SANTE' MAWI'OMI wjit MIKMAQ

foreign affairs

COURIER

10 March 1987

Jakob Th. Möller
Chief, Communications Unit
Centre for Human Rights
United Nations Office at Geneva
CH-1211 Genève 10

Ref.: Case No. 205/1986

Dear Mr. Möller:

I have the honour to transmit to you the comments of the authors of the above-referenced communication, on the 9 February 1987 response of the State party, in accordance with yours of 10 February.

May I take the liberty of asking you to invite the Committee's attention to the request for interim measures under Rule 86, which we have concluded is necessary and appropriate in view of the fact that the actions of the State party we hoped to avoid, are now scheduled for 26-27 March 1987.

With respectful greetings from the officers and council, men and women of Mikmakik, I remain, appreciatively,

Russel L. Barsh

enc/1 and App.

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COMMENTS OF THE MIKMAQ GRAND COUNCIL

ON THE

RESPONSE OF THE GOVERNMENT OF CANADA (DATED 9 FEBRUARY 1987)

IN CASE NO. 205/1986 (MIKMAQ TRIBAL SOCIETY v. CANADA)

I. INTRODUCTION

In its 9 February 1987 response to our communication of 30 January 1986, the Government of Canada has raised six objections to admissibility, to wit:

1. The right to self-determination "cannot be invoked to affect the national unity and territorial integrity of Canada."
2. "[T]he Mikmaq tribal society is not a 'people,' as that term is used in Article 1 of the Covenant."
3. Communications "can only be made by individuals and must related to the breach of a right conferred on individuals."
4. The Halifax Treaty of 1752 "does not lend credence to any contentions that" the Mikmaq people have any "rights of a political or governmental character."
5. "[T]he authors have wrongly characterized the constitutional conferences as relating to the right to self-determination."
6. "The authors have failed to exhaust all available domestic remedies."

We will address each of these objections in turn. In addition, we will assert as a secondary basis for relief Canada's violation of Article 25 of the Covenant, and request interim measures in accordance with Rule 86 of the Committee's Rules of Procedure.

II. ISSUES RELATING TO ADMISSIBILITY

A. The defence of national unity

We have never expressed a desire to exercise our right to self-determination in a manner that would disrupt Canada's identity as a single State. If that had been our aim, we surely would not have limited the relief requested, in paragraph 50 of our communication, to the opportunity to participate directly in national constitutional conferences designed to restructure Canadian government internally. As the State party itself admits on pages 13-14 of its response, the subject of the conferences is indigenous self-government within Canada. To the extent that we are asserting our right to self-determination in a manner consistent with the national unity of Canada, and merely proposing an alternative form of federalism, there is no conflict with the Charter, Covenant, or General Assembly resolution 2625.

Even if we were proposing independent Mikmaq statehood, our communication would

still be admissible for the reasons we gave the Committee in paragraph 41 of this communication and in Case No. 19/78 (Denny v. Canada), viz., that Canada is not presently "conducting [itself] in compliance with the principle of equal rights and self-determination of peoples" and is therefore not entitled to invoke national unity as a defence. In this regard we would direct the Committee's attention particularly to the State party's admission, on pages 11-12 of its response, that it regards treaties made with "Indians" or "native chiefs" as qualitatively different and of lesser character than those made with governments composed of other races or peoples.

B. Whether Mi'kmaq are a "people"

The State party's characterization of indigenous North Americans as "a minority group" rather than "peoples" on pages 5-6 of its response directly contradicts its explicit statement last year to the Sessional Working Group on Economic, Social and Cultural Rights of ECOSOC, in connection with the discussion of its periodic reports:

> Native people were not considered as a cultural minority but as a distinct people with a unique role in Canada.

E/1986/WG.1/SR.15, paragraph 47. Canada cannot represent us as a "people" for the purposes of one International Covenant but not the other.

