

The Human Rights Committee on Traditional Cultural Rights: the Case of the Arctic Indigenous Peoples

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Abstract

Right to live in the traditional lands and manage the traditional way of lives with respect to the indigenous peoples is one of the crucial rights. The right is often being threatened, among others, by the national governments. However, the fact is that international law concerning collective rights lacks certainty, which results in an intense debate over the protection of collective rights of the indigenous peoples. The focus of this article is cultural rights of the indigenous peoples, which includes the right to traditional activities and livelihood. The article explores the interpretation made by the Human Rights Committee on the traditional cultural rights of the indigenous people, and the limits of exercising such rights.

Introduction

The Arctic region includes the ice-covered Arctic Ocean and surrounding land, covering all of Greenland and Spitsbergen, and the northern parts of Alaska, Canada, Finland, Norway, Russia and Sweden (Nuttal 2004). The Arctic as a region has significant importance, especially for its unique nature of geophysical and climatic condition. The Area of the region is about 14.5 million square km, and it has been inhabited by humans for close to 20,000 years. The Arctic region's distinctive nature of biodiversity, flora and fauna, and natural resources has made it unique. The Arctic is homeland for diverse groups of indigenous peoples. In Alaska they are known as Inupiat and Yup'ik Eskimos, Alutiiq and Athabascans; in Greenland they are the Kalaallit and Inughuit; in northern Fennoscandia the Sami; and in the northern Russia the so-called 'Northern Minorities', which include the Chukchi, Evens, Evenks, Nenets, Mivkhi, Sami, Sakhas and Khants. Each of the groups has its own culture, language, history and traditional ways of livelihood. Traditional activities of the Arctic indigenous peoples include: reindeer herding, subsistence hunting and sheep farming, fishing and so on. (Nuttal 1998). Although the modern day activities of the Arctic indigenous peoples include, among others, commercial salmon canning, timber production, oil related business

etcetera, many indigenous groups, nevertheless, mostly rely on the natural resources rooted in the traditional lands they live. Their connection to the traditional activities embraces their economic and cultural survival. However, the rapid melting of sea ice in the Arctic Ocean due to the climate change and increasing industrial and commercial activities in the region pose a threat to the survival of the indigenous communities who have long history of living in their traditional land and exercising traditional activities for their livelihood. This paper looks into views undertaken by the Human Rights Committee (hereinafter HRC) concerning traditional cultural rights of the Arctic indigenous peoples. The HRC is not a judicial body in its appropriate form. Under the Optional Protocol to the Covenant entered into force on 23 March 1976, the HRC is given the competence to receive and consider communications from individuals subject to its jurisdiction, i.e. from individuals of the state parties to the Protocol. The HRC also enjoy the power to provide concluding observations based on the reports submitted by the member states in accordance with the provisions of the Covenant.

Demography of the Arctic indigenous peoples based on major linguistic groups:



Source: UNEP-GRID ARENDAL (2008).

Place of Indigenous Peoples in Human Rights Instruments

There are numerous international instruments that focus on the basic and specific human rights – the rights that are, among others, also applicable to the indigenous peoples.² The term ‘indigenous peoples’ is neither used in the 1948 Universal Declaration of Human Rights nor in the two United Nations Covenants of 1966. The International Labour Organization (ILO) Convention no. 169 on Indigenous and Tribal Peoples (1989) has, however, used the term ‘indigenous peoples’ (Scheinin 2000). In recent time the United Nations’ Declaration on the Rights of Indigenous Peoples (hereinafter Declaration) has directly addressed the specific human rights aspects of the indigenous peoples only. The number of parties in the ILO Convention no. 169 is insignificant. Except for Norway, no other Nordic state has ratified the Convention. Therefore, land claims and land use rights of the indigenous peoples in the Arctic region are not apparently realized. On the other hand, the Declaration highlights the rights related to distinct identity and dignity of the indigenous peoples, their unique cultural, economic and social rights, and other traditional and cultural rights such as right to own, use, develop and control the lands, territories and resources that they possess on the ground of traditional ownership or other traditional occupation or use (Article 26(3), the Declaration). The Declaration does not, however, have any binding legal force.

