

**Symposium on “The Right to Self-Determination in International Law”
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**The Right of self-determination – ICCPR and the jurisprudence
of the Human Rights Committee**

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Summary

The right of self-determination is a keystone in the United Nations human rights system and has been granted a privileged place in two major international treaties, namely the International Covenant on Civil and Political Rights (hereinafter, “ICCPR” or “the Covenant”) and the International Covenant on Economic, Social and Cultural Rights¹. Article 1 of both Covenants clearly establishes the right of all peoples to self-determination, including their right to freely determine their political status and freely pursue their economic, social and cultural development, and the corresponding obligation of States parties to respect and promote the realization of that right.

This recognition is all the more remarkable considering the legally binding nature and wide acceptance of the two International Covenants. Yet, we notice that the main body charged with the task of surveying the implementation of the ICCPR, the Human Rights Committee (“the Committee”), has been cautious when interpreting and applying article 1, especially in the context of the individual complaints procedure established by the Optional Protocol to the

¹ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966.

ICCPR (“OP-ICCPR”)². In this regard, the Committee has systematically refused to examine complaints based solely on article 1, arguing that the OP-ICCPR procedure is reserved to individuals and that, consequently, only individual rights recognised in part III of the ICCPR (articles 6 to 27, included) can be invoked. This may hardly be surprising in light of the strong political implications that the right of self-determination has entailed from the outset.

The Committee’s restrictive approach with regard to individual complaints based on article 1 of the Covenant has been partly compensated by a broad interpretation of article 27, which recognises the rights of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their language. This provision has increasingly been invoked by members of indigenous communities claiming violations of their community rights.

1. Interpretation of article 1 within the context of ICCPR

Article 1 of the ICCPR clearly and unreservedly recognises the right of self-determination of all peoples. It is undisputed that this provision must be construed as containing a positive right –as opposed to a mere political principle- of a collective nature –the right holders being peoples rather than individuals as such-. This collective character differentiates the right of self-determination from other rights recognised in part III of the Covenant, which are individual rights. The latter include the right to life, the right to liberty and security, the right to be held free of torture and the right of equality before the law and equal protection of the law, among many others. These rights are conferred on individuals subject to the jurisdiction of States parties to the Covenant.³

As the Human Rights Committee has expressly declared in its General Comment No. 12⁴, the right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. Article 1 of the ICCPR can therefore be considered, together with articles 2 to 5 –which constitute part II of the Covenant- as overarching or structural provisions, in light of which individual human rights established in part III of the Covenant should be applied.

It is regrettable that no clear definition of the concept of “self-determination” has been provided by the Human Rights Committee when interpreting article 1 of the ICCPR. By contrast, the Committee Against Racial Discrimination has shed some light on this issue by identifying and defining two aspects of the right to self-determination: “The internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level (...) The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights

² Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966.

³ Without prejudice of article 25, which limits the right of suffrage to persons holding citizenship of the States parties concerned.

⁴ CCPR General Comment No. 12 [21]: *The right to self-determination of peoples (Art. 1)*, adopted on 13 March 1984, para. 2.

and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation.”⁵

According to this definition, the internal aspect of the right of self-determination would be guaranteed by other articles of the ICCPR, namely article 25 –which enshrined the right to vote- and article 27 –recognising minority rights-⁶. The protection of the external aspect of that right, however, would still be reduced to article 1 of the Covenant.

As to the subjects of the right of self-determination, no definition of “peoples” has been provided either by the Human Rights Committee, although there seems to be a wide international consensus that this right is not limited to colonial peoples, with clear examples of secessions having occurred in recent times as an exercise of peoples’ right to self-determination. Implicitly acknowledging this fact, in its Concluding Observations on the report of Azerbaijan, the Human Rights Committee recalled that, under article 1 of the Covenant, the principle of self-determination [applied] to all peoples and not merely to colonized peoples.⁷

According to CCPR General Comment No. 12, article 1 (3) imposes specific obligations on States parties to respect and to promote the realization of the right of self-determination, not only in relation to their own peoples but also vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising that right.⁸ This obligation would therefore extend to peoples outside the jurisdiction of the States parties.