Nor is it dispositive of the matter that the author of the successful communication in Case No. 24/1977 (Lovelace v. Canada) chose to ground her complaint on Article 27 of the Covenant. She was not, of course, representing the views of either indigenous Canadians or of the Government of Canada. More importantly, the fact that an indigenous "people" may, for some purposes and under some circumstances, enjoy some of the same rights as a "minority" does not prove that it is--and only is--a "minority." The separate, but possibly overlapping nature of the "indigenous" and "minority" concepts was recognized by the Sub-Commission on Prevention of Discrimination and Protection of Minorities at its thirty-eighth session, in the course of an extended debate on definitions. The fact that some "minorities" could also be "peoples" was similarly recognized. E/CN.4/Sub.2/1985/SR.13-16, summarized in the report of the session, E/CN.4/1986/5 paras. 403-410.

The Commission and Sub-Commission have, it should be recalled, established separate working groups for drafting standards for "indigenous" and "minority" groups, and the Commission's Working Group on the Rights of the Child recently adopted a draft article for a convention referring to "minorities or indigenous populations," E/CN.4/1987/25 para. 68 (draft article 16 bis). Thus there is considerable precedent for the view that indigenous groups are not ordinarily "minorities."

It is clear in any case that questions must be resolved in the context of particular situations. In this respect we must observe that the State party has misinformed the

Committee in a material aspect. The Mi'kmaq do not live "thinly scattered" throughout the Canadian national population, but in geographically-distinct communities, most of them designated by the Government of Canada itself as "Indian reserves," from which non-Mikmaq persons are explicitly excluded from residence by the Indian Act. This residential exclusion, when employed by the State party against an individual indigenous person, was the violation at issue in Case No. 24/1977 (Lovelace), referred to earlier. Having enacted legislation to maintain the distinct and exclusive geographic character of "Indian reserves"--aspects of which were challenged successfully by Lovelace--it seems to us strange that the State party now denies the existence of such distinct enclaves.

We beg to note that the closest approximation to a definition of "peoples" in United Nations practice thus far is General Assembly resolution 1541(XV), discussed in paragraph 40 of our communication, which identifies "factors" for determining whether a territory is "non-self-governing" for the purposes of Article 73 of the Charter. Principle IV refers to places which are "geographically separate and distinct ethnically and/or culturally" from the State administering them. Mi'kmaq reside in such places--"Indian reserves," as administered by the State party under its Indian Act, are the remaining non-confiscated fragments of the aboriginal territory of the Mikmaq people.

C. Individuals' standing to invoke Article 1

We believe this issue was resolved in our favour by the Committee's decision that our previous communication, Case No. 19/78, was inadmissible, on the grounds that the sole author (Kjikeptin Alexander Denny, a co-author of the present communication) had not sufficiently demonstrated his representativity of the Grand Council or of the Mikmaq community as a whole. If the representativity of the author was a relevant factor in the admissibility of Denny, it could only have been because the Committee considered it possible for individuals to invoke Article 1--provided they could show they were directly affected themselves and genuinely representative of the others.

In this respect the State party's reference to Case No. 24/104 (Taylor v. Canada) is inappropriate. In that 1981 decision, the Committee concluded that an "association" (in that instance a political party) cannot be the author of a communication. At the same time, it accepted the standing of individual officers of the organization to communicate violations of the rights of the members of the organization, which they suffered (or were alleged to have suffered) because of their membership. Far from showing that the present communication is inadmissible, Taylor indicates that it is admissible to the extent that the authors represent individuals whose rights have been violated because of, and in relation to, their affiliation with a group.

Even if communications are limited to the rights of individuals, which we do not concede, the State party has failed to respond to our contention that the right to self-

determination has an individual dimension. As we explained in paragraph 43 of our communication, quoting the Sub-Commission's special rapporteur on the right to self-determination, this is an individual right exercised through collective means, such as institutions of self-government. In this respect it is much like the rights contained in Article 22. An individual cannot form an association or a trade union, but individuals are affected when particular associations or trade unions are suppressed or disbanded. Individuals certainly suffer a loss of freedom and of control over their own lives when there is a denial of the right to self-determination--if injured thereby, why can they not complain? Are no individuals injured by (for example) the continued presence of South Africa in Namibia?

