COMMENTS ON

THE 17 MAY 1982 RESPONSE OF THE GOVERNMENT OF CANADA TO SUPPLEMENTAL COMMUNICATIONS OF ALEXANDER DENNY (FOR THE MIKMAQ NATION) DATED 3 OCTOBER AND 11 NOVEMBER OF 1981.

In its 17 May 1982 response to our supplemental communications of 3 October and 11 November 1981, the Government of Canada once again challenges the admissibility of our original (30 September 1980) communication. Canada's present objections are basically three:

> (1) that individuals may not advance "collective" rights under the Optional Protocol to the International Covenant on Civil and Political Rights;
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> (2) that as a "non-colonial" State Canada is entitled to assert national unity and territorial integrity as a defense; and
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> (3) that historical facts as to the circumstances by which Canada came into possession of our territory are "irrelevant" to whether we are entitled to claim the right of self-determination under the Covenant and Protocol.

Canada also disputes several allegations we have made of subsidiary violations of human rights protected by the Covenant, particularly our references to education, involuntary assimilation, forced emigration, and deprivation of property. We feel these questions on material fact are premature in an exchange of views on admissibility, but have responded in summary fashion nonetheless lest there be any misunderstanding.

Lastly, Canada argues that the adoption of its new constitution earlier this year (the Constitution Act, 1982) obviates our principal concerns and assures us the future enjoyment of our rights under the Covenant.

We will comment on these arguments in turn.

I-ADMISSIBILITY OF COMMUNICATIONS RELATING TO SELF-DETERMINATION

A. "Collective" Rights

Canada correctly views the universal right of self-determination as central to our original communication of 30 September 1980. We concur with Special Rapporteur Hector Gros Espiell in his study The Right of Self-Determination: Implementation of United Nations Resolutions (1980), U.N.Doc. E/CN.4/Sub.2/405/Rev.1, in paragraph 59, that "the effective exercise of a people's right to self-determination is an essential condition or perquisite, although not necessarily excluding other conditions, for the genuine existence of the other human rights and freedoms" contained in the Covenant. It is our belief that no people can be truly secure without a direct voice in the legal definition and enforcement of their human rights.

Canada contends that our communications are inadmissible under the Protocol because they relate to "collective," as opposed to "individual" rights. We believe this misconstrues the plain intent of the Covenant and Protocol, and would, if it were to be accepted by the Committee, bar a large class of human rights violations from needful international scrutiny.

The Covenant and Protocol do not distinguish between individual and collective rights, but between individual and State Party communications. The classification goes to the identity of the communicant, not to the scope or nature of the rights which may be included in the communication. The Protocol (Article 1) is as explicit as it can be when it refers to "communications from individuals . . . who claim to be victims of a violation . . . of any of the rights set forth in the Covenant" (emphasis supplied). It cannot be an "abuse of the right of submission" (as Canada contends) for an individual to base his communication on any of the rights enumerated in the Covenant, including rights enumerated in Article 1.

Even if there were a distinction such as Canada proposes, requiring individuals to limit their communications to "individual" rights, we find no authority that self-determination is not an "individual" right. On the contrary, Special Rapporteur Gros Espiell, in paragraph 58 of his 1980 study, notes that the Commission on Human Rights "has repeatedly invoked" self-determination as a right of individuals, as much as a right of peoples collectively. The argument that our communication relates only to collective rights is therefore an unwarranted assumption of law on the part of the Government of Canada.

Canada further argues that we have chosen the wrong procedure to communicate with this Committee. If we believe we are a State, Canada suggests, we should have proceeded under Article 41 of the Covenant rather than the Protocol (page 7 of their Response).

We respectfully remind the Government of Canada that Article 41 is available only to States Parties to the Covenant, and that accession to the Covenant is limited by Article 48 to Members of the United Nations, States Parties to the Statute of the International Court of Justice, and States invited by the General Assembly to become Parties to the Covenant. This means we cannot acceded to the Covenant without leave, in some form, from the General Assembly, either to confer accept us as a Member, or to authorize us to accede to the Statute or Covenant directly.

We are eager to commit ourselves formally to the Covenant if permitted, for we have lived by its principles for centuries. We have already pledged to abide by it in our declaration of acceptance of the jurisdiction of the International Court of Justice, deposited with the Registrar in October 1980. But this is beside the point. Canada's argument that self-determination must be raised under Article 41 would limit the protection of this right to Members and recognized States—that is, to Governments already fully possessed of self-determination. It would be absurd to suppose that the draftsmen and States Parties to the Covenant intended to restrict the communication of violations of self-determination to cases where there are no violations.

