RESPONSE OF THE GOVERNMENT OF CANADA TO THE COMMUNICATIONS DATED MARCH 10, 1987 AND MAY 18, 1987 OF THE MIKMAQ TRIBAL SOCIETY

October 7, 1987

I INTRODUCTION

The Secretary-General of the United Nations in his note no. G/SO 215/51 CANA (42) 205/1986, dated May 29, 1987, transmitted to the Government of Canada the further submissions of the complainant dated March 10, 1987 and May 18, 1987. The Government of Canada then received the further decision under rule 91 of the Human Rights Committee, dated July 20, 1987, requesting a copy of the text of the judgment of the Supreme Court of Ontario in Prairie Treaty Nations Alliance v. The Queen. Subsequently, the Secretary-General, by a note dated August 12, 1987, transmitted to the Government of Canada a third submission from the communicant dated August 10, 1987. In reply, the Government of Canada submits the following observations.

II RIGHT OF SELF-DETERMINATION IN INTERNATIONAL LAW

The communicant asserts at page 1 of the communication dated March 10, 1987, that in alleging a violation of Article 1 of the Covenant, it is not seeking to disrupt the national unity of Canada, but rather seeks indigenous self-government within Canada. The Government of Canada submits that if the communicant is not, in fact, seeking to disrupt the national unity of Canada, it has improperly relied on the concept of self-determination, as that concept is understood in international law. Self-determination cannot mean that

smaller groups within a democratic and independent state have the right to unilaterally establish a separate political system. This view is evidenced by the practice of the United Nations which has invariably applied the principle of self-determination to dependent or colonial territories. It has never been applied, nor should it be applied, in the context suggested by the communicant. In this regard, the Government of Canada refers the Committee to pages 3-4 of its earlier submission, dated February 9, 1987.

III MEANING OF THE WORD "PEOPLES" IN ARTICLE 1 OF THE COVENANT

The communicant claims at page 2 of its submission, that the Mikmaq are a "people", and as evidence of this, refers to Canada's statement at the Sessional Working Group on Economic, Social and Cultural Rights of ECOSOC. It is the position of the Government of Canada that the word "peoples" is used in a variety of contexts and a distinction must be drawn between the legal definition and common usage of the word.

In the present circumstances, the word "peoples" as it is

used in Article 1, must be specifically examined in the context of that Article. Reference to the use of the word in a different context, unrelated to Article 1 of the Covenant, is not helpful. For example, as the Government of Canada noted at pages 6-7 of its earlier submission, the term "peoples" is used domestically in the Constitution Act, 1982, to refer to the three principal divisions of aboriginal persons in Canada.

IV INDIVIDUAL'S STANDING TO INVOKE ARTICLE 1

The communicant states at page 3 of its communication that the Committee has already implicitly decided that individuals can claim a violation of Article 1. The communicant bases its claim on the fact that, in case no. 19/78, the Committee found that Alexander Denny had failed to demonstrate that he represented the Mikmaq Grand Council or the Mikmaq community as a whole. The Government of Canada submits that the issue of whether an individual who alleges to represent a group, does in fact represent that group, is different from the issue of whether an individual can allege a violation of a collective right. The Committee, in case no. 19/78, decided that Alexander Denny

had not proved his representative character; therefore, it did not need to address the issue of whether Article 1 could be invoked by an individual. There is no basis for assuming, by implication, that the second question was resolved.

Moreover, this matter was addressed by the Human Rights Committee in communication no. 167/1984. The Committee stated that the author (whose communication was also based on self-determination),"...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 1 of the Covenant, which deals with rights conferred upon peoples, as such". The Government of Canada therefore submits 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.