Canada's response misconstrues the Committee's general comment on Article 1, contained in CCPR/C/21/Add.3, to the effect that self-determination is "an essential condition for the effective guarantee and observance of individual human rights," suggesting (on page 9) this means that self-determination is not a human right at all, but merely some kind of "contextual background" for the enjoyment of human rights. In our view, it is manifest in the legislation and practice of the United Nations as a whole as well as the Committee that self-determination is a human right, not a "background," and that it is justly accorded a certain primacy because of its relationship to the protection of all other human rights.

We must also deal with Canada's argument, on page 10 of its response, that self-determination cannot be an individual right because it appears in both International Covenants, when only one Covenant contemplates individual complaints. This is illogical. The fact that an international instrument does not create an individual complaint mechanism does not in itself prove that the rights it contains are not individual rights. Torture, apartheid and discrimination on the grounds of sex clearly violate individual rights, but the relevant conventions lack individual complaint channels. The International Covenant on Economic, Social and Cultural Rights contains many individual rights, such as the right to non-discrimination in the provision of public education or entitlement to social security, without an individual complaint mechanism. Thus the fact that self-determination appears in the Article 1 common to both Covenants cannot prove that it is not an individual right. It demonstrates--if anything--only that it is a very important right.

D. The significance of the Halifax Treaty

Ordinarily, the fact that an entity has concluded treaties with States is taken as evidence of its international personality. Canada refuses to apply this to our situation, on the grounds that we are "Indians" and the Grand Council consists of "native chiefs." This is discrimination on the basis of race, colour, and national origin, and as such is incompatible with Article 2(1) of the Covenant. Racial or ethnic inferiority should never be accepted as legitimate arguments by the Committee.

We originally referred to the Halifax Treaty to show that Canada, having a subsisting treaty relationship with us, must acknowledge that we have at least some elements of legal personality or existence as a distinct people. We are not pursuing recognition a Mikmaq statehood, but merely insisting on the right to participate directly in any decision affecting the legal status of Mikmaq people within Canada, or affecting the implementation of the Treaty itself.

E. The nature of the constitutional conferences

Our communication maintains that the State party cannot alter our legal status or political rights, through "constitutional conferences" and the proposed constitutional accord with Canada's "aboriginal peoples," without our direct participation and consent. In its response, Canada contends that the proposed accord will deal with "self-government" rather than "self-determination," and therefore will not affect our rights under Article 1 of the Covenant. But the right to self-determination includes peoples' right to "choose their political status" and their own political institutions. If the proposed accord places constitutional limits on our right to govern ourselves, or to determine the nature of our relationship with the Government of Canada, it will necessarily involve self-determination as that term is used in the Covenant.

For the information of the Committee, we enclose (as Appendix "A") the texts the State party has proposed for discussion at the final constitutional conference, now scheduled for 26-27 March 1987. They are far-reaching and would, if adopted, plainly establish a constitutional framework affecting the manner in which we may exercise our political and treaty rights in the future.

The State party alternatively (and somewhat inconsistently) suggests that we could realize our political objectives through "non-constitutional processes," viz., negotiating community-level administrative arrangements with the Minister in accordance with his 15 April 1986 "Indian Self-Government" policy. But it is obvious that any such agreement with the Minister, even if implemented by legislation, would be subject to the constitutional accord, along with all other contracts and laws. It is therefore no satisfaction to us, having been excluded from participating in the constitutional decision, to be told that we may still be able to negotiate some local arrangements for ourselves subject to its limitations.

By the State party's own admission on page 8 of its response, the indigenous peoples it calls "Indians" constitute two-thirds of the aboriginal peoples of Canada and comprise "widely diverse" societies and cultures. "Indians" as a whole are permitted only a single representative organization, and one-fourth of the "aboriginal" seats, at the conferences, however. This alone should raise questions. As far as we are aware, moreover, the organizations supposedly representing us--as well as "a substantial majority" of all indigenous

Canadians, according to the State party's response (page 15)--do not themselves purport to do so, and would not concur in the State party's characterization of them. If the Commitee wishes, we will be pleased to arrange for written verification of this with the organizations concerned.