Lastly, we beg to reiterate what we said in our supplemental communication of 9 December 1980: that the communicant speaks both as an individual deprived of his own rights, and as head of state of a people deprived of its rights. He speaks

as an individual, as one authorized to speak for other individuals who are his kinsmen, and as the representative of a people and government. The Committee may characterize his status as it chooses, but cannot properly dismiss the propriety of his communication under the Protocol.

B. Territorial Integrity as a Defense

Canada resolutely maintains that our position is "secessionist" and as such is not entitled to Article 1 protection. Canada apparently assumes the colonisation and alien domination only can occur at long distances and across blue water. The location of Mikmaq territory is not conclusive as to whether it is subject to alien domination by Canada.

Whether we are proposing to "separate" from Canada depends upon whether we ever were lawfully "part" of Canada. We have shown, in our original communication, that we have never ceded our territory or agreed to become incorporated in Canada, or in its predecessor the United Kingdom. Canada's presence in our territory is the result of aggression and lawless annexation directed against a neighbouring people, and is a violation of our territorial integrity as the original inhabitants and government of the place.

There is a powerful irony is Canada's argument that we threaten its unity and integrity as a State, since Canada is an immigrant nation on other men's continent. We think the burden of proof should rest on Canada to show how it (or the United Kingdom) acquired half of North America from the original inhabitants, rather have it presumed that the continent is theirs. Indeed, all that is now Canada was until recently a colony or dominion of the United Kingdom, and this no one will deny. Did the United Kingdom's liberation of its colonists in North America, permitting them to exercise self-determination, somehow deprive us of our right of self-determination?

Canada describes itself as a "non-colonial state" (page 3). We ask, where do Canadians come from? Are they of North American origin? Are they not predominantly peoples of Europe, and do they not speak predominantly two European languages? Were they not, until this year, governing themselves under legislation of the United Kingdom, which is a European State? When peoples of one continent are found in control of lands and peoples on another continent, is it not to be suspected that a colonial situation exists until specific evidence to the contrary is produced?

P. 5

We are able to agree completely with Canada's statement (page 4) that "the principle of self-determination is not applicable to the case of ethnic, religious or linguistic minorities in non-colonial States" (emphasis supplied).* This is tautological. If a State has acquired no territory by unilateral annexation, aggression of colonisation, and if it is composed entirely of peoples who have chosen freely to incorporate themselves as one multi-ethnic State, then in the current view of international law secession is unacceptable.

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* Canada routinely refers to us as a "national minority" (e.g., pages 4 and 8). We object to this as a legal conclusion unsupported by historical evidence of Canada's acquisition of our territory or allegiance. Whether we are a people entitled to self-determination, or a minority, is the question before the Committee.

Canada has not, however, responded to a single historical fact we have advanced to show that Canada is colonising our territory and that we have not chosen to become Canadians by any means accepted by United Nations law. Canada asks this Committee to accept its characterization of itself as a non-colonial State on mere assertion. This is a simple way for States to perpetuate colonial situations: deny that they exist, and thereby render Protocol communications inadmissible.

We respectfully direct the Committee's attention to paragraph 90 of Special Rapporteur Gros Espiell's 1980 study, in which he reports

> It is necessary . . . to specify that if the national unity claimed and territorial integrity invoked are merely legal fictions which cloak real colonial and alien domination, resulting from actual disregard of the principle of self-determination, the subject people or peoples are entitled to exercise, with all the consequences thereof, their right to self-determination.

We suggest that Canada's assertion of territorial integrity is a legal fiction invoked to deflect a substantive examination of the historical basis for Canadian claims to our territory.

Canada misconstrues the language of General Assembly Resolution 2625(XXV), 24 October 1970, which protects from dismemberment States

> conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour . . .

(emphasis supplied). In Canada's view (pages 4 and 5) the fact that we may vote in Canadian elections is proof that the Government of Canada represents us, and that Canada therefore has respected our right to self-determination. The Resolution does not state, however, that representative government proves the existence of self-determination. It states that representative government is a natural consequence of of the exercise of self-determination. Canada's argument reverses the cause-and-effect order of the Resolution's language.

The significance of Resolution 2625's choice of words is plain. The mere fact that a people is permitted to vote does not in itself show that they have any real influence on their fate. As a practical matter, representation must be substantial in order to be effective. If a large State should annex its much smaller neighbour and accord the annexed people the right to vote, they would be no better off in real terms than if they had not been permitted to vote, nor would the annexation be any the less a violation of international law.

Canada admits (page 5) that our population has been dispersed "within the midst of a more numerous population" of Canadians. How, then, are we to prevent this majority from electing whomsoever they please? Or from oppressing us through the representatives they elect?

