicon Lake Band has a valid claim to benefits under Treaty 8, which was entered into with the Cree and other Indians in the Province of Alberta in 1899. Rights under Treaty 8 formed the basis of the offers made by the Canadian and Albertan governments to the Band. The land offered by the provincial government under the October 1988 agreement is related to these Treaty provisions. On the other hand, the 10,000 square kilometres area referred to by the Band in its submissions relate to its aboriginal claims, which have not been recognized by the federal Government. The Band's complaint about oil exploration and exploitation and impending timber development, refers to activities on this wider territory of' 10,000 square kilometres — not on lands that were identified in proposed settlements between the Band and the federal and provincial government.

28.3 The State party refutes the Band's claim that its trapping and hunting lifestyle has been irretrievably destroyed and points out that in areas covered by timber leases the forest, generally, remains intact and sustains an animal population sufficient to satisfy those members of the Lubicon Lake Band who wish to engage in traditional activities. It adds that disturbances of the forest ecosystems usually result in an increase of the population of larger mammals, as they increase food availability in open areas.

28.4 Lastly, the State party reaffirms the voluntary nature of the establishment of the Woodland Cree Band. It points out that a minority of those wishing to join the Woodland Cree Band were at one point in time full members of the Lubicon Lake Band. Some of them, the State party points out, have since left the Band voluntarily, while about 30 of the members were expelled recently by decision of the Lubicon Lake Band. It is submitted that members of the Woodland Cree Band petitioned the federal Government, much in the same way as members of the Lubicon Lake Band did prior to the Band's recognition in the 1930s. The new Band was recognized because, in the State party's view, some of its members have land entitlements pursuant to Treaty 8 which they wish to assert. The State party adds that it recognized the Woodland Cree Band, at the express request of those who sought recognition, so that their desire to form a community could be realized, and that the Woodland Cree Band has not sought any land portions also claimed by the Lubicons.

Summary of the submissions

29.1 At the outset, the author's claim, although set against a complex background, concerned basically the alleged denial of the right of self-determination and the right of the members of the Lubicon Lake Band to dispose freely of their natural wealth and resources. It was claimed that, although the Government of Canada, through the Indian Act of 1970 and Treaty 8 of 1899, had recognized the right of the Lubicon Lake Band to continue its traditional way of life, its land (approximately 10,000 square kilometres) had been expropriated for commercial interest (oil and gas exploration) and destroyed, thus depriving the Lubicon Lake Band of its means of subsistence and enjoyment of the right of self-determination. It was claimed that the rapid destruction of the Band's economic base and aboriginal way of life had already caused irreparable injury. It was further claimed that the Government of Canada had deliberately used the domestic political and legal processes to thwart and delay all the Band's efforts to seek redress, so that the industrial development in the area, accompanied by the destruction of the environmental and economic base of the Band, would make it impossible for the Band to survive as a people. The author has stated that the Lubicon Lake Band is not seeking from the Committee a territorial rights decision, but only that the Committee assist it in attempting to convince the Government of Canada: (a) that the Band's existence is seriously threatened; and (b) that Canada is responsible for the current state of affairs.

29.2 From the outset, the State party has denied the allegations that the existence of the Lubicon

Lake Band has been threatened and has maintained that continued resource development would not cause irreparable injury to the traditional way of life of the Band. It submitted that the Band's claim to certain lands in northern Alberta was part of a complex situation that involved a number of competing claims from several other native communications in the area, that effective redress in respect of the Band's claims was still available, both through the courts and through negotiations, that the Government had made an ex gratia payment to the Band of $C 1.5 million to cover legal costs and that, at any rate, article 1 of the Covenant, concerning the rights of people, could not be invoked under the Optional Protocol, which provides for the consideration of alleged violations of individual rights, but not collective rights conferred upon peoples.

29.3 This was the state of affairs when the Committee decided in July 1987 that the communication was admissible "in so far as it may raise issues under article 27 or other articles of the Covenant". In view of the seriousness of the author's allegations that the Lubicon Lake Band was at the verge of extinction, the Committee requested the State party, under rule 86 of the rules of procedure "to take interim measures of protection to avoid irreparable damage to [the author of the communication] and other members of the Lubicon Lake Band".