There are other instruments available for making the case in favour of the traditional cultural rights of the indigenous peoples. One of them is the International Covenant on Economic, Social and Cultural Rights (CESCR), which although does not have a mention of ‘indigenous peoples’, recognizes the right of everyone to take part in cultural life and to benefit from the moral and material interests of any scientific, literary or artistic production (Article 15 (1) CESCR). The right of everyone no doubt includes indigenous peoples. Moreover, for indigenous peoples these rights arguably give birth to the possibility of the protection of traditional knowledge and intellectual property rights (MacKay 2005). The UN Convention on the Rights of the Child states that a child who belongs to a minority group, including the one who is of indigenous origin, has the right to enjoy his or her culture (Article 30, the UN Convention on the Rights of Child). The Draft Nordic Sami Convention, which is still a draft, and thus, does not provide any legal obligation, directly addresses Sami livelihoods and Sami use of natural resources. The protection of such livelihoods and use of land constitute an important basis for Sami culture. The other applicable Conventions are: the Convention on the Elimination of Racial discrimination (CERD), the American Declaration of the Rights and

duties of Men under the Inter-American Human Rights System, the Framework Convention for the Protection of National Minorities under the European human rights system and so on.

Of importance, however, is the International Covenant on Civil and Political Rights (hereinafter the Covenant), which does not make any reference to ‘indigenous peoples’, but provides provisions on the protection of minority rights instead. Article 27 of the Covenant states: “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” This is relevant here as in most of the Arctic states indigenous peoples belong to minority groups. As a minority, the indigenous peoples enjoy certain rights regarding the practise of culture, language, religion and traditional spiritual matters. The right of indigenous peoples with regard to the enjoyment of their culture largely developed through the cases brought before the HRC. The interpretation is based on Article 27 of the Covenant – the essence of which applies to indigenous peoples where they form a minority to enjoy their distinct culture. In addition, indigenous peoples enjoy a separate identity in international law, which is unique compared to other minorities.

As a group indigenous peoples form stronger community than other minority groups, for instance, linguistic or religious minorities, because of their historical, traditional and cultural connection with the land where they live. Therefore, some even go a step further and advocate that indigenous peoples are ‘peoples’ within the meaning of common Article 1 of the two Covenants (the other Covenant is the International Covenant on Economic, Social and Cultural Rights), which states that all peoples have right to self-determination. The idea has received both stronger and softer interpretations; in other words, external and internal dimension of self-determination. The proponents who conceive the stronger interpretation argue that in accordance with Article 1 of the Covenant the indigenous peoples may secede from the nation state. Whereas latter group of proponents, leaving the political dimension out of context, argue that the self-determination of indigenous peoples extends to independent resource management only. This group invokes Article 1(2) of the Covenant as applicable for the indigenous peoples. The debate over the concept of self-determination of indigenous peoples is out of the scope for this article. Suffice is to make a reference of Article 27 together with Article 1 of the Covenant to demonstrate that indigenous peoples have full right to enjoy their culture without any hindrance as they belong to the community. Indigenous peoples right

to culture stands for maintaining the harmonious relationship with their lands, traditional activities such as hunting, fishing, gathering, herding etcetera, which are central to their cultural survival, and these are far broader in scope than ordinary minority rights, such as right to practice own religion or right to speak own language.

Leading Cases Related to Traditional Cultural Rights

Bernard Ominayak of Lubicon Lake Band vs. Canada (Communication No. 167/1984): The case is commonly known as Lubicon Lake Band case. The Band is an aboriginal nation that resides close to Lubicon Lake near northern Alberta in Canada. According to the Indian Act of 1899, Canada recognised the rights of the Band extending to traditional activities such as hunting, fishing, trapping in their traditional land. These activities are essential to maintain the subsistence economy underpinning the Band's distinctive culture, spirituality and language. However, construction of pipelines and other related commercial activities were seriously affecting the Band's subsistence rights. The issue was then brought to the knowledge of the HRC. Two questions were posed. One, whether the Band could be treated as 'people' within the meaning of common Article 1, and the other whether the subsistence rights of the Band belong to cultural rights under Article 27 of the Covenant.

Ivan Kitok vs. Sweden (Communication no. 197/1985): Ivan Kitok, was a Sami by his ethnic origin, but by the legislation he was held not to be Sami in accordance with the Reindeer Husbandry Act of Sweden. He lost his Sami status because of his long absence from living in the Sami village. According to Swedish legislation, the legal rights to traditional hunting, fishing and reindeer herding activities apply to the Samis living in the Sami villages only. Thus, according to law he is merely a 'half-Sami' who is not entitled to engage in hunting, fishing or reindeer herding as Sami. However, his 'half-Sami' status allows him to engage in such traditional activities, but by paying the required fee in accordance with the legislation. The Sami village community may consider his Sami status only when there are enough reasons for his absence from Sami village. The Reindeer Husbandry Act provided the specific provisions as to who may be treated as Sami for the purpose of reindeer herding. The Act also granted the power to the Sami community to accept or refuse membership for certain reasons. For this case, the question was whether Mr. Kitok's right to enjoy culture under Article 27 was violated by the denial of being Sami to practice traditional cultural rights.