If a small people trust the good will and integrity of a large neighbouring State, it may be reasonable for them to seek its protection, and place themselves under its laws. If trust and a common prupose do not unite two peoples, no access to the ballot box can save the smaller from abuse at the hands of the larger. We believe Resolution 2625 does not accept representative government as sufficient proof of self-determination.

We think it clear, moreover, that the principle of territorial integrity in Resolution 2625 was intended to prevent States from intervening aggressively in the internal affairs of other States on the pretext of supporting national liberation movements. We see no evidence that it was intended to deny the right of colonised peoples themselves to oppose and resist continued alien domination. Territorial integrity may bar the United States or some other Member from intervening on our behalf within territory claimed by Canada, but does not prevent us from speaking to this Committee on our own behalf.

In conclusion, we think Canada's position that territorial integrity bars legal inquiry into the location and legitimacy of State boundaries is erroneous, and maintain that a State only has the right to invoke territorial integrity as a defense within boundaries it can show are lawful in origin. Our views on this matter are set out more fully in our 1982 communication to the Commission on Human Rights, U.N.Doc. E/CN.4/1982/NGO/30/Rev.1, which is attached as Enclosure A.

C. Materiality of Territorial Issues

Canada relegates the main substance of our communications, "whether the Mi'kmaq tribe's territory was ever lawfully incorporated into Canada," to its list of "other issues" which it deems "irrelevant" under the Covenant and Protocol (pages 15 and 16). On the contrary, there is plainly no way of ascertaining whether we are a people entitled to self-determination, or an incorporated "national minority" (as Canada contends), with examining the basis of Canada's claims to our territory. If our territory was annexed without our consent, we are by definition a non-self-governing people in an administered territory, entitled to assert Article 1 rights.

Under Canada's theory, a State may cut off its colonies' right to appeal to this Committee for Article 1 rights simply by annexing their territory under municipal laws. No peoples would be amenable to decolonisation unless the administering State admitted that their territory had never been annexed and remained separate. No such doctrine should be endorsed by the Committee. It would leave very little of Article 1 of the Covenant, and it would leave lawlessly-annexed peoples little or no peaceable recourse within the United Nations Organisation.

Canada suggests that its territorial extent is lawful because it has been "accepted internationally." In our view, States recognize the territorial extent of other States on the basis of what they know or believe to be true, and are capable of revising this recognition as new facts appear. A State acquires no rights through other States' ignorance. In municipal law, if a person pretend to be the owner of property, he is treated as such unless and until an adverse claimant appears to dispute his right. The fact that he was for some time accepted as the owner is of no consequence, especially if he knew himself that his claim was subject to challenge. We feel the same principle is applicable here.

We are not aware that the community of nations has been apprised fully of the facts in our situation, and subsequently renewed their recognition of Canadian sovereignty over our territory. We further note that the United Nations accepted the territorial claims of many Members for some years before subjecting them to decolonisation, and that many of today's Members were "accepted internationally" as part of other States' territories until a decade or two ago. It would be subversive to the entire program of decolonisation to accept evidence of States' past mutual territorial recognition as proof that indigenous peoples under their control had been incorporated lawfully.

II-SUBSIDIARY VIOLATIONS OF HUMAN RIGHTS

Canada attempts to refute several of our specifications of human rights violations by alleging that what we describe did not occur, or that the effect on our people was other than as we indicated. Before responding to this portion of Canada's response, we feel we must emphasize that the issue presently before the Committee is admissibility. Whether our assertions of fact relating to specific violations are correct cannot affect the admissibility of our communication. We were under the impression that a communication is admissible if it alleges violations of rights enumerated in the Covenant. The Committee should, we feel, rule first on the admissibility of our communication and then, if it is deemed admissible, proceed to an investigation of the facts upon which our communication is based.

We are prepared to submit extended documentation in support of our allegations of historical facts, with leave of the Committee for reasonable time to prepare it. But we feel that an exchange of evidentiary material with Canada is premature. First it seems advisable to establish that we have a matter here upon which the Committee properly can act. If, of course, Canada wishes to agree that our communication is admissible at this time, we can proceed at once to a consideration of the substance of our concerns.

A. Self-Government

Canada avers that there is no Article 1 violation in fact, because its Indian Act accords us "limited self-government" in accordance with which our people periodically elect "chiefs" to manage their affairs. Canada intimates (page 9) that the existence of these election proves that we enjoy a "modality" of self-determination. We consider this an admission by Canada that we have a right to govern ourselves. Where we disagree with Canada is whether this right has been sufficiently exercised through the Indian Act.