29.4 Insisting that no irreparable damage to the traditional way of life of the Lubicon Lake Band had occurred and that there was no imminent threat of such harm, and further that both a trial on the merits of the Band's claims and the negotiation process constitute effective and viable alternatives to the interim relief which the Band had unsuccessfully sought in the courts, the State party, in October 1987, requested the Committee, under rule 93, paragraph 4, of the rules of procedure, to review its decision on admissibility, in so far as it concerns the requirement of exhaustion of domestic remedies. The State party stressed in this connection that delays in the judicial proceedings initiated by the Band were largely attributable to the Band's own inaction. The State party further explained its long-standing policy to seek the resolutions of valid, outstanding land claims by Indian bands through negotiations.

29.5 Since October 1987, the parties have made a number of submissions, refuting each other's statements as factually misleading or wrong. The author has accused the State party of creating a situation that has directly or indirectly led to the death of many Band members and is threatening the lives of all other members of the Lubicon community, that miscarriages and stillbirths have skyrocketed and abnormal births have risen from zero to near 100 per cent, all in violation of article 6 of the Covenant; that the devastation wrought on the community constitutes cruel, inhuman and degrading treatment in violation of article 7; that the bias of the Canadian courts has frustrated the Band's efforts to protect its land, community and livelihood, and that several of the judges have had clear economic and personal ties to the parties opposing the Band in the court actions, all in violation of articles 14, paragraph 1, and 26; that the State party has permitted the destruction of the families and homes of the Band members in violation of articles 17 and 23, paragraph 1; that the Band members have been "robbed of the physical realm to which their religion attaches" in violation of article 18, paragraph 1; and that all of the above also constitutes violations of article 2, paragraphs 1 to 3, of the Covenant.

29.6 The State party has categorically rejected the above allegations as unfounded and unsubstantiated and as constituting an abuse of the right of submission. It submits that serious and genuine efforts continued in early 1988 to engage representatives of the Lubicon Lake Band in negotiations in respect of the Band's claims. These efforts, which included an interim offer to set aside 25.4 square miles as reserve land for the Band, without prejudice to negotiations or any court actions, failed. According to the author, all but the 25.4 square miles of the Band's traditional lands had been leased out, in defiance of the Committee's request for interim measures of protection, in conjunction with a pulp mill to be constructed by the Daishowa Canada Company Ltd. near Peace River, Alberta, and that the Daishowa project frustrated any hopes of the continuation of some traditional activity by Band members.

29.7 Accepting its obligation to provide the Lubicon Lake Band with reserve land under Treaty 8, and after further unsuccessful discussions, the Federal Government, in May 1988, initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band, in an effort to provide a common jurisdiction and thus to enable it to meet its lawful obligations to the Band under Treaty 8. In the author's opinion, however, this initiative was designated for the sole purpose of delaying indefinitely the resolution of the Lublcon land issues and, on 6 October 1988 (30 September, according to the State party), the Lubicon Lake Band asserted jurisdiction over its territory and declared that it had ceased to recognlze the jurisdiction of the Canadian courts. The author further accused the State party of "practicing deceit in the media and dismissing advisors who recommend any resolution favourable to the Lubicon people".

29.8 Followlng an agreement between the provinclal government of Alberta and the Lobicon Lake Band in November 1988 to set aside 95 square miles of land for a reserve, negotiations started between the federal Government and the Band on the modalities of the land transfer and related issues. According to the State party, consensus had been reached on the majority of issues, including Band membership, size of the reserve, community construction and delivery of programmes and services, but not on cash compensation, when the Baud withdrew from the negotiations on 24 January 1989. The formal offer presented at that time by the federal Government amounted to approxlmately $C 45 million in benefits and programmes, in addition to the 95 square mile reserve.

29.9 The author, on the other hand, states that the above information from the State party is not only misleading but virtually entirely untrue and that there had been no serious attempt by the Government to reach a settlement. He describes the Government's offer as an exercise in public relations, "which committed the Federal Government to virtually nothing", and states that no agreement or consensus had been reached on any issue. The author further accused the State party of sending agents into communities surrounndlng the traditional Lubicon territory to induce other natives to make competing claims for traditional Lubicon land.