V THE CONSTITUTIONAL CONFERENCE

As is indicated in the communicant's submission dated May 18, 1987, no agreement was reached at the constitutional conference of March 26-27, 1987. The proposal made by the federal government at that conference was for a

constitutional amendment for recognition of a right to self-government, subject to the negotiation of specific agreements. This would have established a constitutional framework as characterized in the communicant's submission, but would not have been effective until negotiations were completed between governments and aboriginal communities. Direct negotiations between governments and aboriginal communities to reach agreement on the nature of the community self-government proposals would have occurred outside the forum of a constitutional conference.

It should be noted that the conference of March 1987 was the final conference mandated by section 37.1 of the Constitution Act, 1982. Therefore, the relief sought by the communicant for a seat at the constitutional conference is now moot. Moreover, the Government of Canada wishes to reassert its position, stated at pages 13 to 16 of its earlier submission, that the constitutional conferences did not relate to the right of self-determination. Rather, they represented an internal political process dealing with a right of self-government within the Canadian federation. Participation in such discussions had no direct connection with the right of self-determination alleged by the Mikmaq tribal society.

The communicant also alleges at page 6 of the submission dated March 10, 1987, that the constitutional accord process, as presently constituted, violates Article 25 of the Covenant. The communicant has not however put forward any evidence to explain or support this allegation. Accordingly, the Government of Canada submits that the communication in this regard should be declared inadmissible as being an abuse of the right of submission, pursuant to Article 3 of the Optional Protocol.

VI THE COMMUNICANT IS NOT A VICTIM

The Government of Canada submits that even if, contrary to the views of Canada, an individual can claim a violation of Article 1 and the constitutional conference can be said to relate to the right of self-determination, the communicant is not a victim of an alleged violation of any of the rights set forth in the Covenant.

In Article 1 of the Optional Protocol, State Parties recognize "the competence of the committee to receive and consider communications from individuals...who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant". (emphasis added)

Similarly, Rule 90(1)(b) of the Rules of Procedure of the Human Rights Committee states that, "[w]ith a view to reaching a decision on the admissibility of a communication, the Committee shall ascertain that the individual claims to be a victim of a violation by that State Party of any of the rights set forth in the Covenant". (emphasis added).

In its submission of March 10, 1987, the communicant asked "[t]hat no accord or constitutional amendment reached as a result of the constitutional conference apply to the Mikmaq tribal society until the Human Rights Committee rules on the right of the communicant to participate in the conference". Subsequently, in its submission of May 18, 1987, the communicant notes that no agreement was reached at the constitutional conference and appears to request that the Committee make a declaration that any legislation passed by the Government of Canada affecting the political status of the Mikmaq tribal society be preceded by direct negotiations between the communicant and Canada.

The Government of Canada submits that the communicant is, in effect, asking the Committee to make a declaration on the possible implications and administration of future, but presently non-existent, legal provisions. It is submitted

that the notion of victim under the Optional Protocol requires that the individual complainant be personally affected. The system set up under the Protocol does not grant an actio popularis, nor does it permit the Committee to rule on abstract possibilities.1

The comments of the Human Rights Committee in communication no. 163/1984, C. v. Italy are relevant in this regard. In that case, a law concerning the right to work of disabled and handicapped persons was challenged, in part, by persons who were themselves handicapped or disabled, but who had not personally been affected by the law. In declaring the communication inadmissible, the Committee stated:

> The author of a communication must himself claim, in a substantiated manner, to be the victim of a violation by the State party concerned. It is not the task of the Human Rights Committee, acting under the Optional Protocol, to review in abstracto national legislation as to its compliance with obligations imposed by the Covenant. It is true that, in some circumstances, a domestic law may by its mere existence directly violate the rights of individuals under the Covenant. In the present case, however, the authors of the communication have not demonstrated that they are themselves actually and personally affected by article 9 of law No. 638 of 11 November 1983. Consequently, the Committee is unable, in accordance with the terms of the Optional Protocol, to consider their complaints.