Länsman et al. vs. Finland (Communication No. 511/1992): Etelä Riutusvaara Mountain is located in the Finnish Lapland. The Mountain was surrounded by reindeer husbandry area, where local Samis are engaged in the reindeer husbandry activities. Quarrying of stones from the Etelä Riutusvaara Mountain and their transportation through the reindeer herding territory were the subject matter of the case. Mr. Länsman and the other complainants brought the case before the HRC. They challenged that the quarrying of stones and their transportation through the reindeer herding land cause a violation of the enjoyment of traditional cultural rights under Article 27 of the Covenant.

Second Länsman case (Communication No. 671/1995): The case is based on the adverse effect taken place in the territory of reindeer herding activities. The complainants were reindeer breeders of Sami ethnic origin. They challenged the plans of Finnish Central Forestry Board to approve logging and the construction of roads in an area covering about 3,000 hectares of the area of the Muotkatunturi Herdsmen's Committee. They claimed that there will be an adverse effect on reindeer herding because of the logging and construction activities. Moreover, female reindeer calve in the disputed area during spring time, because the surroundings are quiet and undisturbed. Therefore, the logging and construction activities will cause serious repercussion that will hinder the enjoyment of their reindeer herding rights resulting in violation of Article 27 of the Covenant.

Interpretation by the Human Rights Committee

The interpretation of the Article 27, especially with regard to indigenous peoples, developed through the communications brought before the HRC. Despite the clear connotation of the Article that it applies to minority protection with regard to the ethnic, religious and linguistic rights, the HRC interpreted the Article to protect the rights belonging to the indigenous peoples as well. It is a fact that in many countries indigenous peoples form the minority. Therefore, use of Article 27 to include those indigenous peoples is consistent with the idea enshrined in it. Moreover, as stated before, due to the historical connectivity with the land they live, indigenous peoples' legal position for the entitlement of rights is stronger than that of other minorities. This means that application of Article 27 strictly protects the rights of the

indigenous peoples to enjoy their culture and traditional livelihoods. Although the first optional protocol of 1976 to the Covenant, in Article 1 states that the Committee receives and considers communication only from the individuals who are the victims of the violation of the human rights under the Covenant, the view already upheld by the HRC suggests that an individual may exercise the right in community with the other members of their group. The right concerns the material basis for their culture, thus giving members of such group, inter alia, a right to participate in relevant decision-making. Consequently, indigenous peoples should be properly consulted in any decision-making process where their cultural rights are subject to be affected.

Several communications initiated in the HRC were brought by the indigenous individuals or communities, where the complaints were largely based on the use of the land and other natural resources in the way the indigenous peoples traditionally do. Thus, their rights to enjoy the culture under Article 27 were focused in the interpretation by the HRC. During the 1990s, the Committee developed a fairly elaborate test for assessing whether the modern usages of traditional land resources may justify an interference with traditional or otherwise typical usage by indigenous people (Scheinin 2000). This traditional or otherwise typical usage of the resources is within the practise of 'culture' in accordance with the meaning of Article 27 was decisive in the Committee's interpretation. In *Kitok vs. Sweden* case,³ it was highlighted that legal right to traditional hunting, fishing and reindeer herding applies to the Samis living in the Sami villages, meaning that the activities belong to 'culture' within the meaning of Article 27.⁴ The Committee has undertaken the approach that rights of persons involve economic and social activities, which are part of the culture of the community to which they belong. Therefore, such engagement, in community with others, demonstrates the right to practice culture. The Committee thereby recognized that indigenous peoples' subsistence and other traditional economic activities are an integral part of their culture, and interference with those activities can be detrimental to cultural integrity and survival (MacKey 1998). In *Kitok vs. Sweden*, the HRC also made reference to *Lovelace vs. Canada* in which it stated that "a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole." Therefore, any restriction upon a member of an indigenous community to practice and enjoy their culture, especially when related to subsistence practices and their relationship to land and territory, must comply with the

reasonable and objective justification, and indeed the restriction should be necessary for the overall welfare for the whole community concerned.