2. Application of article 1 of the ICCPR by the Human Rights Committee

The Human Rights Committee, as the body charged with the supervision and monitoring of the implementation of ICCPR obligations by States parties, has a major role in defining the exact meaning and scope of the right of self-determination recognised by article 1.

However, the Committee has always been cautious when applying this provision and its application must be analysed within the context of each of the Committee’s functions. In this regard, although the Committee has insisted on the extension of States parties’ reporting duties to article 1, it has been far more reticent in accepting individual complaints invoking violations of the right to self-determination. That is, while States parties are obliged to include detailed information on each paragraph of article 1 in their reports submitted to the Committee, they are not bound to be tried for claims of violations of that article brought by individuals under the Optional Protocol to the Covenant.

⁵ CERD General Recommendation No. 21: Right to self-determination, adopted on 23 August 1996, para. 4.

⁶ In this same line, *vid.* Joseph, S., and others in *The international Covenant on Civil and Political Rights, Cases, materials and Commentary*, Oxford University Press, New York, 2004, p. 148. The authors contend that “the notion of ISD [internal self-determination] overlaps considerably with the rights guaranteed in article 25 and 27”. Going even further, Cassese defines this internal aspect of the right of self-determination as the “manifestation of the totality of rights embodied in the Covenant”. Cassese, A., *Self-determination of Peoples*, Cambridge University Press, Cambridge, 1995. p. 53.

⁷ Concluding Observations of the Human Rights Committee on Azerbaijan, adopted on 3 August 1994. CCPR/C/79/Add.38; A/49/40, para. 4.

⁸ CCPR General Comment No. 12, *op.cit.*, para. 6.

A. Reporting obligations

In its General Comment No. 12, the Human Rights Committee has stressed the importance that States parties include in their reports submitted under article 40 of the Covenant, measures adopted to give effect to the right of self-determination. It has further noted that few States parties include information relating to article 1 and has called on them to provide detailed information on each paragraph thereof. This would include information on constitutional and political processes which in practice allow the exercise of this right –under paragraph 1-, the factors and difficulties which prevent the free disposal of peoples’ natural wealth and resources and the extent to which that may affect the enjoyment of other rights set forth in the Covenant –under paragraph 2- and, in general, positive action undertaken to facilitate the realization of and respect for the right of peoples to self-determination, irrespective of whether this people depends on a State party to the Covenant or not.⁹

With this statement, the Committee has made it very clear that States parties’ reporting obligations under article 40 cover all rights recognised by the Covenant, including the right of self-determination of article 1, and that this obligation goes even beyond the States Parties’ jurisdiction.

This interpretation is in line with the Committee’s view that article 2 (1) of the Covenant, which establishes States parties’ obligation to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant without distinction of any kind, also includes the right of self-determination contained in article 1.

However, the reporting practice shows that more often than not States parties fail to include any reference to article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws.¹⁰

B. Inter-state complaints

With regard to the inter-state complaints procedure established by article 41 of the ICCPR, that is, claims brought by a State party that another State party is not fulfilling its obligations under the Covenant, it seems that such claims could, in principle, include an alleged violation of the right to self-determination as recognised in article 1 of the Covenant.

Although the Committee has not made any specific remarks on this issue –probably due to the fact that an inter-state complaint has never been submitted to it-, it seems that such an interpretation would be consistent with the Committee’s clear position that article 1 (3) imposes specific obligations on States parties to respect and to promote the realization of the right to self-determination.

C. Individual complaints

a. The jurisprudence of the Human Rights Committee on article 1 of the ICCPR

⁹ CCPR General Comment No. 12, *op.cit.*, paras. 3 to 6.

¹⁰ CCPR General Comment No. 12, *op.cit.*, para. 3.

Under the individual complaints procedure established by the Optional Protocol to the ICCPR, the Committee may receive and consider complaints brought by individuals subject to the jurisdiction of States parties to the OP who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant, provided that certain admissibility conditions are met. These conditions are, among others, that the author of the communication is the victim of the alleged violation or a duly authorised representative and that all available domestic remedies have been exhausted.¹¹

Despite the broad wording of article 1 of the OP-ICCPR, which declares the Committee's competence to consider communications of violations of "any of the rights set forth in the Covenant", the Committee has expressly and consistently refused to consider communications alleging a violation of article 1 of the Covenant. Indeed, the Committee has adopted a cautious and often criticised position by limiting the OP-ICCPR procedure to complaints based on violations of the articles set forth in part III of the Covenant (i.e., articles 6 to 27, included). With that, it has prevented any consideration under the OP-ICCPR of complaints based on alleged violations of article 1, arguing that the right of self-determination recognised by this article is of a collective nature and that the OP-ICCPR procedure is limited to individuals who claim that their individual rights have been violated.

