

**BRIEFING NOTE #4: 22<sup>nd</sup> MAY 2017**

**INDIGENOUS PEOPLES' RIGHTS TO  
TRADITIONAL FISHING AND HUNTING UNDER THE  
UNITED NATIONS HUMAN RIGHTS INSTRUMENTS**



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This briefing note was prepared for the Human Rights Council of Greenland in response to a request for information regarding indigenous rights to resources from the Association of Fishers and Hunters in Greenland (KNAPK).

*Please note: this Briefing Note is intended for educational purposes only. It should not be considered legal advice.*

### **Introduction**

This briefing note will examine the rights of indigenous peoples to enjoy their traditional fishing and hunting rights with reference to the main UN treaties on human rights. These are binding treaties to which the Kingdom of Denmark is party. Each has a supervisory body (committee) that advises about their obligations. Some can accept communications (complaints) from people who think that their rights have been violated.

### **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)**

Article 27 of the ICCPR reads:

*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.*

The UN Human Rights Committee that monitors the implementation of the ICCPR has made a General Comment about this article in which it stated that:

*The committee notes that the existence of an ethnic, religious or linguistic minority is a question of fact and does not depend on the group's recognition as such by the State.<sup>1</sup>*

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<sup>1</sup> Human Rights Committee, General comment No. 23: Article 27 (Rights of minorities) 1994, para 5.2.

This means that it is not up to the State to decide if a group constitute an ethnic, religious or linguistic minority but that it is determined according to the facts in each case. Indigenous peoples are ethnic minorities and might also be linguistic minorities. In Greenland, for example, although the Kingdom of Denmark recognises only one indigenous people (the Inuit), there are as a matter of fact (at least) two further linguistic minorities in North Greenland and East Greenland respectively. (Potentially, these groups are also ethnic minorities or even distinct indigenous peoples but that would require further investigation.) Approaching the Greenlanders as a minority under article 27, which they undoubtedly are ethnically and linguistically, also avoids the sensitive question as to whether they are an indigenous people, a colonial people or have some other status.

The State has positive obligations to make sure that non-state actors (including tourists and private companies offering tourism packages) do not act in such a way that they interfere with the rights of minorities to their language, religion and culture.

*Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party.<sup>2</sup>*

In respect of indigenous hunting and fishing rights, the committee has recognised:

*[O]ne or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.<sup>3</sup>*

*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.<sup>4</sup>*

## **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)**

Article 15 of the ICESCR reads:

*1. The States Parties to the present Covenant recognize the right of everyone:*

*(a) To take part in cultural life.....*

*2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture....*

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<sup>2</sup> Ibid para 6.1.

<sup>3</sup> Ibid para 3.2

<sup>4</sup> Ibid para 7

Unlike article 27 of the ICCPR, the ICESCR accords the right to take part in cultural life to *everyone*, not just to minorities or indigenous peoples. However, some groups, like indigenous peoples, find their culture more at risk from assimilation than majority groups and hence the government has an obligation to take measures to protect it.

The Committee on Economic, Social and Cultural Rights agreed a general comment on the right to take part in cultural life in 2009, two years after the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was agreed by the General Assembly.<sup>5</sup> It repeatedly addresses indigenous peoples and refers to both the UNDRIP and to ILO Convention 169. The Committee holds that:

*The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, their well being and their full development and includes "the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" [REF UNDRIP]. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. Thus States parties must take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources; and, where they have been otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.*<sup>6</sup>

### **CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION (CERD)**

As ethnic minorities, indigenous peoples are also protected from discrimination by the CERD. The Committee on the Elimination of Racial Discrimination has also issued a general comment on indigenous peoples' rights in this regard.<sup>7</sup> In the general comment, the committee emphasises, *inter alia*, that States must:

*Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.*<sup>8</sup>

It continues:

*The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.*<sup>9</sup>

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<sup>5</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 21 'The Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights)', 20 November 2009, UN Doc. E/C.12/GC/21.

<sup>6</sup> Ibid para 36.

<sup>7</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXIII on the rights of indigenous peoples (1997) in Compilation of General Comments II (n **Error! Bookmark not defined.**) 285, para 3.

<sup>8</sup> Ibid para 4(e).

It might be difficult to apply this treaty, however, to the Greenlandic situation where one group of Greenlanders (those in government) are acting in such a way as to violate the rights of another group (the fishers and hunters).

## CASE LAW

All three treaties discussed above contain a communications procedure but to date, most of the case law has been considered by the Human Rights Committee (ICCPR). This includes a number of cases regarding indigenous rights under article 27. The Kingdom of Denmark has accepted the procedures for the ICCPR and for the CERD but not for the ICESCR. The Human Rights Committee has also considered a number of communications from indigenous people regarding interference with their traditional activities.