It is essential to the exercise of self-determination that non-self-governing peoples be afforded a range of options for their political destiny, including "emergence as a sovereign independent State, free association with an independent State, or integration with an independent State." General Assembly Resolution 1541(XV), 10 December 1960. In practice the General Assembly usually has insisted upon multiple-option plebiscites (e.g., Togoland, British Cameroons, Ruanda, Western Samoa, Spanish Sahara) and has refused to recognize changes in the status of territories, short of full indpendence, unless United Nations observatior

of the process was permitted (e.g., French Somaliland, Antigua, Grenada and St. Kitts). See A. Rigo Sureda, The Evolution of the Right of Self-Determination (A.W. sijthoff, Leyden 1973), pages 294-323, and Umozurike Oji Umozurike, Self-Determination in International Law (Archon, Connecticut 1972), pages 105-108.

Recent actions involving non-self-governing territories of the United States illustrate that the administering State must make no effort to influence the outcome of plebiscites, by word or deed. Hence in 1978 the Trusteeship Council dispatched a special mission to the Trust Territory of the Pacific to investigate complaints that U.S. officials there had pronounced certain self-determination option "unacceptable," and the Special Committee of 24 recently reviewed charges that some pro-independence organisations had been barred from participating fully in Puerto Rico s 1967 plebiscite. United Nations Chronicle, March 1978, page 34; July 1978, page 19; October 1981, page 34.

Whether a plebiscite or other means of ascertaining a non-self-governing people's wishes is legitimate is a question of fact for determination by appropriate agencies of the United Nations, and is not foreclosed by the administering State's position on the matter.

There has never been a Mikmaq plebiscite. As we showed in our original communication, Canada unilaterally divided us into twelve "bands" in 1960, and directed each "band" to form a local elective government under the Indian Act. Canada admits (page 5 note 3) that membership in bands and eligibility to vote in band elections is determined by the Indian Act, not by ourselves. We were given a de facto choice between "limited self-government" under the Indian Act, and no government. We have not surrendered our right of self-determination by doing the best we can to make use of such institutions of self-government Canada permits us for such time as we are forced to endure them.

Canada's argument would deprive every former colony in the world of the right of self-determination. It was nearly universal practice among 19th-century European empires to administer indigenous peoples "indirectly" through appointment of a native civil service and the formation of limited—and carefully supervised—local native elective governments. The fact that (for example) India, Nigeria and Fiji were administered by the United Kingdom through a hierarchy of native "chiefs" and councils, controlled by a Governor's veto, was never accepted as an argument why these territories and peoples should not be decolonised.

That some individuals collaborated, to a greater or lesser extent, with these colonial systems for their own survival, was never before deemed a surrender forever of their peoples' right of self-determination. The United Nations have always understood that colonised native governments had little choice in the matter, and that colonised peoples deserved a truly democratic opportunity to reorganize according to their true aspirations.

Canada's position seems to be that Mikmaqs should have resisted the Indian Act by force if they wanted to preserve their human rights; that by taking, for the time being, as much freedom as Canada was willing to give us, we sacrificed our right to seek more freedom. We can only say that we find this an incredible and dangerous excuse for perpetuating a colonial situation.

B. Involuntary "Enfranchisement"

As evidence of an historical pattern of colonialism and violations of human rights, our original communication described Canada's involuntary "enfranchisement" of indigenous peoples, including Mikmaqs, resulting in their being forced to emigrate from their homes and communities.

Part of this problem was addressed by the Committee in Lovelace v. Canada, G/SO 215/51 CANA(8) R.6/24, which determined that the policy of "enfranchising" indigenous or "status Indian" women because they had married "non-status" men is a violation of the right of association. We await concrete action by Canada to implement the Committee's decision. The other part of the problem involved men and women "enfranchised" because they were deemed educated enough to be forced to integrate into Canadian society.

We agree that this practice came to an end officially in 1962, although we believe its effects continue since persons "enfranchised" twenty years ago still live and are still separated from their homes and communities. They have not been restored to their original rights or status. Canada's remark that its violation of these persons' freedom of association and property rights was well-intentioned (page 10) and therefore justifiable is contemnable. Good intentions do not render violations of the Covenant acceptable—less odious, perhaps, but not acceptable, or immune from international scrutiny.