The Committee's reticence to examine alleged violations of States parties' obligations under article 1 was first made clear in the case *Mikmaq v Canada*.¹² The communication was brought by a representative of the Mikmaq tribal society who claimed that the Mikmaq peoples' right of self-determination had been violated by Canada. The Committee did not pronounce itself on the substance of the issue at stake and decided instead that the complaint was inadmissible on the basis of lack of *locus standi* of the tribe's representative –in light of failure of the Grand Council, in its legal entity, to authorize the author-.

The possibility of interpreting *a contrario* the Mikmaq case as implicitly recognising peoples' rights to bring complaints on the collective right of self-determination under the OP-ICCPR through a duly authorised representative was eliminated when the Committee decided on the *Lubicon Lake Band* case¹³. In this instance, the Committee opted for a restrictive interpretation of the OP-ICCPR with regard to complaints based on the right of self-determination, by stating the following:

"While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive."

¹¹ Additional admissibility conditions are that the same matter be not under consideration by another procedure of international investigation or settlement, that the communication is in writing and not anonymous, that it does not constitute an abuse of the right of submission of such communications or be incompatible with the provisions of the Covenant. These conditions are to be found in articles 2 to 5 of the Optional Protocol to ICCPR.

¹² *Mikmaq v Canada*, Communication No. 78/1980, views adopted on 29 July 1984.

¹³ *Lubicon Lake Band v Canada*, Communication No. 167/1984, Views adopted on 26 March 1990.

This position has been confirmed in subsequent decisions, where similar or identical terms have been used. In this regard, in *Kitok v Sweden*¹⁴, the Committee considered that the author -a member of the Sami people-, as an individual, could not claim to be victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. It noted that, whereas the OP-ICCPR provides a recourse procedure for individuals claiming that their rights have been violated, article 1 deals with rights conferred upon peoples as such.

More recent decisions on cases brought against Canada, Colombia, Italy, New Zealand, Namibia and France have consolidated the Committee's categorical position that no claim for self-determination may be brought under the Optional Protocol.¹⁵

In some instances, the Committee has added that a group of individuals, who claim to be commonly affected, may nevertheless submit a communication about alleged breaches of their rights established in part III of the Covenant.

It has also noted that article 1 may furthermore be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.¹⁶

In *Gillot et al v France*¹⁷, the Committee examined whether the criteria established for the determination of the electorates for the 1998 referendum held in New Caledonia and future referendums from 2014 onwards, which would determine the status of New Caledonia as an exercise of its peoples' right to self-determination, violated the authors' rights under articles 25 and 26 of the Covenant.

The Committee considered that, in the present case, the articles invoked –the right to suffrage and prohibition of discrimination–, had to be considered in conjunction with article 1. It therefore considered that these criteria were reasonable to the extent that they were applied strictly and solely to ballots held in the framework of a self-determination process and could be justified only in relation to article 1 of the Covenant.

Without expressing any view on the definition of the concept of “peoples” as referred to in article 1, the Committee further considered that, in the present case, it would no be unreasonable to limit participation in local referendums to persons “concerned” by the future of New Caledonia who had proven sufficiently strong ties to that territory. It noted that, in every self-determination process, limitations of the electorate were legitimized by the need to ensure a sufficient definition of identity.

¹⁴ *Kitok v Sweden*, Communication No. 197/1985, Views adopted on 27 July 1988.

¹⁵ *Vid. Marshall et al v Canada*, Communication No. 205/1986, Views adopted on 4 November 2006; *E.P. et al v Colombia*, Communication No. 318/1988, Views adopted on 25 July 1990; *A.B. et al v Italy*, Communication No. 413/1990, Views adopted on 5 November 1991; *R.L. et al v Canada*, Communication No. 358/1989, Views adopted on 2 November 1991; *Apirana Mahuika et al v New Zealand*, Communication No. 547/1993, Views adopted on 20 October 2000; *J.G.A. Diergaardt et al v Namibia*, Communication No. 760/1996, Views adopted on 25 July 2000; and *Gillot et al v France*, Communication No. 932/2000, Views adopted on 15 July 2002.