29.10 The State party rejects the allegation that it negotiated in bad faith or engaged in improper behaviour to the detriment of the interests of the Lubicon Lake Band. It concedes that the Lubicon Lake Band has suffered a historical inequity, but maintains that its formal offer would, if accepted, enable the Band to maintain its culture, control its way of life and achieve economic self-sufficiency and, thus, constitute an effective remedy. On the basis of a total of 500 Band members, the package worth $C 45 million would amount to almost $C 500,000 for each family of five. It states that a number of the Band's demands, including an indoor ice arena or a swimming pool, had been refused. The major remaining point of contention, the State party submits, is a request for $C 167 million in compensation for economic and other losses allegedly suffered. That claim, it submits, could be pursued in the courts, irrespective of the acceptance of the formal offer. It reiterates that its offer to the Band stands.

29.11 Further submissions from both parties have, inter alia, dealt with the impact of the Daishowa pulp mill on the traditional way of life of the Lubicon Lake Band. While the author states that the impact would be devastating, the State party maintains that it would have no serious adverse consequences, pointing out that the pulp mill, located about 80 kilometres away from the land set aside for the reserve, is not within the Band's claimed traditional territory and that the area to be cut annually, outside the proposed reserve, involves less than 1 per cent of the area specified in the forest management agreement.

30 . The Human Rights Committee has considered the present communication in the light of the information made available by the parties, as provided for in articles 5, paragraph 1, of the Optional Protocol. In so doing, the Committee observes that the persistent disagreement between the parties as to what constitutes the factual setting for the dispute at issue has made the consideration of the claims on the merits most difficult.

Request for a review of the decision on admissibility

31.1 The Committee has seriously considered the State party's request that it review its decision declaring the communication admissible under the Optional Protocol "in so far as it may raise issues under article 27 or other articles of the Covenant". In the light of the information now before it, the Committee notes that the State party has argued convincingly that, by actively pursuing matters before the appropriate courts, delays, which appeared to be unreasonably prolonged, could have been reduced by the Lubicon Lake Band. At issue, however, is the question of whether the road of litigation would have represented an effective method of saving or restoring the traditional or cultural livelihood of the Lubicon Lake Band, which, at the material time, was allegedly at the brink of collapse. The Committee is not persuaded that that would have constituted an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol. In the circumstances, the Committee upholds its earlier decision on admissibility.

31.2 At this stage, the Committee must also state that it does not agree with the State party's contention that it was remiss in not spelling out, at the time of declaring the communication admissible, which of the author's allegations deserved consideration on the merits. Although somewhat confusing at times, the author's claims have been set out sufficiently clearly as to permit both the State party and the Committee, in turn, to address the issues on the merits.

Articles of the Covenant alleged to have been violated

32.1 The question has arisen of whether any claim under article 1 of the Covenant remains, the Committee's decision on admissibility notwithstanding. While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. 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. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.

32.2 Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under article 27. The Committee recognizes that the rights protected by article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong. Sweeping allegations concerning extremely serious breaches of other articles of the Covenant (6, 7, 14, para. 1, and 26), made after the communication was declared admissible, have not been substantiated to the extent that they would deserve serious consideration. The allegations concerning breaches of articles 17 and 23, paragraph 1, are similarly of a sweeping nature and will not be taken into account except in so far as they may be considered subsumed under the allegations which, generally, raise issues under article 27.

32.3 The most recent allegations that the State party has conspired to create an artificial band, the Woodland Cree Band, said to have competing claims to traditional Lubicon land, are dismissed as an abuse of the right of submission within the meaning of article 3 of the Optional Protocol.

Violations and the remedy offered

33 . Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant.

Appendix I
Individual opinion: submitted by Mr. Nisuke Ando pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No, 17/1984, B. Ominayak and the Lubicon Lake Band v. Canada

Mr Nisuke Ando

1 I do not oppose the adoption of the Human Rights Committee's views, as they may serve as a warning against the exploitation of natural resources which might cause irreparable damage to the environment of the earth that must be preserved for future generations. However, I am not certain if the situation at issue in the present communication should be viewed as constituting a violation of the provisions of article 27 of the Covenant.