1. deZayas, A., Moller, J. and Opsahl, T., Application by the Human Rights Committee of the International Covenant on Civil & Political Rights Under the Optional Protocol (1987) Canadian Human

In the communication of Aumeeruddy-Cziffra v. Mauritius, case no. 35/1978, at issue was whether an immigration law which treated alien men married to Mauritian women differently from alien women married to Mauritian men, violated the Covenant. Of the twenty women who co-authored the communication, only three were married. In dealing with the standing of the seventeen unmarried co-authors, the Committee stated that:

> A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an actio popularis, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility. (emphasis added)

Similarly, in communication no. 61/1979, Herzberg v. Finland, the Committee stressed:

> that it has only been entrusted with the mandate of examining whether an individual has suffered an actual violation of his rights. It cannot review in the abstract whether national legislation contravenes the Covenant, although such legislation may, in particular circumstances, produce adverse effects which directly affect the individual, making him thus a victim in the sense contemplated by articles 1 and 2 of the Optional Protocol.

In the present circumstances, not only has the Mikmaq tribal society failed to show that it has suffered an actual violation of any rights set forth in the Covenant, it is unable to even point to an existing law or provision of which it could claim to be a victim.

The issue of whether the Mikmaq tribal society had a right to participate in the constitutional conferences is now moot. The Government of Canada submits that the Committee should not make a declaration concerning the participation of the Mikmaq tribal society in future processes, because at this point in time, any implications for the communicant would be no more than a theoretical possibility. Accordingly, the Government of Canada submits that the communication is incompatible ratione personae with Article 1 of the Covenant and should be deemed inadmissible pursuant to Article 3 of the Optional Protocol.

VII EXHAUSTION OF DOMESTIC REMEDIES

The issue in dispute, according to the communicant's own submission dated August 10, 1987 is "whether a Canadian could have directed the Prime Minister of Canada to invite representatives of the Mikmaq people to participate in the

discussions of 'aboriginal rights' provided in section 37 of the Constitution Act, 1982.." In its earlier submission, the Government of Canada indicated that the Band had not pursued to completion domestic remedies available to it. Specifically, the Government of Canada stated at page 19 that: "It is open to the Mikmaq tribal society to bring an application to a Canadian court for an order requiring the Prime Minister to invite the Mikmaq tribal society to participate in the constitutional discussions, or alternatively, for a declaration of their right to participate". The domestic remedy which was at issue in the communicant's initial submission did not in any way relate to trying to "block a constitutional amendment", as is suggested at page 7 of the communicant's submission dated March 10, 1987. Rather, it related to obtaining a seat at the constitutional conference, an issue which is now moot. It is this latter remedy which was the sole focus of Canada's comments in regard to exhaustion of domestic remedies; "blocking a constitutional amendment" was never in issue.

The communicant also states at page 6 of its submission, that a Canadian court has already ruled under virtually

identical circumstances that no remedy exists, and the communicant therefore claims that the Mikmaq tribal society does not need to exhaust all available domestic remedies, pursuant to Article 5(2)(b) of the Optional Protocol. Reference is made to a case involving the Prairie Treaty Nations Alliance, a case which never went beyond the first level of court. As the Government of Canada indicated at page 19 of its earlier submission, the Prairie Treaty Nations Alliance sought a mandatory order in the Supreme Court of Ontario that they be invited by the Prime Minister to the constitutional conference. The judge dismissed the application.

In Canada, each province has a superior court of first instance (e.g., the Supreme Court of Ontario), from which decisions may be appealed to the appellate court of the province. Provincial appeal court decisions may be appealed, with leave, to the Supreme Court of Canada; the latter is the highest court in the land. The plaintiffs in the Prairie Treaty Nations Alliance case had the right to appeal to the Ontario Court of Appeal and from there, upon obtaining leave, to the Supreme Court of Canada. The plaintiffs chose, however, not to appeal the judgment. Pursuant to the

Committee's request, a copy of the provincial court decision in the Prairie Treaty Nations Alliance case is attached.