The whole community may become vulnerable once the relationship of the indigenous peoples to their land and territory and subsistence practices, are threatened by the modern activities, e.g. industrial activities, mining and mineral extractions. In *Lubicon Lake Band* case, the HRC observed that large scale oil and gas extraction, and failure of the government to provide information of this particular issue to the indigenous peoples affected caused the violation of Article 27 of the Covenant. *Lubicon Lake Band* case was the 'first case' in which the Committee found the violation of Article 27 with regard to right to the enjoyment of culture in community with the other members of Lubicon Lake Band (Schenin 2000). The activities as such threatened the way of life and culture of the Lubicon Lake Band community. The Committee therefore stated that Canada should make every effort to resume negotiations with the Lubicon Lake Band, with the view to finding a solution, which respects the rights of the Band under the Covenant. The Committee further demanded that government should consult with the Band before granting licences for economic exploitations of the disputed land, and should ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.

A similar approach was undertaken in the first *Länsman* case. The Committee stated that the measures taken by the state will not be compatible with the obligations under Article 27, if the impact of such measures amount to a denial of the right to enjoy minority culture. The Committee also recalls paragraph 7 of its General Comment on Article 27⁵ according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing, or, as in the case in question, reindeer husbandry, and that measures must be taken “to ensure the effective participation of members of minority communities in decisions which affect them.” In the second *Länsman* case (Jouni E. Länsman vs. Finland), which was about the logging operation, the HRC stated that cumulative effects of the activities must be taken into account. The HRC maintains that different activities in themselves may not constitute a violation of Article 27. However, such activities as a whole may erode the rights of Sami people to enjoy their culture. Thus, in both the *Länsman* cases, the Committee recognised the traditional reindeer husbandry as an essential element in the Sami culture. The Committee, however, did not find any violation of Article 27 as it stated that the quarrying stones on the slopes of the Mountain Riutusvaara that had already taken

place had only very limited impact with regard to Article 27 (first *Länsman* case), and the logging activities already carried out and the planned activities would not amount to long-term impact (second *Länsman* case). As a result, there was no adverse affect in the traditional activities (reindeer herding) as such. In addition the authors of the complainants were consulted during the proceedings. The Committee's decisions in the *Länsman* cases were based on two part test of 'consultation' and 'economic sustainability' (Schenin 2000).

The General Comment No. 23 on the Article 27 of the Covenant in paragraph 7 suggests that a particular way of life associated with land form part of the culture of the indigenous peoples. States must ensure that the right as such is realized. The cultural rights of the indigenous peoples have also attracted focus in the country reporting system under various other Conventions in addition to the Covenant. For example, the Committee on Economic, Social and Cultural Rights urged Finland to finalize its review of the legislation concerning the Sami population with a view to ratifying ILO Convention No 169 so that the question of Sami land title is settled. The Committee emphasize the centrality of the rights to culture for indigenous peoples and asked states to ensure the participation of indigenous peoples in public life and to ensure that no decisions directly relating to their right and interests are taken without their informed consent (Heinämäki 2008). Similar observation is found in the Committee on the Elimination of all Forms of Racial Discrimination. The Committee asked the states to pay attention to the Committee's general recommendation XXIII on indigenous peoples, which stresses the importance of securing the informed consent of indigenous communities and calls for recognition and compensation for any loss incurred (Heinämäki 2008).

The interdependence between self-determination (Article 1) and right to enjoy minority culture (Article 27) was already present in the *Lubicon Lake Band* case despite the HRC's silence in suggesting whether the Band could be treated as 'people' under Article 1 of the Covenant. Here *Apirana Mahuika* case is of importance where the HRC's interpretation maintained the view that the use and control of fisheries are essential part of the culture of a Maori community – a group of indigenous people in New Zealand. The *Apirana Mahuika* case is relevant here to demonstrate that the formal recognition by the HRC of interconnectedness between Article 1 and Article 27 is established in this case. From here follows the conception that the indigenous peoples have right to enjoy their traditional

cultural right not only as minority under Article 27, but also as ‘people’ under Article 1 of the Covenant.