Nor has the State party offered any specific grounds for its contention that making the conferences more broadly participatory would not be "feasible" (page 15). Only about a dozen indigenous groups have, like ourselves, treaty relationships with Canada, and, so far as we are aware, not more than three or four have made unsuccessful requests to participate directly in negotiating a constitutional accord. ("Bands," of which there indeed are hundreds, are not ethnic, linguistic, or national divisions among indigenous Canadians themselves, but administrative divisions imposed upon them by the Indian Act, often with the result, intentional or not, of dismembering much larger historical and political groupings--we refer the Committee to paragraph 35 of our communication.) If Canada can include its twelve provincial and territorial governments in the conferences, it should be able to accomodate at least an equal number of aboriginal peoples who are, after all, the subject of discussion.

It is at this point appropriate to express our view that, independent of any violation of Article 1 of the Covenant, the constitutional-accord process, as presently constituted, also violates Article 25 of the Covenant, insofar as it is nonrepresentative and deprives a particular racial, ethnic or national class of persons of the right to participate meaningfully in decisions directly (and indeed, selectively) affecting them.

F. Exhaustion of domestic remedies

As the State party admits on page 19 of its response, efforts by another "Indian" group to obtain a judicial declaration of their right to participate in the constitutional conferences failed, when the Supreme Court of Ontario ruled that the appointment of "representative" organizations is a political question for the Prime Minister, and as such is not subject to judicial review. Canada nevertheless suggests that we should try the same legal issue again, before a different Canadian judge. In our view, this goes beyond what is required by Article 5(2)(b) of the Optional Protocol.

Article 5(2)(b) does not require the exhaustion of every possible remedy, only an effort to take advantage of remedies which are reasonably effective and available. This does not, in our opinion, include applying to every judge and appealing to every Minister. A Canadian court has already ruled under virtually identical circumstances that no remedy exists as a matter of law. Requiring us to exhaust the remote possibility of overturning this ruling in a new case is the kind of "extraordinary remedy" that the Committee decided, in Case No. 89/1981 (Muhonen v. Finland) not to impose on authors of communications.

It may shed some light on our likelihood of succeeding in such a case to recall the recent decision of the Supreme Court of Canada in Simon v. The Queen, relied upon by the State party on page 11 of its response for the proposition that treaties made with "Indians" are not real treaties. That decision involved our attempt to win a judicial declaration implementing our Halifax Treaty of 1752.

It is plain, in any event, that no court in Canada can block a constitutional amendment, if that is what emerges from the 26-27 March conference from which we have been excluded. If we are wrong in this respect as a matter of law, we would beg the State party to correct us and explain just how we are to persuade a judge to invalidate part of the constitution of Canada.

Finally, we find little sense in Canada's suggestion, on page 20 of its response, that we have a "remedy" in the negotiation of a contract with the Minister for "Indian Self-Government." As noted earlier, any agreement we might make with the Minister will be subject to the constitutional accord and amendment, if one in fact is achieved as a result of the 26-27 March conference. If we are excluded from participating in the accord, yet subject to it, how is this a "remedy"? We are being told we can play in the game, but cannot participate in making the rules.

The State party's position is a little like saying, "we won't let you vote, but you have a remedy because you can always negotiate with the government after it has been elected." That, in our humble opinion, is no remedy at all.

III. REQUEST FOR INTERIM MEASURES

As indicated above, the final constitutional conference on our rights is scheduled for 26-27 March 1987. It is plainly impossible for the Committee to take a decision before then--or for us to explore any possible alternative avenues of relief. We are in the position of a prisoner whose appeals cannot be heard until after the date fixed for his execution. Since we no longer can afford any reasonable hope of participating in the constitutional process, but yet may still be subjected to its results, we believe i t proper for the Committee to provide us with interim protection as follows:

> That no accord or constitutional amendment reached as a result of the constitutional conferences be applied to limit the rights of the Mi'kmaq under Articles 1 or 25 of the Covenant in any way, until the Committee has determined whether the State party should have permitted Mikmaq representatives to participate directly in the discussions affecting them.