## STATE RESPONSIBILITY

Under international law, only the State can be party to these human rights treaties and this means that it is the Kingdom of Denmark that bears responsibility for violations, even if these are conducted under the authority of the self-government in Greenland. This is based on the principle that:

*The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and **whatever its character as an organ of the central government or of a territorial unit of the state.***<sup>10</sup>

In human rights law practice, the case of *Lovelace v Canada* shows us how this can operate in practice with indigenous communities that enjoy a degree of self-governance.<sup>11</sup> In this case, Ms Lovelace had lost her status as an “Indian” under Canadian law and membership of her Band when she married outside of the group. As a result, she also lost her right to live on the Band’s reserve. Even though she had since divorced, she could not recover her Indian status and she was not entitled by right to stay on the reserve. The tribe could permit her stay on the reserve but since they were suffering from a housing shortage, they gave priority to their recognised members. The Committee found a violation of article 27 *by the State of Canada*. We can see this principle of State responsibility for tribal or indigenous governance also in the cases of *Omanayak* and *Kitok* discussed below.

Furthermore, States have *due diligence* obligations to ensure that private actors (e.g. companies and other individuals, such as tourism operators or individual tourists) do not

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<sup>9</sup> Ibid para 5.

<sup>10</sup> International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts, second reading 2001, article 4(1) (emphasis added).

<sup>11</sup> Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).

violate the rights of others. They have a duty to monitor the implementation of any permit and provide remedies.<sup>12</sup>

### CASE LAW REGARDING INDIGENEOUS RESOURCE RIGHTS

The Human Rights Committee, supervising the ICCPR, has long recognised the special connections that indigenous peoples have to their traditional territories and resources, a relationship that is more profound than ownership or property as understood in Western legal thought.

***Ominayak v Canada***<sup>13</sup> The province of Alberta, Canada, had appropriated land from the Lubicon Lake Band (Cree nation) and granted leases for oil and gas exploration to private hydrocarbon firms.<sup>14</sup> The committee evaluated the facts of the case in light of article 27 and held that Alberta's (Canada's) conduct constituted a violation of Mr Ominayak's and others' rights to culture as members of a minority group.<sup>15</sup> It held, *inter alia*, 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.*<sup>16</sup>

Note also that this case is another example of the federal government being held accountable in international law for the actions of a subsidiary administration (the province of Alberta).

***Kitok v Sweden***<sup>17</sup> Kitok is Swedish Sami reindeer herder, living in Sweden. Under Swedish law, only Sami who are members of a *sameby* (Sami village) have the right to herd reindeer and to hunt and fish on historic lands and waters. Further, under Swedish law, a Sami herder who ceases to keep reindeer for three years or more consecutively loses his or her status and right to herd.<sup>18</sup> It is then up to the Sami village to determine whether or not he or she should be readmitted and the Swedish courts can only overturn such a decision in exceptional circumstances.<sup>19</sup>

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<sup>12</sup> See Human Rights Committee, General comment No. 23: Article 27 (Rights of minorities) 1994, Para 6.1 (discussed above). See also, e.g., *López Ostra v Spain*, App no 16798/90 [1994] ECHR 46 – in which the Spanish authorities were held responsible for permitting a privately operated waste facility to emit dangerous toxic fumes. The facility in this case had not met the standards of Spanish law and the permit conditions but Spain was still responsible for not having enforced the conditions.

<sup>13</sup> Human Rights Committee, *Ominayak and the Lubicon Lake Band v Canada*, Communication No. 167/1984 (10 May 1990) CCPR/C/38/D/167/1984.

<sup>14</sup> *Ibid* para 2.3.

<sup>15</sup> *Ibid* para 33.

<sup>16</sup> *Ibid* para. 32.2

<sup>17</sup> *Kitok v Sweden*, Human Rights Committee, Communication No. 197/1985 (27 July 1988) CCPR/C/33/D/197/1985.

<sup>18</sup> *Ibid* paras 2.1 and 2.2.

<sup>19</sup> *Ibid* para 4.2.

Kitok had taken such a break from reindeer herding and was engaged in alternative employment. However, he then inherited a herd of reindeer and sought readmission to the village, to ensure an ongoing *right* to herd reindeer. His application was denied by the village and this denial upheld by the Swedish courts. He was, however, permitted by the village to herd the reindeer on an *ad hoc* basis and on the payment of a fee.

The Committee held on balance that there was no violation in the case (mainly because Mr Kitok could, in practice, herd his reindeer and live a traditional ‘Sami’ life).<sup>20</sup> However, it emphasised that traditional practices like reindeer herding are an essential element of culture for members of minority groups and are protected under article 27:

*where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant.*<sup>21</sup>

Note also: in this case, Sweden argued that the dispute in question was between Mr Kitok and the Sami village because the latter had refused to readmit him. However, the Committee held that it was still based on Swedish legislation and hence Sweden bore responsibility.<sup>22</sup>

***Ilmari Länsman et al v Finland 1994 (Länsman I)***<sup>23</sup> Ilmari Länsman is a Sami reindeer herder from the Muotkatunturi Herdsmen’s Committee and the Angeli community. He complained to the Human Rights Committee that quarrying stone and transporting it through his community’s land disrupted the reindeer and hence violated his right to culture. Finland claimed that the quarrying activities would have minimal impact on the Sami herding, using as it did a relatively small amount of land within an area of 2585km<sup>2</sup> used by the community.