¹⁶ See, for instance, *Apirana Mahuika et al v New Zealand*, Communication No. 547/1993, Views adopted on 20 October 2000, para. 9.2; *J.G.A. Diergaardt et al v Namibia*, Communication No. 760/1996, Views adopted on 25 July 2000, para. 10.3; and *Gillot et al v France*, Communication No. 932/2000, Views adopted on 15 July 2002, para. 13.4.

¹⁷ *Gillot et al. v France*, Communication No. 932/2000, Views adopted on 26 July 202.

The Committee concluded that the challenged criteria, mainly based on birth and period of residence, were not discriminatory but responded to objective grounds for differentiation that were reasonable and compatible with the provisions of the Covenant.

b. The jurisprudence of the Human Rights Committee on article 27 of the ICCPR

The Committee's restrictive interpretation of article 1 claims has prompted an increasing resort to article 27 of the Covenant by members of indigenous communities as a way of bringing their claims before the Committee.

This tendency may have been fostered by the Committee itself when examining the complaint submitted by the Lubicon Lake Band against Canada, where -after recalling that no complaint based on an alleged violation of article 1 could be brought under the Optional Protocol- the Committee recognized that many of the claims presented by the authors raised issues under article 27 of the Covenant. On this basis, the Committee concluded that historical inequities and certain more recent developments threatened the way of life and culture of the Lubicon Lake Band and constituted a violation of article 27 so long as they continued.¹⁸

Article 27 of the Covenant provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Although the Committee has neither assimilated nor defined the concepts of "peoples" or "minorities" used by articles 1 and 27 respectively, indigenous peoples are in most cases bound to fit under the concept of "ethnic, religious or linguistic minorities" used by the latter. The Committee's jurisprudence has shown that, in practice, article 27 can be a suitable way of addressing some of the problems affecting indigenous communities, namely those related to the internal aspect of their right to self-determination.

This is particularly so in light of the broad interpretation that the Committee has made of article 27. Indeed, minorities' right to "enjoy their own culture" has been widely interpreted so as to include "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."¹⁹

The Committee's jurisprudence on article 27 has consistently confirmed that economic activities may come within the scope of article 27, if they are an essential element of a minority community.²⁰

Since the rights enshrined in article 27 are conferred to individuals -persons belonging to minority groups- and contained in part III of the Covenant, they are cognizable under the OP

¹⁸ *Lubicon Lake Band v Canada*, Communication No. 167/1984, Views adopted on 26 March 1990, paras. 32 and 33.

¹⁹ CCPR General Comment No. 23: The rights of minorities (Art. 27), adopted on 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 7.

²⁰ *Vid.*, among others, *Lubicon Lake Band v Canada*, Communication No. 167/1984, Views adopted on 26 March 1990, para. 32.2; *Kitok v Sweden*, Communication No. 197/1985, Views adopted on 27 July 1988, para. 9.2; and *Länsman et al v Finland*, Communication No. 511/1992, Views adopted on 26 October 1994, para. 9.2.

to ICCPR.²¹ This constitutes a gateway through which the Committee has examined claims relating to some issues affecting indigenous communities.

However, it is clear that article 27 was not conceived to solve all problems affecting these communities, some of which would require special measures going beyond the protection afforded by article 27.²²

It is also clear that the Human Rights Committee should endeavour to provide a more clear interpretation to the leading and most important article of the Covenant. The adoption of an updated version of its Comment No. 12 could be useful in this regard. It should also consider the possibility of transmitting a clearer message through its jurisprudence of how the right of self-determination is to be ensured by States parties. *Gillot v France* leaves some room for an indirect application of article 1 and could be the starting point of a more fruitful jurisprudence on the right of self-determination.

²¹ CCPR General Comment No. 23, *op.cit.*, para. 3.1.

²² Nowak, Manfred, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised edition, N.P. Engel Publisher, 2005.