In its submission of August 10, 1987, the communicant claims that "a decision entrusted to a Minister by Parliament can be reviewed by the courts only to the extent that, in exercising his discretion, the Minister disregards explicit Parliamentary instructions. The reasonableness or fairness of his decision, or his policy in making it, is not reviewable." The Government of Canada submits that, based on recent jurisprudence, this issue is far from settled. In Operation Dismantle v. The Queen the Supreme Court of Canada considered whether a decision made by the federal government to allow the United States to test cruise missiles in Canada violated the right to life, liberty and security of the person in section 7 of the Charter. The action was dismissed, but in the course of its decision, the Court held that decisions of Cabinet are reviewable by the courts under the Charter and subject to judicial scrutiny for compatibility with the Constitution.

The Government of Canada submits that, for the purposes of

exhausting domestic remedies, the communicant had the responsibility to institute and pursue proceedings seeking a seat at the constitutional conference in the courts and, if necessary, appeal the proceedings to the highest court of the land. The timing of the first aboriginal conference (i.e. March 15 and 16, 1983) has been known since the adoption of the Constitution Act, 1982 on April 17, 1982. The timing of the constitutional conferences in 1984 and in 1987 (i.e. March 8 and 9, 1984, and March 26 and 27, 1987 respectively) has been known since the adoption of the Consitutional Amendment Proclamation, 1983, in March 1983. The Government of Canada submits that the obligation to take appropriate legal proceedings in the domestic courts implies a responsibility to seek domestic remedies in a timely fashion.

It cannot, in light of these circumstances, be said that a decision of a provincial superior court of first instance (i.e. the Supreme Court of Ontario), is a definitive determination of a legal question. It is only the Supreme Court of Canada which can finally determine a matter, and it has never addressed the issue of whether any particular Indian band has a right to a seat at a constitutional conference.

VIII NON-CONSTITUTIONAL PROCESSES

As noted in Canada's response of February 9, 1987 (pages 16-18, page 20, appendices), the Canadian government has in place a number of non-constitutional processes to assist aboriginal groups to attain self-government, in addition to their rights as citizens of Canada to participate in public affairs. There are 14,072 Mikmaqs registered under the Indian Act and approximately 38,475 acres of land have been set aside by the Crown for their use and benefit throughout the Atlantic region and Quebec. The Act provides a measure of local government to the Mikmaq residents of these reserves, and the government of Canada is committed to increasing the role of Indians under the Act in the governing of their own affairs and the reserves. It should also be noted that the government is making serious and concerted efforts to assist Indian groups who wish self-government outside of the Indian Act. More details on these measures can be found in the appendices to Canada's earlier response. In this context, an agreement was recently signed on behalf of the Minister of Indian Affairs and Northern Development and the Union of Nova Scotia Indians relating to the development of Mikmaq government.

IX MISCELLANEOUS

The communicant alleges that the federal government's assertion that domestic remedies had not been exhausted, was made with the sole intent of delaying any action by the Committee until after the last constitutional conference. The Government of Canada rejects this allegation. Moreover, it should be re-emphasized that the communicant was aware of the timing of the constitutional conferences since March 1983. Nevertheless, the communicant chose to bypass domestic courts and to initiate procedures under the Optional Protocol in August 1986, only eight months before the date of the final constitutional conference.

The communicant also states in the submission dated August 10, 1987, that a letter sent by the communicant to the Minister of Indian Affairs and Northern Development had not been answered. Attached to this submission is a copy of a letter dated August 10, 1987, sent from the Minister to the communicant's counsel. In that letter, the Minister indicates his willingness to meet with Mikmaq representatives and attempt to resolve outstanding matters.

X CONCLUSION

For the reasons given above, the Government of Canada submits that the present communication should be deemed inadmissible by the Committee. However, if the Committee should reach a contrary conclusion on any of the above submissions, the Government of Canada reserves the right to make further comments at a later date.