Once more, the Committee recognised that modern, commercial reindeer herding could still be an expression of minority (and indigenous) culture. It accepted Finland’s argument that the interference was very small in this case but advised the State that it must take into account the herders when assessing any new concessions.

*Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27. However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27.*<sup>24</sup>

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<sup>20</sup> Ibid para 9.8.

<sup>21</sup> Ibid para 9.2.

<sup>22</sup> Ibid para 9.4.

<sup>23</sup> *Länsman, Ilmari et al v Finland*, Human Rights Committee, Communication No. 511/1992 (8 November 1994) CCPR/C/52/D/511/1992.

<sup>24</sup> Ibid para 7.3.

**Jouni Länsman, Eino Länsman, et al v Finland 1996 (Länsman II)**<sup>25</sup> In this case brought by the same community, the objection was to logging and road construction in the same area that was argued to interfere with the reindeer herding. Finland argued that the forestry service had consulted extensively with the reindeer herders and amended their plans as a result of the consultations and that there would be no long-lasting effects that would interfere with their right to practise their culture. The Committee considered that the Sami community had not demonstrated that the impact was so significant as to deny their rights but they did remind Finland that it must consider cumulative impacts, including cumulative impacts from different sectors.<sup>26</sup> (E.g. it must consider any increase in logging in light of the quarrying concessions already granted in the area.) The importance of taking into account cumulative affects was also repeated in a further case brought by the same herders, even if on the facts, the Committee did not think the interference was significant enough to violate the Samis' rights under article 27.<sup>27</sup>

**Apirana Mahuiki v New Zealand**<sup>28</sup> In this case, the Human Rights Committee recognised fishing as an element of Maori culture, protected by article 27, even when undertaken on a commercial basis.<sup>29</sup> On the facts, the Committee did not find a violation in this case, but nevertheless held:

*In particular, article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology.*<sup>30</sup>

**Poma Poma v Peru**<sup>31</sup> Ms Poma Poma is a llama farmer of Aymara descent (an indigenous minority in Peru). The water supply on which she depended to raise her llama had been diverted over the course of many decades. The Human Rights Committee recognised that:

*raising llamas is an essential element of the culture of the Aymara community, since it is a form of subsistence and an ancestral tradition handed down from parent to child.*<sup>32</sup>

The Committee recognised that indigenous traditional economies do not foreclose any development but that any development that interferes with their rights must be justified based on: participation of the communities affected, their *free, prior and informed consent* to the developments, and the proportionality of the interference with the benefits gained.<sup>33</sup>

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<sup>25</sup> Länsman, Jouni E. et al v Finland, Human Rights Committee, Communication No. 671/1995 (30 October 1996) CCPR/C/58/D/671/1995.

<sup>26</sup> Ibid para 10.7.

<sup>27</sup> Länsman, Jouni et al v Finland, Human Rights Committee, Communication No. 1023/2001 (17 March 2005) CCPR/C/83/D/1023/2001.

<sup>28</sup> Human Rights Committee, *Apirana Mahuika et al v New Zealand*, Communication No. 547/1993 (15 November 2000) CCPR/C/70/D/547/1993.

<sup>29</sup> Ibid paras 9.3 – 9.4.

<sup>30</sup> Ibid para 9.4.

<sup>31</sup> Human Rights Committee, *Poma Poma v Peru*, Communication No. 1457/2006 (27 March 2009).

<sup>32</sup> Ibid para 7.3.

<sup>33</sup> Ibid para 7.6.

The Committee held that none of these three conditions had been met in Ms Poma Poma's case.<sup>34</sup>

## SUMMARY

States are allowed to facilitate economic development on indigenous land and territory. This would include tourism concessions. However, they must take into account traditional uses of the land by minorities, including indigenous peoples, even when those uses are now modernised and commercialised. States must ensure that any concessions granted do not significantly interfere with the rights of the minorities or indigenous groups affected to practise their culture.

Further, States granting concessions to private companies or individuals (e.g. tourism operators or individual tourists) must exercise *due diligence* (take adequate care) that the permit-holders respect the conditions of the permits and do not in practice violate the rights of minorities. In other words, it is not enough to grant a permit that specifies protections for minority cultural activities; the State must also monitor the activity to ensure that it is carried out in a manner respectfully of human rights.

It is always the State that bears responsibility, even when it transfers some decision-making authority to a sub-state government (e.g. Alberta, Greenland or an indigenous governing body).

**See also: Jakob Möller, "Case Law of the UN Human Rights Committee relevant to Members of Minorities and Peoples in the Arctic Region" (2011) 3 *Yearbook of Polar Law* 27.**

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<sup>34</sup> Ibid para 7.7.