We are surprised at Canada's statement that "it is . . . impossible to ascertain if the Government of Canada actually enfranchised any Mi'kmaq Indians." Does Canada deny, as a matter of fact, that each enfranchisement was a separate administrative proceeding (see page 10 note 1), or that records were kept of the change in individuals' legal status? Are we to conclude that Canada has no idea today whether any particular Mikmaq has been enfranchised? How does Canada know which Mikmaqs are still subject to the provisions of the Indian Act and which are not? We respectfully direct the Government of Canada to the Native Council of Nova Scotia at Truro, Nova Scotia, which is an organization of enfranchised Mikmaqs, and offer to assemble further details on enfranchisement if the Committee should so wish.

C. Education Rights

Canada objects to our communication of interference with the education of our children, arguing that "the Covenant does not make out any provision with respect to the right to education." Canada further argues that any rights our children may have are to be found in Articles 24 (protection of children) and 27 (minority cultural rights). However, our communication was explicitly based on Articles 18 and 23, which provide in material part for "the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions," and that "the family is the natural and fundamental group unit of society and is entitled to protection." Canada's remarks are therefore not responsive to the issues of law we have raised.

Our position has been that Articles 18 and 23 accord families a broad right to choose the education of their children—a kind of educational self-determination

at the family level. We believe these two Articles implement Article 26 of the Universal Declaration of Human Rights: "Parents have a prior right to choose the kind of education that shall be given their children." We did not propose, nor do we now, that Canada be required to provide our children with a Canadian education. Our concern is that Mikmaq families be under no compulsion to participate in any form of Canadian schooling, but remain free to educate their children, if they so choose, in their own communities and in the Mikmaq way, which is a religious and spiritual path of knowledge.

Canada relies on the Belgian Linguistic Case (No. 2), (1980) 1 E.H.R.R. 252, decided under provisions of the European Convention on Human Rights that are similar to Article 27 of the Covenant. The Belgian decision has no bearing on our communication, however, because it involved the duty of a State to subsidize special educational opportunities for national linguistic minorities. We have neither alleged such a responsibility, nor are we a minority group.

Canada tries to bring us within the Belgian decision by commenting (page 11 note 2) that "the Government of Canada possesses full sovereignty over its territories and, therefore, complete legislative authority over its inhabitants, including the Mi'kmaq." This is begging the very question raised by our communication—that is, whether we are within Canada's territory and subject to its legislative authority. The Committee should not be considering the educational rights of "minorities" until it has disposed of the more basic question of whether we are a minority or not.

Canada further argues that its laws encourage federal and provincial schools to include "Indian" cultural content, "wherever possible," in their curricula. We do not dispute that this is a constructive policy, but it avoids the principal issue of our families' ability to choose the education of our children. They still have no choice but to subject our children to Canadian schooling, with as much or as little "Indian" content as Canada's national and local school administrators choose for us.

"Indian" content, furthermore, is not Mikmaq content, nor has Canada shown that we can participate in its selection. We suggest that Canada submit for the Committee specific evidence of the nature and extent of Mikmaq curricular content actually provided by schools attended by our children, for we were aware of very little or none.

According to Canada, its courts "may well" agree with us under the freedom or religion and freedom of association provisions of the Constitution Act, 1982. This is speculation on Canada's part. We do not think it an adequate response to an historical pattern of human rights violations, for the State involved to advise that its laws "may well" protect the communicant. The material issue in Protocol proceedings must be whether the communicant's rights are in fact protected, the public and private remarks of public officials notwithstanding. It would be too easy for States to avoid scrutiny by adopting high-sounding but unenforceable laws and policies, creating a situation of official human rights concern and de facto violations.

D. Property

We are particularly puzzled by Canada's remarks on our communication of concerns relating to rights of property under Article 1(2) of the Covenant. As noted above, we find nothing in the Covenant or Protocol to prevent the assertion of Article 1 rights by individuals, nor do we understand why a people's right to the "free disposal of its natural wealth and resources" is of such a collective nature that it should not be invoked by individuals actually injured by violations. While a State or people enjoys "permanent sovereignty" over its territory, General Assembly Resolution 1803(XVII), 14 December 1962, each individual is an occupant and user of property and is directly affected by external interference, as, for example, by the loss of his livelihood or home.

p.11

We explained in our original communication that Mikmaq land tenure ceded most rights of property in families, with a residual power of regulation, but not of alienation, in the nation. Annexation and expropriation of our territory has divested our nation of "permanent sovereignty," and our families of ownership, subsistence, and homes. Two associated rights, political and economic, collective and individual, are bound together in Article 1(2). It is pointless for the people as a whole to have property, if none individually have the right to use it.

Most particularly, our original communication indicated that Canada's actions in expropriating our farms and fisheries have deprived us of our own means of subsistence, which is a matter collective in magnitude, but certainly very much individual in hardship.