2 Article 27 stipulates: "In those States in which ethnic, religious or linguistic minorities exists, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". Obviously, persons belonging to the Lubicon Lake Band are not denied the right to profess and practice their own religion or to use their own language. At issue in the present communication is therefore, whether the recent expropriation by the Government of the Province of Alberta of the Band's land for commercial interest (e.g. leases for oil and gas exploration) constitutes a violation of those persons' right "to enjoy their own culture".

3 It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may affect the Band's traditional way of life, including hunting and fishing. In my opinion, however, the right to enjoy one's own culture should not be understood to imply that the Band's traditional way of life must be preserved intact at all costs. Past history of mankind bears out that technical development has brought about various changes to existing ways of life and thus affected a culture sustained thereon. Indeed, outright refusal by a group in a given society to change its traditional way of life may hamper the economic development of the society as a whole. For this reason I would like to express my reservation to the categorical statement that recent developments have threatened the life of the Lubicon Lake Band and constitute a violation of article 27.

Nisuke ANDO

Appendix II
Individual opinion: submitted by Mr. Bertil Wennergren pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on Communication No.167/1984, B. Ominayak and the Lubicon Lake Band v. Canada

Mr Bertil Wennergren

1 The communication in its present form essentially concerns the authors' rights to freely dispose of their natural wealth and resources, and to retain their own means of subsistence, such as hunting and fishing. In its decision of 22 July 1987, the Human Rights Committee decided that the communication was admissible in so far as it could have raised issues under article 27 or other articles of the Covenant. With respect to provisions other than article 27 the authors' allegations have remained, however, of such a sweeping nature that the Committee has not been able to take them into account except in so far as they may be subsumed under the claims which, generally, raise issues under article 27. That is the basis of my individual opinion.

2 Since the Committee adopted its decision on admissibility, discussions seeking a resolution of the matter have taken place between the Federal Government, the Province of Alberta and the authors. As no progress was made towards a settlement, the Federal Government initiated legal proceedings against the Province of Alberta and the Lubicon Lake Band on 17 May 1988, in order to enable Canada to meet its legal obligations vis-a-vis the authors under Treaty 8. The Statement of Claim, initiating the legal action, seeks from the Court of the Queen's Bench of Alberta (a) a declaration that the Lubicon Lake Band is entitled to a reserve and (b) a determination of the size of that reserve.

3 On 9 June 1988, the Lubicon Lake Band filed a Statement of Defence and Counterclaim. In this connection, the State party has submitted that the issue forming the basis of the domestic dispute as well as the basis of the communication before the Human Rights Committee concerns the extent of the territory to be set aside as a reserve, and related issues. It is not altogether clear that all issues which may be raised under article 27 of the Covenant are issues to be considered by the Court of Queen's Bench of Alberta in the case still pending before it. At the same time, it does appear that issues under article 27 of the Covenant are inextricably linked with the extent of the territory to be set aside as a reserve, and questions related to those issues.

4 The rationale behind the general rule of international law that domestic remedies should be exhausted before a claim is submitted to an instance of international investigation or settlement is primarily to give a respondent State an opportunity to redress, by its own means within the framework of its domestic legal system, the wrongs alleged to have been suffered by the individual. In my opinion, this rationale implies that, in a-case such as the present one, an international instance shall not examine a matter pending before a court of the respondent State. To my mind, it is not compatible with international law that an international instance consider issues which, concurrently, are pending before a national court. An instance of international investigation or settlement must, in my opinion, refrain from considering any issue pending before a national court until such time as the matter has been adjudicated upon by the national courts. As that is not the case here, I find the communication inadmissible at this point in time.

Bertil WENNERGREN

Footnotes:

∗ Individual opinions submitted by Mr. Nisuke Ando and Mr. Bertil Wennergren, respectively, are appended.

a/ Communication No. 203/1986, final views adopted on 4 November 1988, para. 11.3.

b/ Communication No. 24/1977, final views adopted on 30 July 1981.