Moreover, the HRC, while asking for the country report from the member states on the observance of the Covenant, stated that it “considers it highly desirable that States parties’ reports should contain information on each paragraph of Article 1” (Ulfstein 2004), which contains the reference to Article 1 of the Covenant. The HRC’s pronouncements in the Concluding Observations based on the reports by countries reflect an understanding that at least certain indigenous groups qualify as ‘peoples,’ under Article 1 (Scheinin 2004). This approach was first made explicit in the Committee’s concluding observations on Canada that self-determination is of particular importance in order to guarantee the protection, and development of the individual and collective human rights. The HRC emphasized that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Article 1, paragraph 2). In the latest observations related to the fifth period report of Canada in 2005 the Committee has expressed great concern related to Canadian policies and the development of modern treaties with indigenous peoples claiming that these may in practice amount to an extinguishment of inherent indigenous rights, incompatible with Article 1 of the Covenant. The Committee thus stated that Canada should re-examine its policy and practices to ensure that they do not result in extinguishment of inherent aboriginal rights (Henriksen 2005).

The Committee has also commented on the reports submitted by Finland, Norway and Sweden concerning right to self-determination of indigenous Sami people. In its observation on Finland, the Committee stated that it regrets that the government of Finland has not clearly responded in relation to the rights of indigenous Sami people in the light of Article 1 of the Covenant (Henriksen 2005). The government and the Parliament of Norway have addressed the situation of the Sami in the framework of the right to self-determination, which have been stated in the fourth periodic report of Norway in 1999. In relation to the report, the HRC emphasized the resource dimension of the right to self-determination, and asks Norway to report on the Sami people’s right to self-determination under Article 1 of the Covenant, including paragraph 1 of that Article (Henriksen 2005). The Committee’s observation with regard to the report submitted by Sweden in 2002 is that the Sami Parliament of Sweden should have a significant role in the decision making process on issues affecting the

traditional lands and economic activities of the Sami indigenous peoples. The Committee did not make reference of Article 1 only; it also provided reference of Articles 25 and 27. The Committee also urged Sweden to take steps to involve the Sami by giving them greater influence in decision-making related to issues that affect their lands and their means of subsistence (Ulfstein 2004). In addition, explicit references to either Article 1 or the notion of self determination have been made in the Committee's concluding observation on Australia, Denmark and Mexico.

Conclusion

The right to culture consists of a way of life that is closely associated with a territory and the use of its resources. In the case of the Arctic indigenous peoples a traditional way of life that is based on natural environment is the crux of their culture, which means that a relationship between land and all living things is maintained in their societies. Therefore, human rights of indigenous peoples are treated in the context of their association with the land and resources, broadly their traditional culture. This association with the land and resources must be uninterrupted in its real sense. For example, a number of people from the indigenous communities move to urban areas, and thereby cease their association with the traditional land. As discussed previously the HRC in *Kitok vs. Sweden* case turned down Mr. Kitok's complaint as violation of Article 27, because he has lost his Sami identity due to his lack of association with the Sami land. However, the interpretation of the HRC on various communications from the individuals belonging to the indigenous communities suggest that the HRC has conceived the view that the indigenous peoples enjoy the right to culture under Article 27 not only as minority, but also as 'people' with a right to dispose of their traditional natural resources under Article 1(2) of the Covenant. The HRC's interpretations have significant influence in the behaviour of national governments as it monitors the observance of the Covenant by the member states.

Notes

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- 2) These international documents include, for example, the Declaration on the Rights of Indigenous Peoples, Universal Declaration of Human Rights of 1948, Convention on the Prevention and Punishment of the Crime of Genocide of 1948, International Covenant on Civil and Political Rights of 1966, International Covenant on Economic, Social and Cultural Rights of 1966, Convention on the Elimination of All Forms of Racial Discrimination of 1966, International Labour Organization 169 of 1989, Convention on the Rights of the Child of 1989, Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities of 1992, Rio Declaration on Environment and Development and Agenda 21 of 1992, Convention on Biological Diversity of 1992, Vienna Declaration and Programme of Action of 1993, Report of the International Conference on Population and Development of 1994, Durban Declaration and Program of Action 2001.
- 3) Ivan Kitok, who was the author of the complaint, was refused to be accepted for reindeer herding activity as a Sami because of his absence in the Sami village for a considerable period of time. Although Mr. Kitok was a Sami by origin, in accordance with Swedish legislation, he held not to be a Sami for the purpose of the Reindeer Husbandry Act of Sweden. He has been treated as half-Sami and has not though been refused to reindeer herding activity, but he was not accepted to the activity as such as a Sami along with the other Sami living in Sami village with full rights. The Committee did not find any violation of article 27, but accepted the traditional activity as such as 'culture' within the meaning of article 27 of the Covenant.
- 4) Paragraph 9.2 of the Communication on *Ivan Kitok vs. Sweden* states: "... where the activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27."
- 5) Paragraph 7 of the General Comment on Article 27 states: "With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."

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