Canada's assertion that we may pursue municipal remedies contradicts its laws and our experience. It is Canada's current policy to settle selected disputes over lands still occupied by indigenous peoples through negotiation. Negotiated settlements, according to the Government of Canada's current guidelines, "exchange undefined aboriginal land rights for concrete rights and benefits." Department of Indian Affairs, In All Fairness: A Native Claims Policy (1981), at 19. That is, the settlement itself is a treaty of cession by which the indigenous peoples acknowledge Canadian sovereignty over their territory and receive in return some specific economic benefits and continued use of portions of their land. Such is the James Bay and Northern Quebec Agreement (1975), extending Canadian sovereignty into the eastern Arctic.

It is Canada's policy not to negotiate for lands previously expropriated or annexed by its Parliament ("superseded by law"). Where a people's territory was ceded or seized in the past, Canada will consider compensation for its failure to implement terms of the cession or annexation legislation, provided these too have not been cut off by subsequent Parliamentary enactments. Department of Indian Affairs, Outstanding Business: A Native Claims Policy (1982).

Indigenous peoples' grievances are reviewed by an Office of Native Claims employed by the Minister of Indian Affairs, and either accepted or rejected by the Minister and the Attorney General. If a grievance is rejected, it cannot be taken to the courts of Canada without the Government's consent.

In no case has Canada indicated that it is prepared to recognize indigenous peoples' right to remain sovereign and independent in their territories, or even to retain ownership of all unceded lands which they occupy or hold under treaties. It

is a prerequisite to negotiations that indigenous peoples submit themselves without reservation to Canadian legislative authority. This is why Canada has refused to discuss land rights with us, or with the Innut people of Ntesinan (Labrador), since 1980: we insist upon recognition of our right of self-determination as an element of any boundary settlement. Canada has taken the position that it already owns Mikmaq and Innut lands and has only a moral obligation, if any, to deal with us.

The municipal laws and policy of Canada, then, protect our property only if we first surrender our right of self-determination. This is a choice we dare not accept. We will not relinquish our Article 1(1) rights in exchange for Canada's temporary and limited protection of our Article 1(2) rights.

E. Other Human Rights

Canada argues that we enjoy the same rights as Canadians under general human rights provisions of Canadian law and the Constitution Act, 1982. The Charter of Rights and Freedoms in the Constitution Act was based of the Canadian Bill of Rights, which Canada's courts already have declared inapplicable to the Indian Act and other discriminatory legislation of Canada. Attorney-General of Canada v. Lavell (1973), 38 D.L.R.3d 481, at 490. Parliament was said to have inherent authority to treat "Indians" differently from Canadians, even in derogation of treaties.

It is true, however, that "Indians" may escape most or all of the disabilities of the Indian Act by emigrating to Canadian communities and incorporating themselves with Canadians. But it is not freedom, to be free only by emigrating and losing one's home and family. The Committee already concluded that Canada may not force a woman to emigrate from one of our communities in Lovelace v. Canada; the Committee should for the same reasons condemn conditioning the enjoyment of human rights on emigration.

III-THE CONSTITUTION ACT, 1982

Canada relies considerably on section 35 of its newly-adopted national constitution, the Constitution Act, 1982, as evidence that we are already possessed of our human rights. In pertinent part, section 35 provides that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Canada's position fails on three grounds. First, this provision of Canada's municipal law only secures "existing" rights; second, it refers to "aboriginal and treaty rights," which remain undefined; and third, this provision can be abolished at any time by Canada over the objections of the "aboriginal peoples" to whom it refers.

In our original communication we described a systematic pattern of discrimination and oppression of indigenous peoples, including Mikmaqs, under the Indian Act and decisions of Canada's courts. We showed that "aboriginal peoples of Canada" had few, if any, "existing" rights: their lands could be expropriated at pleasure, their institutions of self-government reversed or abolished, and their children removed or schooled without their consent. It is therefore of little interest to us that Canada's new constitution purports to preserve those rights we had at the

time of its adoption, for we had little or nothing then. What rights "existed" on the date of the constitution's adoption will of course be subject to some degree of interpretation by the courts of Canada.

There is no definition of "aboriginal and treaty rights" in Canadian law, but we note that Canada has interpreted them in practice in its "native claims" policies. Department of Indian Affairs, In All Fairness, and Outstanding Business, op. cit. According to these documents, a people has an "aboriginal right" to be compensated, in some form acceptable to the Government of Canada, for the surrender or seizure of its lands. A people has a "treaty right" to be paid the compensation agreed in a treaty of cession or "land claims settlement" negotiated with Canada—unless Parliament abolishes the obligation by legislation. Self-determination is nowhere to be found in this scheme.

Canada's understanding of the Constitution Act's provision for "aboriginal" peoples' rights is contained in a Cabinet briefing paper circulated within the Government at the time the Act was drafted. Pertinent portions of this document are attached as Enclosure B.

Lastly, any protection afforded us by the Constitution Act, 1982 can be abolished at any time without our consent. In accordance with section 38 of the Act, amendments require the consent of two-thirds of Canada's ten Provincial Assemblies representing at least one-half of Canada's population. We are far too few, even in combination with all indigenous peoples of Canada, to prevent such an amendment by democratic means. Should the non-indigenous majority choose to amend or delete section 35 of the Constitution Act, 1982, we would be powerless to object.

It may not even be necessary for Canadians to amend their constitution to eliminate such few rights as it may secure to us. An Ontario court already has held that Canada's Parliament may legislate against our rights notwithstanding the Constitution Act, 1982. Section 35 of the Act, the court apparently concluded, merely "recognizes" our rights but does not prevent Parliament from "suspending" their exercise and enjoyment indefinitely. The court's decision is attached as Enclosure C.

Canada quotes the opinion of Lord Denning in a recent United Kingdom decision, The Queen v. Secretary of State for Foreign and Commonwealth Affairs, that the Constitution Act, 1982 "does all that can be done to protect the rights and freedoms of the aboriginal peoples of Canada." Lord Denning's remarks were not based on any facts presented in that case, but merely on his reading of the Act itself. In our opinion, they were gratuitous dicta and quite premature. We would be more assured if the Government of Canada were prepared to acknowledge Lord Denning's words as a rule of law binding on Canadian courts.

Far from supporting our rights, The Queen v. Secretary of State actually disregarded them. It questioned whether the United Kingdom could lawfully grant Canada full independence without providing for the continued freedom and self-determination of indigenous peoples, including ourselves, who have subsisting treaties of association with the British Crown. The court acknowledged that the Constitution Act, 1982, once approved by the United Kingdom, would have the effect of turning us, our lands and treaties, over to Canada, but refused to treat this as a state succession problem. Instead, the court relied on the racist theory that, as "Indians," we have no right of self-determination and are naturally and

inevitably subject to alien domination.

This case upon which Canada so plainly relies is not an argument that our human rights are protected, but on the contrary potent evidence for the continuing disregard of our rights as peoples, and the use of racist theories to justify our subjugation. A copy of the court's decision is attached as Enclosure D.

We find Canada's particular response (page 14) to our 11 November 1981 supplemental communication rather poignant. On 11 November we advised the Committee that the "aboriginal and treaty rights" provision had been deleted from the draft of the Constitution Act. Canada now retorts, eight months later, that our advice in this matter is "irrelevant" to the Committee's proceedings because the provision for "aboriginal and treaty rights" involved "is still part of the Constitution Act, 1982" as enacted, although admittedly "it has been amended to provide that 'existing' rights would be protected."

We beg to observe that this provision of the draft constitution was in fact deleted in November 1981, as described in an article in the 11 November 1981 edition of the Toronto Globe and Mail, attached as Enclosure E. The Government of Canada restored this provision to the draft only after we brought the deletion to this Committee's attention.

Far from evincing a consistent pattern of respect for human rights, we think this demonstrates that Canada will not bring its municipal actions into conformity with international norms until subjected to international attention and criticism.

IV-REMEDIES

Canada argues that our communication is inadmissible because, in its view, there is no remedy for the violations of the Covenant we have related (page 5). We have no need to deny Canada's allegations that our population of about 18,000 is scattered in several small towns and villages, and is surrounded by some 2 million Canadians, but merely observe that this is a situation of Canada's own doing. The seizure of our territory and forcible removal of our people was the cause of our being concentrated in a few small enclaves not unlike the current situation in South Africa. We also suggest that the present size of our population be considered in relation to Article II(c) of the Convention on the Prevention of the Crime of Genocide, General Assembly Resolution 260A(III), 9 December 1948, and Article 1(2) of the Covenant as it regards subsistence rights.

Canada asserts that we "live in bands, each of which is politically independent from the others" (page 5 note 3). We direct the Committee's attention to an Order-in-Council, P.C. 1960-260, by which the Government of Canada unilaterally divided our people in "bands." This was not our way, but part of the colonial administration of our country and an illustration of diuide et impera.

In effect, Canada is advancing the consequences of its violations of our human rights as a justification why we should not be afforded a hearing, or relief by the Committee.

We have no desire to be unreasonable, nor do we wish to compound one injustice with another. Although we maintain firmly our right to claim the entire territory we occupied and governed prior to intervention by the United Kingdom and Canada, we are agreeable to settling for permanent sovereignty and self-determination in a reduced area sufficient for our needs.

Presently uninhabited lands and unexploited fisheries lay adjacent to our existing communities. Few if any Canadians need be displaced to provide us with a small and modest country of our own, at least as great in extent as many Members of the United Nations. Even in such a diminished territory we could have our freedom.

Canada contends that the remedies we seek nonetheless fall outside of the Committee's competence—particularly, that the Committee is without authority to declare that we are a separate State. We had thought that whether we are, or have been a State and a people are matters to be determined in ascertaining whether our right of self-determination has been violated. If we are neither a State nor a people, there may be no violation of Article 1. Our collective identity therefore is a question the Committee must resolve before any others, and is a matter of fact and law in identifying violations, not a remedy as such.

We moreover believe the Committee is competent to make a number of determinations of fact and law under the Covenant, in support of our desire for self-determination:

(1) Mikmaqs were an independent sovereign State and/or people prior to European exploration of the Americas;

(2) Mikmaqs are still a State and/or people today;

(3) Mikmaqs never exercised their right of self-determination in any way adverse to their continued independence, except to enter into a free and equal association with the United Kingdom in 1752;

(4) Mikmaqs never disposed of any of their natural wealth or resources to the United Kingdom or Canada;

(5) Mikmaqs are entitled to determine their own political, social, economic and cultural institutions by democratic means under United Nations supervision;

(6) Mikmaqs are entitled to the use, enjoyment and disposal of their natural wealth and resources, and to subsist by their own means, within their unrelinquished territories; and

(7) the United Kingdom and Canada are obligated by Articles 1 and 76 of the Charter, and by Article 1 of the Covenant, not to interfere with Mikmaqs' exercise of self-determination, or in any way to subject Mikmaqs to alien domination.

We understand that the Committee itself cannot confer Statehood upon us, nor make a specific demarcated settlement of our boundary with Canada. But the Committee can pronounce itself on whether Canada's assertions of authority over us and over our historical territory violate the Covenant. If they do violate the Covenant, these assertions are contrary to international jus cogens and do not merit recognition by the community of nations.

Canada proposes as an alternative that our concerns might better be advanced before the Special Committee of 24 (page 6). We note, however, that the Commission on Human Rights has consistently viewed decolonisation and human rights as closely related problems, and has coordinated its work with the work of the Special Committee. We think it is reasonable to infer that there is no basic distinction in United Nations law or practice today between colonial situations and other violations of human rights, such that the one cannot be considered with the other.

In practical terms, Canada is a State Party to the Protocol and as such is amenable to the jurisdiction of this Committee. Canada has not participated as an Administering Power in the work of the Special Committee of 24. We see no reason why our concerns should not be considered in a process familiar to, and supported by Canada, rather than one in which it has little experience.

The jurisdictions of this Committee and the Special Committee of 24 are not separate, but overlap in explicit terms. The Covenant under which this Committee serves embraces "self-determination," as does the General Assembly Resolution which forms the charter of the Special Committee of 24. General Assembly Resolution 1514 (XV), 14 December 1960. The only distinction we can find between the review powers of this Committee and the Special Committee of 24, is that this Committee must limit its work to States Parties to the Protocol, and typically works in relative confidence.

If the Committee is persuaded nevertheless that our communication is of such a nature, and relates to such rights, that it falls beyond the Committee's competence, we respectfully suggest that our concerns be brought to the attention of the Economic and Social Council with the recommendation that an Advisory Opinion be sought from the International Court of Justice. There can be no doubt that the International Court is competent to rule on all of the self-determination and territorial issues we have communicated, and we would welcome the finality of its decree.

For the foregoing reasons, we suggest that the Government of Canada has not yet shown why our communication of concerns under Article 1 of the Covenant should be deemed inadmissible. The Protocol is explicit that "any" right enumerated in the Covenant may be advanced by individual communicants, and Canada has offered no facts to support its contention that it is a "non-colonial" State or to rebut the evidence we have provided of actual alien domination. Canada admits that we are permitted only "limited self-government" under its Indian Act, and does not show how its new constitution enlarges this or extends us the full measure of self-determination to which we are entitled by the Covenant.

We respectfully propose that the Committee accept our original communication as admissible and proceed to the determination of specific violations and remedies.

DONE at Seattle on the 15th day of July, 1982, for Alexander Denny, Grand Captain (Jikapten, Santeioi Maoaiomi), by:

Russel L. Barsh
Counsel